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Exchequer Court of Canada

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JUDGES
OF THE
EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE JOSEPH T. THORSON
(Appointed, October 6, 1942)

PUISNE JUDGES:

THE HONOURABLE EUGENE REAL ANGERS
(Appointed, February 1, 1932)

THE HONOURABLE J. C. A. CAMERON
(Appointed, September 4, 1946)

THE HONOURABLE MAYNARD B. ARCHIBALD
(Appointed, July 1, 1948)

DISTRICT JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT
OF CANADA

- The Honourable FRED H. BARLOW, Ontario Admiralty District—appointed October 18, 1938.
- The Honourable SIDNEY ALEXANDER SMITH, British Columbia Admiralty District—appointed January 2, 1942.
- The Honourable W. ARTHUR I. ANGLIN, New Brunswick Admiralty District—appointed June 9, 1945.
- HAROLD L. PALMER, Esquire, Prince Edward Island Admiralty District—appointed August 3, 1948.
- The Honourable Sir ALBERT JOSEPH WALSH, Newfoundland Admiralty District—appointed September 13, 1949.
- The Honourable Sir BRIAN DUNFIELD, Newfoundland Admiralty District—appointed May 9, 1949.
- The Honourable HENRY ANDERSON WINTER, Newfoundland Admiralty District—appointed May 9, 1949.
- His Honour VINCENT JOSEPH POTTIER, Nova Scotia Admiralty District—appointed February 8, 1950.
- The Honourable ARTHUR IVES SMITH, Quebec Admiralty District—appointed June 16, 1950.

DEPUTY DISTRICT JUDGE

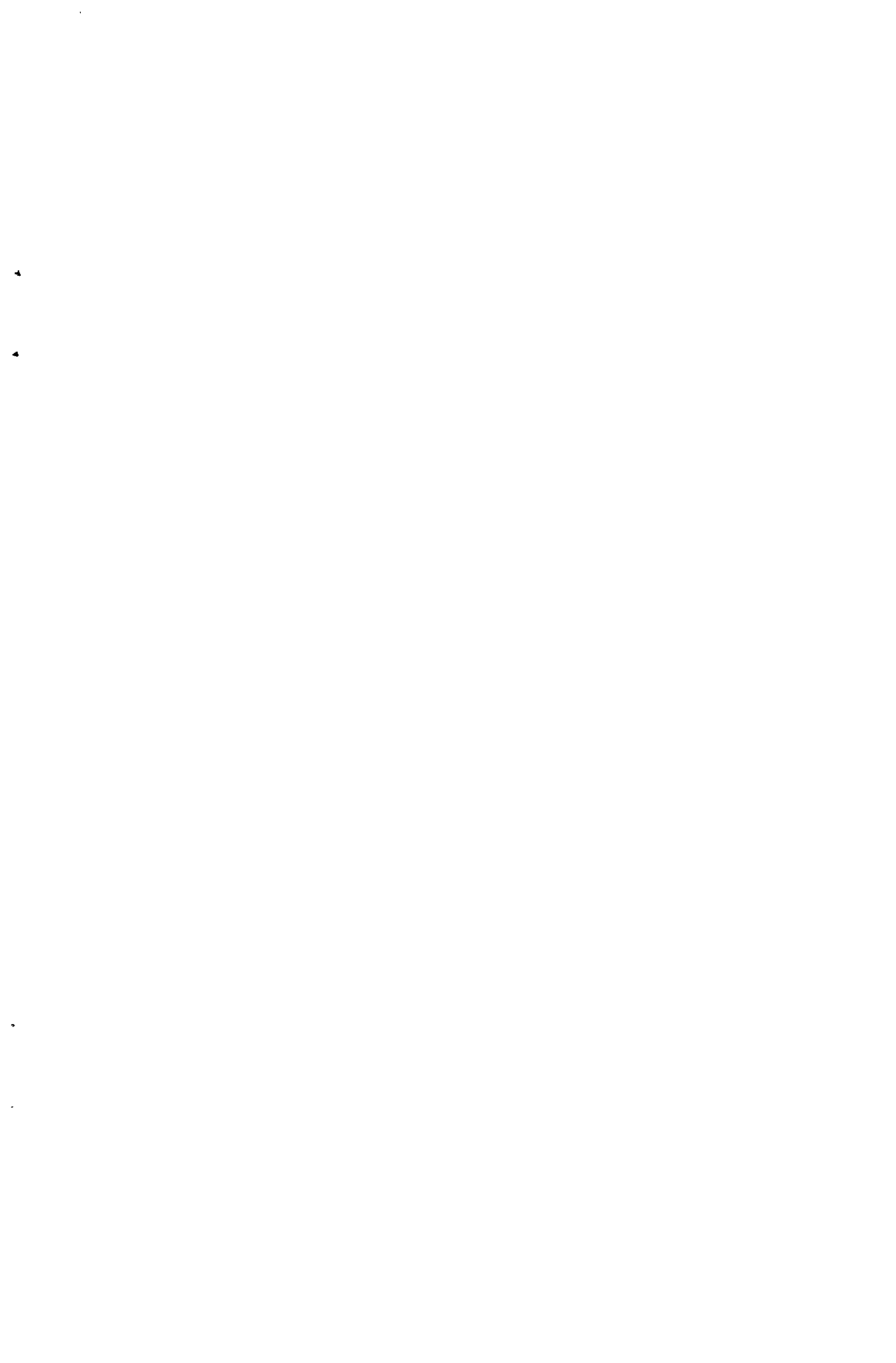
His Honour JOHN A. BARRY, New Brunswick Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Honourable STUART S. GARSON, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Honourable HUGHES LAPOINTE, K.C.



**The Honourable Lucien Cannon,
District Judge in Admiralty for the Quebec Admiralty District
died during the current year.**



CORRIGENDA

At page 269 in the headnote C. 197 should read 179.

At page 506, line 28, the word "respondent" should read "respondeat".

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A. To the Judicial Committee of the Privy Council:

1. *Burns, The Honourable Patrick et al v. Minister of National Revenue* (1946) Ex. C.R. 229. Appeal to the Supreme Court of Canada allowed in part, (1947) S.C.R. 132. Appeal to the Privy Council allowed in part.
2. *Minerals Separation North American Corpn. v. Noranda Mines Ltd.* (1947) Ex. C.R. 306. Appeal to the Supreme Court of Canada allowed (1950) S.C.R. 36. Leave to appeal to Privy Council granted. Appeal pending.

B. To the Supreme Court of Canada:

1. *Blackwell, Fred James v. Minister of National Revenue* (1949) Ex. C.R. 391. Appeal dismissed.
2. *Canada Steamship Lines Ltd. v. The King* (1948) Ex. C.R. 635. Appeal allowed.
3. *DeMontigny, Louwigny v. Rev. Père Jacques Cousineau* (1948) Ex. C.R. 330. Appeal allowed.
4. *Greater Vancouver Water District v. The Ship Sparrows Point et al* (1950) Ex. C.R. 279. Appeal allowed in part.
5. *Joggins Coal Co. Ltd. et al v. Minister of National Revenue* (1949) Ex. C.R. 361. Appeal allowed.
6. *Joy Oil Co. Ltd. et al v. The King* (1949) Ex. C.R. 136. Appeal pending.
7. *Kalamazoo Paper Co. v. Canadian Pacific Ry. Co.* (1949) Ex. C.R. 287. Appeal and cross appeal dismissed.
8. *King, The, v. Pacific Bedding Co. Ltd.* (1950) Ex. C.R. 456. Appeal pending.
9. *King, The, v. Arthur Sauvageau et al* (1948) Ex. C.R. 534. Appeal allowed.
10. *Lethbridge Collieries Ltd. v. The King* (1950) Ex. C.R. 1. Appeal dismissed.
11. *Moodie Co. Ltd., J. R., v. Minister of National Revenue* (1948) Ex. C.R. 483. Appeal dismissed.
12. *Puget Sound Navigation Co. v. The Ship Dagmar Salen* (1950) Ex. C.R. 283. Appeal pending.
13. *St. Ann's Island Shooting & Fishing Club Ltd. v. The King* (1950) Ex. C.R. 185. Appeal dismissed.
14. *Smith, Charles McCarroll v. Minister of National Revenue* (1950) Ex. C.R. 104. Appeal allowed.
15. *Spence, Trevelyn v. The King* (1950) Ex. C.R. 488. Appeal pending.

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

BETWEEN:

LETHBRIDGE COLLIERIES LIMITED SUPPLIANT;

AND

HIS MAJESTY THE KINGRESPONDENT.

1948

Oct. 20

1949

June 13

Sept. 21

Crown—Petition of Right—Emergency Coal Production Board—Subsidy—Contract—Offer of a grant or gift of a subsidy by the Board is not an offer acceptable by performance to create a contract—No recovery against the Crown.

The policy of the Emergency Coal Production Board established by Order in Council P.C. 10674 November 23, 1942, as set out in the Minutes of the Meeting of the Board on 23rd March, 1944, was that "approved coal mine operators in the fields indicated to be entitled to a maximum production subsidy as follows . . ." and that the members of the Board "approved putting the scheme into force for the fiscal year April 1, 1944 to March 31, 1945 . . ." In a letter addressed to the Coal Mine Operators in the Domestic Fields of Alberta it was stated "the Board has approved a payment of a flat rate production subsidy as from April 1, 1944, on coal production of approved operators."

Suppliant claims payment of the subsidy on the basis of 35 cents per ton instead of at the rate of 12 cents and 16 cents per ton approved by the Board.

Held: That the Board offered a grant or gift of a subsidy to the coal operators and such action did not constitute an offer which could be accepted by performance thereby creating a contract between the Board and the coal operators.

2. That no contract having been created there was no covenant on the part of the Board to pay a subsidy in consideration of the production of coal and therefore the suppliant was not entitled to recover the same.

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PETITION OF RIGHT by Suppliant to recover payment of a coal subsidy from the Crown.

The action was tried before the Honourable Mr. Justice O'Connor at Calgary and Ottawa.

George H. Steer, K.C. for suppliant.

Harold W. Riley, Jr. for respondent.

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

O'CONNOR J. now (September 21, 1949) delivered the following judgment:

By a Petition of Right the suppliant claims to be entitled to recover from the Crown a subsidy in respect of coal mined by it during the two-year period from 1st April, 1944 to the 31st March, 1946.

By Order in Council P.C. 10674, dated 23rd November, 1942, (Exhibit 1) the Emergency Coal Production Board was established under powers conferred by the War Measures Act and otherwise, to meet a threatened coal shortage.

Paragraph 3 of the Order in Council is in part as follows:

3. (1) The Board shall be responsible, under the direction of the Minister, for taking all such measures, as are necessary or expedient for maintaining and stimulating the production of Canadian Coal and for ensuring an adequate and continuous supply thereof for all essential purposes and, without restricting the generality of the foregoing, the Board shall have the power and duty, under the direction of the Minister, of . . .

(e) rendering or procuring such financial assistance in such manner to such coal mine as the Board deems proper, for the purpose of ensuring the maximum or more efficient operation of such mine; provided that the Board shall not render or procure any financial assistance, except capital assistance, in any case where the net profits of operation exceed standard profits within the meaning of the Excise Profits Tax Act.

On the 23rd March, 1944, the Board passed the following resolution:
 23rd March, 1944.

The Chairman advised that since the last meeting considerable work had been done to determine a fair basis of subsidy to cover the increased cost incurred by operators over which they had no control due to wages

increases and absorption of the cost of living bonus in the basic wage rates. Independent calculations by different methods resulted in the following tentative basis of subsidy:

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(i) Approved coal mine operators in the fields indicated to be entitled to a maximum production subsidy as follows:

Area	Subsidy Per Net Ton of Marketable Coal Produced
Edmonton	65 cents
Drumheller	30 cents
Camrose	30 cents
Lethbridge	35 cents
Coalspur	35 cents
Saunders	35 cents

(ii) Alternatively, subsidy may be computed based on the average subsidy approved for payment on Form F-4A for the months of October, November and December, 1943, plus the uncompensated proportion of Cost of Living Bonus.

Subsidy payable to be whichever is the less of (i) and (ii).

In discussion, it was agreed that this scheme should have the effect of keeping efficient mines in operation and should encourage less efficient operations to reduce costs sufficiently to enable them to maintain operations at the flat rates of subsidy set.

The members approved putting the scheme into force for the fiscal year April 1, 1944, to March 31, 1945, operators to be required to submit cost returns on a similar basis to form F-4A on a quarterly basis and rates of subsidy to be subject to review at the end of every three months.

Subsidy may be reduced if upon review the profit is greater than that allowed under the company's standard profits.

The suppliant received a copy of the telegram (Exhibit 4) and a letter from the Controller, dated 11th April, 1944, (Exhibit 12) at the same time. The letter is referred to in the evidence as C.C. 152, and is as follows:

To Coal Mine Operators in the Domestic Fields of Alberta
 Gentlemen,

Re: Production Subsidy

The Board has approved payment of a flat rate production subsidy as from April 1, 1944 on coal production of approved operators in the "domestic" fields of Alberta, such subsidy being based upon wage increases authorized by Government and not compensated by authorized price increases, plus the previously compensated portion of the cost of living bonus now incorporated in the wage scale. The subsidy is payable as an amount per net ton of coal production.

The conditions under which the subsidy will be provided are as follows:—

1. An operator to be eligible for subsidy must show, to the satisfaction of the Board, that he is unable to absorb the wage increases and cost of living bonus referred to above. Operators who, on March 31, 1944, were in receipt of subsidy in accordance with Form F-4A need not make fresh submissions other than a direct application to be placed on the new basis of subsidy.

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2. Operators applying for subsidy for the first time must submit such data as is available in support of the claim, including a recent audited financial statement, and statement of costs (This will not be necessary if already filed with the Board or the Coal Controller.)

3. Operators approved for this subsidy will be required to submit, in duplicate, monthly, a sworn statement showing the net tons (of 2,000 lbs.) of marketable coal produced from their mining operation for the period. This may include coal used under colliery boilers and employee's coal. Coal *purchased* for resale must *not* be included in such claims, except as provided in (4). In addition, operators under subsidy will be required to submit, for information, a quarterly statement of costs and revenues on a form which will be supplied later.

Claims must be submitted not later than the 15th of the following month.

4. Operators may include tonnages of coal produced by others under contract *from leases owned by the operator*. Operators will be held responsible for notifying any such contractors that they (the operators) are claiming subsidy on such production. The Board will *not* entertain claims for subsidy from the contractors, who must look to the operator for any recompense.

5. Subsidy will be discontinued if it is found that it is being employed to enable the operator to cut prices below those which have been established as fair and reasonable for the grade of coal produced.

6. *No subsidy will be paid until the operator has supplied supporting data in a form satisfactory to the Board, and has been approved for subsidy.*

7. In the case of those operators who were in receipt of subsidy in accordance with Form F-4A during the last three months of the calendar year 1943, the subsidy applicable as from April 1, 1944, will be the lesser of items (i) and (ii) hereunder:—

(i) A maximum flat rate subsidy applicable to *underground* mines only, as follows:—

Area	Subsidy Per Net Ton of Marketable Coal Produced
Edmonton	65 cents
Drumheller	30 cents
Camrose	30 cents
Lethbridge	35 cents
Coalspur	35 cents
Saunders	35 cents

Operators in districts not mentioned above will take the rate of subsidy applicable to the area mentioned with which they are most closely related by reason of operating conditions, grade of coal and market areas served, or

(ii) The average of subsidy approved (after adjustments) for payment, per net ton of marketable coal produced, under Form F-4A for October, November and December, 1943, plus the previously compensated portion of the cost of living bonus now incorporated in the wage scale. The Board will determine the rate of subsidy to be advanced.

Approved operators not on F-4A subsidy during the last quarter of 1943 will receive subsidy at the rates indicated in subsection (i) or such lesser rate as the Board may determine.

8. The Board further directs that in no case will subsidy be provided which will result in net profits of operation exceeding Standard Profits within the meaning of the Excess Profits Tax Act, consequently, all interim payments of subsidy will be considered as accountable advances subject to final adjustment after receipt and consideration of the operator's audited financial statement for his full financial year:

9. The new flat rate subsidy will replace any subsidies paid prior to April 1, 1944.

Yours very truly,
E. J. BRUNNING
Chairman.

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Paragraph 10 of the Order in Council provided that:

10. The Board shall report to the Minister as and when required to do so by the Minister, shall keep the Minister advised of the principles it is following in exercising the powers and duties conferred or imposed upon it by this Order and shall refrain from doing all such things as the Minister may, in writing, from time to time direct.

Pursuant to such provision, on the 13th April, 1944, the Chairman of the Board sent to the Minister a Memorandum (Exhibit 8) which he stated in the letter enclosing the same (Exhibit 7) set out the reason for withdrawal of the old plans and the advantages of the new type of subsidy. He also enclosed a copy of C.C. 152 (Exhibit 12) which he stated outlined in more detail the new production subsidy arrangements. The Memorandum to the Minister (Exhibit 8) is as follows:

Memorandum re Production Subsidies.

April 13, 1944.

The reasons for withdrawing the previous type of subsidy, reported on Form F-4A, are as follows:—

- (1) The Western domestic coal fields are now in surplus production. In other words, the coal emergency no longer exists in these areas.
- (2) To continue paying to operators all their losses, plus fifteen cents a ton profit, would result in keeping the high cost mines in operation, thus depriving the efficient low cost mines of sales, which in turn would result in bringing these mines down to a loss position, as there is insufficient demand for coal to keep all mines operating steadily throughout the year. In other words, to continue this form of subsidy would be subsidizing inefficiency.
- (3) An analysis of the profit or loss position of the individual mines in the domestic field show that they range from a profit of nearly one dollar per ton to a loss position requiring Government assistance amounting to \$2.50 per ton.
- (4) Great difficulty has been experienced in administering F-4 form of subsidy due to the continual controversy with operators on questions of fair and reasonable depreciation, depletion and the inclusion of excessive future development costs in current cost of production.
- (5) The payment of losses plus a profit to operators provides no incentive to either the owners or to labour to reduce costs.

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The new flat rate subsidy plan obviates the above weaknesses by

- (i) Placing each operator in the same relatively competitive position as existed prior to the payment of production subsidies. This has been accomplished by basing the flat rate subsidy on the amount of assistance required per ton of coal produced to reimburse the operator for the increases in labour rates brought about by direction of the War Labour Board, also an item to offset the increase of cost due to the operator being required to absorb the cost-of-living bonus as of February 15, 1944. This bonus was previously paid by the Government.
- (ii) As the flat rate subsidy is calculated on the average tons per man day produced in the respective fields, it will be necessary for excessively high cost producers either to reduce their cost or close down.
- (iii) The new subsidy should provide the necessary incentive to operators to reduce costs as they can retain all profits that accrued from the operation including the subsidy up to an amount not exceeding standard profits within the meaning of the Excess Profits Tax Act.

Coal Controller.

There was no evidence that the Minister took any action on receipt of the said Memorandum (Exhibit 8).

On the 18th April, 1944, a Coal Committee representing the coal operators of Alberta, including the suppliant, interviewed the Cabinet and as a result of that interview a sub-committee of the Alberta Coal Committee met the Chairman, Mr. Brunning, and certain officials of the Board. Mr. Brunning put before the Committee the Memorandum (Exhibit 8) that he had furnished to the Minister as establishing the policy that was being followed by the Board in administering this question of subsidy. The Memorandum was contained in the Minutes of the Meeting between the sub-committee and Mr. Brunning, which Minutes were prepared and circulated by the office of the Board to those members of the sub-committee present (and others) and in turn by them to the operators, including the suppliant.

Parts of these Minutes (Exhibit 6) are:

The Controller again stated that the labour costs were not the only ones and that the true test of efficiency lay in the reduction of other costs. It was the feeling of the Board that since coal was in surplus supply subsidy should be paid to cover those costs that had increased through direct Government action and that this policy would place the field upon a normal competitive basis wherein the efficient operations would survive and the inefficient would have to choose between closing or improving their operational efficiency.

Then follows the Memorandum to the Minister (Exhibit 8) *supra*.

C.C. 152 (Exhibit 12) *supra* was not shown to the meeting.

The suppliant had never been on Form F-4A, and had never received a subsidy. So it came within the first category, that is, an operator not on F-4A subsidy.

The suppliant received a copy of the Minutes from the Alberta Coal Committee (Exhibit 6) which related the Memorandum to the Minister (Exhibit 8) and from the Chairman of the Board a copy of C.C. 152 (Exhibit 12).

Mr. Donaldson took the statement in C.C. 152—“Approved operators not on F-4A subsidy during the last quarter of 1943 will receive subsidy at the rates indicated in subsection (i),” as meaning just what it said and the following sentence—“or such lesser rate as the Board may determine,” as meaning that if 35 cents put the company over its standard profits that the Board would determine such lesser rate so as to keep the company within such standard profits. On this interpretation that the subsidy was 35 cents per ton up to standard profits, the suppliant worked the mine in a manner quite different from that which it normally would have done. It employed green men with a fire boss for every ten men instead of every sixty men. This was described by Mr. Stubbs as more or less a training school for men which would result in the production per man day being very low. And instead of driving to the boundaries they reversed this and took the coal in advance instead of in retreat. All this was done to increase the production, but it greatly added to the cost. I accept Mr. Donaldson’s evidence.

On the 7th August, 1944, the Board advised the suppliant by letter (Exhibit 20) that “your Company’s application to be placed on Flat Rate Subsidy as from 1st April, 1944, was provisionally approved. The rate so approved was determined to be 12 cents per ton and payments will be made on that basis and such payments will be treated as accountable advances until an auditor’s certified statement . . . has been received and reviewed.”

On the 1st September, 1944, the suppliant wrote the Board (Exhibit 13) pointing out that it had been allowed

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a flat subsidy of 12 cents per ton and other operators in the district had received up to 35 cents per ton and that it seemed to it that wage increases not compensated for applied to all operators alike, and as the 35 cents per ton had been decided upon as the rate applicable to Lethbridge, its books had been set up on that basis, but on the advice of its accountant an adjustment had been made to correct this mistake. The letter concludes with:

Will you please define for us the items covered by the 12 cent per ton and advise if there is liable to be any change in this figure depending upon our entire year's operations.

Mr. Brunning replied under date of 13th September, 1944, (Exhibit 14) that the rate of 35 cents per ton was established for the Lethbridge area as the maximum amount required to cover the authorized wage increases. He then adds:

However, due to the fact that conditions under which different mines operate, vary considerably, operating costs therefore also vary and not necessarily as a result of inefficiency. Therefore it is necessary for this Board to examine each operator's position and determine what rate of flat rate subsidy is required to help him meet the above mentioned costs, but in no case will such subsidy exceed the maximum rate set for the field.

In your case the rate of 12 cents per ton was established from the data you submitted covering the basic three months period ending December 31, 1943.

It will be observed that Mr. Brunning did not answer either of the two questions asked in Exhibit 13:

(1) Will you please define for us the items covered by the 12 cents per ton and, (2), advise if there is liable to be any change in this figure depending upon our entire year's operations.

But on Exhibit 13 written in lead pencil opposite these questions "No" is underlined.

On the 18th September, 1944, the suppliant wired the Board (Exhibit 15):

Re your let 13 paragraph 3. Does this mean if the rate of 12 cents established fails to bring our year's operations to show standard profit will the rate be increased to provide for this or until the 35 cents is reached.

Instead of giving a definite answer either one way or the other to this question, on the 19th September, 1944, Mr. Brunning wrote to the suppliant (Exhibit 16):

Replying to your telegram of the 18th instant, I would refer you to my letter of September 13th and also Circular C.C. 152 dated April 11th, 1944, both of which should clarify the basis on which the present

flat rate subsidy assistance is payable. The present rate of 12 cents payable to your operation which has been approved by this Board is not subject to revision.

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It would not be known at that date whether 12 cents per ton would or would not reimburse the suppliant for the authorized wage increases or whether or not the suppliant would show a profit over the fiscal period. The letter adds:

However, if at the end of the fiscal year, it is found that revenue has not been sufficient to meet the costs as outlined in C.C. 152, it will be in order for your Company to make a submission to this Board for its consideration.

The suppliant interpreted this to mean that at the end of the year it could apply for an increase in the 12 cents per ton for that year. Eventually, however, the Board refused to reconsider this question, but it did increase the amount to 16 cents per ton for the following year.

On the 12th December, 1944, the Board wrote to the suppliant (Exhibit J) in part as follows:

In accordance with Mr. Brunning's letter of October 12, settlement of the subsidy assistance to your operations will have to be deferred until your financial statement has been received. We might point out that the Board has in the past tried to avoid paying subsidy to any operator who is paying dividends. The Board does not wish to be accused of supplying funds for distribution to stockholders.

In a letter to the suppliant under date of 21st December, 1944, (Exhibit 11) the Board stated in part:

As your production season has now begun it is felt that you will be operating on a profitable basis for the balance of your fiscal period. The Board must guard against placing the operators in the excess profits bracket and as operators who show a profit over the fiscal period must not be subsidized, we must await your returns of December 31st or possibly your financial statement at the close of your fiscal period before resuming subsidy payments . . .

We would appreciate your advice whether it is your intention to refrain from making any dividend payments during the fiscal period.

In June 1945, Mr. Donaldson met Mr. Brunning and on June 28th, 1945, submitted a brief to the Board (Exhibit L). What the position was at the meeting is well described by the brief:

During our interview it early became apparent that we had a misunderstanding with respect to the Board's policy relating to subsidy assistance on the flat rate basis applicable to the various domestic coal fields. That policy as outlined to us by the Chairman was not a fixed

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one but discretionary by decision of the Board. This was so much at variance with the interpretation which we placed upon the pronouncement of the Board as set forth in C.C. 152 that the Chairman invited us to make a submission of the Company's case. This we are glad to do.

During the whole period the suppliant worked the mine in the manner indicated and continued to claim for a subsidy at 35 cents per ton up to an amount equal to standard profits.

The Board approved the suppliant for subsidy but paid only 12 cents and 16 cents per ton for 1944 and 1945.

Mr. Frank G. Neate in his examination for discovery as an officer of the Crown, stated:

That the amount of flat rate subsidy was arrived in this manner. The operators were divided into certain areas and F-4 returns were requested for October, November and December, 1943, and from that F-4 the flat rate was determined for a certain operating area and Drumheller had one field and Lethbridge another and Edmonton another, and in each case the flat rate varied according to the returns of losses sent in by the various operators. I can say this, that I know in calculating it was found the Drumheller losses amounted to 28 cents and, to be generous, they added 2 cents and made it 30 cents, and in the case of Lethbridge the figure was slightly over 30 cents and they made it 35 cents to bring each into the flat rate pattern . . . but the flat rate was not determined on an arithmetical average. You have two smaller mines and they could not swing it. It would be the tonnage of the Lethbridge field based on their losses and it would be 30 cents or 35 cents as the case might be.

The Minutes of the Meeting of the Board held on the 31st May, 1944, set out C.C. 152 in full but no action was taken in respect to it in any way. That is, C.C. 152 is merely copied into the Minutes without either being approved or disapproved.

On the 27th July, 1944, the Minutes of the Board show that the subsidy for the suppliant was then fixed at 12 cents per ton and the Minutes of the Board on the 18th October, 1945, show that the subsidy to the suppliant was then fixed at 16 cents per ton.

The first question that arises is what policy did the Board lay down at the meeting held on the 23rd March, 1944? To understand that it is necessary to examine the policy that had been in force before that date and the results. Prior to the introduction of this maximum production subsidy, as it is termed in the Minutes of the Meeting of the Board, dated the 23rd March, 1944, there

had been in force a subsidy, which the Memorandum to the Minister (Exhibit 8) referred to as F-4A-form of subsidy.

Under the F-4A form of subsidy, only those operators who were operating at a loss received a subsidy. The subsidy consisted of a payment to operators of all their losses plus 15 cent a ton profit. Each operator submitted the Form F-4A and the Board considered each application separately and fixed the amount of the subsidy. The losses depended in part upon the amount charged for depreciation, depletion and development costs, so that mines operating at a loss, even when they were in the same area, received subsidy in varying amounts, and those mines which were not operating at a loss did not receive anything.

As each mine in the same area received a different amount, the subsidy was the direct opposite of a flat rate subsidy applicable to all mines in one area. The result, so long as coal was in short supply, did not affect the competitive position between any two mines, because the efficient mine could still sell all the coal that it could produce.

When, however, the coal fields in question were in surplus production and all mines in the same area were competing and there was an insufficient demand for coal to keep them all operating steadily, difficulties arose. As the report to the Minister points out, to pay to an inefficient mine all its losses plus 15 cents a ton profit, would keep the high-cost mines in operation and thus deprive the efficient low-cost mines of sales, which in turn would put them in a loss position. As the paragraph in the report puts it: "in other words, to continue this form of subsidy would be subsidizing inefficiency."

The new flat rate subsidy plan for each area "obviated these weaknesses" (in the language of the report to the Minister) by:—

1. Placing each operator in the same relatively competitive position as existed prior to the payment of production subsidies.
2. Made it necessary for excessively high cost producers, either to reduce their cost or close down.
3. Provided the necessary incentive to operators to reduce costs, as they can retain all profits that accrued from the operating, including the subsidy, up to an amount not exceeding standard profits, within the meaning of the Excess Profits Tax Act.

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In other words, the subsidy was changed from one in which the Board allotted varying amounts to the different mines in the same area, to one in which each mine (approved by the Board) in the same area, received the same flat rate subsidy, based on the net ton of coal production.

It is quite clear that if the Board paid each mine in the same area at a different rate of subsidy, then the operators would not be in the same relative competitive position as existed prior to the payment of production subsidies. The essence of the new policy was that the *same flat rate* would be paid to *all mines in the same area*.

Mr. Neate stated that C.C. 152 merely embodied the policy of the Board, as set out in the Minutes of the Meeting of the Board. If the sentence in the letter C.C. 152 (Exhibit 12) "or such lesser rate as the Board may determine" is given the meaning that the Board would pay mines in the same area at varying rates, then that provision is wholly inconsistent with the policy laid down by the Board, and was in fact directly opposed to such policy and was unauthorized.

In my opinion, the policy which the Board laid down in the Minutes and as explained in the report to the Minister, was that all operators in the Lethbridge area approved for subsidy by the Board, would be paid 35 cents per ton.

The suppliant having been approved for subsidy by the Board and having produced coal, should, in my opinion, have received a subsidy of 35 cents per ton up to standard profits.

Mr. S. T. D. Morrow, an auditor with the Treasury Department, made an audit of the books of the suppliant and a report of the audit bears date 15th April, 1947.

Mr. Morrow questioned, and I think that is as far as he went, the prices obtained on the sale of coal, the depreciation charged by the suppliant, the stores and supplies and general work, i.e. switching and loading, outside general and underground general. Using the sale price of coal as an example, what Mr. Morrow said in effect, that if the suppliant had sold coal at the maximum price permitted by the Order of the Wartime Prices

and Trade Board, that the company would have received a greater revenue and therefore would have had a much higher profit.

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The evidence of Mr. R. H. Roberts, the Sales Manager of the suppliant company, showed that the company had continued to sell after the Order of the Board became effective, at the price that coal was sold during the basic period, 15th September to 11th October, 1941, plus additional increases authorized from time to time and that the suppliant had strictly adhered to the orders of the Board at all times. In addition, the suppliant had applied from time to time to obtain increases in price, and some increases had been granted and the coal had been sold at the increased price.

Mr. Patterson, the auditor of the company, dealt with the question of depreciation and the other questions raised. There is no need of my dealing with each item raised. I am satisfied on the evidence before me, that the suppliant obtained the highest prices for its coal that it could obtain and that the items that it has charged for depreciation, stores and supplies and general work and the other items questioned by Mr. Morrow, were reasonable and proper, and I so find.

Assuming that I am right in holding that the suppliant was entitled to such subsidy, the next question is whether there is a liability on the part of the respondent to pay the difference and a right in the suppliant to recover the same enforceable by petition of right?

On the facts here, the claim cannot be put on the basis of a contract reached by mutual agreement.

Nor in my opinion, can the claim be put on the basis of compliance with conditions of regulations having the force of law. P.C. 10674 (Exhibit 1) which established the Board and the powers of the Board, does not set out conditions which could be complied with so as to create a statutory contract. Moreover, its language is permissive and not imperative, and in addition, the payment of subsidies is in the discretion of the Board.

And for the same reasons a statutory contract cannot be created in my opinion, by combining the regulations under P.C. 10674 with what the Board did.

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With statutory contract excluded, there remains the question of whether the claim can be put on this basis: that what the Board did, was an offer capable of acceptance by performance, that is, the production of coal by an approved operator, thus constituting a contract, which created a liability on the part of the respondent to pay the subsidy, and gave the suppliants a right to recover it, enforceable by petition of right. As this in turn depends on whether what the Board did constituted such an offer, it is necessary to examine just what was done.

Under P.C. 10674, the Board was responsible under the direction of the Minister of Munitions & Supply, for taking all such measures as were necessary or expedient for maintaining and stimulating the production of coal and for ensuring an adequate and continuous supply for all essential purposes, and without restricting the generality of the foregoing, the Order provided that the Board had the power and duty under the direction of the Minister of *inter alia* rendering or procuring such financial assistance in such manner to such coal mines as the Board deemed proper for the purpose of ensuring a maximum or more efficient operation of such mine.

The policy of the Board was as set out in the Minutes of the Meeting of the 23rd March, 1944. After setting out that independent calculations by different methods resulted in the following tentative basis of subsidy, the Minutes state that: "approved coal mine operators in the fields indicated to be entitled to a maximum production subsidy as follows: . . ." The Minutes also show that "the members approved putting the scheme into force for the fiscal year April 1, 1944 to March 31, 1945 . . ."

Next, in C.C. 152 (Exhibit 12) addressed to the Coal Mine Operators in the Domestic Fields of Alberta, it was stated: "the Board has approved payment of a flat rate production subsidy as from April 1, 1944, on coal production of approved operators."

The question then is, did the Board make an offer which could be accepted by performance and thus create a contract, or did the Board merely offer a grant or gift of subsidy? Based on what I have set out above, I reach the conclusion that what the Board did was to offer a grant

or a gift of subsidy, and what the Board did, did not constitute an offer which could be accepted by performance.

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No contract was therefore in my opinion created, and hence there was no covenant to pay a subsidy in consideration of the production of coal. And there was no right in the suppliant to recover the subsidy enforceable by petition of right.

For these reasons, the suppliant is not entitled to the relief claimed. The respondent is entitled to costs.

Judgment accordingly.

BETWEEN:

LISUNIA CHERNENKOFF APPELLANT;
AND
THE MINISTER OF NATIONAL REVENUE } RESPONDENT.

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Revenue—Income tax—Income—Income War Tax Act, R.S.C. 1927, c. 97, s. 47—Onus on appellant—Evidence of appellant unsatisfactory—Failure to file proper returns—Appellant assessed on basis of net worth over a period of years—Appeal dismissed.

Appellant filed income tax returns for the years 1942 to 1945 inclusive. The returns as filed were not accepted by the respondent and appellant was assessed on the basis of the total taxable increase in worth of the appellant during those years. On appeal to this Court appellant contended that certain items included in the calculation are wrong.

Held: That the onus is on appellant to establish affirmatively that her taxable income was not that for each of the years for which she was assessed and this she failed to do.

- 2. That the conduct of the appellant and her agent in failing to produce proper records or accounts to the income tax inspector and in withholding information from him caused the inspector to adopt the "net worth" increase method as a basis for assessments and the appellant having failed to establish that her taxable income for each of the years in question is not that on which she has been assessed the appeal must be dismissed.
- 3. That the appellant at trial failed to establish her income with proper deductions and allowances by the production of records available to her and in the absence of such records the appellant failed to prove that on a proper and complete "net worth" basis the assessments were wrong.

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APPEAL under the Income War Tax Act.

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The appeal was heard before the Honourable Mr. Justice Cameron at Saskatoon.

E. W. Gerrand, K.C. for appellant.

W. Walker and T. Z. Boles for respondent.

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

CAMERON J. now (November 15, 1949) delivered the following judgment:

In this matter the appellant appeals from assessment to income tax for the taxation years 1942 to 1945, inclusive. During these years the appellant was the owner of three quarter-sections of farm lands near Arran, Saskatchewan, comprising in all 480 acres of which 354 acres were under cultivation. She operated the farm with the help of a son, John Chernenkoff, her husband having died in 1937. She made no income tax return for the years 1942 to 1944 until August, 1945, when, following a demand, her son John on her behalf completed the returns for those years. He also later filed the return for 1945. As so filed these returns showed a net income as follows:

(a) 1942	\$ 462 12
(b) 1943	773 08
(c) 1944	1,229 27
(d) 1945	a loss

The respondent did not accept these returns as satisfactory. Two inspectors of the Income Tax Division at Saskatoon interviewed the appellant in 1947 under circumstances to be mentioned later; and, upon being advised that the appellant had no records or vouchers for the years in question, determined to check the returns so made by ascertaining (from information supplied by the appellant) her net worth at December 31, 1941, and at December 31, 1946, and particulars of her expenditures and capital gains. The respondent apparently accepted the report of these two officers which indicated that the total taxable increase in worth of the appellant between those dates was

\$10,693.02; and on February 28, 1948, the appellant's taxable income was determined and the appellant was assessed as follows:

1942	\$ 1,800 00
1943	2,100 00
1944	2,300 00
1945	2,300 00
1946	2,293 02
	10,693 02

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In so assessing the appellant the respondent proceeded under the provisions of section 47 of The Income War Tax Act, which is as follows:

Sec. 47. The Minister shall not be bound by any return or information supplied by or on behalf of a taxpayer, and notwithstanding such return or information, or if no return has been made, the Minister may determine the amount of the tax to be paid by any person.

From these assessments appeals were taken and by his decision the respondent affirmed the assessments, his reasons being given as follows:

The Honourable the Minister of National Revenue having duly considered the facts as set forth in the Notices of Appeal and matters thereto relating, hereby affirms the said Assessments on the ground that Section 47 of the Act provides that the Minister shall not be bound by any return or information supplied by or on behalf of a taxpayer and notwithstanding such return or information the Minister may determine the amount of tax to be paid by any person; that in the absence of proper proof and accounting records and upon investigation and in view of all the facts the Minister has under the said Section 47 determined the amount of tax to be paid by the taxpayer for the years 1942, 1943, 1944 and 1945. Therefore on these and related grounds and by reason of other provisions of the Income War Tax Act the said Assessments are affirmed.

Notice of dissatisfaction followed and by his reply the respondent affirmed the assessments as levied.

As I have said two officials of the Income Tax Division in Saskatoon, John Lesiuk and Walter Fawcett, interviewed the appellant in September 1947. They first called at her farm but were advised by her son John that she had given up farming and was living with her married daughter, Mrs. Picton. Lesiuk advised the son that they represented the Income Tax Department and that certain information was required in regard to the appellant's income before she could be assessed. The son stated that he represented his mother, that he had no records of the farm operations

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and that when he had made out the returns for his mother they were not made out from any records but were estimates only. That he made these statements was not denied by the son, although in his own evidence he stated that when the returns were made out he had used farm records for that purpose. He was then advised by Lesiuk that in the absence of any records the returns could not be accepted but that a financial statement would be required. He replied that he could not give that information before seeing his mother. He was informed as to what would be required and it was arranged that he would attend at the bank, secure information as to bank balance there and take the officials that afternoon to see his mother. On the same day the officials interviewed the mother at the residence of her son-in-law. Those present were Lesiuk, Fawcett, the appellant, her son John, her son-in-law John Picton, and her daughter Mrs. Picton. All gave evidence at the trial except Mrs. Picton.

The appellant is a member of the Doukhobor community and speaks the Russian language only. Her son John is Canadian-born and speaks both Russian and English fluently, as does her son-in-law Mr. Picton. Mr. Lesiuk is Canadian-born but speaks and understands the Russian language thoroughly, although this fact was not disclosed to the appellant's family. Lesiuk conducted the investigation by putting questions in English to the appellant, which questions were then interpreted into Russian by the appellant's son. On occasions she gave the answers in Russian immediately, but on many occasions would discuss the matter in Russian with her family before reaching a conclusion. Her replies were given in Russian and again interpreted into English by her son. Lesiuk then in English would repeat the answer given by the son and the information so obtained was written down by Mr. Fawcett who took little, if any, part in the discussion. By reason of his knowledge of Russian, Lesiuk understood all the conversation between the members of the appellant's family and he states that in every instance the information which he gave to Fawcett to record came from the appellant, was correctly interpreted by her son John into the English language and was correctly taken down by Fawcett. Mr. Picton, while having no knowledge of what Fawcett

wrote down, does agree that the appellant's family explained to her very clearly what was said, that she gave the answer to John, that John correctly translated it to Lesiuk in English, that Lesiuk would then turn to Fawcett and tell him what to put down and that what Lesiuk so told Fawcett to record was the information that came directly from John Chernenkoff on behalf of the appellant.

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The interview lasted approximately three hours and I have no doubt whatever that the appellant and her family fully understood the nature of the enquiry and were afforded every opportunity of thoroughly considering all questions put by Lesiuk before giving the information required. I find no reason whatever to question the credibility of Fawcett who stated that he took down the information exactly as given by John Chernenkoff on behalf of his mother and as repeated to him by Lesiuk. Before leaving, Fawcett and Lesiuk, on the basis of the information taken down, computed the total taxable increase from December 31, 1941, to December 31, 1946, at \$10,693.02. They realized that crops in some years had been substantially better than for other years and therefore, instead of allocating a large part of that increase to a good year (and thereby raising the rate of taxation to a higher bracket), decided to apportion the whole in more relatively even proportions over the whole five years, and that was done. No objection is taken to that procedure. They left with the appellant a statement of the tax which would be payable for each year, including interest.

It should be noted that in the Notice of Appeal the appellant took the position that the assessments were invalid and should be set aside; that the returns as filed by her were complete and accurate except for one item in the return for 1942, amounting to \$410, which it was admitted should not have been claimed as a deduction. Pleadings were delivered and in her Statement of Claim the appellant again alleged that the assessments were invalid and should be set aside and that the returns as filed were correct, save as to the one item for 1942. At the trial, however, counsel for the appellant was content to attack items in the computation based on the total taxable increase in the appellant's worth between

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December 31, 1941, and December 31, 1946, and made no attempt to establish in any way that the appellant for the year in question did not have the taxable income for which she had been assessed.

Exhibit 2 is a copy of the computation made by Lesiuk and Fawcett. Page 2 is a computation of depreciation claimed by the appellant on the machinery and buildings. Page 3 is a statement of capital gains made on machinery sold. The information on which these two items is based was secured entirely from the appellant and her son and no dispute arises in connection therewith, the full amounts claimed having been allowed.

Page 1 of Exhibit 2 is a computation of the appellant's net worth on December 31, 1941, and December 31, 1946, the difference amounting to \$4,165.02. To that have been added annual gifts to the son of \$700 for each of the five years; a deduction of \$3,472 was allowed for capital gains and then there was added "drawings" by the appellant for each of the five years at \$1,300.

Objection is taken to the inclusion of the cost of two trips taken by the appellant, one to Vancouver and one to Winnipeg, at a cost of \$250 and \$100 respectively. It is admitted that the trips were taken by the appellant although it is rather vaguely suggested that the one to Winnipeg was in 1947. No attempt was made, however, to indicate just when the trips were made or what amount the appellant actually disbursed in connection therewith. I have no hesitation in reaching the conclusion that these figures were given to the officials by or on behalf of the appellant, and the evidence given at the trial falls short of establishing that they are incorrect in any way.

Objection is also taken to the inclusion of \$3,500 as representing gifts to the son John in the years 1941 to 1946, over and above his wages. Both the appellant and her son insist that no such gifts were made and that throughout the entire period the son was paid only wages of approximately \$600 per year, of which amount \$400 was paid in cash and the balance charged as board. The son states that this item of \$3,500 was put down by Fawcett and Lesiuk without any authority whatever.

Objection is also made to the inclusion of the sum of \$6,500 for "drawings", being an average of \$1,300 for each

of the five years. Lesiuk's evidence is that in order to ascertain the appellant's earnings over these years it was necessary to find out what she had spent for fuel, clothing, household living expenses, medical account, pleasure, fuel, operations of motor car, etc. He was told that in all these items would total over \$2,000 a year, including \$700 a year paid to the son John as gifts. Rough estimates for each category were given to him and he accepted them as correct. He says that the appellant approved of this item of \$1,300 as annual "drawings". Again, the appellant and her son deny having given any such approval, stating that Lesiuk established the figures personally and without any consent on their part. They now attack this item as grossly excessive. They say that the medical expenses put in at \$200 a year were never incurred, that fuel itemized at \$80 a year should be deleted entirely as they bought none; that the item of \$150 per year for clothing is excessive and, as well, the estimate of \$30 per month for groceries purchased. No part of their evidence is supported by books of account, vouchers or cheques. The appellant's son-in-law Picton says that some of these items, comprising an annual total of \$1,300 were not mentioned by anyone at the enquiry.

I find it difficult, on the evidence before me, to determine what amount the appellant paid out for these various items. Were it not for the evidence of Lesiuk and Fawcett that the appellant and her son actually agreed on these amounts, I would be inclined to find that the estimate of \$1,300 was somewhat in excess of that actually disbursed annually, but in the view that I have taken of the matter it is not necessary to reach any concluded opinion as to which of the parties I am to believe as to the amount of "drawings" or gifts.

In effect, the appellant agrees that the "net worth" computation of her income is a satisfactory basis for arriving at her taxable income, but that some of the items—those which I have indicated—are wrong. When these are corrected in accordance with the evidence adduced—so she states—the result is that there is no taxable income for any of the years in question.

My opinion is that the appellant must do far more than she has attempted to do here if her appeal is to be

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successful. There can be no question that the onus lies on the appellant and that, in my view, means that she must establish affirmatively that her taxable income was not that for each of the years for which she was assessed. Two courses were open to her, the first being to establish her income with proper deductions and allowances, and that course could quite readily have been followed. A perusal of Exhibit 1—her own returns for these years—indicates that with the exception of a few hundred dollars her entire income came from the sale of grain. All the necessary records of income from that source were available to her but were not produced in court, the son merely stating that he was not asked to bring them, or did not think it necessary to do so. The disbursement also could have been ascertained without any great difficulty, all or most of them having been made to people in the district, many of whom would have had books of record which could have been produced had the appellant herself possessed none. It is in evidence, also, that the appellant's son had a bank account from which farm expenses were paid and cancelled cheques could quite easily have been secured, but the appellant did not avail herself of the very obvious and simple method of establishing her income in this way.

In the absence of records, the alternative course open to the appellant was to prove that even on a proper and complete "net worth" basis the assessments were wrong. But that also she has failed to do. She submits that all she needs to do is to establish certain inaccuracies in the amounts and that these items must be adjusted accordingly. But it will be kept in mind that the "net worth" increase was established on her own statements and it was amply proven at the trial that these statements were most inaccurate and incomplete. I accept the evidence of Mr. Lesiuk that the appellant was asked if she had any assets other than those included in the statement, Exhibit 1, or cash on hand, and that she said she had not. The evidence establishes clearly that she had very large sums in cash at her home, so large that in one year alone she was able to expend \$3,500 on account of the purchase price of new machinery, the balance of \$3,500 being paid by cheque on the bank account. No attempt was made to

indicate what cash she had on hand at the beginning or end of the five-year period or to explain the sources of these funds on hand. In addition, in 1941 she opened a bank account in the name of her son and out of this account farm operating expenses were met in part. On December 31, 1946, there was a balance in this account of about \$2,000, all of which was the property of the appellant, but this was not disclosed to the assessors. On December 31, 1941, the balance was \$450 so that it would appear that the difference of \$1,500 at least should have been added to the increased net worth of the appellant.

Both the appellant and her son had knowledge of this bank account and the money on hand, but withheld the information from the officials, the son stating at the trial that he was not asked about them and adding that he did not want anyone to know about the money his mother had at home. The appellant merely states that she was not asked about them. They withheld the information from the inspectors and did not choose to inform the Court as to what part of these very substantial items was earned in the period 1941 to 1946.

In the course of the trial I formed an unfavourable opinion as to the credibility of the appellant and her son. No attempt was made to file income tax returns until, after a lapse of some years, she was compelled to do so. It seems reasonably clear, too, that the returns as filed were incorrect in that substantial amounts derived from grain participation certificates seem to have been omitted. At the interview in 1947, the appellant was given an opportunity to ascertain her income with complete accuracy by production of available records, but her son stated that these records were not available when, as a fact, he had them at his home. She had a further opportunity to do so at the trial but again they were not forthcoming. It was the failure to produce these records and the denial of their existence that compelled the inspector to adopt the "net worth" increase method as a basis for assessments and it is now admitted that very large items of cash in bank and on hand were not disclosed. The conduct of the appellant and of her son in all these instances suggests very strongly that the production of all

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the records in their possession would not have been to the appellant's financial interest and that they were deliberately withheld.

The appellant has failed to establish that her taxable income for each of the years in question is not that on which she has been assessed, and her appeal must therefore be dismissed, with costs to be taxed.

Judgment accordingly.

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 Sept. 19
 Nov. 26

BETWEEN:

EAGLE LAKE SAWMILLS LIMITED, .. APPELLANT;

AND

MINISTER OF NATIONAL REVENUE, RESPONDENT.

Revenue—Excess Profits—Standard Profits—Excess Profits Tax Act, 1940, s. 2(1) (i), 4(1) (b) (i), 4(1) (b) (iii), 5(3), 5(5)—“Final and conclusive”—Power to adjust standard profits as conferred by s. 4 of the Act applies to all standard profits however ascertained—Onus on appellant to establish under which clause of s. 5(3) of the Act the Minister was satisfied that excessive taxation might result—Reduction in capital by appellant—Position of the appellant during the standard period considered in fixing standard profits and not as it was after capital reduced—Appeals dismissed.

In December 1944, appellant's standard profits were ascertained by the Board of Referees under s. 5(3) of the Excess Profits Tax Act, 1940, and were duly approved by or on behalf of the respondent under s. 5(5) of the Act.

The capital employed by the appellant in its business had, in February, 1944, and since the commencement of the last fiscal period of the appellant in the standard period, been reduced and such reduction had been accompanied by an equivalent reduction in capital stock.

Respondent, in 1946 and in 1948 adjusted appellant's standard profits for the fiscal years ending November 30, 1944, and November 30, 1945 and computed the tax payable by appellant accordingly.

From these assessments the appellant appealed to this Court.

Held: That the power to adjust standard profits, as conferred on the respondent by s. 4 of the Act, applies to all standard profits whether ascertained by the Board of Referees or otherwise, subject to the conditions and within the limits therein provided.

2. That the appellant having failed to establish affirmatively under which clause of s. 5(3) of the Act the Minister was satisfied that standard profits ascertained by reference to capital employed would result in the imposition of excessive taxation the Court is unable to determine that in exercising his discretion under s. 4 of the Act the Minister must have reached a conclusion opposed to that which he had reached in considering appellant's application under s. 5(3).

3. That in ascertaining the standard profits the Board of Referees considered the position of the appellant as it was during the standard period and not as it was after its capital was reduced in 1944 and the appellant had the full benefit of the standard profits so fixed by the Board of Referees from the coming into effect of the Act until 1944 when its capital was reduced and there is nothing to show that that reduction in capital was taken into consideration by the Board of Referees or that when the Minister approved of the decision of the Board of Referees he had any knowledge of such reduction in capital.

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APPEALS under the Excess Profits Tax Act, 1940.

The appeals were heard before the Honourable Mr. Justice Cameron at Vancouver.

R. H. Tupper for appellant.

W. S. Owen, K.C. and *D. K. Petapiece* for respondent.

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

CAMERON J. now (November 26, 1949) delivered the following judgment:

In this case the appellant appeals from assessments made under the Excess Profits Tax Act, 1940, and amendments, in respect of its fiscal years ending November 30, 1944, and November 30, 1945. The facts are not in dispute and are set forth in the special case submitted to the Court, as follows:

SPECIAL CASE

The parties to this cause have concurred in stating the questions of law arising herein in the following case for the opinion of the Court:

1. The Appellant is a company incorporated under the laws of British Columbia and, during its fiscal years ending November 30, 1944, and November 30, 1945, was resident and carried on business in Canada;

2. The Appellant had profits for the fiscal years referred to in paragraph 1 in respect of which it is subject to tax under The Excess Profits Tax Act, 1940;

3. Pursuant to the provisions of subsection (3) of section 5 of The Excess Profits Tax Act, 1940, the standard profits of the appellant, for the purposes of the said Act, were ascertained by the Board of Referees at \$90,000 on December 11, 1944, and the decision of the Board so ascertaining the Appellant's profits was duly approved by the Deputy Minister of National Revenue for Taxation, exercising the powers of the Respondent under subsection (5) of section 5. On January 5, 1945, the Deputy Minister of National Revenue communicated the aforesaid decision to the Appellant;

4. By assessment dated December 11, 1946, the Respondent assessed the Appellant for tax under The Excess Profits Tax Act, 1940, for the

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fiscal year ending November 30, 1944, and in so doing, purporting to exercise or exercising the power conferred on him by subsection (1) of section 4 of the said Act (capital employed by the Appellant in its business having, since the commencement of the last fiscal period of the Appellant in the standard period, been reduced in or about the month of February, 1944, and such reduction having been accompanied by an equivalent reduction in capital stock), adjusted the Appellant's standard profits in accordance with subparagraph (i) of paragraph (b) of the said subsection (1) from \$90,000 to \$78,656.59 and computed the tax payable accordingly;

5. By assessment dated March 5, 1948, the Respondent assessed the Appellant for tax under the Excess Profits Tax Act, 1940, for the fiscal year ending November 30, 1945, and in so doing, purporting to exercise or exercising the power conferred on him by subsection (1) of section 4 of the said Act (the capital employed by the Appellant in its business having, since the commencement of the last fiscal period of the Appellant in the standard period, been reduced in or about the month of February, 1944, and such reduction having been accompanied by an equivalent reduction in capital stock), adjusted the Appellant's standard profits in accordance with subparagraph (i) of paragraph (b) of the said subsection (1) from \$90,000 to \$76,984.38 and computed the tax payable accordingly;

6. The Appellant thereupon duly appealed from the aforesaid assessments to this Honourable Court

The question for the opinion of the Court is whether, in making the adjustments in the Appellant's standard profits referred to in paragraphs 4 and 5 of this Stated Case, the Respondent exercised authority conferred upon him by subsection (1) of section 4 of The Excess Profits Tax Act, 1940, in which case the appeals should be disallowed with costs, or whether the said subsection (1) did not authorize him to make adjustments in the circumstances of this case, in which case the appeals should be allowed with costs and the assessments should be referred back to the Respondent for re-assessment.

The sole question for determination, therefore, is whether the respondent had authority in the circumstances here disclosed to adjust the standard profits of the appellant when its standard profits had been ascertained by the Board of Referees under section 5(3) of the Act and duly approved by or on behalf of the respondent under section 5(5) of the Act. The appellant does not raise any question as to whether the discretion of the respondent was properly exercised, but submits that he had no discretion whatever and that under all the circumstances later to be discussed, the provisions of section 4 of the Act could not be invoked by him.

In assessing the appellant the respondent purported to act under the provisions of section 4(1) (b) (i) which is in part as follows:

Sec. 4(1) The Minister may in his discretion make the following adjustments in the standard profits of a taxpayer:

(b) adjust the standard profits

(i) in the case where any alteration in the capital employed since the commencement of the last year or fiscal period of the taxpayer in the standard period has occurred, by adding to or deducting from (accordingly as the capital has been increased or reduced) the standard profits an amount equal to seven and one-half per centum per annum of the amount of the alteration in the capital: Provided that in the case of a corporation or joint stock company such adjustments may only be made if the alteration in capital was accompanied by an equivalent alteration in capital stock . . . "Standard profits" is defined in section 2(1) (i) as follows:

"Standard profits" means the average yearly profits of a taxpayer in the standard period in carrying on what was in the opinion of the Minister the same class of business as the business of the taxpayer in the year of taxation or *the standard profits ascertained in accordance with section five of this Act.*

In my opinion, therefore, as the standard profits which the respondent has a discretion to adjust under section 4 include the standard profits ascertained by the Board of Referees by virtue of the definition of standard profits, the appellant's admission that in each of the years in question its employed capital had been reduced below its capital so used at the commencement of its last fiscal year in the standard period (1939) and that such reduction had been accompanied by an equivalent reduction in its capital stock, quite clearly brings the appellant within the ambit of section 4(1) (b) (i)—unless by some section of the Act the respondent's discretion to adjust its standard profits is taken away.

Section 5 of the Act contains provision for the ascertainment of standard profits by the Board of Referees and it is admitted that upon application of the appellant the Board proceeded under subsection (3) thereof and on December 11, 1944, reported its decision to the respondent. That decision was duly approved by the Deputy Minister of National Revenue for Taxation on behalf of the respondent, in accordance with section 5(5), and on January 5, 1945, the Deputy Minister communicated the decision to the appellant.

Subsection (5) of section 5 is as follows:

Notwithstanding anything contained in this section a decision of the Board given under this section shall not be operative until approved by the Minister whereupon the said decision shall be final and conclusive: Provided that if a decision is not approved by the Minister it shall be

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submitted to the Treasury Board who shall thereupon determine the standard profits and the decision of the Treasury Board shall be final and conclusive.

Counsel for the appellant relies mainly on the provisions of that subsection and submits that the decision of the Board, when it has been approved by the Minister, is for all purposes "final and conclusive" and is not subject to adjustment by the respondent under section 4. He contends that section 5 must be read by itself and without reference to section 4, and, in effect, that the power to adjust standard profits conferred on the respondent under section 4 is limited to those standard profits ascertained otherwise than by the Board of Referees. Finally, however, in argument he admitted that the respondent might have power to adjust upwards the standard profits ascertained by the Board of Referees but had no power to lower them.

In dealing with these submissions it is necessary to consider the reasons for establishing a Board of Referees. The object of the Act was to establish a special tax on excess profits—namely, those profits in excess of standard profits. It was necessary, therefore, to define "standard profits". Normally, they were the average yearly profits in the standard period—1936 to 1939, both inclusive—and such standard profits were capable of exact computation. They were referred to at the trial as "factual standard profits." But in order to take care of taxpayers not in business in the standard period and of other special cases a Board of Referees was established to ascertain such standard profits in the manner laid down in section 5. The decision of the Board, however, was not operative until its decision had been approved by the Minister, when it became "final and conclusive"; and, if not approved by him, it would then be submitted to the Treasury Board whose determination was "final and conclusive."

What is the proper interpretation to be placed on the words "final and conclusive"? It is not necessary for me to consider the effect of section 14 of the Act which, *inter alia*, makes the appeal sections of The Income War Tax Act apply *mutatis mutandis* to this Act (see *Nanaimo Community Hotel Limited v. Board of Referees* (1); and *The M. Company v. M. N.R.* (2)). I think that I need

(1) (1945) C.T.C. 125.

(2) (1948) C.T.C. 213.
 (1948) Ex. C.R. 483.

only consider whether they have the meaning attributed to them by the appellant, namely, that they are fixed and unalterable and not subject to adjustment under section 4.

Now it is the decision of the Board that upon approval of the respondent becomes "final and conclusive"; and the decision is the determination by the Board of the only matter that is referred to it for consideration, namely, the ascertainment, in accordance with the provisions of section 5, of the taxpayer's standard profits. As I have suggested above, the function of the Board is to determine the standard profits in special cases and when, because of special circumstances, it would be unfair or impossible to ascertain them in the normal way by averaging the actual profits over the standard period. When the Board's decision has been made and the necessary approval given by the Minister (or, alternatively, the standard profits have been fixed by the Treasury Board), the standard profits of those taxpayers whose standard profits have been so fixed are as definitely and finally fixed as those of other taxpayers whose standard profits have been determined in the normal way. The ascertainment of that which was previously not established, or uncertain, has been completed. That decision would then, in the absence of any further powers in the respondent to adjust the standard profits, be binding on the respondent.

In my opinion, section 4 confers a limited power on the respondent to do so. The power to adjust the standard profits is not by the terms of section 4 confined to cases where the standard profits have been fixed in the normal way inasmuch as "standard profits" includes those ascertained by the Board. Moreover, in one specific instance at least, the respondent is given power to increase the standard profits above those ascertained by the Board of Referees, namely, under section 4(1) (b) (iii), which is as follows:

Sec. 4(1). The Minister may in his discretion make the following adjustments in the standard profits of a taxpayer:

(b) adjust the standard profits

(i) in the case of a corporation or joint stock company where the capital employed at the beginning of the nineteen hundred and forty-four fiscal period has been increased over the capital employed

(a) at the commencement of the nineteen hundred and thirty-nine taxation period, or

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(b) at the commencement of the fiscal period, after the year nineteen hundred and thirty-nine in respect of which the Board of Referees has last determined standard profits,

whichever is later in time, by adding to the standard profits an amount equal to five per centum of the amount by which such increase exceeds an accompanying increase in capital stock by reason of which an addition to standard profits was made under sub-paragraph (1) of this paragraph.

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In my opinion, section 5 cannot be read separate and apart from section 4. They must be read together. Nowhere in the Act can I find any indication that after the standard profits have been ascertained different treatment is to be accorded to taxpayers whose standard profits have been ascertained normally and those whose standard profits have been ascertained by the Board. And I am not surprised to find that no such distinction exists, for if it did gross and unfair discrimination would be the result. The obvious intention is that all should be treated alike. In section 5, the Board is required "to compare (an applicant) with other businesses of the same class," to take into consideration "the rate earned by taxpayers during the standard period in similar circumstances engaged in the same or an analogous class of business," and "to have regard to the standard profits of taxpayers in similar circumstances engaged in the same or an analogous class of business." Counsel advances no sound reason for his suggestion that taxpayers whose standard profits had been fixed by the Board should be in any better (or worse) position than the others, and I am unable to find one.

As an instance of such unfairness one could take the example of a company commencing business in 1938 with a very small capital. Under section 5(2) its standard profits could be fixed by the Board on the basis of capital employed. If, in the course of four years, its business had increased to the point where it had three times as much capital employed, could it be argued successfully that the respondent had not the power under section 4(1) (b) (i) to increase its standard profits beyond those fixed by the Board, if the required conditions were met? I think not, and if he had the power to adjust its standard profits by increasing them, he also had a similar power to adjust them by decreasing them, providing the conditions laid down were established.

My conclusion on this submission is that the power to adjust standard profits, as conferred on the respondent by section 4, applies to all standard profits however ascertained, but, of course, subject to the conditions and within the limits therein provided.

A further submission is made by appellant's counsel that in this particular case, since the standard profits were ascertained under the provisions of section 5(3), it would be improper for the respondent to adjust them under section 4 as he would be giving consideration to the same factors as were before him and the Board of Referees when considering the application under section 5(3); and that in effect as the Minister, on the advice of the Board, had been satisfied that it would be unfair or improper for the Board to ascertain the standard profits by reference to capital employed, it would later be unfair for him, under the provisions of section 4, to determine that the standard profits should be adjusted downwards on the basis that the capital employed had been reduced. Section 5(3) is as follows:

If on the application of a taxpayer the Minister is satisfied that the business either was depressed during the standard period or was not in operation prior to the first day of January, one thousand nine hundred and thirty-eight, and the Minister on the advice of the Board of Referees is satisfied that because,

- (a) the business is of such a nature that capital is not an important factor in the earning of profits, or
- (b) the capital has become abnormally impaired or due to other extraordinary circumstances is abnormally low

standard profits ascertained by reference to capital employed would result in the imposition of excessive taxation amounting to unjustifiable hardship or extreme discrimination or would jeopardize the continuation of the business of the taxpayer the Minister shall direct that the standard profits be ascertained by the Board of Referees and the Board shall in its sole discretion thereupon ascertain the standard profits on such basis as the Board thinks just having regard to the standard profits of taxpayers in similar circumstances engaged in the same or an analogous class of business.

Implicit in the above submission is the suggestion that in exercising his discretion under section 4, the Minister must have reached the conclusion that the capital employed by the appellant was an important factor in its profit-making potential, a conclusion contrary to that which he had reached in referring the application to the Board under section 5(3). But that is not necessarily so. Under section 5(3) the Minister, on the advice of the Board, could

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be satisfied that the standard profits should not be ascertained by reference to capital employed, because either

(a) the business is of such a nature that capital is not an important factor in the earning of profits, or

(b) the capital has become abnormally impaired or due to other extraordinary circumstances is abnormally low.

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No evidence was given at the trial and the only material before me, in addition to that transmitted to the Court by the Minister, was the statement of agreed facts in the special case. The appellant furnished me with no information as to the nature of its application to have its standard profits fixed by the Board and I have, therefore, no knowledge as to whether its application was based on clause (a) or clause (b) of section 5(3). The satisfaction of the Minister may have been brought about on the ground that the appellant's capital had been abnormally impaired, or due to other extraordinary circumstances was abnormally low, rather than because its business was of such a nature that capital was not an important factor in the earning of profits. The onus in this matter lies on the appellant and in the absence of any evidence to establish affirmatively under which clause the Minister was satisfied, I am unable to determine that in exercising his discretion under section 4 he must have reached a conclusion opposed to that which he had reached in considering the appellant's application under section 5(3). The submission of counsel for the appellant on this point therefore fails.

There is a further suggestion as the Board's decision and the Minister's approval thereon were given after the appellant's capital had been reduced in February 1944, that that reduction in capital must have been taken into consideration in ascertaining the standard profits. But there is no evidence whatever to establish that such was the case. The application by the appellant was referred to the Board on September 3, 1941, and on December 11, 1944, the latter reported to the Minister as follows:

Under the provisions of subsection three of section five of The Excess Profits Tax Act, 1940, as amended, the Board of Referees ascertains the yearly standard profits of the taxpayer at ninety thousand dollars (\$90,000) at 1st November, 1938.

It is apparent from the concluding words that in ascertaining the standard profits the Board was considering the position of the appellant as it was during the standard

period and not as it was after its capital was reduced in 1944. It would appear that the finding of the Board was retroactive and that the appellant had the full benefit of the standard profits so fixed by the Board from the coming into effect of The Excess Profits Tax Act, until 1944 when its capital employed was reduced. There is no evidence to show that when the Board's finding was made it had any knowledge of the reduction of capital in February 1944, or that when the Minister approved of its decision he had any knowledge of such reduction in capital. The argument of counsel for the appellant on this point therefore fails.

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I have considered all of the arguments advanced on behalf of the appellant and have reached the conclusion that none of them can be supported. The appeals therefore must fail and they will be dismissed with costs to be taxed.

Judgment accordingly.

IN THE MATTER OF Orders in Council P.C. 6982 of 1940, P.C. 11081 of 1942 and P.C. 449 of 1944 and certain patents owned and/or controlled by DET NORSKE AKTIESELSKAB for ELEKTROKEM-ISK INDUSTRI,

BETWEEN:

THE HONOURABLE THE SECRETARY OF STATE OF CANADA acting in his capacity as Custodian under the Revised Regulations Respecting Trading with the Enemy (1943),

APPELLANT;

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AND

HIS MAJESTY THE KING

AND

ALUMINUM COMPANY OF CANADA LIMITED,.....

RESPONDENTS.

Patents—Reasonable compensation for use of invention—The Patent Act, 1935, S. of C. 1935, c. 32, s. 19—Orders in Council P.C. 6982, dated December 4, 1940, P.C. 11081, dated December 8, 1942, and P.C. 449, dated January 24, 1944—Value of use of inventions a matter of evidence—Measure of compensation such fair and reasonable price

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*or consideration as would be arrived at between willing licensor and willing licensee bargaining on equal terms—No interest against Crown unless under statute or contract—Appellate jurisdiction of Court under Order in Council P.C. 11081 of December 8, 1942, not limited to questions of law.*

The respondent Aluminum Company of Canada Limited (Alcan) was a producer of aluminum for war purposes for His Majesty the production of which involved the use of 5 inventions owned by a Norwegian company (Elektrokemisk). On the invasion of Norway by the German forces it became proscribed territory and the patents were vested in the appellant as Custodian. Subsequently the Minister of Munitions and Supply gave the respondent Alcan a letter of indemnity under Order in Council P.C. 11081 of December 8, 1942. The appellant then brought proceedings before the Commissioner of Patents for reasonable compensation for the use of the inventions and then appealed from the Commissioner's decision.

*Held:* That the compensation payable by His Majesty under Order in Council P.C. 11081 of December 8, 1942, is for the use of the inventions in the production of aluminum for war purposes.

2. That the value of an invention for the purpose of determining what compensation is reasonable for its use cannot be estimated by what is claimed for it in the patent. Its commercial value is a matter not of construction of the claims but of evidence.
3. That when there is no dispute as to the validity of a patent or its user by or for His Majesty for war purposes the reasonable compensation payable by His Majesty under Order in Council P.C. 11081 of December 8, 1942, for the use of the inventions is such fair and reasonable price or consideration as would be arrived at between a willing licensor and a willing licensee bargaining on equal terms. *The King v. Irving Air Chute Inc.* (1949) S.C.R. 613 followed.
4. That the revised royalty agreed upon between Alcan and Elektrokemisk under the first amending agreement was fair and reasonable and ought to have been adopted by the Commissioner as the measure of the reasonable compensation payable by His Majesty, subject to the ceiling agreed upon in the second amending agreement.
5. That interest may not be allowed against the Crown unless there is a statute or a contract providing for it.
6. That the appellate jurisdiction of the Court under Order in Council P.C. 11081 of December 8, 1942, is not limited to questions of law, and that it is the duty of the Court when it finds that the Commissioner's decision was based on wrong principles to determine itself the compensation that is reasonable, when there is evidence from which it can properly do so, rather than put the parties to the expense and delay of sending the matter back to the Commissioner.

APPEAL from the decision of the Commissioner of Patents under Order in Council P.C. 11081, dated December 8, 1942.



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

*H. Gerin-Lajoie K.C.* and *K. W. Wright* for appellant.

*E. G. Gowling K.C.* and *G. F. Henderson* for His Majesty.

*J. A. Prud'homme K.C.* and *G. Geoffrion* for respondent Aluminum Company of Canada Limited.

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

THE PRESIDENT now (November 16, 1949) delivered the following judgment:

This is an appeal from the decision of the Commissioner of Patents (1) reporting what he considered to be reasonable compensation to be paid by His Majesty to the appellant for the use of five inventions by the respondent Aluminum Company of Canada Limited, hereinafter called Alcan, in its production of aluminum for war purposes for His Majesty, the said inventions being covered by Canadian patents of invention owned by Det Norske Aktieselskab for Elektrokemisk Industri, hereinafter called Elektrokemisk, a corporation incorporated under the laws of Norway and having its head office in Oslo, Norway.

The five patents, in the order of their grant, were the following:

| Patent No. | Date       | Inventor        | Invention                                              |
|------------|------------|-----------------|--------------------------------------------------------|
| 264,997    | Oct. 12/26 | C. W. Soderberg | Electrode Mass<br>for Self-Baking<br>Electrodes        |
| 287,700    | Mar. 5/29  | J. Westly       | Electrodes                                             |
| 341,667    | May 15/34  | P. Torchet      | Electrode<br>Suspension                                |
| 346,868    | Dec. 17/34 | P. Torchet      | Manufacture of<br>Aluminum in<br>High Power<br>Tanks   |
| 383,238    | Aug. 8/39  | J. L. Legeron   | Arrangement with<br>Electrodes and<br>their Suspension |

Alcan was a licensee of Elektrokemisk under these and other patents pursuant to a license agreement, dated July 14, 1937, the terms of which were modified by two amend-

(1) (1945) 4 C.P.R. 173; (1945) 5 Fox Pat. C. 17.

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ing agreements, the first dated January 27, 1941, and the second May 7, 1943. The original license agreement and the two amending agreements will be further referred to.

The circumstances under which the Commissioner was called upon to make his decision may be outlined briefly. Upon the invasion of Norway by the Germans on April 9, 1940, it became proscribed territory and all the Canadian patents of invention owned by Elektrokemisk, including the five in question, were vested in the appellant pursuant to the Regulations Respecting Trading with the Enemy, 1939, established by Order in Council P.C. 2512, dated September 5, 1939, as amended, later replaced by the Consolidated Regulations Respecting Trading with the Enemy (1939), established by Order in Council P.C. 3959, dated August 21, 1940, as amended, which were in turn replaced by the Revised Regulations Respecting Trading with the Enemy (1943), established by Order in Council P.C. 8526, dated November 13, 1943.

Subsequently, steps were taken by the Government to prevent the production of war supplies from being hampered by fear of claims or actions for infringement of patents or industrial designs and to prevent the cost of such supplies from being inflated by the payment of excessive royalties and the three Orders in Council referred to in the style of cause herein were passed. By Order in Council P.C. 6982, dated December 4, 1940, it was provided that no claim, action or proceeding for the infringement of any patent or registered industrial design based upon the use of the invention or design covered thereby in the production or sale of munitions of war or supplies or in the carrying out of defence projects should be made or instituted against any person, firm or corporation or his or its agents or subcontractors, whom the Minister of Munitions and Supply should have agreed to indemnify or protect against such claim, action or proceeding, but that His Majesty should pay to the owner of any such patent or registered design which is valid such compensation as the Commissioner of Patents reports to be reasonable for the use aforesaid of the invention or design covered thereby, and that the decision of the Commissioner should be subject to appeal to this Court. This Order in Council has no specific bearing on this case in view of the fact that Alcan

had no cause to fear infringement proceedings since it was operating under a license agreement. But subsequently the Minister of Munitions and Supply reported that it was desirable and in the public interest that the protection given by this Order in Council should be broadened to include and cover any claim, action or proceeding for non-payment of royalties or other sums payable under any agreement with respect to patents or registered industrial designs or the use of any invention or design covered thereby and by Order in Council P.C. 11081, dated December 8, 1942, Order in Council P.C. 6982, Dated December 4, 1940, was amended to read as follows:

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That if the Minister of Munitions and Supply on behalf of His Majesty the King in right of Canada or on behalf of His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland or the Government of any other Allied or Associated Power, including the Government of any British Dominion other than Canada, has agreed or hereafter agrees to indemnify or to protect any person, firm or corporation against any claims, action or proceedings for the infringement of any patent or registered industrial design based upon the use of the invention or design covered thereby in the production or sale of munitions of war or supplies or in the carrying out of defence projects or for the non-payment, in accordance with any contractual obligation, of any royalties for or in respect of such use by such person, firm or corporation, then no claim, action or proceeding for the infringement of any such patent or registered industrial design based upon such use or the non-payment, in accordance with any contractual obligation of any royalties for or in respect of such use, shall be made or instituted against such person, firm or corporation or his or its agents or sub-contractors; but His Majesty shall pay to the owner or licensor of any such patent or registered industrial design which is valid such compensation as the Commissioner of Patents reports to be reasonable for the use aforesaid of the invention or design covered by such patent or registered industrial design, and any decision hereunder of the Commissioner of Patents shall be subject to appeal to the Exchequer Court.

Still later, it was deemed desirable and in the public interest that the two Orders in Council referred to should be broadened to provide that the terms "subcontractors" as used therein should include "suppliers" and to include payments for "fees", for engineering or other technical services, and Order in Council P.C. 449, dated January 24, 1944, made the necessary amendments. The Orders in Council are extensions of the principle set forth in section 19 of The Patent Act, 1935, Statutes of Canada, 1935, chap. 32, which provides:

19. The Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports

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to be a reasonable compensation for the use thereof, and any decision of the Commissioner under this section shall be subject to appeal to the Exchequer Court.

Under the authority of Order in Council P.C. 11081, dated December 8, 1942, which is applicable in this case, the Minister of Munitions and Supply agreed to indemnify Alcan as contemplated by the Order in Council by a letter, dated March 23, 1943, from the Deputy Minister of Munitions and Supply to Alcan. After the date of this letter Alcan made no further payments either under the original license agreement or the amending agreements. Prior thereto it had paid royalties either to Elektrokemisk or to the appellant up to October 1, 1941. The appellant has, therefore, an outstanding claim accruing since that date, which, but for the Order in Council, it could have pursued against Alcan direct.

It was under these circumstances that the appellant took proceedings by way of a petition to the Commissioner of Patents praying that he should report the amount of compensation payable under the Order in Council. After a lengthy hearing before him at which the parties hereto were represented the Commissioner made his report, the final paragraph thereof stating his decision as follows:

The compensation which I consider fair and reasonable for use of the five patents by the Government of Canada in the production of aluminum for war purposes is one-fortieth of a cent for each pound of aluminum produced. When the compensation for any one year amounts to \$100,000 then no further compensation shall be paid for that year. This compensation is effective from October 1, 1941.

This is the decision from which the present appeal is taken.

The Order in Council requires the Commissioner to report reasonable compensation for the use of inventions "in the production or sale of munitions of war or supplies or in the carrying out of defence projects". In the present case the compensation is for the use by Alcan of the inventions covered by the five patents in the production of aluminum for war purposes for His Majesty. This means that the value of the use of the inventions in the production of aluminum must be ascertained. To this end it is desirable, I think, to deal with the state of the art relating to the production of aluminum prior to the inventions covered by the patents specified or referred to in the

license agreement, the problems requiring solution, the efforts made to solve them, the nature of the five inventions and their place and importance in the art, it being constantly kept in mind that the art is that of the production of aluminum and that the value of the use of the inventions sought to be ascertained is commercial value.

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Aluminum is the most widely distributed metal. Material of various kinds, including clay, containing 10 to 35 per cent of aluminum oxide is found almost everywhere but it is not economical to extract it as long as bauxite containing 50 to 60 per cent of alumina, as aluminum oxide is called, is available. We are not here concerned with the production of alumina from bauxite but only with the reduction of aluminum from alumina. This is the production of aluminum that is referred to in these proceedings. The formula for alumina is  $Al_2O_3$ , meaning that each molecule of it contains two atoms of aluminum and three of oxygen. The problem is to separate the aluminum from the oxygen. It is not an easy metal to reduce from its oxide. Most metals, such as iron, for example, lend themselves readily to reduction from their oxides by smelting, but aluminum does not. Some other method of reduction had to be found. This was discovered about 1886 by two persons working independently, Charles M. Hall in the United States and Paul L. R. Heroult in France. Their discovery consisted in using a substance called cryolite, which melts at 960 degrees centigrade, to dissolve the alumina and then subjecting the solution of the alumina in the molten cryolite to electrolysis, whereby the constituent elements of the alumina are decomposed and the aluminum by itself is recovered. The solvent power of cryolite for alumina and its suitability for making the solution an electrolyte made the aluminum industry possible. The only known commercial deposit of cryolite is in Greenland, but the aluminum industry is not dependent upon the Greenland deposits since cryolite can be made synthetically.

After the alumina has been dissolved in the molten cryolite the electrolysis is accomplished by passing a strong electric current of high amperage and low voltage through the solution or bath, as it is sometimes called. The container in which this is done is known as an electrolytic cell. In the aluminum industry it is called an aluminum pot.

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There are two poles in this cell, the anode and the cathode. As the electric current passes from the anode to the cathode and decomposes the alumina the aluminum goes to the cathode and the oxygen to the anode. But no breakup of the cryolite takes place; it is purely a solvent for the alumina. The bottom of the cell or aluminum pot serves as the cathode. As the aluminum separates from the oxygen it falls to the bottom of the cell or pot, its specific gravity being lower than that of the cryolite. There is thus a layer of molten aluminum below the solution of alumina and cryolite, which is drained off from time to time. The anode by which the electric current is led into the electrolyte is also called an electrode. It is made mainly of carbon and since it must enter into the molten solution it is gradually consumed, the carbon going off with the oxygen in the form of carbon dioxide gas  $\text{CO}_2$  or carbon monoxide gas  $\text{CO}$ . As this consumption takes place the electrode must be lowered so that its end may be in the solution at the proper distance of from an inch and a half to three inches above the layer of molten aluminum.

There is thus a direct relation between the production of aluminum and the consumption of carbon, about one half to three quarters of a pound of carbon being used in the production of a pound of aluminum. The lower end of the electrode is consumed at the rate of about three quarters of an inch in 24 hours so that the periodic adjustment of the electrode to its proper place in the solution is a matter of great importance.

The electrode serves a twofold purpose. It is the anode in the electrolytic process from which the electric current passes through the solution to the cathode. It also generates heat by the resistance of the solution to the electric current passing through it, and such heat must be sufficient for the whole operation including the melting of the cryolite as well as the electrolysis. Because of the heat thus generated the electrolytic cell is an electric furnace. I have already referred to the fact that in the aluminum industry the electrolytic cell is called an aluminum pot; it is also called an aluminum furnace. It should be noted that the terms electric furnace and aluminum furnace are not interchangeable. Not every electric furnace is an aluminum one for electric furnaces may also be used for

smelting purposes; the term aluminum furnace is confined to an electric furnace in which aluminum is produced by electrolysis.

The electrodes used originally were pre-baked electrodes. They were made of carbonaceous material, usually petroleum coke with a binder of pitch, ground up and pressed under heavy hydraulic pressure into moulds and then baked at a high temperature. This made a solid electrode. The pre-baking was done in a separate plant and the pre-baked electrode was then inserted into the aluminum pot. The size of an electrolytic cell may vary. The amount of aluminum produced per cell per day is approximately proportional to the amount of electric current employed and that depends to some extent on the number of electrodes used, there being an upper limit set to this by the difficulty in adjusting them. In the diagram of an electrolytic cell on page 302 of Exhibit B, The Aluminum Industry, by Edwards, Frary and Jeffries, a row of six pre-baked electrodes is shown. In the ordinary course there would be four such rows in an aluminum pot. The six electrodes are held suspended by iron rods clamped to a central busbar, through which the current is distributed to the electrodes, and attached to the inside of the electrodes. No part of these iron rods should be allowed to go into the solution for it will be affected by the electrolysis and the iron will go with the aluminum and contaminate it.

There were three main drawbacks to the use of the pre-baked electrodes. The first was the difficulty of adjusting the electrodes to their proper place in the solution as the lower ends were consumed, even in the case of such small electrodes as are shown in the figure, six inches in diameter and eighteen inches in height. This adjustment had to be made by hand. The second drawback was the necessity of replacing the electrodes as they were consumed. They could not be used above the place where the iron rod was attached to them, so that when they were consumed up to that point the butts had to be removed and new electrodes put in their place. It was not easy to determine when this should be done. The third drawback was the economic waste involved in using small electrodes instead of large ones.

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The difficulties involved in the use of pre-baked electrodes have been substantially met by the use of continuous self-baking electrodes, known as Soderberg electrodes, named after their inventor, Mr. Carl W. Soderberg, the chief metallurgist of Elektrokemisk, as adapted to the production of aluminum by other inventors. This brings me to a consideration of the Soderberg inventions, which the Commissioner in his decision referred to as basic. During the first world war it was difficult to obtain pre-baked carbon electrodes and Mr. Soderberg and Dr. M. O. Sem as his assistant worked on the problem of how to replace them. Mr. Soderberg conceived the idea of making use of the heat generated by the passage of the electric current inside the electrode to bake it. His first invention, made in Norway, was covered in Canada by Patent No. 215,697, dated February 7, 1922, styled Process of Baking Carbon Electrodes. It was carried out with an iron rod imbedded in an electrode paste made from exactly the same materials as the pre-baked carbon electrodes. This invention completely failed to accomplish its purpose. It was easy to introduce the electric current into the electrode by means of the iron rod and generate the heat necessary to bake it but the rod melted off and the electrode fell into the electric furnace. The difficulty was that when the electric current passed through the rod the heat generated by the resistance in it to the current heated the rod and caused it to expand, but caused the electrode paste to shrink as it was being baked, and the expansion of the rod exposed the electrode to a heavy strain which it could not stand before it was baked, with the result that it went to pieces. Many tests of the invention were made with various arrangements of the iron rod but all of them failed. It should be pointed out that this invention was directed to making a self-baking electrode for use in a smelting furnace for the production of calcium carbide, ferroalloys and the like. It was not directed for use in the recovery of aluminum and was never tried anywhere for the production of aluminum. Even if it could have been made to work in a smelting furnace it would not have worked satisfactorily in an aluminum furnace because of the fact that the end of the iron rod melted off and fell into the furnace. This would not have mattered in a smelting

furnace but if it happened in an aluminum one the iron would contaminate the aluminum because both metals would go off together as the result of the electrolysis. All that need be said about this invention at the moment is that whatever the claims in the patent may be and whatever arguments may be based upon their language, the plain fact is that the invention could not be made to work even in a smelting furnace, let alone in an aluminum one, and no self-baking electrode was ever successfully made by its use. The evidence of Dr. Sem is explicit on these points. He worked with Mr. Soderberg as his assistant and probably knows more about the subject than anyone else except Mr. Soderberg, who was unable by reason of age and failing health to come to this country to testify. Under the circumstances, I accept his evidence without hesitation.

Mr. Soderberg was so discouraged with the failure to make his invention work that he wanted to give up further tests but he was urged to continue them. While he was doing so he fell upon and developed two other inventions that made a continuous self-baking electrode possible for use in a smelting furnace. He found that it was necessary to use a different electrode paste from that used in the pre-baked electrodes and that this required an armament for holding the paste, supplying the electric current to bake it and suspending the electrode. Canadian patents were taken out for these two inventions.

I shall deal first with Patent No. 264,997, dated October 12, 1926, styled Electrode Mass for Self-baking Electrodes. The Soderberg electrode, as the continuous self-baking electrode was thereafter called, consists of a lower baked portion which is the one working in the furnace and an upper baked portion which is built up continuously by adding unbaked paste to it as the lower end of the electrode is consumed in the furnace. Between these two portions there is a baking zone which moves slowly upward relatively to the electrode as the lower end is consumed and the electrode is allowed to slip into the furnace. It is in this baking zone that the volatile matter is driven off and the paste becomes hard. The pre-baked electrode was made

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with as little binder as possible, whereas in the Soderberg electrode the reverse is true and quite a soft paste with a great deal of binder is used.

The new paste was too soft to be used with an iron rod imbedded in it and it was also necessary that it should settle as it was being baked without being exposed to the strain of the expansion of the iron rod by the heat of the electric current passing through it. It was therefore necessary to discard the use of an iron rod in the paste and arrange the iron around it in such a way as to act both as a container for the paste and as a conveyor of the electric current to it. The solution was found in the invention covered in Canada by Patent No. 216,092, dated February 21, 1922, styled Electrodes for Electric Furnaces and Process of Manufacturing the Same. This was carried out by the use of an iron casing or mantle to contain the paste and enclose and hold the baked electrode together with the use of iron ribs extending inward from the inside of the casing. The essential feature of the invention is the use of these ribs. They serve as a contact means to carry the electric current to the paste in the baking zone and to sustain the baked portion of the electrode. The electrode is built up in sections. As the lower end is consumed in the furnace a section of the casing with the ribs inside it is added to the top by welding and filled with fresh paste and the whole electrode lowered to the proper distance. The electrode is suspended from a hoist by chains attached to an electrode holder consisting of an iron ring clamped around the casing. The electric current is conducted through this ring to the casing and the ribs and through them to the paste in the baking zone and then to the baked portion of the electrode. The casing around this portion and the ribs in it melt and the molten iron flows into the furnace and the electric current passes through the baked carbon to the lower end of it and enters the furnace to supply the necessary heat to it. The electric current operates only in respect of the part of the electrode that is below the electrode holder. When it is necessary to let the electrode down into the furnace the clamp must be loosened, and when the electrode has been allowed to slip down the desired length the clamp is tightened again and the process of baking the fresh paste which has reached

the baking zone begins again. This invention together with that of the paste met the difficulties which the first invention had failed to solve and made it possible to make a self-baking continuous electrode for use in a smelting furnace by the use of the same electric current as that which supplied heat to the furnace. It was no longer necessary to depend upon pre-baked electrodes for use in such a furnace.

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Only a brief reference need be made to another Soderberg invention covered in Canada by Patent No. 212,181, dated May 31, 1921, styled Electrode Holders. This was merely an improvement of the previous electrode holder. Instead of one clamp around the outside of the casing there was a series of clamps pressing on it, with a screw for each clamp by which it could be adjusted to let the electrode slip down into the furnace. The invention was designed particularly for large electrodes to allow a more even slipping of them and to do so without cutting off the current while the adjustment of the electrode was taking place.

While Mr. Soderberg's final inventions were successful in making continuous self-baking electrodes for use in a smelting furnace they could not be used with commercial success in the production of aluminum. Here it might, I think, be useful to refer to the distinction between a smelting furnace and an aluminum furnace. The purpose of a smelting furnace is either to separate or to fuse metals by heat, which may be supplied by any kind of fuel. Where it is supplied by an electric current the furnace is called an electric furnace and the sole function of the electric current is to supply the necessary heat. The electrode through which it passes into the furnace does not enter into the reactions at all. In an aluminum furnace, however, which is an electrolytic one, the primary purpose of the electric current is not to supply heat to the furnace so much as to effect the electrolysis by which the aluminum is separated from its oxide and the electrode does enter into the reaction to the extent that the consumed carbon goes off with the oxygen in the form of carbon dioxide gas or carbon monoxide gas. A further difference is that the electric current used in an electric smelting furnace, is alternating, whereas that used in an electric aluminum furnace is direct. Moreover, there is a great difference in

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the voltage required. In an aluminum furnace the required voltage is low, being only from four and a half to five and a half volts, whereas in a smelting furnace it is high, ranging from forty to one hundred volts.

The differences to which I have referred were of great importance when Mr. Soderberg sought to apply his invention to the production of aluminum. For the reason already indicated the iron casing and ribs that could be used in an electric smelting furnace were not satisfactory in an aluminum one for the iron would melt and introduce impurities into the aluminum. An effort was, therefore, made to use an aluminum casing and aluminum ribs but this was not successful for as the electric current was conducted through the aluminum ribs they melted away because of the low melting point of aluminum as compared with that of iron before the electrode paste could be baked and there was also a loss of voltage in the electrode of two or more volts. This loss was ruinous. Mr. Soderberg and Dr. Sem then experimented with an aluminum casing and thin iron ribs but this was subject to objection. Although the use of the thin iron ribs reduced the impurities in the aluminum to only 2 per cent yet the voltage required went up to seven volts. Nevertheless, they attempted to have the inventions put into practice. They first operated a small test in an aluminum furnace in the Elektrokemisk plant and then had furnaces made for tests in aluminum plants in Norway and France and in the plant of the Aluminum Company of America in Baden, North Carolina. Dr. Sem went to Baden in 1924 to start the tests there. The Aluminum Company of America was using a Hall type of electrolytic furnace with pre-baked electrodes. Dr. Sem thought that it was not efficient and that the Soderberg Electrode System as it had then developed could successfully compete with it, but in this he was disappointed. The tests at Baden were carried on with the use of an aluminum casing and thin iron ribs and the improved electrode holder and were on a full scale. Dr. Sem said that they embodied all the best knowledge that Elektrokemisk had of the production of aluminum. Nevertheless, the tests ended in failure. The aluminum furnaces in which the Soderberg electrodes were used consumed too much power and there were impurities in the aluminum. It was, of course, possible

to produce aluminum by the use of the Soderberg electrodes, but there was no commercial advantage in their use over that of the pre-baked electrodes. The tests showed that they could not successfully compete with them in the production of aluminum. The trial aluminum furnaces at Baden were shut down and so were the test furnaces that had been set up in Norway and France.

After the failure at Baden a fresh start had to be made and Elektrokemisk entrusted the task to Jens Westly, one of its employees. After many tests, several of which were made the subject of patent applications and later covered by patents, Mr. Westly conceived the idea of using individual iron studs as contact means instead of iron ribs and removing them before they could touch the molten electrolyte and contaminate the aluminum. His invention was covered in Canada by Patent No. 287,700, dated March 5, 1929, styled Electrodes. It was carried out by introducing individual iron studs at a downward angle through holes in the casing into the upper part of the electrode containing the soft paste, conveying the electric current through them into the paste in the baking zone and then extracting the studs from the baked portion of the electrode before they could come into contact with the solution of the alumina and the molten cryolite. At first the studs were threaded and screwed in but later they were inserted without threads. The studs extended beyond the casing and the electric current, which was supplied by copper or aluminum cables attached to them, went directly to them and through them into the electrode. It did not pass through the electrode holder and the casing as in the case of the previous invention. The result was that the studs were superior to the ribs as contact means. As the studs passed through the baking zone they became covered with a film of pitch attracted from the paste which made it possible to extract them from the baked portion of the electrode without breaking it. The studs had to extend beyond the casing so that the necessary pulling arrangement, which in the case of a large electrode exerted a force of 20 tons, could be attached to them. The holes left in the electrode were then filled with paste or alumina solution in order to prevent air pockets with their resultant loss of voltage from being formed. An aluminum casing

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was used instead of an iron one. This, of course, melted off as it went into the electrolyte, but since the iron studs were extracted before they could be affected by the electrolysis there was no longer any danger of introducing impurities into the aluminum. There was no interference with the flow of electric current while the studs were being extracted. In a large electrode there were five rows of studs from eight to ten inches apart with the electric current operating only on the studs in the two lower rows and before the studs in the lower of these rows were extracted the electric cables were raised and attached to the studs in the row next above the upper one and in turn the studs in this row became operative as the electrode was let down.

After Mr. Westly's invention was worked out Elektrokemisk informed the Aluminum Company of America of the new arrangement, and it adopted it in its four trial furnaces at Baden. It then decided to install a series of aluminum pots with the Soderberg electrodes and Westly studs in its large plant at Alcoa, Tennessee, and Dr. Sem helped it with its installation. This started in 1928. There were approximately 90 furnaces in the series, each using about 30,000 amperes of current. The electrode in each was a large round one, approximately seven feet in diameter and weighing about 15 tons. Dr. Sem thought that the Soderberg electrode with the Westly studs did better than the Hall furnace with pre-baked electrodes, but the Aluminum Company of America had developed a new European type of furnace using pre-baked electrodes that had better heat insulation than the Hall type and was more efficient. A race between this and the Soderberg Electrode System took a couple of years, but the operation of the improved European type of furnace gained the upper hand and in May, 1932, Dr. Sem was informed that the Soderberg Electrode System could not compete with it. Rather than have the series closed down Elektrokemisk waived all royalties for two years pending further research. The tests at Alcoa showed that, although aluminum could be produced with the use of Soderberg electrodes, there was no commercial advantage in such use over that of pre-baked electrodes in the improved European type of aluminum furnace.

There were several difficulties in the operation of the Soderberg electrode even with the Westly studs. In the first place, the electrode holder with the clamps through which the electrode had to slip could not easily be controlled by the workmen when they loosened the screws with the result that the electrode had a tendency to slip more on one side than on the other. This brought the lower end of it closer to the aluminum at the bottom of the pot on one side than on the other causing a concentration of the current at the lower side with the result that it was overheated and there was a loss of power. There was a second difficulty connected with the suspension of the electrode. The electrode holder consisted of contact clamps with a pressure ring surrounding the clamps and equipped with screws so that each clamp could be pressed around the surface of the electrode. The clamps, and through them the whole electrode, were suspended by a ring attached to a hoist whereby the position of the electrode could be controlled. But the difficulty was that although the clamps were so arranged that the studs could pass between them, they could not pass beyond the pressure ring and had to be extracted before they hit it, which meant that they could not be used to their full effect. But the main drawback continued to be that the electric power consumption in the pots was too high as were also the labour costs.

The next improvements in the Soderberg Electrode System came from France where La Compagnie de Produits Chimiques et Electrometallurgique Alais, Froges et Camarque had experimented with the Soderberg electrodes in its plant at Riouperoux. There two important inventions were made by Pierre J. M. Torchet, covered in Canada by Patent No. 346,868, dated December 18, 1934, styled Manufacture of Aluminum in High Power Tanks and Patent No. 341,667, dated May 15, 1934, styled Electrode Suspension. I shall deal with the former first since it was the prior invention. Torchet discovered that the Soderberg electrode should be restricted in width. He therefore used a rectangular electrode not wider than 43 inches instead of the big round one with its diameter of seven feet. The length of the electrode did not matter. It could be four or five times as long as it was wide. The reason why Torchet's narrower

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rectangular electrode worked better than the big round one was as follows. The carbon dioxide and carbon monoxide gases developed underneath the electrode by the union of the carbon in the electrode and the oxygen in the alumina had to escape by moving out beyond the circumference of the electrode where they could rise to the surface. As they did so they formed bubbles in the solution and the longer the distance to the circumference the bigger the bubbles would be. Since the distance between the lower end of the electrode and the aluminum at the bottom of the solution was only from one and a half to two and a half inches the aluminum could easily be upset by the turbulence caused by the bubbles and since the specific gravity of the aluminum was only slightly greater than that of the solution it was easy to make the aluminum rise and stir up waves that would touch the lower end of the electrode and cause a short circuit of the service and thereby lessen its efficiency for the production of aluminum. The use of a rectangular electrode that was narrower in width than the big round Soderberg electrode lessened the length of the distance that the gases had to travel in order to escape and so reduced the size of the resulting bubbles and minimized the risk of turbulence in the bath. The result was that aluminum could be produced with a lower power consumption, for the rectangular electrode could be lowered nearer the aluminum without running the risk of turbulence causing a short circuit. A saving of voltage could thus be made. This was a great achievement. Moreover, in the big round electrode there was always a risk of overheating the central part with a resultant loss of efficiency, which risk was less in the case of the narrower rectangular one. It followed from Mr. Torchet's invention that the Soderberg electrode could be made as large as was desirable provided it was restricted in width. The use of the narrower rectangular electrode thus maintained all the advantages of the large electrode and substantially removed the disadvantages that had led to high electric power consumption.

The other Torchet invention related to a new device for suspending the electrode whereby the difficulty of uneven slipping was eliminated. This suspension device made use of the Westly studs for suspension purposes in

addition to their use as contact means. An iron beam was arranged on the outside of the casing immediately under each row of studs and the structure so obtained was attached to a winch by which the electrode could be raised or lowered as required without slipping. The studs were arranged only on the long sides of the rectangular electrode and not on the short ones and so were the beams. The beams were removed from the lowest row of studs on each side before they came near the top of the electrolyte and put under the row of studs at the top before the studs in the lowest row were extracted. In this way there was a continuous operation of the electrode. The beams also served a further important purpose. The electrode paste was soft and tended to make the rectangular shape of the electrode bulge into a round one as it baked and became hard, but the beams served to prevent the casing of the electrode from bulging and helped it to retain its rectangular shape.

The suspension arrangement invented by Mr. Torchet was improved by Mr. Jean L. Legeron, another employee of the French company at Riouperoux. His invention was covered in Canada by Patent No. 383,238, dated August 8, 1939, styled Arrangement with Electrodes and their Suspension. Mr. Torchet had arranged his iron beams underneath the iron contact studs in such a way that there was a space between them for the insertion of the studs equal to the distance between the rows of studs. The gases from the furnace tended to escape between the beams and the casing and to melt the casing causing the electrode to be corroded and so increase the electrode consumption. Mr. Legeron met this difficulty by using U-shaped beams and arranging them on top of one another in such a way as to form a continuous wall. The Westly studs were inserted through holes in the beams instead of through the casing in the space between them as formerly. This arrangement made a stronger structure and gave better protection to the electrode against air corrosion. There was really a continuous container built up by removing the lower beam and putting it up on top as the electrode was let down into the furnace, as Mr. Torchet had done, except that there was no intervening space. There was thus really no need for any casing at all except to cover

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up the holes in the beams before the contact studs were introduced, but it was preferable to use a thin one for otherwise some of the paste would stick to the beam. The main purpose of the Legeron invention was to avoid air corrosion of the electrode, but it also enabled the use of a thin aluminum casing and made a stronger suspension. It was an improvement over the prior invention that materially added to its results.

The change from the large round electrode to the narrower rectangular one while seemingly a minor one was really revolutionary in character. The inventions at Riouperoux attracted world wide attention and aluminum people from all over the world came there to study the new arrangement. It met with great success wherever it was adopted. There is, I think, strong support for Dr. Sem's conclusion that the successful introduction of the Soderberg Electrode System into the aluminum industry came with the Torchet inventions. I accept his statement that it was not possible to produce aluminum with commercial success by the use of the Soderberg electrode without using the Westly studs, as was shown by the failure at Baden, and also his statement that it was the use of the narrower rectangular electrode instead of the wider round one that really made it possible to use the Soderberg electrode in the production of aluminum with commercial advantage. Certainly the wide extension of its use started with the Torchet inventions. The improved Soderberg Electrode System, as it was called, was installed by the Aluminum Company of America at Alcoa, notwithstanding its previous rejections of it at Baden and Alcoa, and was operated with great success. Alcan, as we shall see, adopted it in 1937. The Reynolds Metal Company, the second largest aluminum producer in the United States, used it exclusively when it started aluminum production in 1941. It has been installed in aluminum plants all over the world. Indeed, from 90 to 95 per cent of the extension of the aluminum industry has been effected with the use of the improved Soderberg Electrode System.

Alcan, which is one of the largest producers of aluminum in the world, adopted the Soderberg Electrode System soon after it had been adapted to the successful commercial production of aluminum by the Torchet invention. It

entered into a license agreement with Elektrokemisk, dated July 14, 1937. This recited that Elektrokemisk was the sole owner and/or had sole control of certain patents relating to self-baking electrodes and manufacture thereof, called the Soderberg Electrode System, and of certain patents relating to improvements on Soderberg electrodes and that Alcan was desirous of obtaining a licence to make and use, but not to sell, the inventions described in the said patents, 30 patents in all being specified. The agreement granted to Alcan a non-exclusive licence to make and use, but not to sell, for the production, treatment or manufacture of aluminum only, at its own works in Canada the inventions described and claimed in the said patents and set the royalties to be paid by it on all products made by the use of the licensed Soderberg Electrode System at "1/10 cent U.S. currency per pound of aluminum". By paragraph 7 of the agreement Alcan was permitted to use improvements of the Soderberg Electrode System made or acquired by Elektrokemisk during the life of the agreement without additional royalties. The agreement was to expire with the expiry of the latest patent specified or permitted to be used under paragraph 7.

It was also provided in the agreement that Elektrokemisk should prepare and deliver to Alcan working drawings of the Soderberg Electrode System for its first installation and send a competent expert to supervise its erection and starting and that Alcan should install it and put it into operation within 12 months after the execution of the agreement. These provisions were complied with and installations of the system were put in at Alcan's plants in accordance with the plans supplied by Elektrokemisk. A plan of these installations was filed as Exhibit A. It embodies the five inventions in question in these proceedings. Dr. Sem who supervised the plans for the installations said that Elektrokemisk, knowing that Alcan was one of the biggest producers of aluminum in the world, included everything it could to make the installations as efficient and economical as possible. He said that only the five inventions in question were used but on cross-examination agreed that in so far as a continuous self-

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baking electrode was used the invention thereof described in the basic Soderberg patents was to that extent also embodied in the Alcan installations.

With the outbreak of the war Alcan's production of aluminum greatly increased. In 1939 it produced 68,000,000 pounds by the use of the Soderberg Electrode System with royalties amounting to \$68,000 and in 1940 this production went up to 92,000,000 pounds with a royalty of \$92,000. In 1940 it decided to expand its Soderberg Electrode System plants and a new license agreement with Elektrokemisk was negotiated. It may be called the first amending agreement. Its terms are contained in a letter from Mr. Hagerup-Larssen, Elektrokemisk's representative in the United States, to Alcan, dated January 27, 1941. Alcan's licence was changed from a non-exclusive to an exclusive one for the Dominion of Canada and the new installation was to be in its entirety an installation of the Soderberg Electrode System. The royalty arrangement fixed by the license agreement of July 14, 1937, was modified as follows: the rate set forth in that agreement was to remain in effect for each annual production of aluminum up to 40,000 metric tons; for any additional amount up to a further 30,000 metric tons the rate was to be 66 $\frac{2}{3}$ per cent of the original one; and for any amount produced over 70,000 metric tons it was to be 50 per cent. Alcan's exclusive licence was limited to the electrolytic production of aluminum. It was also noted in the letter that the three patents, which the Commissioner in his decision referred to as basic patents, had expired and that others whose use was permitted under paragraph 7 of the original agreement had issued.

After the new installations Alcan's production of aluminum under the Soderberg Electrode System increased enormously. In 1941 it amounted to 135,000,000 pounds, which under the new rates would mean a royalty of \$119,000; in 1942 it grew to 350,000,000 pounds with a royalty of \$231,000; in 1943 it reached a maximum of 666,000,000 pounds with a royalty of \$388,000; and in 1943 the amount was only slightly less, namely, 663,000,000 pounds with a royalty of \$386,000. In the spring of 1943 Elektrokemisk and Alcan agreed upon a ceiling of \$215,000 in U.S. currency as the maximum amount of royalty pay-

able in any one calendar year, with effect as from January 1, 1941, and during each year of active hostilities. The terms of this agreement, which may be called the second amending one, are contained in a memorandum enclosed with a letter from Mr. Hagerup-Larsen to Mr. N. E. Russell of Alcan, dated May 7, 1943. Prior to this date the Deputy Minister of Munitions and Supply had intervened with his letter of March 23, 1943, with the result that the agreement was never signed. But there is no doubt that as between Elektrokemisk and Alcan the ceiling of \$215,000 in U.S. currency was agreed upon. Alcan was quite willing to pay royalties based on the first amending agreement subject to the ceiling set by the second one.

It was under these circumstances that the appellant applied to the Commissioner of Patents for the determination of the reasonable compensation to be paid by His Majesty for the use by Alcan of the five inventions in question in its production of aluminum for war purposes. It should be noted that there is another petition before the Commissioner relating to production of aluminum for civilian purposes the hearing of which was deferred and with which we are not here concerned.

The Commissioner rendered his decision after a lengthy hearing before him. I briefly summarize his main findings. After setting out particulars of the number, date, name of inventor and subject matter of invention of the thirty patents specified in the licence agreement and the five patents and three patent applications subsequent to the date of the agreement the use of which was permitted to the licensee by paragraph 7 of it, the Commissioner examined the five patents, for whose use he was to find reasonable compensation, by reference to their claims and concluded that the inventions covered by them were merely improvements in the art. The basic patents, in his opinion, were, first, No. 216,092, Electrodes for Electric Furnaces and Process for Manufacturing the Same, which he held to be the foundation of the Soderberg System, second, No. 215,697, Process of Baking Carbon Electrodes, which he said was operative for the production of aluminum, and, third, No. 212,181, Electrode Holders, which he regarded as a valuable contribution to the development of the Soderberg System. Those three basic patents, as well as

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two others, had expired at the time of the hearing and the inventions covered by them had fallen into the public domain. The Commissioner then proceeded to determine the compensation payable for the use of the five inventions by two methods. The first was based on the assumption that each patent specified or referred to in the licence agreement must have some value. That being so, it followed, in the Commissioner's opinion, that since Alcan used only the inventions covered by five patents the compensation payable for such use should be less than one-tenth of a cent per pound paid by Alcan under the license agreement for the use of all of them. He considered that the three basic patents, all of which had expired, had a great value and thought, for the reasons enumerated in his decision, that the five patents used by Alcan had less value than the three expired basic ones. The remaining patents specified or referred to in the licence agreement, other than the three expired basic ones and the five used by Alcan, also had some value. Finally, it was his opinion that the basic patents and the remaining ones, other than the five under consideration, had 75 per cent of the value of the total royalty and that only 25 per cent of it should be attributed to the five. By this line of reasoning he reached a compensation of one-fortieth of a cent per pound of aluminum produced by the use of the five inventions. Then, taking the average production of aluminum between 1939 and 1944 at 329,771.68 pounds per year and applying 25 per cent of the existing royalty thereto, he reached a maximum compensation in any one year of approximately \$82,500. The second method used by the Commissioner was to base the compensation on a percentage of the savings effected by Alcan through the use of the Soderberg Electrode System as compared with the use of pre-baked electrodes. The Commissioner accepted the evidence of Mr. Russell, based on the experience of Alcan at Arvida in 1944 where both systems were used, that this came to .11 of a cent per pound, taking into account the factors of consumption of power, consumption of electrodes, cost of labour and the cost of repairs and maintenance of equipment. Then he applied 25 per cent of this to the average annual production already referred to and reached a maximum compensation in any

one year of approximately \$90,500, which worked out at one-thirty-ninth of a cent per pound. Then, after considering the two methods he came to the conclusion that a compensation of one-fortieth of a cent per pound of aluminum produced by the use of the five patents was fair and reasonable and that when it should reach the sum of \$100,000 for any one year no further compensation should be paid for that year. The compensation was to be paid in Canadian currency. Finally, the Commissioner made his award retroactive to October 1, 1941, all royalties having been paid by Alcan up to that date either to Elektrokemisk or to the appellant.

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The compensation which Order in Council P.C. 11081, dated December 8, 1942, directed the Commissioner to determine was reasonable compensation for the use of the five inventions by Alcan in the production of aluminum for war purposes for His Majesty. There is no dispute as to the validity of the patents covering the inventions or their use by Alcan. It is also clear that if the compensation is to be reasonable it must be based on the value of the use of the inventions in the production of aluminum and that the value to be considered is commercial value.

There was, I think, a basic error on the part of the Commissioner in assuming that each patent specified or referred to in the original license agreement had a separate commercial value in the production of aluminum and that the royalty payable thereunder represented the total of such separate values, and that since only five of the inventions were used by Alcan the reasonable compensation payable for their use must of necessity be only a fraction of the total royalty. The evidence is indisputably against the Commissioner's assumption. Many of the patents specified in the license agreement covered inventions that did not relate to the production of aluminum at all and had no value for use therein. The most that could be said of some of them is that they related to the Soderberg electrode and had some value in smelting furnaces. There were several other patents that covered inventions that had been superseded by later ones, as, for example, those made by Mr. Westly before he hit upon his important invention of using removable iron contact studs instead of the iron ribs referred to in Patent No.

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216,092. Still other inventions had not been put to any commercial or practical use at all. Then there were some inventions such as those made by Dr. Sem with regard to which he stated that although they had some value in the production of aluminum their use could not improve the economy of Alcan's use of the five inventions.

Moreover, in such a case as this where the inventions are used together in such a way as to form a process or system I think it would be wholly impractical to assess the value of the inventions separately even to the extent that the Commissioner attempted.

Finally, the Commissioner's assumption is not in accord with the manner in which the parties to the license agreement arrived at the royalty. Certainly they did not agree upon a royalty of one tenth of a cent per pound by attributing a value to each of the patents specified or referred to in the agreement and adding such values together. It is clear that what Elektrokemisk did was to give a licence to Alcan for a certain purpose; it listed all the patents it owned that could have any bearing on the Soderberg electrode for use for any purpose and regardless of whether the inventions covered by them were operable or had any value for use in the aluminum industry or not and then confined Alcan's right to use the inventions to the production of aluminum. The evidence shows that it was a common practice to make license agreements of this sort. That the parties did not contemplate a separate value for each patent is shown by the fact that there was no provision in the agreement for any abatement or reduction of the royalty as the patents expired and the inventions covered by them fell into the public domain. The royalty was a collective one and continued to be the same during the life of the agreement whether there were thirty patents covered by it or only one. It was, therefore, in my judgment, unsound to take one tenth of a cent per pound as representing the total of the separate values of each of the patents covered by the original license agreement and then work down from such total to one fortieth of a cent per pound as the total of the values of the five inventions. The Commissioner could not arrive at a reasonable compensation for the use of the five inventions by this or any similar mathematical method.

I am also of the view that the Commissioner erred in attempting to assess the value of the inventions by examining the claims in the patents and thereby determining whether they were basic or merely improvements and then holding that the inventions which he found to be basic had greater value than those which he found to be merely improvements. It is quite in order and, indeed, necessary to examine the claims to ascertain exactly what the invention for which the patent was granted consists of and what advance in the art was accomplished by it. But the value of an invention for the purpose of determining what compensation is reasonable for its use cannot be estimated by what is claimed for it in the patent. Its commercial value is a matter not of construction of the claims but of evidence. So that we are here concerned not so much with the place of the five inventions in the art or whether they are basic or merely improvements as with the commercial value of their use in the aluminum industry. There is no magic in the word "basic" so far as the commercial value of a patent is concerned. If in the present case an invention had no commercial value for use in the production of aluminum it does not matter whether it was basic in the metallurgical art or not.

An illustration of the error into which the Commissioner fell through not distinguishing between the claims made in a patent and the proved commercial value of the invention covered by it, or lack of such value, is to be found in his inclusion of Patent No. 215,697 in his list of basic patents and his statement that it was operable for the production of aluminum. The claims in this patent were not restricted to the use of the self-baking electrode in a smelting furnace and the disclosures state that the invention relates to the manufacture of electrodes for use in electric furnaces and as anodes or cathodes in various electrolytic furnaces without excluding aluminum furnaces therefrom. This no doubt led Mr. Mann to the expression of opinion that the invention was operable for the production of aluminum and the Commissioner's acceptance of it as a fact. On this appeal the Court had a great advantage over the Commissioner on this point in having the evidence of Dr. Sem who was a pioneer in the development of the Soderberg electrode and worked with Mr. Soderberg as

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his assistant on this very invention. I was very favourably impressed with him. His evidence establishes conclusively that not only was the invention described in this patent never tried in the production of aluminum but also that it was never operable for the production of a self-baking electrode even in a smelting furnace and that no self-baking electrode was ever made by its use. The invention might be regarded as basic only in the sense that it expressed the idea of baking an electrode by the use of the heat generated in it by its resistance to the electric current passing through it but it never became an operable device at all and Mr. Soderberg was so discouraged with his failure to make it work that he almost gave up all further attempts to embody his idea in an operable device. In view of this evidence, which I accept, it does not matter what the language of the claims or disclosures in the patent may show and any argument as to the value of the invention based thereon must fall; the conclusion is inescapable that Patent No. 215,697, far from being one of the more valuable basic patents, had no commercial value at all. No one would have paid any royalty for its use, because nobody could make it work.

The evidence is also against the Commissioner's finding that the two other so-called basic patents had greater value than the five patents covering the inventions used by Alcan. There would be support for such a finding if he had been considering the value of the use of such inventions in electric smelting furnaces, but the same is not true of their use in aluminum furnaces. The tests at Baden in 1924 as well as those in Norway and France showed that the original Soderberg electrode could not be used with commercial advantage over the pre-baked electrodes in the production of aluminum. Moreover, if there was any merit in distinguishing between basic and improvement patents so far as the production of aluminum is concerned the Commissioner should have regarded Patent No. 264,997, relating to the electrode paste, as basic rather than Patent No. 216,092, relating to the casing and the iron ribs. It was the electrode paste invention rather than the casing one that was basic in the production of aluminum for it was found later that it was possible to do without the casing, as the electrode was let down into the

furnace, by the suspension device improvement invented by Mr. Legeron with its container wall continuously built up above the portion of the electrode that went into the bath. And the evidence also shows that the Commissioner did not attach sufficient importance to the five inventions used by Alcan from the point of view of the value of their use in the production of aluminum. He dismissed the Westly studs patent much too curtly when he described it as reading on United States Patent No. 824,153, dated June 26, 1906, issued to G. O. Seward relating to Carbon Holder for Electric Furnaces and merely an improvement on it. Mr. Seward was not occupied with aluminum production and the problem which faced Mr. Westly was quite a different one from that with which he had dealt. And the Commissioner wholly failed to appreciate the importance of the Torchet inventions and the value of their use in the aluminum industry.

In ascertaining the commercial value of the five patents certain facts must be kept in mind. One is that the inventions cooperate with one another and form a process or system that can be used with commercial advantage in the production of aluminum. Another fact is that the five inventions or, to speak more precisely, the Westly and Torchet inventions completely dominate and control the production of aluminum by the use of the so-called Soderberg electrode. Without their use it could not be used in such production with commercial advantage over the pre-baked electrodes. It was not until after it had been adapted to the production of aluminum by the use of the dominating inventions that it had any commercial value in the aluminum industry over that of the pre-baked electrodes. While there were undoubted advantages in the use of a single large continuous self-baking electrode over that of many small pre-baked electrodes the advantages did not make up for two serious disadvantages, namely, too high a consumption of electric power and impurities in the aluminum. These disadvantages showed up in the tests of the installations at Baden which embodied the so-called basic Soderberg inventions. Undoubtedly, aluminum could be produced by their use but not in such a way as to give such use any commercial advantage over that of the pre-baked electrodes. Indeed, the Soderberg electrode could

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not compete with them. Under the circumstances, it had no value for which anyone in the aluminum industry would be willing to pay. Certainly, the Aluminum Company of America was not interested in it. And the experience of Dr. Luzatto in Europe was similar to that of Dr. Sem at Baden. Then came the efforts to adapt the Soderberg electrode to advantageous use in the aluminum industry. The Westly invention removed the complaint about the impurities in the aluminum by providing for the extraction of the iron contact studs from the baked portion of the electrode before they could enter the electrolyte. It also lessened the loss of electric power by reason of the improved contact means provided by the studs over that of the clamp, casing and iron ribs of the previous device. But even with these improvements the heavy disadvantage of undue power consumption still showed up in the tests at Alcoa between 1928 and 1932. The improved Soderberg Electrode was now able, by reason of the Westly invention, to compete with the pre-baked electrodes in a Hall type of aluminum furnace but could not compete with them in the improved European type. It is true that for four years the Aluminum Company of America paid a royalty of \$20,000 per year for its use but then the Company notified Dr. Sem that it could not compete. The electric power consumption in the pots was too high and so were the labour costs. Part of the high power consumption was due to the difficulty of controlling the slipping of the electrode into the bath as its lower end was consumed. And later Mr. Torchet put his finger on another source of electric power loss and a way to lessen it. He found that the power consumption could be lessened without loss of the advantages of the big electrode if he restricted its width and thus shortened the distance for the gases to escape, reduced the size of the bubbles and lessened the risk of turbulence. This enabled the electrode to get nearer to the aluminum and also reduced the heat loss at the centre. Mr. Torchet also found that he could use the Westly studs for suspension purposes as well as for contact means and so provide a more efficient suspension which would eliminate the power loss resulting from uneven slipping of the electrode. I have already referred to the fact that the first Torchet invention was revolutionary.

That was so, not because of the change in the shape of the electrode from round to rectangular, for square electrodes were known, but because Torchet found that he could lessen the power consumption incidental to a big electrode, whether round or square, and yet maintain the undoubted advantages of the big continuous self-baking electrode, provided he restricted its width. This was a discovery of great practical and commercial value. To any one merely reading the claims in the patent and determining the value of the Torchet invention accordingly it would seem that it was merely an improvement on the previous art, but in the aluminum industry its effect was remarkable. It attracted attention all over the world. The reason was plain, for it was only after the Soderberg electrode had been finally adapted for commercially successful use in the production of aluminum by the use of the Torchet inventions that the so-called Soderberg Electrode System really won its way in the aluminum industry and acquired commercial value in it. It was really a misnomer, as Mr. Mann put it, to continue to describe the improved electrode as a Soderberg electrode for it had become quite a different thing from what Mr. Soderberg had invented. Certainly, any one who was familiar with the original Soderberg electrode would hardly recognize it in its improved form. It matters not, therefore, whether the Torchet invention is described as merely an improvement or not. As a matter of fact in the aluminum industry it was a basic invention in the sense that it turned the tide in favour of the so-called Soderberg electrode and the great expansion of its use in that industry started with it. Some indication of the value of the Torchet inventions is to be found in the fact that Elektrokemisk paid several million kroner for their use and continued to pay according to the extent of their adoption. Moreover, 90 to 95 per cent of the expansion in the aluminum industry has been effected by the use of the improved Soderberg electrode. Without the improvements of the Westly and Torchet inventions the original Soderberg electrode would have had none of this value. It would have remained in the same position as it was at Baden. The fact is that such commercial value as the improved Soderberg electrode now has in the production of aluminum was wholly the result of the so-

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called improvement inventions. Under the circumstances, and even if it were conceded, which it is not, that the royalty agreed upon in the original license agreement was the proper foundation for the Commissioner's assumption and calculations of value of the patents covered by it, I am quite unable to agree with his finding that the five inventions used by Alcan had less value than the original Soderberg inventions which he considered basic.

Nor did the Commissioner, in my opinion, sufficiently consider the benefits and advantages resulting to Alcan from the use of the five inventions. Even if no exception is taken to his acceptance of the evidence of Mr. Russell that the savings in operating costs through the use of the Soderberg Electrode System as compared with that of the pre-baked electrode system, based on Alcan's experience at Arvida in 1944, came to .11 cents per pound, taking into account the factors of consumption of power, consumption of electrodes, cost of labour and cost of repairs and maintenance of equipment, these savings of operating costs did not exhaust the list of benefits and advantages. There were others which the Commissioner failed to take into proper account. Some of them were referred to by Dr. Sem in the course of his evidence. There was the greater convenience in having only one large electrode that continued to operate through the whole lifetime of the furnace instead of many small electrodes that continually required changing. This meant that the system did not require the use of skilled labour, as was proved in places like Hungary and Yugoslavia. Secondly, the system was safer in its operation in that the furnaces using it could stand a longer period of shutdown without freezing the aluminum pots than those using pre-baked electrodes. The latter could stand a shutdown of only two hours, whereas the former could stand six. The reason for this is that the massive electrode has a higher heat capacity and can conserve it longer. This advantage was of particular importance in war time in view of the fact that if the pots did freeze they had to be chipped out by hand and it would take weeks to put them back into operation. A third advantage referred to by Dr. Sem was that aluminum of greater purity could be produced by the use of the Soderberg Electrode System, namely, from 99.75 to

99.80 per cent. This was .2 per cent higher than that produced by the use of the pre-baked electrodes. There was no evidence before the Commissioner that Alcan received any higher price for the aluminum produced by it because of its purity, but there was evidence in this Court that the United States paid a higher price for the purer aluminum. This was a matter of importance to the Canadian Government in its sales of aluminum to the United States. In addition there were better working conditions in that the pre-baked electrode furnaces were open and exposed the workmen to the heat and escaping gas, whereas the Soderberg electrode furnaces could be closed and the fumes led off to the outside. There was a further advantage in that in the case of the pre-baked electrode system it was necessary to have a plant for making the electrode paste, rams for pressing the electrodes and ovens for baking them, whereas all that was necessary in the case of the Soderberg Electrode System was to have facilities for making the paste. It was also stated that it was possible to produce more aluminum with the same power than was possible by use of the pre-baked electrodes. This was important where the supply of power was limited. Dr. Sem said that these advantages in addition to the direct savings in operating costs were of importance and that in many cases the aluminum industry found them so important that Elektrokemisk was able to sell a licence against a royalty that was three to four times higher than that which was charged to Alcan. Moreover, Mr. Russell mentioned other benefits and advantages. With the use of the Soderberg Electrode System Alcan was able to produce the maximum amount of aluminum in the shortest possible time and to provide the required expansion in the industry more rapidly than would otherwise have been possible. Thus the evidence shows that in so far as the Commissioner based his finding on the benefits and advantages to Alcan from the use of the five inventions he was wrong in confining himself to the savings of direct operating costs.

Under the circumstances I have come to the conclusion that the reasons given by the Commissioner for arriving at his compensation were not sound and that his decision must be set aside.

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Some assistance in determining what principles ought to have been applied by the Commissioner may be found in some of the compulsory license cases, for in a sense His Majesty is in the position of a statutory licensee. A leading decision on the subject is that in *Applications by Brownie Wireless Co., Ltd.* (1). There applications were made for the grant of compulsory licences on the ground that the patentees had refused to grant them on reasonable grounds. One of the questions in the case being whether the royalty of 12s. 6d. on a certain article insisted upon by the patentee was reasonable, Luxmoore J. at page 475, laid down the following test:

The best test of whether a royalty is reasonable in amount or the reverse is: How much are manufacturers who are anxious to make and deal with the patented article on commercial lines ready and willing to pay? Here the evidence is that numbers of licensees have taken licences to manufacture and deal with the patented article on the footing that the royalty to be paid is 12s. 6d. per valve holder, and notwithstanding the amount of such royalty have continued to work under such licence and to pay the royalties, although under the terms of such licences there is power to terminate them on notice. In my opinion it is impossible, in the face of the evidence, to say that the amount of the royalty is unreasonable.

The established royalty rule has been applied for a long time by the Court of Claims of the United States in dealing with claims for just and reasonable compensation for the use of inventions by the United States. Thus in *Carley Life Float Company v. United States* (2) that Court held that where a patentee gave an exclusive licence and received from his licensee 10·86 per cent of the selling price of an article the patentee should be awarded 10·86 per cent of the cost of the purchases of the article by the United States from an unlicensed manufacturer. Likewise in *Barlow v. United States* (3) the Court held that a royalty of 10 per cent established by a license contract was reasonable compensation. And in *Marconi Wireless Telegraph Co. of America v. United States* (4) Chief Justice Waley said:

If the plaintiff has already established a royalty by a licence or licences, he has himself fixed the average of his compensation, and if this has been established prior to the infringement, the task of the court then becomes easy.

(1) (1929) 46 R.P.C. 457.

(3) (1937) 34 U.S. P.Q. 127.

(2) (1932) 13 U.S. P.Q. 112.

(4) (1942) 53 U.S. P.Q. 246 at 251.

A similar principle has been followed in the United Kingdom by the Royal Commission on Awards to Inventors set up by Royal Warrant in 1919 to deal with disputes or differences between patentees and the Crown as to the amount of compensation payable by the Crown for the use of inventions under section 29 of the Patents and Design Act, 1907, as amended. The principles upon which the Royal Commission acted in the various classes of cases referred to it are set out in a series of reports, the first of which was made in 1921: *vide* Graham on Awards to Inventors, page 111. The principle to be applied when there is no dispute as to the validity of the patent or its user by the Crown and the reasons for its adoption are set out in paragraphs 8, 9 and 10 of this report. These deal with the subject so lucidly as to warrant their being set out in full:

8. It is clear in the first place that, however vital the invention may be to the service of the Crown, or however imperative the necessity of acquiring it for that service, the patentee cannot exploit the needs of the nation by insisting on an extortionate price for its use. The proviso to the section is obviously framed so as to prevent any such claim. On the other hand it would be unfair that the Crown should be enabled to use the invention at an inadequate price on the ground that it was useful only for naval and military operations and the like, and that Government departments were therefore the only possible customers. The section places the Crown, by its Departments and contractors, in the position of a statutory licensee with these two great advantages, namely, first that the licence may be exercised at the option of the Crown for such periods, continuous or discontinuous, and to such extent as the exigencies of the public service may demand, and secondly, that the Crown may have the terms of user settled either prospectively or retrospectively at their option. But, when and so far as the Crown has admittedly decided to avail itself of this statutory licence, and the only remaining question is as to the terms of user, the proper interpretation of the section would seem to be that such a fair and reasonable price or consideration should be fixed for the user as would be arrived at between a willing licensor and willing licensee bargaining on equal terms. It has indeed been suggested that statutory selection of the Treasury as the adjudicating authority shows an intention to minimize the consideration that should be paid for user by the Government. But this view appears to be inconsistent with the general character of the section, and would place the Treasury (and the Commission as their substitute) in a most invidious position, as an adjudicating authority with a statutory bias against all claimants under the section. And the recent substitution by the Act of 1919 of an obviously independent tribunal for the Treasury appears to be a statutory recognition of the fact that, whatever the tribunal, the basis of the award has throughout been intended to be a fair and impartial adjudication.

9. Taking then as the standard such a price or consideration as would be arrived at on a private bargain between a willing licensor and

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a willing licensee, it is to be observed that in private bargains this consideration is usually fixed on the basis of a royalty, that is of a definite sum or percentage on each patented article, or in the case of small and cheap articles on each unit consisting of a definite number or bulk of such articles. And there seems to be no valid reason for departing from this method in assessing the consideration under section 29. It has been urged that, where there has been an enormous user by and on behalf of the Crown, this method may result in an exaggerated or extravagant remuneration to a patentee whose patent may perhaps show little inventive merit. But to this argument there are several answers. In the first place, as a matter of ordinary business arrangement the rate or percentage of royalty is often much diminished when the quantity taken by the licensee is very large, and this principle is equally applicable where the Crown is a statutory licensee. Further, in common experience, the profits obtained by patentees for the use by the public of their inventions bear little relation to the technical merit of their inventions, and sometimes are or seem disproportionately large; while there is no express provision in the section to put the Crown in any better economic position in this respect than the general mass of its subjects. And lastly, if practical utility is the main test of the commercial value of an invention, as appears generally to be the case, then obviously great importance must be attached to the fact that exceptional use has been made of an invention.

10. Normally, then, this basis of a fair royalty as between a willing licensor and a willing licensee has been accepted by the Commission as the proper basis of award or remuneration in the case of inventions protected by valid patents and unquestionably used by the Crown. But it has also been necessary to determine separately in each case what is, or would be, as between a willing licensor and a willing licensee, the proper rate of royalty. This rate is usually ascertained or expressed as a percentage of the cost or selling price of the patented article, but there are a great number of factors that must affect the amount of this percentage. Much must depend, for instance, on the advantage or saving in use given by the patented invention over other competing devices; and much on the cost of the patented article, and the relation borne by that part of it which is essentially the subject of the patent to that part which is of ordinary construction. The problem is very similar to that which arises when a compulsory licence is applied for by a subject under the relevant sections of the Patents and Designs Act, 1907. It is perhaps impossible, and is certainly inexpedient, to lay down any general rule in the matter other than that all the circumstances of each particular case have to be considered.

The principle followed by the Royal Commission on Awards to Inventors, namely, that "such a fair and reasonable price or consideration should be fixed for the user as would be arrived at between a willing licensor and willing licensee bargaining on equal terms" was expressly adopted by the Supreme Court of Canada as applicable in determining the reasonable compensation payable by His Majesty

for the use of an invention under Order in Council 6982, dated December 4, 1940: *vide The King v. Irving Air Chute Co. Inc.* (1). 1949  
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The same principle is applicable in the present case but the Commissioner did not apply it. He did not attempt to ascertain the compensation from the standpoint of the price or consideration that would be arrived at between a willing licensor and a willing licensee bargaining on equal terms but sought to determine it otherwise. In so doing he took a mistaken view of the true nature of the original license agreement. Alcan was not buying nor was Elektrokemisk selling the unrestricted right to use all the inventions covered by the patents specified or referred to in it for all purposes. If that had been so there might have been some substance in the Commissioner's assumption that each patent had a separate commercial value and his estimate that the so-called basic Soderberg patents had greater value than the so-called improvement ones. But that was not the situation. What Alcan was interested in was not the right to use all the inventions for all purposes but only the right to use those that had commercial value in the production of aluminum in such production. And Elektrokemisk expressly confined Alcan's rights to such use. Consequently, whatever value the inventions covered by the agreement might have had for uses other than the production of aluminum did not enter into the calculation of the royalty fixed by the agreement. What the license agreement really covered was the right to use the inventions that made it possible to use the so-called Soderberg Electrode System to commercial advantage in the production of aluminum and such improvements in it as might be made for a collective royalty that was to remain the same during the lifetime of the agreement regardless of whether some of the patents expired or not. The Commissioner did not correctly appreciate this important fact. In this view of the agreement all of the royalty was properly attributable to the Soderberg Electrode System as it had been adapted to the production of aluminum and that meant the five inventions used by Alcan. Whatever there was of commercial value in the use of the Soderberg Electrode System in the production of aluminum was comprised

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in them and really in the Westly and Torchet inventions. The parties did not attach any value to the use of the so-called basic Soderberg inventions. Through the use of the five inventions Alcan received all the benefits and advantages that were possible from the use of the Soderberg Electrode System in the production of aluminum. Without them Alcan would have received nothing of commercial value and would have paid nothing. Moreover, Elektrokemisk would have received as great a royalty for a licence to use only the five inventions as it did under the license agreement. This may, I think, properly be inferred from the evidence of Dr. Sem that when the new installations were made for Alcan everything that was of commercial value in the production of aluminum was embodied in them. That meant the use of the five inventions; there was nothing of commercial value in any of the other inventions that could have been added thereto.

But the Commissioner was even more seriously at fault in his complete disregard of the revised royalty arrived at in the first amending agreement of January 27, 1941. If he had used this as a base for determining the compensation he could not possibly have arrived at his fractional compensation of one fortieth of a cent per pound for he could not have found that the so-called basic Soderberg patents had greater value than those covering the inventions used by Alcan, for at the date of the first amending agreement all the said patents had expired and the inventions covered by them had fallen into the public domain. The fact of such expiry was expressly stated in the said agreement, so that it is clear that no part of the revised royalty could possibly have been attributed to any of them. This means that only the five inventions used by Alcan were left.

This I think disposes of the main contention of counsel for His Majesty in support of the Commissioner's finding. His submission was that even if it were conceded that it was the five inventions used by Alcan that made it commercially advantageous to use the Soderberg Electrode System in the production of aluminum, they were all valueless without the basic Soderberg invention. I have already indicated my disagreement with this view, even if the royalty fixed by the original license agreement be

taken as the total of the values of the inventions covered by it, but I think it has no force at all when viewed in the light of the fact that the so-called basic Soderberg patents had expired when the first amending agreement was made and the revised royalty was arrived at with full knowledge and appreciation of that fact.

Counsel for the appellant contended that the revised royalty under the first amending agreement should be adopted as the measure of the reasonable compensation to be paid for the use of the five inventions subject to the ceiling agreed upon in the second amending agreement. In my judgment, there are several reasons for accepting this submission. While it is true that by reason of the Order in Council Alcan could not be sued under either the first or second amending agreements, and they cannot bind the Crown, it does not follow that the royalties agreed upon in them are automatically to be rejected as unreasonable. The right to receive reasonable compensation was substituted for the right to sue under the agreements and it should not be assumed, in the absence of good reason for it, that the quantum of the compensation must be less than that which would have ensued under the agreements. Indeed, if the revised royalty and ceiling meet the conditions of the principle followed by the Royal Commission on Awards to Inventors in the United Kingdom and adopted by the Supreme Court of Canada in the *Irving Air Chute Company* case (*supra*) they afford the best possible test of the value of the use of the five inventions for no one could know such value better than Elektrokemisk and Alcan did. Primarily, the use of the inventions was worth what the parties were willing to pay and receive for it. There can be no doubt that the revised royalty and ceiling were arrived at between a willing licensor and a willing licensee bargaining on equal terms with full knowledge of the value of the inventions that were being used. These were only the five that are in question. The so-called basic patents had all expired and no other inventions than the five have been shown to have had any additional commercial value in the production of aluminum. When the so-called basic patents expired nothing of commercial value for which the aluminum industry would have paid anything passed to the public. Certainly, they had no

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value in the minds of the parties. The whole of the revised royalty was attributable to the right to use the five inventions and it was to remain the same during the lifetime of the agreement. Thus the expiry of the Electrode paste patent in 1944 would not affect the amount of the royalty. The same amount would continue to be payable for the use of the remaining inventions.

The revised royalty being thus attributable to the use of the five inventions or such of them as remained covered by surviving patents during the lifetime of the agreement, the matter really resolves itself into the question whether it was fair and reasonable. I find no ground for thinking that it was not. The evidence is that in most countries the rate of royalty charged by Elektrokemisk was double that of the original license agreement and that it gave a favourable rate to Alcan because of the large production that was contemplated. There is also the statement of Dr. Sem that in many cases the aluminum industry found the savings other than the direct savings in operating costs so important that Elektrokemisk was able to sell a licence for a royalty that was three to four times higher than that charged to Alcan. Moreover, both parties willingly revised the royalty in 1941 because of the proposed expansion of Alcan's facilities to meet the demands of the war. This revision was based on full knowledge by each of the parties as to what use was being made of the inventions and what benefits and advantages Alcan received therefrom. The fact that it was made in contemplation of increased production due to the war is an important factor as paragraph 9 of the first report of the United Kingdom Royal Commission on Awards to Inventors shows. Moreover, the revision was made notwithstanding the fact that the aluminum industry all over the world showed its knowledge of the value of the use of so-called Soderberg Electrode System as it had been adapted to the production of aluminum by the Westly and Torchet inventions by using it in 90 to 95 per cent of the expansion of the industry that took place. The evidence also shows that even on the basis of only the direct saving in operating costs of .11 cents per pound there was a substantial gain by Alcan after payment of the revised royalty. And in addition it had all the other very important benefits and advantages that

Dr. Sem and Mr. Russell mentioned. Under the circumstances it seems to me that the revised royalty under the first amending agreement meets the test of the principle referred to and ought to have been adopted by the Commissioner as the measure of the reasonable compensation payable by His Majesty for the use by Alcan of the five inventions in question, subject to the ceiling agreed upon in the second amending agreement.

I find no grounds for thinking that the ceiling of \$215,000 for any one year agreed upon between Elektrokemisk and Alcan was not a reasonable one. On the other hand, I am of the opinion that the ceiling of \$100,000 set by the Commissioner was arrived at on wrong principles. He was not justified in taking the average yearly production in the years 1939 to 1944 as the basis for his ceiling and applying his 25 per cent to the low average thus produced. There was no need of a ceiling in a year of normal production and the revised royalty was reasonable for the increased production envisaged by the first amending agreement. It was only in the years of production beyond that, such as 1943 and 1944 particularly, that a ceiling became desirable. This was recognized by the parties. Moreover, the Commissioner ought not to have disregarded as he did the ceiling agreed upon by the parties. What I have said on this subject with regard to the revised royalty is applicable in large measure to the ceiling. Since it was arrived at freely by a willing licensor and a willing licensee bargaining on equal terms it should have been adopted unless there were grounds for finding that it was unreasonable. I have already stated that I find no such grounds. I am strengthened in this view by the decision of the Royalty Adjustment Board in the United States in proceedings before it in 1944 and 1945. These were similar in principle to those before the Commissioner and involved similar patents owned by Elektrokemisk and used by or for the United States in the production of aluminum. There the Royalty Adjustment Board fixed a ceiling of \$200,000 in United States currency for any one year. It is interesting to note that this was fixed in contemplation of an annual production that was less than half of that of Alcan in the years 1943 and 1944. Moreover, the United States ceiling was made effective only as of January 1, 1944, whereas

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under the second amending agreement the ceiling of \$215,000 was made retroactive to the same date as that of the revised royalty, namely, January 1, 1941. Furthermore, it is to be noted that the original royalty in the United States remained at one mill per pound, and was not reduced on a sliding scale as was done in Canada under the first amending agreement. Under the circumstances, while the decision of the United States Royalty Adjustment Board has no binding effect it is persuasive to the conclusion that the ceiling of \$215,000 was a reasonable one. I so find.

Moreover, I see no reason for thinking that it was unreasonable to fix the revised royalty and the ceiling in United States currency.

On the hearing before me counsel for the appellant claimed interest as part of the compensation. No such claim was made before the Commissioner, but, quite apart from that fact, no allowance for interest may be made against the Crown in a case such as this. In *The King v. Carroll* (1) Taschereau J. of the Supreme Court of Canada, speaking for the Chief Justice and Estey J. as well as for himself, laid it down that "it is settled jurisprudence that interest may not be allowed against the Crown, unless there is a statute or a contract providing for it": *vide The King v. Roger Miller & Sons Ltd.* (2); *Hochelaga Shipping & Towing Co. Ltd. v. The King* (3); and *The King et al v. Racette* (4). Here there is no statute or contract providing for interest.

Whether this Court, having concluded that the compensation found by the Commissioner was based on wrong principles, should confine itself to such finding and send the matter back to the Commissioner or determine the compensation itself has been a matter of concern to me in view of the opinion expressed by Rinfret C.J. in the *Irving Air Chute Company* case (*supra*), namely, that by section 19 of the Patent Act the Commissioner is *persona designata* to report to the Government of Canada the reasonable compensation for the use of any patented invention used by the Government, that such section ascribes the power and duty to fix a reasonable compensation to the Commissioner alone, and that the right of appeal to this Court is limited to the question whether the Commissioner

(1) (1948) S.C.R. 126 at 132.  
 (2) (1930) S.C.R. 293.

(3) (1944) S.C.R. 138.  
 (4) (1948) S.C.R. 28.



proceeded on a wrong principle. But, as I read the various reasons for judgment in that case, the majority of the judges did not adopt this opinion. Their view was that while I had been right in allowing the appeal from the Commissioner's decision, I ought not to have proceeded to determine the compensation myself in view of the fact that there was not sufficient evidence of the value of the inventions either before the commissioner or this Court to warrant any finding of compensation and that the matter should, therefore, be remitted to the Commissioner for further enquiry by him as to the value of the inventions. In the present case there is plenty of evidence of the value of the inventions in question and I see no reason for remitting the matter to the Commissioner for any further enquiry by him. And, with great respect for the opinion expressed by Rinfret C.J., I am not able to take as restricted a view of this Court's appellate jurisdiction under Order in Council P.C. 11081, dated December 8, 1942, as he indicated. It seems to me that in dealing with an appeal under the Order in Council this Court ought to follow a similar practice to that followed by the Supreme Court of Canada in dealing with appeals from judgments of this Court in expropriation cases. In such cases, it was said in *The King v. Elgin Realty Company Limited* (1) by Taschereau J., delivering the judgment of the Supreme Court of Canada, that when a Court of first instance, in determining the amount of compensation to be awarded, has acted upon proper principles, has not misdirected itself on any matter of law, and the amount arrived at is supported by the evidence, a Court of Appeal ought not to disturb its finding. But, when the Supreme Court of Canada has found that this Court has applied a wrong principle it has not hesitated, when there was evidence from which it could do so, to determine itself the compensation that it considered proper rather than send the matter back to this Court: *vide Canadian National Railway Co. v. Harricana Gold Mine Inc.* (2); *The King v. Halin* (3); *Irving Oil Company Ltd. v. The King* (4); and *Diggon-Hibben Limited v. The King* (not yet reported). I see no reason why this Court should do otherwise in an appeal under the Order in Council. It provides that any decision

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(1) (1943) Ex. C.R. 49.

(3) (1944) S.C.R. 119.

(2) (1943) S.C.R. 382.

(4) (1946) S.C.R. 551.

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of the Commissioner under it shall be subject to appeal to the Exchequer Court and there is no limitation of the appeal to questions of law. Under the circumstances, it is the duty of the Court, in my opinion, when it finds that the Commissioner's decision was based on wrong principles, to determine itself the compensation that is reasonable, when there is evidence from which it can properly do so, as I think there is in this case, rather than put the parties to the expense and delay of sending the matter back to the Commissioner. The fact that the proceedings before the Commissioner do not constitute litigation between parties in the ordinary sense and that he has powers under the Inquiries Act, R.S.C. 1927, chap. 99, does not alter my views in the matter.

Counsel for the appellant contended that whatever compensation is awarded should be effective only as from March 23, 1943, the date of the letter of indemnity to Alcan, and that up to that time the rights of Elektrokemisk as vested in the appellant as against Alcan should be governed by the agreements between Elektrokemisk and Alcan. The defect in this argument is that under Order in Council P.C. 11081, dated December 8, 1942, once the indemnity was given Alcan was protected from any claim, action, or proceeding for the non-payment of "any royalties". This must, I think, mean that Alcan could not be sued for any royalties, even although they had accrued prior to the date of the indemnity. The patentee whose invention was used was given a right to reasonable compensation in substitution for his previous right to sue under his contract. Under the circumstances, I am of the view that the argument of counsel for His Majesty both before the Commissioner and before this Court, namely, that under the Order in Council the compensation should be effective as from October 1, 1941, should be accepted. This was the view taken by the Commissioner and I agree with his decision on this point. In view of the decision to which I have come the question is not of practical importance to the appellant, and the Crown cannot now be heard to object if the award is made effective as from that date.

There remains for consideration, the fact that the ceiling of \$215,000 for any one year agreed upon between Elektrokemisk and Alcan covered the production of alumi-

num both for war and civilian purposes and that the Order in Council requires His Majesty to pay reasonable compensation only for the use of the inventions in the production of aluminum for His Majesty for war purposes. The total production by Alcan by the use of the so-called Soderberg Electrode System in each of the years 1939 to 1944 is shown on Exhibit Z4. All royalties have been paid by Alcan up to September 30, 1941, so that we are concerned only with compensation in respect of production since that date. It is established that all the production for the years 1941, 1942 and 1943 was for war purposes and that for 1944 only approximately 1 per cent of it was for civilian purposes. There is no evidence as to the amount of production in the years subsequent to 1944 or as to the proportions that were for civilian purposes. It was suggested by counsel for the respondent that whatever ceiling was adopted ought to be reduced by the same proportion as the amount of production for civilian purposes bore to the total production. I adopt this suggestion as sound.

For the reasons given, the appeal from the Commissioner's decision must be allowed and his award of compensation set aside. There should be substituted for it the finding of this Court that reasonable compensation for the use by Alcan of the five inventions in question should be an amount equal to that of the revised royalties that would have been payable by Alcan under the first amending agreement, subject to the ceiling of \$215,000 in United States currency for any one year as agreed under the second amending agreement, less the reduction in respect of production for civilian purposes that I have referred to, and without interest. For the years 1941 to 1944 the computation of the royalties at the 1941 rate appears on Exhibit Z4. From these figures the compensation payable up to the end of 1944 is as follows, namely; for 1941, the sum of \$119,646.50 less the amount already paid by Alcan up to September 30, 1941; for each of the years 1942 and 1943, the sum of \$215,000; and for the year 1944, the sum of \$215,000 less 1 per cent for the production for civilian purposes. All the said sums are in United States currency for which the Canadian equivalent is payable. If the parties are unable to agree as to the amount of production in any year subsequent to 1944, for which compensation

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may be payable, and the percentage thereof that was for civilian purposes, a further application to the Court may be made. The appellant is also entitled to costs against His Majesty, but there will be no costs for or against the respondent Alcan.

*Judgment accordingly.*

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BETWEEN :

HELEN COOPER ..... APPELLANT;

AND

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

*Revenue—Income—Income tax—Income War Tax Act, R.S.C. 1927, c. 97—Appellant life beneficiary of estate—Depreciation claimed by executors paid to appellant is income of appellant—Payment out of corpus may properly be assessable income in hands of recipient—Taxpayer not to be assessed for amount of depreciation claimed by executors and withheld by them.*

Executors in filing the Income Tax Return for 1938 of an estate claimed depreciation on various assets of the estate in the sum of \$11,468.37. Appellant, the life tenant of the estate, in her Income Tax Return included as revenue from the estate the sum of \$7,189.69. The respondent amended this return by adding thereto the sum of \$11,468.37, claimed as depreciation and assessed appellant accordingly. From this assessment an appeal was taken to this Court. It was shown at the hearing of the appeal that the executors had received in the taxation year the sum of \$18,658.06 and had paid to appellant a total sum of \$14,850 which was \$7,660.31 in excess of the net amount payable to her after deducting depreciation.

*Held:* That depreciation claimed by executors in filing an income tax return for an estate but in reality paid to the life beneficiary of that estate is taxable income in the hands of the recipient.

2. That the life beneficiary is not liable for income tax on the amount claimed by executors as depreciation but not paid to the beneficiary.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Windsor.

*N. C. MacPhee, K.C.* for appellant.

*G. L. Fraser, K.C.* and *J. D. C. Boland* for respondent.

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

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CAMERON J. now (January 7, 1950) delivered the following judgment:

Cameron J.

This is an appeal from an assessment to income tax dated February 2, 1940, for the taxation year 1938. The appellant is the widow of James Cooper who died in 1931. By his will he appointed Maurice Pougnet and E. F. Ladore to be his executors, and after providing for payment of his debts, funeral and testamentary expenses, he made provision for his widow, the appellant herein, as follows:

3. To my dear wife, Helen Cooper, for the term of her natural life, I will, devise and bequeath all my real and personal estate, wherever situate, of which I died possessed or to which I may die entitled.

Subject to the life interest of his wife, he devised and bequeathed all his estate in equal shares to his three daughters. The concluding paragraph of his will was as follows:

I authorize the trustees of this my Will to invest the moneys of my estate in any investments which they shall deem reasonably secure, and likely to return a fair income, not being limited to investments expressly authorized by law, and with power to retain investments made by me in my lifetime as long as they shall think proper and to re-invest the proceeds of the same or any part thereof in similar securities. And in order to carry out my intention I exonerate the trustees hereof from any responsibility for loss or damage which may be occasioned by retaining investments in the form in which the same shall be at the time of my death or by reason of investments made by them in good faith in securities other than those authorized by law.

The evidence indicates that the executors managed the entire estate, which in 1938, consisted of certain original assets and a number of businesses, some of which were also original assets and others which, by foreclosure or other means, had been taken over by the executors to protect the interest of the estate therein. Mr. Pougnet, one of the executors stated that the gross income for the year 1938, after payment of expenses, was \$18,658.06. He said that in filing the estate T.3 Income Tax Return the executors had claimed depreciation on the various assets in the sum of \$11,468.37 and had shown a net amount of \$7,189.69 as income payable to the appellant for the year 1938. The appellant in her T.1 Income Tax Return included as revenue from her husband's estate the sum of \$7,189.69 only. The respondent, however, acting

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apparently on the ground that the depreciation so claimed by the executors was merely a book entry and had not actually been retained by the executors as a depreciation reserve, and believing that the full sum of \$18,658.06 had, in fact, been paid to the appellant, amended her return by adding thereto the sum of \$11,468.37, and assessed her accordingly. It is from that assessment that the appeal has been taken.

The evidence on the appeal shows that out of the gross income of \$18,658.06, the executors in 1938 actually paid the appellant \$14,850, expended the sum of \$2,398.01 in replacement of machinery and equipment; and, following an audit of the estate accounts in 1939, may have paid the appellant the balance of \$1,410.05 in some later year.

The disagreement between the parties is solely as to the right of the appellant to any allowance for depreciation on the income received by her from the estate. It is admitted that had she been paid the gross income of \$18,658.06, and had she been entitled to claim depreciation in respect thereof, the total claim for depreciation of \$11,468.37 would have been allowed, that sum being made up in accordance with the depreciation allowances normally granted in 1938 for the various assets under administration by the executors. It appears, also, from the evidence that for many years prior to 1938 the executors, in filing the T.3 Estate Income Tax Returns, had deducted depreciation from the gross income of the estate and had shown as income payable to the appellant only the net amount after deducting such depreciation; and, also, that the appellant in her own income tax returns had shown only such net income as received from the Cooper Estate.

In the case of *Davidson v. The King* (1), the President of this Court came to the conclusion that the beneficiary of an estate, insofar as he is entitled to income from it, is not entitled to deduct any amount for depreciation in respect of such income, inasmuch as it is not his assets but those of the estate that are used in the production of such income. He found that any amount that might be allowed for depreciation—being an item of capital—enured to the benefit of the estate and those entitled to its corpus.

Counsel for the appellant endeavoured, however, to draw a distinction between the *Davidson* case and the case at

(1) (1945) Ex. C.R. 160.

bar. He says that while in the Davidson case the appellant was entitled merely to the income for life in one-half of the estate, Mrs. Cooper, by the terms of her husband's will, is entitled specifically to the use and enjoyment in specie of the assets of her husband's estate without interference by the executors; and that such being the case she is bound to maintain the corpus of the estate intact for the remaindermen and cannot do so unless she is allowed depreciation at the proper rates. He suggests that in the absence of any evidence to prove the contrary, the executors throughout may have been acting merely as her agents in the management of the estate and not *qua* executors of her husband's estate.

I do not consider that it is necessary for me to determine whether under her husband's will the appellant had or had not the right to the use and enjoyment of the assets of his estate in specie. I am not concerned in this case with any possible dispute between the life tenants and the remaindermen. The only question is whether that which the appellant received from the executors in 1938 was taxable income in her hand.

The appellant is not one of the remaindermen in the estate. Her only interest in the estate is that of a life beneficiary and as such she would be entitled to receive the income arising from the assets of the estate whether as profits resulting from the operation of the businesses which formed part of the estate, or as revenue from investments, and equally so whether operated by herself—as she asserts she was entitled to do—or as managed and operated by the executors as para. 7 of the Statement of Claim states was the fact. Under no circumstances would she be entitled to any of the corpus for her own personal use and benefit. The executors would have no right to pay her any moneys whatever except such moneys as constituted income from the estate.

As I have said above, the executors in 1938 received and reported a gross income of \$18,658.06. Apart from the provisions of the Act relating to depreciation, the whole of that amount would have been income accruing to the appellant and under the provisions of section 11(1) would have formed part of her income whether received by her or not in 1938. It is not disputed, however, that the

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executors were entitled to deduct therefrom depreciation in the amount now claimed by the appellant. Had they retained the amount of such depreciation and not paid it or a large portion thereof to the appellant, no difficulty would have arisen. They did, however, pay over to her in that year a total of \$14,850 which was \$7,660.31 in excess of the net amount payable to her after deducting depreciation.

What then is the nature of that payment of \$7,660.31? It was paid out of income received by the executors, it was applied by them in the direction that income should be applied—namely, to the appellant who was the life beneficiary—and received by her as such and applied by her to her own use and benefit. None of it has been repaid by her to the executors and there is no evidence that she was ever asked to repay it.

In my opinion, therefore, that amount constituted taxable income in the hands of the appellant.

A further argument advanced by the appellant was that if she was not entitled to receive this sum of \$7,660.31 as income, it must have been paid to her—possibly in error—as a payment out of capital; and that as it was paid out of depreciation which is an item of capital, it should not be considered as income in her hands. In view of the decision in *H. K. Brodie v. The Commissioners of Inland Revenue* (1), that contention cannot be supported. In that case Findlay, J. said at p. 439:

If the capital belonged to the person receiving the sums—if he or she was beneficially entitled not only to the income but to the capital—then I should think that, when the payments were made, they ought to be regarded, and would be regarded, as payments out of capital, but where there is a right to the income, but the capital belongs to somebody else, then, if payments out of capital are made and made in such a form that they come into the hands of the beneficiaries as income, it seems to me that they are income and not the less income, because the source from which they came was—in the hands, not of the person receiving them, but in the hands of somebody else—capital.

Reference may also be made to *Williamson v. Ough (Inspector of Taxes)* (2), where at p. 392 Lord Russell of Killowen said,

It is well settled that a payment out of corpus may properly be assessable income in the hands of the recipient.

For the reasons which I have given, I am of the opinion that the respondent was entitled to amend the 1938 return



of the appellant by including as an item thereof the amount which she actually received in that year from the Cooper Estate. He had assumed in error that she had received \$18,658.06, whereas, in fact, she received only the sum of \$14,850. I do not think that to that sum there should be added the further sum of \$1,410.05 which the executor, at the trial, thought she might have received in a subsequent year. That amount in 1938 was, in my opinion, not accruing to her and it was not received by her. Until paid over to her, the executors were entitled to treat it as part of a depreciation reserve and she could not have successfully made claim thereto.

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I therefore refer the matter back to the respondent to amend the assessment by substituting the sum of \$14,850 as income from the James Cooper Estate for the sum of \$18,584.37 as found by the respondent, and to adjust the assessment accordingly.

Success being divided, under all the circumstances I will make no order as to costs.

*Judgment accordingly.*

BETWEEN :

HIS MAJESTY THE KING, ..... PLAINTIFF;

AND

HERB CUTHBERTSON, ..... DEFENDANT.

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 March 17  
 July 12

*Crown—Information—Foreign Exchange Control Act, Statutes of Canada 1946, c. 53, s. 22(1)—“Forthwith declare to an authorized dealer”—“Forthwith” in s. 22 of the Foreign Exchange Control Act means within a reasonable time—No declaration of forfeiture.*

*Held:* That “forthwith” in s. 22(1) of the Foreign Exchange Control Act, Statutes of Canada, 1946, c. 53, means within a reasonable time in view of the circumstances of the case and of the subject matter.

INFORMATION exhibited by the Attorney General of Canada seeking a declaration that United States currency surrendered by the defendant be forfeited to the Crown.

The action was tried before the Honourable Mr. Justice O’Connor at Ottawa.

*J. Douglas Watt, K.C.* for plaintiff.

*H. A. O’Donnell, K.C.* for defendant.

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 O'CONNOR J.

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

O'CONNOR J. now (July 12, 1949) delivered the following judgment:

The plaintiff seeks a declaration that the sum of \$154 in United States currency, surrendered by the defendant on the 26th day of August 1947, be forfeited to the plaintiff on the ground that the defendant failed to forthwith declare and offer for sale such sum in accordance with the provisions of The Foreign Exchange Control Act, chapter 53 of the Statutes of Canada, 1946.

Section 60(1) of the Act provides *inter alia* that any property of any kind, the possession of which any person fails to declare as required by the Act, may be seized and shall be liable to forfeiture at the instance of the Attorney General of Canada upon proceedings in the Exchequer Court of Canada.

Section 22(1) and (2) provides:—

22(1). Every resident, other than an authorized dealer, who has or acquires the ownership or possession of foreign currency or is or becomes entitled to a right to payment of foreign currency under a negotiable instrument payable either on demand or otherwise immediately payable, or by reason of a deposit, shall forthwith declare to an authorized dealer that he owns or possesses the said currency or is entitled to the said right, provided that this subsection shall not apply in respect of

- (a) foreign currency having a value not exceeding one hundred dollars in the ownership or possession of a resident, unless otherwise required by regulation; or
- (b) foreign currency or any right to payment thereof acquired or held by a resident under a regulation or permit while it is required by the resident for the purpose, and held within the time, specified by the regulation or permit.

(2) Subject to subsection four of this section, where a resident makes a declaration to an authorized dealer under this section relating to foreign currency or to a right to payment thereof for which a rate of exchange with Canadian currency is prescribed under this Act, he shall at the time of making the declaration, sell the said currency or agree to sell the currency payable under the said right to the authorized dealer and for such purpose shall at that time assign or transfer the said right, or direct that payment thereunder be made to the authorized dealer.

Section 22(1) (a) of the Act was amended by P.C. 2045 to provide that every resident who has or acquired possession of foreign banknotes exceeding \$10 shall declare to

an authorized dealer that he possesses such banknotes and offer the same for sale to an authorized dealer pursuant to Section 22 of the Act.

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The facts are not in dispute. The defendant farms near Perth, Ontario, and in addition carries on business as a commission agent purchasing cattle for export to the United States, and during the year 1947, the defendant in the course of his business as such agent, purchased cattle for export amounting in value to approximately \$100,000, which sums were paid in American currency and accounted for by the defendant, according to the regulations under The Foreign Exchange Control Act.

It was the defendant's practice to take the cattle in trucks to the port of entry and to pass them through the Canadian Customs and then to accompany them to the cattle yards over the United States boundary, for the purpose of passing the cattle through the United States Customs.

On the date in question, when he was passing the cattle through the Canadian Customs Port of Lansdowne, he was asked by the port authorities to declare the United States currency in his possession. He stated that he threw everything he had in his pocket out on the counter and this amounted to \$164 in United States currency and \$15 in Canadian currency. Thereupon the port authorities seized \$154 of the American currency and returned \$10 in American currency to him.

It is clear from the nature of the defendant's business that he had to carry United States currency in sums much larger than \$10. He had to make change in United States funds when the cattle were sold and he had to pay United States custom duties on certain cattle in United States funds. That this was necessary to his business was recognized by the Foreign Exchange Control Board which granted him a permit in 1948 and again in 1949 to carry up to \$1,000 a month—\$200 at one time in United States currency.

On the 22nd September 1947, the defendant was interviewed by a constable of the Royal Canadian Mounted Police and gave him a statement in writing, in which he stated *inter alia*, that at the time in question he had in his possession \$154 in American currency which was

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taken from him by the Customs officer and he was informed that he would hear from the Foreign Exchange Board. The statement then continued:

I obtained this money from the sale of cattle. \$50 of it was obtained from the Bank of Montreal, Perth, some time previous which was kept in my pocket and I could not say how much of this \$50 I had at the time of crossing the border.

In his evidence the defendant stated that he was just going over to transfer the cattle and then he intended to return to Perth.

He said that he had obtained part of the money on Form H from the Bank a short time before, but that he had disposed of most of it. He said, "there probably was a little bit left, no large amount, and the other I had received through making change in cattle deals." And that he had received "the other" just a "matter of a few days" before the 26th August 1947.

And under cross-examination he said:—

Q. Just a minute—Mr. Cuthbertson I have a record here—you visited the Port of Lansdowne on the 26th August 1947 but on the 21st of August you sold to the bank \$3,100 in U.S. currency—can you tell me if that is right?

A. I cannot say. I have no recollection.

Q. But you did from time to time sell U.S. currency to the bank?

A. Oh, yes.

Under Sections 60(2) and 56(1), if it is established that the defendant did any act or omission for which a permit is required, then the burden of proof is on the defendant that he possessed the necessary permit or had been exempted from the applicable provisions of the Act.

That does not affect the position here, however, because the defendant does not contend that he had a permit which would permit him to have possession of foreign banknotes without having to forthwith declare the same to an authorized dealer. What the defendant contends is that having received the foreign currency only "a few days" before the 26th August 1947, he did not fail to "forthwith declare" and "sell" the same to an authorized dealer, within the meaning of Section 22(1) as amended.

The plaintiff does not contend that the defendant was about to export this currency from Canada to the United States or had any intention of so doing. On the contrary, counsel for the Crown agreed that the sole ground on

which the declaration is sought is that the defendant failed to "forthwith declare and offer for sale" the said currency to an authorized dealer.

The sole question is, therefore, did the defendant in having possession of the United States currency for "a few days," fail to "forthwith declare" the same to an authorized dealer.

That in turn depends on the construction to be placed on the word "forthwith" in Section 22(1).

Wharton's Law Lexicon XIV edition defines "forthwith" as:—

When a defendant is ordered to plead "forthwith", he must plead within twenty-four hours. When a statute or rule of Court requires an act to be done "forthwith", it means that the act is to be done within a reasonable time having regard to the object of the provision and the circumstances of the case (*Ex parte Lamb (1881) 19 Ch. D. 169; 2 Chit. Arch. Prac. 14th ed., 1435*).

Mozley and Whiteley's Law Dictionary V edition makes the same statement that in a statute the word means "within a reasonable time."

Webster's New International Dictionary defines "forthwith" as:—

Immediately; without delay; directly; Hence, within a reasonable time under the circumstances of the case; Prompt and with reasonable dispatch;—the meaning of the term in a particular case is relative to the circumstances.

Where the word "forthwith" occurs in a statute it has usually been construed as meaning "within a reasonable time in view of the circumstances of the case and of the subject matter" as will be seen from the following:—

I agree that the word "forthwith" is not to receive a strict construction like the word "immediately", so that whatever follows, must be done immediately after that which has been done before. By referring to section 50 (of a private Act) it seems that whatever is to be done under it, ought to be done without any unreasonable delay. I think the word "forthwith" there used, must be considered as having that meaning. *R. v. Worcestershire JJ. (1839), 7 Dowl. 789, per Coleridge J., at p. 790.*

. . . The Act of Parliament (Bastardy Act, 1845, s. 3 (repealed)) says, that the party entering into the recognizance shall "forthwith" give notice of his having done so to the mother of the child. Now, without putting any critical construction on the word "forthwith"; it means I think, with as little delay as the circumstances will reasonably admit of. *Ex p. Lowe (1846). 3 Dowl. & L. 737, per Coleridge J. at p. 739.*

To act "forthwith", . . . seems to mean "reasonably soon in the circumstances". *Brown v. Bonnyrig Magistrates, (1936) S.C. 258, per Lord Carmont (Lord Ordinary), at p. 262.*

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"Forthwith after the threshing" (in s. 5 of the Threshers' Lien Act, which deals with the right to exercise a right of lien on grain) I think means as soon after the work is completed as it is reasonably practicable for the giving of the notice. *Partridge v. Aylwin*, (1924) 2 W.W.R. 671, (C.A.) *per cur.*, at p. 674.

"Forthwith" in The Controverted Elections Act, C.S.N.B. 1903, c. 4, s. 6, means that the petition must be published within a reasonable time, in view of the subject matter and the attendant circumstances . . . (C.A.) *Owens v. Upham* (1909), 39 N.B.R. 198.

"Forthwith" means within a reasonable time, having regard to all the circumstances of the case, as used in the Immigration Act, R.S.C. 1927, c. 93, s. 19(2) . . . *In re Immigration Act, In re Poll.* (1937) 3 W.W.R. 136.

The defendant appears to have acted in good faith in the matter. When he was asked to declare the currency he had with him, he at once made the declaration and handed the currency to the Customs official. Nor do the Board appear to have questioned his good faith, because they subsequently issued a permit to him in each of the years 1948 and 1949, which permitted him to carry substantial sums in foreign currency.

Giving "forthwith" the meaning of "within a reasonable time" in view of the circumstances of the case and of the subject matter, there remains only an examination of the circumstances and of the subject matter.

The evidence shows that in the year 1947 the defendant had handled \$100,000 worth of American currency and that this during the year had been turned into an authorized dealer. Apparently he had turned \$3,100 in United States currency five days before the date in question, and he had \$164 in American currency on the day in question. He stated that he had acquired part of this sum on a form H from the bank a short time before and that "there probably was a little bit left of the \$50 but I think no large amount and the other I had received through making change in cattle deals;" and his evidence was he had received this last amount "just a matter of a few days" before the 26th August 1947. According to his evidence on the time in question there was American money "everywhere—in the stores and everywhere."

The section cannot have intended that even a retail merchant should go to the bank every time he received a United States bill. He would probably declare and sell the United States currency every time he went to the

bank in the ordinary course of business, which in the case of a retail merchant, would probably be every few days.

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Here the defendant is a farmer and a cattle buyer travelling about the country. Having regard to the circumstances and the subject matter, it cannot be said, in my opinion, that the defendant failed to "forthwith declare" and "sell" the currency because he had it in his possession for "a few days."

The plaintiff is not, therefore, in my opinion, entitled to the declaration sought in the information. The defendant is entitled to the costs of the proceedings.

*Judgment accordingly.*

BETWEEN:

HIS MAJESTY THE KING ..... PLAINTIFF;

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Sept. 22  
Nov. 17

AND

STEVE GOMORI ..... DEFENDANT.

*Crown—Information—Seizure under provisions of Foreign Exchange Control Act—Forfeiture—When offence proved Court must declare forfeiture of whole property seized.*

Defendant admittedly attempted to export from Canada a sum of money contrary to the Foreign Exchange Control Act, Statutes of Canada 1946, c. 53. The money was seized and detained by the representatives of the Foreign Exchange Control Board and the plaintiff in this action asks for an order declaring forfeiture to the plaintiff of the sum of money so seized.

*Held:* That when the Attorney General has claimed forfeiture and it is established that the defendant has, in fact, done or omitted to do any of those things enumerated in s. 60(1) of the Act the Court has no power to declare there shall be no forfeiture.

2. That s. 60(1) of the Act, unlike s. 59(1) of the Act, confers no discretion on the Court and the Court cannot declare anything forfeited less than the whole of the property seized and detained.

INFORMATION exhibited by the Attorney General of Canada to have declared forfeited to the Crown money seized and detained by virtue of the provisions of the Foreign Exchange Control Act.

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The action was tried before the Honourable Mr. Justice Cameron at Calgary.

*E. C. Collier and A. J. MacLeod* for plaintiff.

*W. J. C. Kirby* for defendant.

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

CAMERON J. now (November 17, 1949) delivered the following judgment:

This is an information exhibited by the Attorney General of Canada in which it is alleged that the defendant, until December 23, 1947, of Newcastle, Alberta, did on that date attempt to export from Canada at the port of Halifax the sum of \$4,170 Canadian currency, contrary to the provisions of the Foreign Exchange Control Act, ch. 53, Statutes of Canada, 1946. That sum of money was seized and detained by the representatives of the Foreign Exchange Control Board. The plaintiff asks for an order declaring forfeiture of the said sum to the plaintiff, and for costs. The defendant did not appear in person at the trial but was represented by counsel. The only evidence adduced was that of Leonard F. Hayes, Customs Superintendent of the Port of Halifax, and Arthur J. Vaughan, Customs and Excise Officer at Halifax (whose evidence was taken on commission), and that of R. W. Thompson, a member of the staff of the Bank of Montreal at Drumheller, Alberta. No evidence was given on behalf of the defendant but at the conclusion of the plaintiff's case the defendant's counsel admitted that the defendant on December 23, 1947, at the port of Halifax, Nova Scotia, had attempted to export \$4,170 in Canadian currency contrary to the Foreign Exchange Control Act and its regulations, and that he had no permit to export such funds.

Notwithstanding this admission I think it necessary to set out briefly the facts of the case as they are of importance in considering the question of forfeiture which will be dealt with later.

The defendant was born in Hungary in 1894, but for many years had resided in Canada where he was employed as a miner near Drumheller. He had a bank account at



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the Bank of Montreal in that town and the evidence of Mr. R. W. Thompson, an employee of that branch of the bank, is the only evidence before me except that of the Customs Officials who made the seizure at the port of Halifax. Mr. Thompson knew the defendant as a customer of the bank. About September 5, 1947, the defendant attended at the bank and had an interview with Mr. Thompson. He informed him that he intended to leave Canada to reside permanently in Hungary and asked for information as to the steps he would have to take to secure permission to export his funds to that country. He was supplied with Form 107 of the Foreign Exchange Control Board, entitled "Application for Change of Status from Resident to Non-resident for Foreign Exchange Control Purposes." This form he completed and the bank, at his request, forwarded it to the Board for approval. Exhibit 2 is an original copy of that form as completed by the defendant and on the reverse side it shows his assets at a total of \$4,877.04.

The bank was advised by letter of the Board, dated September 17, 1947 (Ex. 3), that his application for change of status had been approved on the basis of the information supplied and that upon his departure from Canada the bank could issue Form H and provide up to \$500 United States funds for in-transit expenses. Within a few days thereafter he was advised by the bank officials that Exhibit 3 had been received and that he could take out \$500 in United States funds and the balance in the form of a Canadian dollar draft. On the evidence of Thompson I must find that he clearly understood these instructions.

Gomori stated to Mr. Thompson that as he was not leaving Canada for a few months he would let the matter stand.

His ledger account with the bank (Ex. 5) shows that he withdrew cash from the bank as follows:

|                   |       |          |
|-------------------|-------|----------|
| November 1, 1947  | ..... | \$500 00 |
| November 7, 1947  | ..... | 600 06   |
| November 14, 1947 | ..... | 500 06   |
| December 5, 1947  | ..... | 500 06   |

About December 11 he returned to the bank and intimated to Mr. Thompson that he was about to leave for Hungary and wished to complete the arrangements

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which he had discussed. At that time his bank balance was \$1,817.72. Form H of the Foreign Exchange Control Board, called "Application for Travel Permit," was prepared by Thompson and signed by Gomori (Ex. 4). As so completed it was an application and authority to take with him out of Canada \$500 in United States funds only and this amount was issued to him in travellers' cheques in United States funds. He was informed by Thompson that the balance of his account could only be taken out of Canada in the form of a Canadian dollar draft and that he could not take out Canadian currency. However, he requested that the balance be given to him in Canadian currency and that was done. He stated to Thompson that none of it would be taken out of Canada and that he intended to give a substantial part of it to a relative in Canada and that he would be spending the balance before he left Canada.

On December 23, 1947, when about to leave Canada at the port of Halifax, the defendant was asked by the witness Hayes (who was accompanied by the witness Vaughan) for his passport and Form H (Ex. 4), which he produced. He was asked to produce any funds that he was carrying and did produce \$500 in United States currency which he was authorized to export. He was asked if he had any other funds in his possession to which he replied, "No." He was then taken to quarters provided for personal search and when his outer clothing had been removed it was found that he had a belt around his waist. Upon request this belt was removed and \$4,170 in Canadian currency was found sewn into the belt. The belt was of flannel and it was apparently specially made so as to conceal the contents of its eight pockets. Most of the money in this belt was in bills of large denominations.

He was asked if he did not know it was illegal to take Canadian funds from Canada without a permit, but made no reply. He was then informed that his Canadian currency would be turned over to the Foreign Exchange Control Board and that any steps he wished to take to recover it should be addressed to that Board. He was then escorted to the ship, taking with him \$500 in United States currency, and he proceeded to Hungary where he

apparently now resides. The witness Hayes states that while Gomori spoke English but poorly he seemed to understand all questions put to him.

The claim for forfeiture of the currency so seized is founded on the provisions of section 60 of the Foreign Exchange Control Act, the relevant part of which is as follows:

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60(1). Any property of any kind which any person exports or attempts to export from Canada . . . contrary to this Act or the regulations . . . may, in addition to any other penalty which may have been imposed on any such person, or to which any person may be subject with relation to such unlawful act or omission, and whether any prosecution in relation thereto has been commenced or not, be seized and detained by any Inspector or Officer and shall be liable to forfeiture at the instance of the Attorney General of Canada upon proceedings in the Exchequer Court of Canada or in any Superior Court, subject, however, to a right of compensation on the part of any innocent person interested in such property . . .

In the Statement of Defence, in addition to asking that the claim be dismissed, the defendant asked in the alternative for an order of this Court that the moneys be returned to the defendant or such proportion thereof as to the Court might seem just. Counsel for the defendant in his argument urged upon me that notwithstanding the admission of a breach of the Act and regulations that the Court had power and a discretion to either (1) deny the claim for forfeiture in toto, or (2) alternatively, to declare a forfeiture of only a portion of the currency so seized and under the circumstances above disclosed should exercise its discretion in favour of the defendant in one or either of these ways. For the plaintiff it is contended that when the Attorney General of Canada has exercised the discretion conferred on him by section 60(1) to initiate proceedings for forfeiture and it has been established to the satisfaction of the Court that the defendant has committed any of the acts enumerated in section 60(1) that the whole of the property so seized and detained must be declared forfeited—subject only to the right of compensation to any innocent person interested in the property, as provided in the section; and, alternatively, that if there is any discretion in the Court to declare a forfeiture of a part only of such property, that such discretion should not here be exercised in favour of the defendant.

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No question arises as to the right of seizure and detention, authority for such being clearly conferred in section 60(1). The important words to be considered are "shall be liable to forfeiture at the instance of the Attorney General of Canada."

I have not been referred to any case in which there has been a judicial determination of the question as to whether the Court has or has not the discretion attributed to it by defendant's counsel. In *Rex v. Mahaffey* (1), a somewhat similar question was raised, but in reaching a conclusion therein I did not find it necessary to determine the point. I assumed—but without deciding—that if the Court had a discretion, the facts in that case did not warrant the exercise of such a discretion in favour of the defendant.

It is submitted that the words "shall be liable to forfeiture" confer upon the Court a discretion to say whether or not forfeiture should be declared. Counsel cites *Rex v. Fraser* (2), in which Campbell, C.J. was considering the provisions of s. 39 of The Fisheries Act, Statutes of Canada, 1932, ch. 42. He came to the conclusion that the phrase "liable . . . on summary conviction to a term not exceeding six months . . . or to a fine of \$100" gave the Magistrate a discretion to impose a fine of less than \$100.

Defendant's counsel cited *James v. Young* (3) which was also referred to in the *Fraser case* (supra). In that case it was found that a clause, "shall be liable to be forfeited", did not result in an immediate forfeiture upon breach of one of the conditions, but only upon the Crown claiming the forfeiture. That case, in my opinion, is not helpful to the defendant here as the plaintiff does not suggest that forfeiture took place upon the seizure of the currency and the Attorney General has, in fact, by proceedings in this Court, claimed the forfeiture.

The case of *re Loftus-Otway* (4) was also cited. The Court there was considering the interpretation of an expression in a will "whereby either directly or by

(1) (1948) 92 C.C.C. 269.

(2) (1944) 2 D.L.R. 461.

(3) (1884) 27 Ch. D. 652.

(4) (1895) 2 Ch. 235.

operation of law he would be deprived or be liable to be deprived of the beneficial enjoyment." In that case Stirling, J. said at p. 240:

There is a contrast between being deprived and being liable to be deprived . . . I think that those earlier words, "whereby or in consequence whereof, either directly or by operation of law, he would be deprived," apply to acts . . . the necessary consequence of which is a deprivation of the beneficial enjoyment. It seems to me that the latter words must be read as including acts which . . . would leave it with a Court of justice to say whether or not he is to be deprived. In this sense the act of bankruptcy . . . was an act which rendered him liable (no doubt in the discretion of the Court) to be deprived of the beneficial enjoyment of the income. The liability existed, although the Court did not see fit to enforce it.

I have considered most carefully the submissions made by defendant's counsel and all the cases cited by him in support thereof. I have scrutinized the provisions of section 60(1) to ascertain whether its language would permit of the interpretation put forward. But somewhat to my regret I have reached the conclusion that his argument must be rejected.

Dealing with the first submission I think it is manifest that when the Attorney General has claimed forfeiture and it is established by evidence (or by admissions made by or on behalf of the defendant), that the defendant has, in fact, done or omitted to do any of those things enumerated in the section, that the Court has no power to declare that there shall be no forfeiture. In my opinion it is the duty of the Court when satisfied of a breach of the statute or regulation, and where the Act confers no authority to do otherwise, to apply the penalty, punishment or sanction provided for in the statute and in this case the only sanction provided under this section is that of forfeiture of the property seized and detained. There is, however, a discretion vested in the Attorney General of Canada inasmuch as the property seized and detained under this section does not become liable to forfeiture unless and until condemnation proceedings are taken by him in one of the Courts enumerated. In the instant case, therefore, the offence having been proven—and later admitted—I must apply the sanction provided for, namely, forfeiture.

But, as I have intimated, it is further contended that the Court has power to declare but a partial forfeiture

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and should do so in this case. It is submitted that under the circumstances disclosed the whole of the property seized should not be condemned as forfeited, but only such part thereof as the Court might determine to be in the nature of a fair penalty considering the nature and circumstances of the offence. I may say at once that were I able to reach the conclusion that the Court had such a power I would not hesitate to use it for reasons which will appear later.

It is pointed out that under section 59(1) of the Act, which provides for *prosecutions* for offences relating to property, and provides for the penalties to be applied, that a wide discretion is given to the Court hearing those charges. Under that section, on summary conviction the Court may levy a fine not exceeding double the value of the property, or may impose imprisonment for a term not exceeding twelve months, or both fine and imprisonment. Where proceedings are taken by indictment the penalty may be a fine not exceeding double the value of the property, or imprisonment not exceeding five years, or both fine and imprisonment. Undoubtedly, under that section the Court has a wide discretion as to the fine or imprisonment to be imposed, the limits being carefully defined.

Section 60(1), on which this claim for forfeiture is based, contains no provision comparable to that in section 59(1). It provides merely that the property seized and detained shall be liable to forfeiture. I think it is proper to infer that when Parliament in passing this Act provided in very clear language in one section for a discretionary power as to the amount of the fine and the term of imprisonment to be imposed, and in the section immediately following used no words which even suggest a similar discretion as to what part of the property seized should be forfeited, that it did not intend to confer any discretion on the Court to declare anything forfeited less than the whole of the property so seized and detained.

Section 61 deals specifically with the offences involving currency and negotiable instruments of a value not over \$100 and provides a summary procedure for seizure and forfeiture. Under that section the Board decides "whether the seized currency or negotiable instrument is forfeited"

(s. 60(4)), and under section 62(4), if the matter is referred by the Board to the Court, the Court is to "acquit or condemn the currency or negotiable instrument." I am unable to find anything in these two sections which gives either the Board or Court power to acquit or condemn part only of what has been seized and detained.

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It must be kept in mind that section 60 has to do with "any property of any kind" and is not confined to currency. For example, the thing seized might be a large and valuable piece of machinery. In such a case it is obvious that the Court would have no power to declare a partial forfeiture of such property. In the absence of language which clearly confers upon the Court a power to declare a partial forfeiture, it must be found that no such power is given to the Court.

In enacting the Foreign Exchange Control Act, Parliament has provided for punishment of offences in two ways. The first is by prosecution where wide latitude is given to the Court in fixing the penalties. The second is directed specifically against the property involved in the offence rather than the person committing the offence. Proceedings may be taken under one or other of these two ways, or under both, but in my view "forfeiture" as used here means forfeiture of the whole of the property seized and detained. I have not been referred to any case in which it was found that the word "forfeiture" meant anything else than the forfeiture of the whole nor have I been able to find any such case.

I have therefore reached the conclusion that under the existing legislation I must find that the whole of the currency so seized and detained is forfeited to the plaintiff and I so declare. The plaintiff is also entitled to judgment against the defendant for his costs after taxation.

I cannot leave the matter, however, without indicating my opinion that this appears to be a case in which the Board might favourably consider an application for remission of a substantial portion of the amount so forfeited. As I have pointed out the defendant could have taken out all his declared assets by using a Canadian draft. No explanation is given as to why he deliberately chose to evade the Act and its regulations. He may have been badly advised by someone as to the value of the Canadian draft in

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Hungary and quite apparently he thought that the Canadian currency would be of greater value to him there than would a Canadian draft. If his declaration of assets is true, then by a single breach of the Act his entire Canadian savings may have been lost to him. That constitutes a very heavy penalty and in my view consideration might well be given to the matter of relieving him from a substantial part of such a drastic penalty.

*Judgment accordingly.*

BRITISH COLUMBIA ADMIRALTY DISTRICT

1950  
Jan. 5, 6  
& 7  
Jan. 12

BETWEEN :

SHERMAN ET AL.....PLAINTIFFS;

AND

THE SHIP *GOOD HOPE II*.....DEFENDANT.

*Shipping—Collision—Both vessels to blame—Damages.*

In an action for damages brought by the plaintiffs for the sinking and total loss of their ship as a result of a collision with defendant vessel the Court found both ships negligent.

*Held:* That defendant vessel being three-quarters to blame and plaintiffs' ship one-quarter to blame judgment would go accordingly.

ACTION for damages for loss of plaintiffs' vessel.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty, at Vancouver.

*W. S. Owen, K.C.* and *J. I. Bird* for plaintiffs.

*Roy W. Ginn* for defendant ship.

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

SIDNEY SMITH, D.J.A. now (January 12, 1950) delivered the following judgment:

This is a suit for damages brought by the plaintiffs for the sinking and total loss of their ship *Paul D* following upon collision with the defendant vessel *Good Hope II*. The area of controversy is not large due in great measure to the commendable frankness with which the master and owner of the *Good Hope II* gave his evidence.



The *Paul D* is a fishing vessel, 20 gross tonnage, 40 feet in length, of a speed of 9 knots, and at the material time was trolling for salmon, at a speed of 1½ to 2 knots, with a crew of two, viz., the plaintiff Paul Sherman (Master and joint owner) and a deckhand named Robinson.

The *Good Hope II* is also a fishing vessel of 21 tons gross, 44 feet long, having a speed of 10 knots, and at the time of the collision was proceeding from one fishing ground to another, with all her nets on board. I find her speed then was 6 knots through the water. Due to a favourable tide her over-the-ground speed may have been somewhat more, but not to any significant extent.

The collision occurred at about 10 a.m. (summer time) on the 11th July, 1949, at the entrance to Juan de Fuca Strait, about 5 miles E.S.E. of Pachena Point. The wind was negligible, there was some westerly swell, and the weather was foggy. The vessels were on crossing courses, that of the *Good Hope II* being west, magnetic, and that of the *Paul D* being N.E. magnetic.

There was a conflict on the visibility. The master of the *Paul D* gave it as 1200 feet. The master of the *Good Hope II* at 150 feet. These figures were necessarily merely estimates, but on the evidence I find that that of the master of the *Good Hope II* (very much the more experienced mariner) was the more correct of the two. On a careful re-consideration of the evidence as a whole, I think the visibility was not more than 500 or 600 feet. An independent witness, master of another fishing vessel, the *Cape Norman* lying at a distance of six miles to the eastward, and who had discontinued fishing operations on account of the fog, stated the visibility in his position as being 150 feet. At the material times the lighthouse keeper at Pachena Point, five miles to the westward, reported "dense fog" and the lighthouse keeper of Carmanah Point, ten miles to the eastward, reported "fog". In this finding I have not overlooked the photographs taken later while the *Paul D* was under tow, but these have to be considered with caution, and do not over-weigh the other evidence.

I have no doubt that the fog was such as to call for strict observance of the Articles requiring sound signals to be given in fog. But these requirements were ignored by

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both. In like manner the elementary seamanlike precaution of keeping a lookout received scant attention from either vessel. The master of the *Paul D* was engaged in his cockpit attending to his fishing lines; his deckhand was engaged in the galley wheelhouse cleaning fishing spoons, having no order to keep a lookout and keeping none. The master of the *Good Hope II* was indeed in his wheelhouse, but at the critical time was looking up data on his charts: his two deckhands were busy mending nets in the cockpit. Fishing vessels have no special dispensation to disregard the rules. They must obey them like all other vessels or take the consequences.

Both vessels were being steered by automatic steering devices. These serve a useful purpose but they may impart a false feeling of confidence and may lessen the vigilance of the look-out. This is all the more true in small vessels and I am satisfied that they did so in the present case.

From first to last the *Good Hope II* was neglectful of her navigation. She was proceeding in fog at too great a speed: she failed to sound any fog signals; she failed to keep a proper look-out: the first thing she knew of the *Paul D* was when her stem was on the point of colliding with the *Paul D*'s starboard quarter. The *Good Hope II* cannot escape liability.

But neither can the *Paul D*. The case for her was that her master, engaged with his fishing operations in the cockpit, saw plainly the *Good Hope II* proceeding towards him on a bearing of 4 points on his starboard bow and at a speed of 8 knots or better; that had she continued her course she would have passed ahead of him, but that she swerved first to starboard, then to port; that this made him apprehensive and that he dashed into the wheelhouse, sounded his whistle (not heard by the *Good Hope II*) then shouted, but that collision was then inevitable; that he then put his engines at full speed and starboarded in an effort to make the impact less direct and more of a glancing blow and that the angle of collision was about 45°.

The two masters were agreed on there being a practice in this fishing fleet, fishing there, for the unencumbered vessel to give way to another vessel actually fishing. For the present case I accept this without comment, and with-

out passing on its validity, since the master of *Good Hope II* said that had he seen the *Paul D* sooner he would have known at once that she was engaged in fishing and would have avoided her. But here fog conditions prevailed and Article 16 was the controlling Article.

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—

I have already dealt with the questions of speed and visibility. I do not accept the plaintiff master's version of the "verging" of the *Good Hope's* course. I think what he saw was no more than usual minor alteration due to the scend of the swell. He said 2 minutes elapsed between his sighting the *Good Hope II* and the collision, of which he spent 1 minute in the cock-pit and the other in the wheelhouse. I think these periods should be much shortened, probably by one half, if not more.

I am not prepared to hold that the whistle he gave was such as could have been heard by the *Good Hope II*. Only a few seconds elapsed between the alleged whistle and the shout. The *Good Hope II* heard the latter, but not the former. It is incredible that she should not have heard it had it been of proper volume; and her master gave such candid evidence that I accept his denial in this respect. It is moreover not without significance that in his preliminary act the master of the *Paul D* stated that at a distance of 150 yards the *Paul D* blew her whistle continuously. In the light of his evidence at the trial this was simply untrue. I think he failed in his duty by not sounding fog signals and thus intimating his presence to other vessels in the vicinity; and by not keeping a proper look-out. Had this look-out been kept, he would have been in a better position to appreciate the danger and take evasive action to avert the collision; for, even relying on the practice, he should still have taken proper care that the *Good Hope II* saw him and was keeping clear; as it was he took no action and only whistled and shouted when all was too late. However, he was going very slowly which reduced the hazard to other vessels.

In my judgment the *Good Hope II* must be held  $\frac{3}{4}$  to blame and the *Paul D*  $\frac{1}{4}$  to blame. There will be judgment accordingly with corresponding costs. There will be a reference to the Registrar to assess the damages.

*Judgment accordingly.*

1948  
 July 6, 7  
 Sept. 27

## BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

M.R. CLIFF TUGBOAT CO. LIMITED..PLAINTIFF;

AND

THE M.S. ISLAND MAIL.....DEFENDANT.

*Shipping—Collision in dense fog—Both ships equally to blame—Reasonable steps taken to lessen the loss—Plaintiff entitled to an accounting.*

In an action arising out of a collision between the motor ship *Island Mail* and a boom of logs in tow of the tug *Brunette* the Court found both vessels equally to blame.

*Held:* That the steps taken by the tug after the collision to retrieve the logs being reasonable in the circumstances the plaintiff is entitled to an accounting for the loss sustained by it.

ACTION by plaintiff to recover damages alleged to have been suffered by it as the result of a collision at the entrance to Vancouver Harbour between defendant vessel and a tug owned by plaintiff.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

*Walter Owen, K.C.* and *Evans Wasson* for plaintiff.

*D. S. Montgomery* and *Vernon R. Hill* for defendant ship.

The facts are stated in the reasons for judgment.

SIDNEY SMITH, D.J.A., now (September 27, 1948) delivered the following judgment:

At the trial Counsel asked leave to submit argument in writing. This was granted. Such argument has now been filed.

The case involves a collision in dense fog at the entrance to Vancouver Harbour, Northward and somewhat to the Eastward of Brockton Point, between the Motor-Ship *Island Mail* (of some 15,000 tons displacement) inward bound and a boom of logs in tow of the Tug *Brunette*, also inward bound and being overtaken by the *Island*

*Mail*. I accept the evidence of Captain A. J. Gilbert (the local Pilot of the *Island Mail*) and Captain Frank Calhoun (the Master of the *Brunette*) with respect to the events that happened as observed by them from their respective ships.

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*Island Mail*

I think the *Island Mail* must be held at fault for not immediately going astern on sighting the boom. She had lost steerage way and was proceeding at slow, making very little headway at the time. She stopped her engines but failed to go astern until three minutes later. Had she done so at once I think the damage would have been negligible.

Sidney  
 Smith  
 D J.A.

In my view the *Brunette* was also at fault, in that she unjustifiably, in the prevailing conditions, altered her course in fog. The fog bank lay heavily in Vancouver Harbour, but the greater part of the First Narrows to the Westward was clear. The *Brunette* entering the fog bank but looking astern into clear weather, saw the *Island Mail* about Prospect Point, later heard her fog signals and knew she was coming up astern and overtaking the *Brunette*. The *Island Mail*, looking ahead into the fogbank, did not see the *Brunette*, or her tow, although she later heard her towing whistles. When past Brockton Point the *Brunette* altered her course 28° to port, and made for her destination at Moodyville on the North shore. This was an alteration which brought the boom across the bow of the *Island Mail* and thus increased the danger to the *Island Mail*, and in the circumstances was wrongful. But for this action there would, in my opinion, have been no collision. I therefore find both vessels equally to blame.

I am not disposed to be critical of the manœuvres taken by the *Brunette*, after the collision, to retrieve the logs. I think the steps she took to that end were reasonable in the circumstances and at that time of anxiety. She is entitled to an accounting under the headings set out in para. 8 of her statement of claim. Unless the parties can agree on the amount, there will be a reference to the Registrar to assess damages.

Costs of each party to be taxed, the total amount to be borne equally.

*Judgment accordingly.*

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BETWEEN :

Sept. 13, 14  
Dec. 30

CHARLES McCARROLL SMITH  
and PHYLLIS G. RUDD, two of the  
successors under and by virtue of the  
will of MARY C. CATHERINE  
FISHER, deceased.....

APPELLANTS;

AND

THE MINISTER OF NATIONAL  
REVENUE .....

RESPONDENT.

*Revenue—Succession Duty—Dominion Succession Duty Act, Statutes of Canada 1940-41, ss. 3, 4 and 58, Regulation 19—Valuation of interest in estate—“Life estate”—“Income or other estate”—Method of valuing an “annuity, term of years, life estate, income or other estate” in respect of which duty is payable—Appeal dismissed.*

The appeal is brought by the beneficiaries of the estate of Mary Catherine Fisher, a daughter of the late Charles Woodward. By the terms of Charles Woodward’s will, Mary Catherine Fisher became entitled absolutely to a share of the income arising from certain real estate belonging to him. The appeal is concerned with the valuation placed by the respondent on the interest of the deceased Mary Catherine Fisher in that real estate. Appellants contend that this interest should be assessed at its fair market value.

*Held:* That Mary Catherine Fisher had acquired a “life estate” or an “income or other estate” which was within the terms of s. 34 of the Dominion Succession Duty Act, Statutes of Canada 1940-41, c. 34, and must be valued accordingly.

APPEAL under the Dominion Succession Duty Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Vancouver.

*John Robinson, K.C.* and *H. R. Barclay* for appellants.

*F. A. Sheppard, K.C., A. J. MacLeod* and *D. K. Petapiece* for respondent.

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

CAMERON J. now (December 30, 1949) delivered the following judgment:

This appeal is from an assessment made by the respondent under the provisions of *The Dominion Succession Duty Act, 1941*, as amended. The appellants are respectively the

nephew and niece of the late Mary Catherine Fisher who died at Vancouver on October 23, 1943, and probate of whose last will and testament and a codicil thereto was duly granted to Cora Lillie Smith, the executrix therein named, who is also the mother of the appellants. The appeal is taken in regard to one matter only, namely, the valuation placed by the respondent on the interest of the deceased in one-third of the income arising from the Vancouver real estate of Charles Woodward, deceased, father of the said Mary Catherine Fisher.

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Charles Woodward, a merchant of Vancouver, under date of December 21, 1922, leased to Woodward's Limited, Lot 16 in Block 4, Old Granville Townsite, being the northwest corner of Hastings and Abbott streets in the city of Vancouver, on which is situated a five-storey building forming a portion of a very large departmental store (known as Woodward's Stores) for the term of sixty-five years, at an annual rental of \$30,000, plus taxes. In order to further secure the payment of the said rentals, he obtained from Woodward's Limited a mortgage dated April 17, 1924, in his favour, covering an adjoining Lot 15 and the easterly 20 feet of Lot 14 (on which the main part of the departmental store is constructed) in the sum of \$150,000. Under date of June 17, 1930, he obtained a further mortgage over the same property for an additional sum of \$150,000, making added security in all of \$300,000.

Charles Woodward died on June 2, 1937, Exhibit 2 is a copy of his last will and testament and a second codicil thereto duly admitted to probate. He directed his trustees to hold the income from the above-mentioned Vancouver real estate for his two daughters and the daughter of a deceased daughter, in equal shares, and (except for special directions applicable to the income arising therefrom during the first three years after his death) provided that his trustees *should distribute the whole of such income* annually during the lifetime of the last survivor of five persons, namely, his two daughters, (Mrs. Smith and Mrs. Fisher), his granddaughter (Mrs. MacLaren, a daughter of a deceased daughter) and the appellants herein, in equal shares between his two daughters and the said Mrs. MacLaren. Provision was also made that if either of his

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daughters or Mrs. MacLaren should predecease him leaving children, the children of such deceased person should take the share of the mother and if more than one equally between them. Mrs. Fisher survived her father and became entitled to one-third of the income from his Vancouver real estate. On application made, it has been held by Mr. Justice Coady that the gift to Mrs. Fisher of the share of the income from the Vancouver real estate vested in her on the death of her father and did not become divested upon her death. The executrix of the will of Mrs. Fisher is therefore entitled to receive Mrs. Fisher's share in that income until the death of the last of the present four survivors of the group named in the will of Charles Woodward.

The appellants under the will of the said Mary Catherine Fisher are each entitled to the income for life from one-half the residue of Mrs. Fisher's estate, of which residue her interest in the Charles Woodward Estate forms a part.

In assessing the estate of the late Mrs. Fisher in regard to this asset, the respondent proceeded under the provisions of section 34 of the Dominion Succession Duty Act and the applicable regulation made under section 58(2) (c) of the Act, all of which are as follows:

34. The value of every annuity, term of years, life estate, income, or other estate, and of every interest in expectancy in respect of the succession to which duty is payable under this Act shall for the purposes of this Act be determined by such rule, method and standard of mortality and of value, and at such rate of interest as from time to time the Minister may decide.

58. (2) The Minister may make any regulations deemed necessary for carrying this Act into effect, and in particular may make regulations:—

- (c) prescribing what rule, method and standard of mortality and of value, and what rate of interest shall be used in determining the value of annuities, terms of years, life estates, income, and interests in expectancy.

Regulation 19—as amended, and as published in the *Canada Gazette* November 8, 1941, and as in effect at the death of Mrs. Fisher:

19(1) The value of every annuity, term of years, life estate, income, or other estate, and of every interest in expectancy, shall be determined,—

- (i) if the succession does not depend on life contingencies on the basis of compound interest at the rate of four per centum per annum with annual rests, and
- (ii) if the succession depends on life contingencies, on the basis of interest as aforesaid, together with the standard of mortality as defined in Table II below,



and Tables I, III and IV, below, which are derived from the bases aforesaid, shall be used so far as they may be applicable in the valuation of any succession.

(2) The amount of the duty payable in respect of any succession coming within the terms of section 7(3) (a) (ii) shall be determined in accordance with Table V below.

As indicated in para. 8 of the Statement of Defence, the respondent determined that under the will of Charles Woodward the estate of Mrs. Fisher was entitled to receive annually the sum of \$10,000 until the death of the last survivor of Charles McCarroll Smith, Phyllis G. Rudd, Mrs. Cora Lillie Smith and Mrs. Eleanor MacLaren who, at the time of Mrs. Fisher's death were, respectively, 30, 33, 57 and 36 years of age, and that the value of that interest on the date of Mrs. Fisher's death, in accordance with the Tables referred to in Regulation 19 and at a rate of 4 per cent, was \$213,667.

The appellants do not dispute the accuracy of the computation so made by the respondent but they say that the respondent has proceeded on entirely wrong principles. They allege that it was the duty of the respondent to assess the value of this interest at its fair market value and that the interest here in question does not come within the provisions of section 34 (*supra*). The appellants take the position that the Fisher Estate is entitled to receive a one-third share in the net income from the Vancouver realty and not an income or annuity of \$10,000 per year. They submit that the proper valuation to be placed on that asset is what it would realize at a sale; that by para. 4 of the will of Mrs. Fisher this asset was given to her trustee upon trust to sell the same (para. 8 of the will, however, gives the trustee power and discretion to postpone the sale of any part of her estate and to retain the same as an investment thereof without responsibility for any loss occasioned thereby,) and that, therefore, it would be the duty of her trustee to sell the asset within a reasonable period after the death of Mrs. Fisher; and that an intending purchaser (after giving consideration to all the factors involved, such as the uncertainty of the period during which the income would be paid, the possibility of depreciation in value of the leasehold property, the possible failure of the lessee thereof, or of the lease being surrendered and the consequent necessity of having to convert the realty into a self-con-

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tained store, and the incidence of income tax) would not pay more than \$55,000 for the asset as a whole, and that that sum—alleged to be the fair market value of the assets—should be the valuation established by the respondent.

The respondent, however, considered that under all the circumstances of the case the asset to be valued was not an interest in realty, but, in fact, a bequest of the sum of \$10,000 annually, terminable only upon the death of the last survivor of the four-named persons.

I am of the opinion that his conclusion was right. An examination of the will and codicil of Charles Woodward indicates that apart from other minor bequests which are not here of importance, he desired to provide a fixed income of that amount for his three daughters (later substituting a granddaughter, Mrs. MacLaren, for her mother who had died after the execution of the will). As the will points out, earlier provision had been made for the testator's sons who received no further benefits under the will and codicil. His daughters and their children were therefore his main concern. At the time he executed his will he was the owner of valuable realty which had been leased for a term of sixty-five years at an annual rental of \$30,000, and taxes. The lessee was a very wealthy corporation whose covenants could be relied on as an adequate guarantee of the payment of the rental and the due performance of the other covenants contained in the lease throughout its full term. In addition, the lease required the lessee to ensure the property in the name of the lessor in the sum of \$100,000, to keep the building in repair (except for ordinary wear and tear and damage by fire, lightning and tempest), and, at the end of the term, to return the property to the lessor with a building thereon worth not less than \$125,000, in a state of good repair. There was no provision that the rent would cease or abate in the event of damage by fire. Steps had been taken to collaterally secure the payment of the annual rentals by the two mortgages I have above referred to, totalling \$300,000, and being first charges on property worth many times that sum. The value of the land and buildings so leased was approximately \$500,000.

While during his lifetime he had agreed with the lessees that the rental during his lifetime should be reduced to

\$15,000 per annum (the reason for which is not apparent), he was careful to provide that upon his death the full annual rental of \$30,000 would be paid thereafter, and by his will directed his trustees to hold his real estate in trust and to sell it only upon the death of the survivor of the five-named individuals—his daughters and their issue—and that in the meantime *the whole* of the income arising therefrom should be divided equally between his two daughters and the daughter of a deceased daughter. At the time of Mrs. Fisher's death this well-secured lease would continue to run for approximately forty-four years, and upon the expiry thereof if the lessee's covenants had been duly carried out, and even if the same lease were not renewed, the property would be of very considerable value and return a substantial income. Insofar as it was possible for him to do so, Mr. Woodward would seem to have taken every possible precaution to provide for the full annual payment of \$10,000 to his daughter Mrs. Fisher (and to her executrix following her death) so long as one of the five-named individuals survived. I am of the opinion, therefore, that when the annual income was so fixed and determined and so well secured by the lease and additional securities, that it should be considered as a gift of that sum of money, payable annually and terminable only upon the death of the last survivor of the five-named persons. The same conclusion was reached by McFarlane, J. in considering the same question under the provisions of the Succession Duty Act of the Province of British Columbia: *in re Succession Duty Act and in re Fisher Estate* (1).

It is submitted, also, by the appellants that the asset to be valid is not one of those referred to in section 34 of the Act (*supra*), and specifically that it is not an annuity. In my opinion, it is sufficient to say that that which the Fisher Estate is entitled to under the will and codicil of the late Charles Woodward is the right to receive one-third of the total annual income from the Vancouver realty until the death of the last survivor of the five-named parties. That being so, that right may be properly described as a "life estate", or "an income or other estate", and so come within the ambit of section 34. It is unnecessary, therefore, to determine whether it is, in fact, an annuity.

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Pursuant to the powers contained in section 58 to make regulations in regard to such valuations, Regulation 19 (*supra*) was made by the respondent and was in effect at the time of Mrs. Fisher's death. The valuation made by the respondent under the Tables referred to in Regulation 19 was, therefore, made with statutory authority and it is not suggested that there was any error in such computation.

Counsel for the appellants also pointed out that by establishing a valuation of \$213,667 on the one-third interest in the income arising from the Vancouver realty, it would follow that the total value of such income would substantially exceed the highest value placed by any of the witnesses on the land and buildings as of the date of Mrs. Fisher's death—namely, about \$500,000. That is so, but the apparent absurdity disappears completely when it is kept in mind that it is not the value of the realty which is the subject of such assessment, but the income therefrom over a long period of years (estimated, I think, at a total of forty-nine years), adequately guaranteed and secured by the collateral mortgages of \$300,000 and the value of the covenant of the lessee to pay the rent and of the other special terms of the lease to which I have referred.

For the reasons which I have stated, the assessment is affirmed and the appeal will be dismissed. The appellants will pay the costs of the respondent after taxation.

*Judgment accordingly.*

BETWEEN:

1949  
Dec. 12,  
14 & 16

WILLIAM KEPPIE MURRAY,.....APPELLANT;

AND

1950  
Jan. 14

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

*Revenue—Income War Tax Act, R.S.C. 1927, c. 97, ss. 6(1) (a), 47, 92(3)—  
Deductions—Onus on appellant to prove expenses claimed as deductible—Failure of appellant to show that deductions claimed had been  
“wholly, exclusively and necessarily laid out or expended to earn  
the income”—Appeal dismissed.*

Appellant, a securities salesman, was paid by his employer on a commission basis solely, no allowance being made to him for expenses incurred in the course of his employment. In his income tax return for the taxation year 1945 appellant deducted certain items of expense incurred by him. Respondent, in the absence of vouchers or receipts to establish that the amounts had been expended, disallowed part of the deduction so claimed on the ground that they had not been shown to have been wholly, exclusively and necessarily laid out or expended for the purpose of earning the income within the meaning of s. 6(1) (a) of the Income War Tax Act, and assessed appellant accordingly. Appellant appealed to this Court.

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*Held:* That the onus is on the appellant to show by acceptable evidence that he did expend the sums he claims as deductions and since appellant has not satisfied that onus the appeal is dismissed.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

*E. H. Dewart* for appellant.

*R. I. Ferguson, K.C.* and *R. S. W. Fordham, K.C.* for respondent.

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

CAMERON J. now (January 14, 1950) delivered the following judgment:

This is an appeal from an assessment to Income Tax dated March 19, 1948, for the taxation year 1945. The appellant in that year was a salesman of securities on the staff of C. C. Fields and Co. (stockbrokers of Toronto) and was paid entirely by commission on sales, no allowance being made to him for his expenses. In his return he claimed as deductions the following items of expenses:—

|                             |            |
|-----------------------------|------------|
| Railway Fares .....         | \$ 294.76  |
| Telephones, Telegrams ..... | 345.76     |
| Hotels and meals .....      | 1,415.25   |
| Automobile .....            | 442.04     |
| Taxis .....                 | 275.00     |
|                             | <hr/>      |
| Total .....                 | \$2,772.81 |

In the absence of any vouchers or receipts which would establish that such amounts had actually been expended by the appellant, the respondent reduced such expenses to

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\$1,500 and assessed the appellant accordingly. Pursuant to the provisions of section 92(3) of the Income War Tax Act, the respondent had requested the appellant's employer to furnish information as to the conditions of his employment, and, in compliance therewith, the employer had supplied the information now contained in Exhibit A, which *inter alia* indicated that in the year 1945 the appellant had been working in his home territory at Toronto for 38 weeks and away from his home territory 14 weeks. An appeal was taken and the respondent by his decision affirmed the assessment on the ground that the deductions claimed had not been shown to have been wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, within the meaning of section 6(1) (a) of the Act. Notice of dissatisfaction followed and by his Reply, the respondent affirmed the assessment. By order of this Court pleadings were delivered.

All of the items claimed were of such a nature that, if proven to have been disbursed, they would have been allowed as proper deductions from the appellant's income. His income was earned by commissions on sales made by him to his own clients, some of whom resided in Toronto, but the majority of them resided elsewhere in Ontario. To contact them and effect sales it was necessary for him to leave Toronto, to expend moneys for railway fares, taxis, hotels and meals, telephones and telegrams and for the operation of his motor car.

In this appeal, the onus is on the appellant to show by acceptable evidence that he did so expend the sums which he claims as deductions. He kept no books of account, vouchers, records or receipts of any sort, and, admittedly, his evidence is based solely on his recollection of trips taken and expenses incurred. He frankly admits that in every case the amount is an estimate only.

The evidence submitted I think may be divided into two portions. The only evidence as to the amounts disbursed by the appellant is that supplied by the appellant himself, and as I have said, it is in each case an estimate only. As to the railway fares, he states that he made several trips to Windsor, North Bay and Montreal and to one or two other places and that the cost of these trips amounted to \$327. He stated that he actually expended on this item

at least the sum of \$294.76 as claimed. His claim for telegrams and telephones is based on an estimated weekly average of \$7. Again he says that he did expend the amount claimed—\$345.76—and may have spent more. As to hotels and meals, he states that he was away from home approximately 240 days in 1945, and the average cost per day for accommodation and food was \$6. His claim is for \$1,415.25. He states that he used his own motor car for business purposes, a total of ten thousand miles and that a charge of 4½c per mile is reasonable. His claim for that item is \$442.04. He gave no details as to the times when any of such trips were made or the distances travelled. He estimated his expenses for taxis at \$275, stating that when he did not have his own motor car he employed taxis to take him to interview his clients.

However, there is other evidence as to the number of days he was absent from his Toronto office on business. Alexander Davidson, who was in charge of the stock position book at C. C. Fields in 1945, left that firm in February, 1946, and has since been in the employ of the appellant. His duties were in the main office of that firm, which office was located some distance from that occupied by the appellant, although on the same floor. It was no part of his duty to know where the appellant was at any given time and the books in his charge contained no record of the appellant's movements. He says that the appellant told him where he had been or where he was going and that he would estimate that throughout the year the appellant averaged 4 days per week out of Toronto. This witness admitted that it was the duty of Lugsden—the office manager of C. C. Fields & Co.—to know where the appellant was engaged at all times.

Miss Jessie E. Vawter was employed as a stenographer by C. C. Fields & Co. from March, 1945, to the end of that year. She occupied a part of the appellant's office and did such office work as he required her to do. No records were kept as to the appellant's movements but she also estimated that he was out of his office on an average of 4 days each week. The appellant informed her from time to time where he was to be so that she should contact him if necessary.

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Mr. R. W. Lugsden—office manager of C. C. Fields & Co.—gave evidence on behalf of the respondent. He was employed by that firm throughout the whole year 1945 and stated that he had a duty to know where the appellant was from time to time. He had charge of recording the sales made by the salesmen of the firm, including those made by the appellant. He stated that from his personal observations and from statements made to him by the appellant, the appellant in 1945 spent 38 weeks in the office in Toronto and was absent on business out of Toronto 14 weeks only. He pointed out that under normal circumstances salesmen did not work on Saturday or Sunday in any week unless possibly on occasions when they were away on a long trip. It was part of the duty of the appellant to know the position of the market from day to day so as to be able to advise his clients as to sales and purchases, and for that reason he would have to spend a considerable part of his time in Toronto, but no office record was kept of the days when the appellant was out of town. This witness stated that the appellant would advise him when he intended to leave Toronto in order that he, the witness, might be able to look after any business that arose on behalf of the appellant during his absence. In cross-examination he admitted that he had no control over the movements of the salesmen, that they could come and go as they pleased, and that it was possible for the appellant to have left Toronto from time to time for a few hours or even a day without his knowledge. As I have said, this witness depended entirely upon his recollection as to the movements of the appellant, but is quite positive that it was impossible for the appellant to have been away from the office a total of 240 days in that year. He was convinced that his own estimate of 14 weeks was as accurate as possible.

In assessing the appellant the respondent acted under the provisions of section 47 of the Act and notwithstanding the return filed by the appellant, determined the amount of the tax to be paid by him.

In *Dezura v. Minister of National Revenue* (1), the President of this Court considered the nature of an assess-

(1) (1948) Ex. C.R. 10.



ment made under section 47 and the onus resting on an appellant therefrom. At p. 15 he said:—

The result is that when the Minister, acting under sec. 47, has determined the amount of the tax to be paid by any person, the amount so determined is subject to review by the Court under its appellate jurisdiction. If on the hearing of the appeal the Court finds that the amount determined by the Minister is incorrect in fact the appeal must be allowed to the extent of the error. But if the Court is not satisfied on the evidence that there has been error in the amount then the appeal must be dismissed, in which case the assessments stand as the fixation of the amount of the taxpayer's liability. The onus of proof of error in the amount of the determination rests on the appellant.

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Ordinarily, the taxpayer knows better than any one else the amount of his taxable income and should be able to prove it to the satisfaction of the Court. If he does so and it is less than the amount determined by the Minister, then such amount must be reduced in accordance with the finding of the Court. If, on the other hand, he fails to show that the amount determined by the Minister is erroneous, he cannot justly complain if the amount stands. If his failure to satisfy the Court is due to his own fault or neglect such as his failure to keep proper accounts or records with which to support his own statements, he has no one to blame but himself.

In *Johnston v. Minister of National Revenue* (1), the question of the onus resting on an appellant from an assessment under the Income War Tax Act was under consideration. At p. 489, Rand J., said:—

Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.

After giving full consideration to the evidence, I have reached the conclusion that the appellant herein has not satisfied the onus resting on him "to demolish the basic fact on which the taxation rested" namely, that the deductible expenses incurred in connection with his business operations, did not exceed \$1,500.

(1) (1948) S.C.R. 486.

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The evidence of Mr. Davidson and Miss Vawter is not of sufficient probative effect to assist the appellant's own statement. Their evidence in the main was based on the fact that he himself had told them he was leaving Toronto on business, and of course neither would have had any personal or accurate knowledge as to where he had gone, or for what length of time he had been out of town on business. Miss Vawter's statement was that she estimated that he was *out of the office* an average of 4 days each week, but she did not say that he was engaged on business *out of Toronto* for that length of time.

On the other hand I see no reason for rejecting the evidence of Mr. Lugsden whose duty it was—as office manager—to know when the appellant was out of town and to see that matters arising in his absence were taken care of. His evidence was precise—perhaps somewhat too precise—based as it was on his recollection and personal observations only, but it was sufficient in my opinion, to establish beyond doubt that the appellant had greatly exaggerated the facts in stating that he was absent on business from Toronto for 240 days. Excluding Saturdays, Sundays and holidays it would have meant that he was away from Toronto practically the entire time. I cannot overlook the fact that in making his claim for deductions he stated the amounts in each case (but one) at an exact number of dollars and cents, as though his computations were based on accurate records. I think he must have done so in the belief that they would thereby be more readily acceptable as completely accurate.

While it may not have been necessary to produce vouchers and records for the disbursements so claimed, the appellant must have known that he would be required to establish his claim by evidence reasonably acceptable to the assessor. Considering the relatively large amounts involved, he should and could have kept vouchers, receipts or records to prove his case. Having failed to do so and having failed to establish affirmatively before me that such disbursements were in fact made, he has no one to blame but himself.

For the reasons which I have stated the appeal will be dismissed.

The respondent is entitled to be paid his costs after taxation. I direct, however, that in such taxation the respondent will be entitled to tax counsel fees at the trial for one day only. One or two days after the conclusion of the hearing a motion was made by the respondent for leave to introduce new evidence and the motion was granted. On a later day the additional evidence was heard. The appellant is also entitled to set off against the respondent's taxed costs, the costs of the motion made by the respondent, which costs I fix at \$20.

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It should be stated also that the appellant appealed from the disallowance of an item of \$142.50 said to have been disbursed as charitable gifts. At the trial his counsel stated that this item of the appeal had been abandoned.

*Judgment accordingly.*

BETWEEN:

|                                                       |             |                 |
|-------------------------------------------------------|-------------|-----------------|
| THE GOVERNORS OF THE<br>UNIVERSITY OF TORONTO, .... } | APPELLANT;  | 1949<br>Dec. 15 |
| AND                                                   |             |                 |
| THE MINISTER OF NATIONAL<br>REVENUE, ..... }          | RESPONDENT. | 1950<br>Feb. 1  |

*Revenue—Succession duty—Dominion Succession Duty Act, S. of C. 1940-41, c. 14, ss. 2(m), 7(1) (d) (e)—“Succession”—“Successor”—Exemption from duty “where the successor is the Dominion of Canada or any province or political subdivision thereof”—Devise to the governors of the University of Toronto is not one within s. 7(1) (e) of Dominion Succession Duty Act—Appeal dismissed.*

*Held:* That a bequest to the governors of the University of Toronto is not one to the Province of Ontario or a political subdivision thereof and consequently does not come within the exemption from succession duty provided for in s. 7(1) (e) of the Dominion Succession Duty Act, Statutes of Canada 1940-41, c. 14; the governors are not agents or servants of the Crown.

APPEAL under the Dominion Succession Duty Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

*Hamilton Cassels, K.C.* and *Donald Guthrie, K.C.* for appellant.

*Joseph Singer, K.C.* and *I. G. Ross* for respondent.

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

CAMERON J. now (February 1, 1950) delivered the following judgment:

This is an appeal from assessment to succession duties under the Dominion Succession Duty Act, Statutes of Canada, 1940-41, c. 14, and dated March 4, 1947. The appellant is a beneficiary under the last will and testament of John S. Chisholm, late of Prince Albert, Saskatchewan, retired physician, who died on September 2, 1945. By the terms of his will, the trustees thereof after providing for payment of his debts, funeral and testamentary expenses, were directed to invest the whole of the net estate, to pay one-half the net income arising therefrom to his sister, Mrs. Collison, during her lifetime, and subject thereto the will then provided as follows:

I WILL, DEVISE AND BEQUEATH the rest and residue of my estate, both real and personal, wheresoever situate, of which I may die possessed or entitled to, or over which I may have power of appointment, unto the Governors of the University of Toronto, of the said City of Toronto for the use of the Faculty of Medicine of the said University. One-half of the said net income of my estate shall be paid by my trustees to the said Governors of the University of Toronto for the said purpose during the lifetime of my said sister; and upon the death of my said sister the surviving trustees shall pay over to the said Governors for the said purpose the rest and residue of my estate, including any undistributed income thereof.

The aggregate net value of the estate, as shown by the assessment, was \$495,568.06. Of this amount \$90,181.43 was attributed to the life interest of the deceased's sister and the balance of \$405,286.63 was determined as the value of the gifts to the appellant.

As of September 2, 1945—the date of Dr. Chisholm's death—the Dominion Succession Duty Act contained the following provisions:

7.(1) From the dutiable value of any property included in a succession the following exemptions shall be deducted and no duty shall be leviable in respect thereof:—

(d) where the successor is a charitable organization in Canada operated exclusively as such and not for the benefit, gain or profit of any person, member or shareholder thereof, provided this exemption shall apply only to an amount not exceeding fifty per centum of the value of all the property included in the aggregate net value; and provided further that where more than one charitable organization is entitled to exemption here-

under each such organization shall be entitled to that proportion of the total exemption applicable in the case of the total number of charitable organizations entitled as the value of the property included in its succession bears to the total value of the dutiable property divisible amongst the organizations,

(e) where the successor is the Dominion of Canada or any province or political subdivision thereof.

The respondent, in assessing the estate to duty, considered that the gifts to the appellant came within the provisions of section 7(1) (d) and therefore deducted \$247,734.03 (being fifty per centum of the value of all property included in the aggregate net value) from \$405,286.63 (the dutiable value of the property included in the succession to the appellant), and assessed the balance of \$157,552.60 to tax, such tax amounting to \$29,068.46.

Pending the issue of the formal assessment, the trustees of the estate, without the knowledge or approval of the appellant, paid almost the entire amount as now claimed in the assessment; and following the notice of assessment they paid the balance, apparently under protest, and without prejudice to the rights of the appellant. No difficulty now arises in that connection, it being agreed by the respondent that if the appeal herein should be allowed, the payments so made in reference to the benefits of the appellant would be refunded to the trustees.

The appellant, considering that the benefits to it came within the provisions of section 7(1) (e) (*supra*), and were therefore totally exempt, launched an appeal from the assessment. The respondent affirmed the assessment; notice of dissatisfaction was given by the appellant and by his reply the respondent affirmed the assessment as levied. By order of the Court, pleadings were delivered.

The sole matter for consideration, therefore, is the claim of the appellant that the gifts to it fell within the ambit of section 7(1) (e) and that, therefore, they are totally exempt from duty.

To be successful in its appeal, the appellant must establish that the "successor" is the Dominion of Canada or any province or political subdivision thereof. "Successor" is defined by section 2(n) as "the person entitled under a succession." "Succession" is defined by section 2(m) as follows:

"Succession" means every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to

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any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession.

Bearing in mind the definition of "successor", it seems abundantly clear that the successor to these benefits under Dr. Chisholm's will is "the Governors of the University of Toronto" (hereafter to be referred to as the Board). The Board alone is entitled thereto. It alone could enforce payment of its benefits by the trustees of the will and it alone is beneficially entitled thereto. Now, that being so, if the appellant is to succeed it must establish that it, i.e., the Governors of the University of Toronto, is the Province of Ontario, or a political subdivision thereof. To put the problem in that way is to supply the answer thereto. Whatever the relationship between the Board and the Province of Ontario may be—and that will be considered later—the Board is not the Province of Ontario and the Province of Ontario is not the Board.

Nor in the view that I have taken as to the meaning of the words "political subdivision" can it be said that the appellant, i.e., the Governors of the University of Toronto—is "a political subdivision thereof." I do not think it is necessary for the purposes of this case to determine whether the "political subdivision" must be a political subdivision of the Dominion or of a province thereof.

In the Shorter Oxford English Dictionary, 2nd Ed., "political" is defined as "of, belonging or pertaining to, the state, its government and policy" and "concerned or dealing with politics or the science of government."

In the same volume, "subdivision" is defined as "one of the parts into which a whole is subdivided; part of a part; a section resulting from a further division."

In vol. 49, Corpus Juris, at pp. 1074 and 1077, the expressions "political division" and "political subdivisions" are defined as follows:

Political Division of a State.—A division formed for the more effectual or convenient exercise of political power within the political localities.

Political Subdivision:

1. In General. A term implying a division of a parent entity for some governmental purpose.

2. Of a County. A subdivision of a county exercising some function of government.

3. Of a State. A subdivision of a state to which has been delegated certain functions of local government.

It is further stated therein that the distinctive marks of a division or subdivision of a state are that such divisions embrace each a certain territory and its inhabitants, organized for the public advantage and not in the interests of particular individuals or classes, that their chief design is the exercise of governmental functions, and that to the electors residing within each is to some extent committed the powers of local government, to be wielded either mediately or immediately, for the benefit of the people there residing.

In my opinion, the term "political subdivision" as used in section 7(1) (e) refers to a geographical part of the larger entities—the Dominion or any of its provinces—set aside for the purposes of local government by the inhabitants thereof. The Board—set up by provincial statute to manage the affairs of a provincial university—and which university was established to carry out part of the educational programme of the Province of Ontario—does not fall within that description of a political subdivision.

The word "is" in ss. 7(1) (e) would seem clearly to indicate that the successor must be identical with one or other of the specified entities. That identity does not exist in the case at bar.

My conclusion, therefore, is that the Board is not the Dominion of Canada or any province or political subdivision thereof.

That finding, in my opinion, is sufficient in itself to dispose of the appeal. However, as I have intimated above, counsel for the appellant relied strongly on the relationship existing between the Board and the Province of Ontario which he submitted was of such a nature that the Board was, in fact, the agent of the Crown. His submission, I think, can best be put in his own words. He said:

The question involved is a comparatively narrow one. It is as to whether or not we fall within the provisions of Section 7(1) (e). In other words the Governors of the University of Toronto, in my submission, are the "province" or a "political subdivision thereof." Our submission is that their status is that of the Crown in the right of the Province of Ontario—the Governors, who, by the Act, are incorporated, being the

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agents of the Crown to administer the affairs of the Provincial University and I think, my lord, perhaps I should say that in my opinion, from a consideration of the University Act, it is made abundantly clear that the control of the University is a function of the government—the work of the University being an integral part of the public educational system of the province—the University being actually an extension of the Department of Education of the province and/or a political subdivision of the province within the meaning of section 7, subsection 1(e) of the Succession Duty Act.

Briefly, the submission of the appellant is that the control exercised by the Province of Ontario over the Board and the affairs of the University is such that the Board is, in fact, the agent of the Crown and that the status of the appellant is that of the Crown in right of the Province of Ontario. Reliance is placed on the provisions of The University Act, R.S.O., 1937, c. 372, Exhibit I (originally enacted as c. 55 of the Statutes of 1906), hereinafter to be referred to as The University Act.

It is of interest to note that by the Act of 1906—which for the first time set up the Board as the governing body of the University—very substantial changes were brought about. Reference to c. 298, R.S.O. 1897, indicates that a large measure of control over the affairs of the University was then in the Crown. The Lieutenant-Governor was the Visitor with commission powers to be exercised under the Great Seal. The President, professors, lecturers, teachers, officers and servants were appointed by the Lieutenant-Governor and held office during his pleasure. The Lieutenant-Governor in Council appointed nine members to the Senate and all statutes enacted by that body and all regulations passed by the Council were invalid until approved by the Visitor. The Lieutenant-Governor in Council determined the fees to be paid by students in attendance. All endowments were vested in the Crown. The Lieutenant-Governor in Council was empowered to make regulations respecting the retirement of the teaching staff and the officers and servants of the University, subject to the approval of the Legislative Assembly.

Following a report of the Royal Commission in 1906, which recommended the propriety of divorcing the affairs of the University from the direct superintendence of political powers and which suggested a proposal “to delegate the powers of the Crown to a Board of Governors dictated



by the desire to impart strength, continuity and freedom of action to the supreme governing body", The University Act was enacted in 1906. By that Act there was constituted a Board of Governors of the University and University College, declared to be a body corporate with all the rights, privileges and powers mentioned in subsection (25) of section 8 of The Interpretation Act, and with the power to hold real property for the purposes of the University without licence-in-mortmain, and the Board was declared to be the successor of the former "Trustees of the University of Toronto," with the enlarged rights, powers and privileges conferred by the Act. It is not necessary to state all the powers thus conferred on the Board, many of which were similar to the powers contained in The University Act, R.S.O. 1937, c. 372, which will be considered later. It is sufficient to say that in addition to a great many specified powers it contained (s. 37) the section which now appears as s. 29 of the 1937 Act, which is as follows:

29. The government, conduct, management and control of the University and of University College, and of the property, revenues, business and affairs thereof, shall be vested in the Board.

Exhibit I is The University Act, R.S.O. 1937, c. 372. By that Act the Board is made the supreme governing body of the University. By s. 10, all property of the University and University College, and all property conveyed, devised or bequeathed to them or any faculty or department thereof, is vested in the Board, subject always to any trust affecting the same. In addition to the general management and control provided for in s. 29 (*supra*), the following powers are conferred on the Board. In the field of management it has power to appoint the president, officers, employees and servants of the University, and upon the recommendation of the president to appoint the deans and all members of the teaching staff, to remove all members of the teaching staff, employees and servants, to establish faculties and departments, to provide for federation and affiliation of the University with any other college in Ontario, to fix the student fees, to regulate and manage the residence and dining halls, to enter into arrangements with secondary and primary schools.

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In the field of property it is given power to invest all moneys coming into its hands, subject to the limitations of any trust, to acquire and hold real and personal property, however acquired, to purchase and acquire all such property as it deems necessary for the University, to sell all real property of the Board, and to lease the same for a period not exceeding twenty-one years.

In the field of finance it has power to expend such sums as it considers necessary for the support and maintenance of the buildings and for their betterment, and for the erection of new buildings and for the equipping of all such buildings; to erect and equip and maintain residences and dining-halls; and to borrow from banks up to \$250,000.

All of the powers of the Board which I have above enumerated are absolute and not subject to any control by any outside authority.

By sections 41 to 50, provision is made for the composition of the Senate and substantial powers are allocated to it, including power to provide for the granting of degrees (except in Theology), the establishment of faculties, chairs, departments and courses of instruction, scholarships and prizes, and the consideration and determination of the courses of study. Many of the enactments of the Senate are made subject to the approval of the Board.

In addition to the above, certain other privileges and exemptions are conferred on the Board. It has power to expropriate such real property as the Board deems necessary; to acquire and hold land without license-in-mortmain. Its real property, so far as the application of any Statute of Limitations is concerned, is deemed to be real property of the Crown. Its property is not subject to expropriation and is exempt from taxation except in certain special cases. The consent of the Attorney-General is required before any action can be brought against the Board.

The Act refers to the University as "the Provincial University." The Board consists of the Chancellor (elected by the graduates), the President (appointed by the Board), and twenty-two persons all appointed by the Lieutenant-Governor in Council. Eight of the twenty-two members so appointed are first nominated by the Alumni Federation of the University. Any of the twenty-two

appointed members may be removed by the Lieutenant-Governor in Council, apparently without cause assigned. The Lieutenant-Governor in Council appoints one of the members of the Board to be its Chairman. The Board may not incur any expenditure which would impair the endowments, nor may it expend moneys for the purchase of lands or erection of buildings, the cost of which cannot be met out of the year's income, without the approval of the Lieutenant-Governor in Council. The Board is given power to borrow up to the sum of \$4,000,000 for the purchase of land and the erection of buildings, but only with the approval of the Lieutenant-Governor in Council, who may prescribe the terms and conditions thereof and the nature of the securities to be given therefor, and may provide for the guarantee of such securities by the Province. For general purposes the Board may not borrow a sum in excess of \$250,000 without the approval of the Lieutenant-Governor in Council. The accounts of the Board must be audited annually by the provincial auditor or by some person appointed by the Lieutenant-Governor in Council. The Board is required to make an annual report of its transactions to the Lieutenant-Governor in Council with details of its receipts and expenditures and of its investments and such other particulars as may be required, and such report is laid before the Assembly. Provision is made for an annual grant to the Board of 50 per centum of the average yearly gross receipts in the Province from succession duties, up to a maximum of \$500,000 in any one year.

One of the affiliated colleges of the University is the Ontario College of Education. It is a training college for all high school teachers in the province. Appointments to its staff are made by the Board on the recommendation of the Minister of Education. The College recommends the granting of teaching certificates which are actually granted by the Minister. The College is administered by the Board and its courses are prescribed by the Senate, subject to the approval of the Minister of Education. It has a separate budget which is subject to the approval of the Minister and of the Board of Governors before it is submitted to the Legislature.

In addition to the statutory grant by the Province to the Board, special and supplementary grants are made from

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time to time as needed. These amount to very substantial sums as shown by a number of the Board's annual reports filed as Exhibit 4. In 1945-46 the grants totalled \$1,817,000 and in 1948-49 slightly over \$3,000,000. The Board's report for the year ending June 30, 1946, indicated that it had assets under its control as follows: General Funds, including properties—in excess of seventeen million dollars; and Trust Funds—in excess of fourteen million dollars.

The status of boards, commissions and corporations which have been established by the Crown has been frequently considered in the Courts, many of such cases having to do with liability to taxation and to actions in tort or in contract. It seems to me—after a study of all the cases cited—that each case must necessarily depend upon the wording of the relevant statute and the legislative intention to be inferred therefrom.

In *City of Halifax v. Halifax Harbour Commissioners* (1), the question for determination was the liability of the Commissioners—who occupied Crown property—to assessment for business tax, as an “occupier.” In the Court en banc, three of the Judges came to the conclusion that the Commissioners “are to be considered agents of the Government,” and the other member of the Court held that the Commissioners were “exempt from business tax as agents and servants of the Crown occupying the property on behalf of the Crown.”

In dismissing the appeal Duff, C.J., summarized the powers and duties of the Commissioners as follows:

Their occupation is for the purpose of managing and administering the public harbour of Halifax and the properties belonging thereto which are the property of the Crown; their powers are derived from a statute of the Parliament of Canada; but they are subject at every turn in executing those powers to the control of the Governor representing His Majesty and acting on the advice of His Majesty's Privy Council for Canada, or of the Minister of Marine and Fisheries; they cannot take possession of any property belonging to the harbour property without the consent of, and only upon such terms as may be imposed by, the Government; they cannot acquire property or dispose of property without the same consent; they can only acquire capital funds by measures taken under the control of the Government; they can only apply capital funds in constructing works and facilities under a supervision and control, the character of which has been explained; the tolls and charges which are the sources of their revenue they can only impose under the authority of the Government; the expenditure of revenues in the maintenance of services is under the control and supervision of a Government Depart-

ment; the salaries and compensation payable to officers and servants are determined under the authority of the Government; the regulations necessary for the control of the harbour, the harbour works, officers and servants, the proceedings of the Corporation, can only take effect under the same authority; the surplus of revenue after providing for costs of services and the interest on the debenture debt goes into a sinking fund under the direction of the Minister; finally, they are appointed by the Crown and hold office during pleasure.

At p. 227 he added:

I cannot doubt that the services contemplated by this legislation are, not only public services in the broad sense, but also, in the strictest sense, Government services; or that the occupation of the Government property with which we are concerned is, in the meaning with which Lord Cairns used the words in the passage cited (and in the sense in which those words were interpreted by Lord Blackburn and Lord Watson), an occupation by persons "using" that property "exclusively in and for the service of the Crown."

In that case Duff C.J. found from an examination of the statute that the occupation by the respondents of the property and facilities under their jurisdiction was an occupation for the Dominion of Canada; that the property of the respondents was part of the public property of Canada and that the statute treated all of the revenues of the respondents as moneys at the disposal of Parliament and, subject to the specific directions of the statute, gave the control of them to the Government.

In the *Halifax* case, the Court considered and distinguished two judgments of the Judicial Committee of the Privy Council to which I shall now refer. In *Fox v. Government of Newfoundland* (1), the question was whether moneys owing to certain Boards of Education in Newfoundland took priority over ordinary debts in the liquidation of a bank, as falling within the description, "debts and claims due to the Crown or to the Government or revenues of the Colony." The Judicial Committee held that these Boards were not the agents of the Government. In that case the moneys in question had been paid by the Government out of public moneys to the banks on behalf of the several Boards of Education. After pointing out that the Government thereafter had no control over the moneys, Sir Richard Couch proceeded:

It was contended by Mr. Asquith, who appeared for the Government before their Lordships, that the Boards of Education were merely distributing agents of the Government, only distributing branches. This appears to be the view of the majority of the learned judges, as expressed in the reasons they have given for their judgment, and indeed is the only

(1) (1898) A.C. 667.

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way in which the judgment can be supported. But this view is not consistent with the provisions in the Act. In ss. 1 and 2 a distinction is made between money to be expended by a board of education and money to be expended as the Governor in Council may determine. By s. 34 the boards have power to make by-laws and rules to be approved by the Governor in Council, but are not bound to do so. By s. 37 their accounts are to be audited, and returns of all schools with detailed accounts duly audited are to be transmitted to the superintendent, and these are by s. 72 to be laid before the Legislature. This seems to be for the information of the Government and Legislature, and not in order that any item of expenditure may be disallowed if the Government does not approve of it. The appointment of Boards for each of the three religious denominations, and the constitution of the board, indicate that it is not to be a mere agent of the Government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it—a power which is independent of the Government.

In *Metropolitan Meat Industry Board v. Sheedy* (1), Lord Haldane, who delivered the judgment of the Committee, explained the *ratio decidendi* of *Fox v. Government of Newfoundland*, as follows:

The reason was that the various boards of education were not mere agents of the Government for the distribution of money entrusted to them, but were to have, within the limits of general educational purposes, uncontrolled discretionary power in expending it. The service, in other words, was not treated as being the service of the Sovereign exclusively within the meaning of the principle, but their own service.

In the *Metropolitan Meat Industry Board* case, the question was whether a debt due to the Board of New South Wales was a debt due to the Crown. In considering the powers of that Board, Lord Haldane said:

They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund. Under these circumstances their Lordships think that it ought not to be held that the appellant Board are acting mainly, if at all, as servants of the Crown acting in its service.

It was held that the debt due to the Board was not a debt due to the Crown.

In *Tamlin v. Hannaford* (2), the Court of Appeal held that the British Transport Commission was not a servant or agent of the Crown. There the plaintiff, who was the lessee from a railway company of a house to which the Rent Restriction Acts applied, sublet two rooms to the defendant. By the Transport Act, 1947, the house became vested in the British Transport Commission. The plaintiff having brought proceedings for possession of the rooms, the defendant relied on the Rent Restriction Acts.

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In that case the Court considered the various powers delegated to the Commission and the control retained by the Minister of Transport. At p. 422-3 Denning, L.J., said in part:

The Transport Act, 1947, brings into being the British Transport Commission, which is a statutory corporation of a kind comparatively new to English law. It has many of the qualities which belong to corporations of other kinds to which we have been accustomed. It has, for instance, defined powers which it cannot exceed; and it is directed by a group of men whose duty it is to see that those powers are properly used. It may own property, carry on business, borrow and lend money, just as any other corporation may do, so long as it keeps within the bounds which Parliament has set. But the significant difference in this corporation is that there are no shareholders to subscribe to capital or to have any voice in its affairs. The money which the corporation needs is not raised by the issue of shares but by borrowing; and its borrowing is not secured by debentures but it is guaranteed by the Treasury. If it cannot repay, the loss falls on the Consolidated Fund of the United Kingdom; that is to say, on the taxpayer. There are no shareholders to elect the directors or to fix their remuneration, there are no profits to be made or distributed. The duty of the corporation is to make revenue and expenditure balance one another, taking, of course, one year with another, but not to make profits . . . Indeed, the taxpayer is the universal guarantor of the corporation. But for him it could not have acquired its business at all, nor could it now continue it for a single day . . . The protection of the interests of all these—taxpayer, user and beneficiary—is entrusted by Parliament to the Minister of Transport. He is given powers over this corporation which are as great as those possessed by a man who holds all the shares in a private company, subject, however, as such man is not, to a duty to account to Parliament for his stewardship. It is the Minister who appoints the directors—the members of the commission—and fixes their remuneration. They must give him any information he wants; and lest they should not prove amenable to his suggestions as to the policy which they should adopt, he is given power to give them directions of a general nature in matters which appear to him to affect the national interest—as to which he is the sole judge—and they are then bound to obey.

These are great powers, but still we cannot regard the corporation as being his agent any more than a company is the agent of the shareholders, or even of a sole shareholder. In the eyes of the law the corporation is its own master and is answerable as fully as any other person or

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corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not Civil servants and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes. But it is not a Government department, nor do its powers fall within the province of Government.

The only fact in this case which can be said to make the British Transport Commission a servant or agent of the Crown is the control over it which the Minister of Transport exercises. But there is ample authority both in this Court and the House of Lords for saying that such control as he exercises is insufficient for the purpose: see *Central Control Board (Liquor Traffic) v. Cannon Brewery Company, Limited* (1919) A.C. 744, at 757. When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly, as it did in the case of the Central Land Board by the Town and Country Planning Act, 1947, which was passed on the very same day as the Transport Act, 1947. In the absence of any such express provision, the proper inference, in the case at any rate of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a Government department.

In our opinion, therefore, the British Transport Commission is not a servant or agent of the Crown, and its property is as much subject to the Rent Restriction Acts as the property of any other person.

In *Scott v. Governors of University of Toronto* (1), the appellant here was the defendant. The action was for damages sustained by the plaintiff while at work for the defendant. It was held that the appointment under the authority of a statute by the Lieutenant-Governor in Council of members of the Board of Governors of the University of Toronto does not constitute them Crown officers, nor does it confer on them immunity from civil actions.

After considering the provisions of The University Act, 1906, Meredith, C.J.C.P., said at p. 155:

The contention that the rule that the King can do no wrong applies to the wrongs of "The Governors of the University of Toronto" was ruled against upon the argument. The mere fact that the Lieutenant-Governor in Council of the Province appoints most—not all—of the Governors does not confer upon them the character of Crown officers. Such an appointment, in itself, has no such extraordinary effect; and indeed is not even extremely unusual. I mentioned, during the argument, two other instances: one being the appointment of a member of a municipal hospital board; and the King in council, I believe, appoints the members of a University board in England. There is no reason why the Lieutenant-Governor in Council might not appoint members of a board of directors, or of management, of any concern; I mean there is no legal reason; and, if that were done, the effect in law would be none other than the effect of a like appointment made in any other valid manner.



Nor do the other powers, respecting the university, which the Lieutenant-Governor in Council has, under the enactments mentioned, bring to the Governors the character of Crown officers governing Crown property for the use or benefit of the Crown. They are but officers of the University, having power to deal with the property under their control for the uses and benefit of the University only. The case of the Niagara Falls Parks Commission is quite different; there the Commissioners are Crown officers, dealing with Crown lands in the right of the Crown, and in the public interests only. The University of Toronto is a body having its own separate and independent rights and interests, upon which the Crown cannot infringe; and the University press, in the carrying on of the work in which the accident which is the subject-matter of this litigation happened, is one of those things.

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In *Powlett et al v. University of Alberta et al* (1), the Court of Appeal had under consideration the liability of the Board of Governors of the University for damages sustained by a student during initiation proceedings. Three of the five judges agreed with the trial judge that the Board was liable for such damages but reduced the amount awarded by him. The other two judges found no liability and would have allowed the appeal. The powers and duties of the Board of Governors under The University Act, R.S.A. 1922, c. 56, were considered. By that Act the Board of Governors was established as a body corporate. It was composed of the Chancellor (elected by the graduates); the President (appointed by the Lieutenant-Governor in Council)—both of whom were members *ex officio*—and a Chairman and six other persons appointed by the Lieutenant-Governor in Council, and all such appointed members were subject to removal by the Lieutenant-Governor in Council. Many of the powers and duties of that Board were similar to those of the appellant herein as will be seen from a summary contained in the judgment of McGillivray, J.A., at p. 264-5.

It is to be observed that all University property is vested in the Board of Governors, that the government, conduct, management and control of the University and its affairs are vested in the Board subject only to the reservations in the Act contained. Interference by the Lieutenant-Governor in Council is in some instances contemplated but not so as to make the "acts of administration", resulting from any such interference, acts of the Crown and not those of the Board.

It will also be seen that the Board appoints all deans and professors with the approval of the president and all officers, clerks and servants; that the Board has wide discretionary powers with respect to the investment of money and the acquiring and holding of real estate and the expropriation of lands; that the Board has power to spend money for the maintenance

(1) (1934) 2 W.W.R. 209.

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and improvement of the buildings already in existence and the erection of such new buildings as the Board may think necessary and in the furnishing and equipping of the same.

There is also the power before quoted with respect to erecting, furnishing and maintaining residences and dining halls. The Board also has the power of fixing and determining the fees to be paid by students in the University. In addition the Board is given generous borrowing powers and may with the approval of the Lieutenant-Governor in Council issue bonds, debenture stock or securities of a like nature.

It is quite true that the Government of the province, which puts up a goodly share of the moneys necessary to carry on the activities of the University, has seen to it that it has a goodly measure of control in the expenditure of those moneys but I cannot think, having regard to the wide general powers given to the Board and having regard to the fact that it is at liberty to accept endowments and subscriptions from anyone willing to contribute and having regard to the fact that the Board according to the bursar receives large sums of money from sources other than the Government, and having regard to the fact that neither the fees collected by the Board nor any other moneys received by it go into the general revenue fund of the province, that it can be said that the Board is, to use the words of Viscount Haldane, "acting mainly if at all as servants of the Crown acting in its service."

I may add that I am of the further opinion that there is nothing in the Act contained which would justify the inference that the Legislature intended to make the Board immune from actions based upon tortious negligence.

In the result I have come to the conclusion that the Board cannot escape liability.

The case of *re Taxation of University of Manitoba Lands* (1), was a reference to determine whether the provincial Legislature of Manitoba had power to enact legislation rendering lands of the University of Manitoba, not used for educational purposes, subject to taxation by certain municipalities. One of the questions submitted for the opinion of the Court was:

(1) Is the University of Manitoba an emanation or arm or branch of the Government of Manitoba so that any property standing in its name is therefore exempt from taxation?

In answering "no" to that question, Robson, J.A., speaking also for Prendergast, C.J.M., Dennistoun and Richards, J.J.A., said at p. 595:

The other argument advanced on behalf of the University is that it is an emanation from the Crown or an arm of government. I think a perusal of the *University Act* (1936) (Man.), c. 47, repels this argument. In one sense I suppose it is true that every corporation is an emanation from the Crown but that is a different thing from being an arm of the Executive government. It may be quite true that the Crown exercises a prerogative of naming a majority of the board of governors; that it appoints the Chancellor after nomination by the committee on nominations;

that it annually makes large financial augmentations and that the main buildings are on Crown property; but nevertheless neither the appointment of authorities nor the grants of funds in aid of education are necessarily inconsistent with the independence of the University as an institution of higher learning. It is not to be imputed to the Crown that any of its acts or subsidies would be actuated by any motive of direction, let alone control, of the University's free scope in its normal sphere of action.

I think the words of Hon. R. M. Meredith in *Scott v. Toronto University*, (1913) 10 D.L.R. 154, are applicable here. That was a case wherein the Board set up immunity from liability for injury to an employee. The Board of Governors there were themselves a corporation but the point is the same. The learned Chief Justice said (p. 156): "Nor do the other powers, respecting the university, which the Lieutenant-Governor in council has, under the enactments mentioned, bring to the Governors the character of Crown officers governing Crown property for the use or benefit of the Crown. They are but officers of the University, having power to deal with the property under their control for the uses and benefit of the University only."

Now the test applied in all the cases to which I have referred above, was the degree of control exercised or retained by the Crown, and counsel for the Board, in submitting that it was but the servant or agent of the Province of Ontario, have stressed all those matters in which the complete independence of the Board may be thought to be curtailed in any way. The main submission is, of course, that as the Lieutenant-Governor in Council appoints twenty-two members of a Board of twenty-four—only eight of whom are appointed following recommendation by the Alumni Federation, and as ten members are required to constitute a quorum—the actions of the Board could at all times be controlled by the Lieutenant-Governor in Council removing members who are not carrying out the will of the Government, and by replacing them by others of a more compliant disposition. Theoretically, it might be possible for the Lieutenant-Governor in Council to appoint only members of the Board who were committed to carry out the instructions and wishes of the Government. It could hardly be suggested, however, that anyone possessed of the knowledge, experience and independence essential to the proper carrying out of the important and difficult duties of a Board such as this would accept the appointment under any such conditions. The Board is a body with wide discretionary powers and there is nothing in the statute which makes the Board's administrative acts the acts of the Crown rather than its own acts. Nothing that the

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Board is empowered to do is subject in any way to the control or veto of the Minister of Education or of the Lieutenant-Governor in Council; and in the carrying out of its duties it acts for itself and not as agent to bind the Crown—its alleged principal.

The only other manner in which any degree of control can be said to be reserved to the Lieutenant-Governor in Council is in the field of finance. In considering this aspect of the matter, it is essential to keep in mind that the University of Toronto is a provincial university, established by the province. The province, therefore, has always assumed a degree of financial responsibility for its operations as evidenced by the very substantial grants made each year. The statutory payment of 50 per centum of the annual succession duties collected by the province—up to a maximum of \$500,000 in any year—is made without any restrictions as to its expenditure, the Board having complete control thereover. The Board's accounts are audited by the provincial auditor or by some person appointed for that purpose, and the Board each year renders a report of its receipts and expenditures for the preceding year. This, however, appears to be for information purposes only, no doubt being a matter for consideration when additional funds are asked for by the Board from the province. Such receipts and expenditures of the Board cannot be questioned in any way. The Board is master in its own financial house save that it may not without the consent of the Lieutenant-Governor in Council: (a) impair its endowments: (b) in the purchase of land or erection of buildings expend moneys other than from its income of the year; (c) borrow from banks or lenders more than \$250,000; and (d) borrow on the security of its assets for the purchase of land, the erection of buildings, and the equipping thereof. Any moneys so borrowed become the property of the Board free of any control on the part of the province.

Without attempting to recapitulate all the powers of the Board, the following matters in my opinion are essentially significant. It administers its own property, all the assets both real and personal being vested in it for its own use. It administers its own endowments, receives its income and makes its expenditures entirely on its own behalf and limited only in the manner which I have indicated. Its

members are not civil servants. It appoints and removes all the members of the teaching staff and the officers and servants of the University, none of whom are civil servants. The Province of Ontario has nothing to say as to the departments of the University or the courses of instruction or the fees to be charged. The Board may buy, expropriate, sell and lease lands, erect buildings and borrow money. The statute itself says that the management and control of the revenues, business and affairs of the University are not in the Crown but in the Board. Its very wide powers, in my opinion, indicate that the Act conferred on the Board these powers to be exercised at its own discretion and without consulting in any way the representatives of the Crown. The Board is not a mere agent of the Government for the purposes of distributing such money as may be given annually by way of subsidy or otherwise, but is to have, within the limits of the purposes for which the University was established, a very wide discretionary power in the management and control of the University—a power which I think is quite independent of the Government. In doing what it does it acts on its own behalf and not on behalf of the Government and is not controlled by a department of the Government.

My conclusion is, therefore, that the Board cannot be said to be the agent or servant of the Crown and the contention of the appellant fails on that point.

A consideration of subsection 7(*d*) and (*e*) (*supra*) suggests very strongly that Parliament wished to draw a distinction between two different categories of bequests and to treat them in a different way. In subsection (*e*), gifts to the Dominion or any province or political subdivision thereof, where the benefits would accrue to all the inhabitants of a geographical area, the exemption from tax was complete. But in regard to charitable organizations, such exemption was limited to 50 per centum of all the property included in the aggregate net value. "Charitable organization" is a term well known to the law as including not only institutions directly devoted to charitable purposes, but also to religious and educational purposes. It would seem reasonable to assume that because the beneficiaries of such charitable bequests would be more limited than the inhabitants of a geographical subdivision such as

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are specifically named, Parliament intended to confer a larger degree of exemption on the latter than on the former. It may be of interest to note that by the amendment of 1948, the limitations on exemptions to charitable organizations were removed.

For the reasons which I have given, the appeal fails and will be dismissed with costs—if demanded. I have been informed that this is a test case.

*Judgment accordingly.*

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BETWEEN:

GAR WOOD INDUSTRIES INC.,.....PLAINTIFF;

AND

SICARD LIMITEE,.....DEFENDANT.

*Practice—Costs—Discontinuance of action by plaintiff—Rules 107 and 263—Costs to be taxed on the basis of tariff in force at time of discontinuance of action—Disbursement properly incurred in preparation for trial allowed.*

*Held:* That where an action has been discontinued the defendant's right to tax its costs arose upon the filing of the notice of discontinuance and that right was to tax such costs upon the basis of the tariff then in force, and it is not open to the taxing officer to take into consideration an amendment to the Rules made on a later date, unless such amendment is clearly retroactive in its terms.

2. That a disbursement of a reasonable amount incurred for services rendered in preparation for trial and not done prematurely or from an excess of caution is a proper item for taxation on discontinuance as well as after trial.

APPEAL from the decision of the Registrar upon taxation of defendant's bill of costs.

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

*C. A. Geoffrion* for plaintiff.

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

CAMERON J. now (January 25, 1950) delivered the following judgment:

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In this matter I am asked to review the taxation of the defendant's costs pursuant to Rule 263. Proceedings were instituted by the plaintiff on March 5, 1946, claiming infringement of two patents, an injunction, damages and costs. By order dated November 16, 1948, the matter was set down for trial at Montreal on March 1, 1949. However, on February 23, 1949, the plaintiff gave notice of its application for an order granting leave to wholly discontinue the action; and on February 24 such an order was made by consent, "subject to the payment by the plaintiff of defendant's costs to be taxed herein, and without any other condition being attached to such discontinuance."

On March 4 the plaintiff's solicitors gave notice, pursuant to the order of February 24, that the plaintiff wholly discontinued the said action subject to the payment of the defendant's costs.

The taxation was commenced before the Registrar on September 16, 1949. The bill of costs as submitted contained twenty-two items in all and the main contest on the taxation appears to have been in reference to an item of disbursements—Item 21—which was as follows:

21. Paid by defendant to MM. Marion & Marion, Patent Attorneys, for research work carried on at the Patent Office at Washington in connection with Canadian patents Nos. 388, 439, 418 and 773, and also for work related to the defence of the action: \$1,869.12.

The taxing officer on that date reserved his finding and on December 19 completed the taxation, the total amount allowed being \$2,513.62, included in which was the whole of Item 21. It is from the allowance of Item 21 that the plaintiff now appeals.

Rule 107 lays down the procedure to be followed upon discontinuance of an action. The first and fourth paragraphs of the Rule, as amended, are not here applicable. Paragraphs 2 and 3 thereof are relevant, the latter being an amendment of *October 31, 1949*. These two paragraphs are as follows:

Rule 107

Para. 2. Save as in this Rule otherwise provided, it shall not be competent for the Attorney-General, petitioner or plaintiff to discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before or after the hearing or trial, upon such terms as to costs,

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and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint struck out.

Para. 3. Costs of all work reasonably, and not prematurely done in preparing pleadings, evidence, briefs, etc., down to Notice of Discontinuance shall be allowed on taxation, subject to review by a Judge in Chambers.

Mr. Geoffrion for the appellant submits that the amendment to the Rule was not retrospective and could not be taken into consideration on the taxation; and that prior to such amendment the tariff of costs contained no provision for payment of such costs upon discontinuance. Mr. Lajoie opposes both these contentions.

I shall consider first the question as to whether the amendment to Rule 107 could be taken into consideration by the taxing officer. It is the general rule of law that *statutes* are not to operate retrospectively. *There is nothing in the amendment which by express enactment or necessary implication from the language used requires a departure from that general rule.* The basis of that general rule is that statutes should be interpreted, if possible, so as to respect vested rights.

The general principle, however, seems to be that *alterations in procedure* are retrospective unless there be some good reason against it (Maxwell on Interpretation of Statutes, 9th ed., p. 233).

In Craies on Statute Law, 4th ed., p. 337, it is stated, "But there is no vested right in procedure or costs. Enactments dealing with these subjects apply to pending actions unless a contrary intention is expressed or clearly implied."

In *Earle et al. v. Burland et al.* (1), it was held by Street, J., that the quantum of costs, as well as the right to them, is ascertained at the time of judgment and the quantum cannot, without the clearest words, be altered by a subsequent change in the tariff, or by the creation of a tariff which had no existence until after the judgment.

Reference may also be made to *Delap et al. v. Charlebois et al.* (2). In that case judgment was given by the Court of Appeal in 1895, dismissing the appeal and ordering the defendants to pay the costs of the appeal. The defendants appealed to the Supreme Court and obtained a decision in their favour, against which the plaintiff successfully

(1) 8 O.L.R. 174.

(2) 18 Ontario Practice Reports, 417.



appealed to the Privy Council. In the Privy Council in 1898 the judgment of the Court of Appeal was sustained and restored, so far as the costs were concerned. In 1896 Item 155 of the Tariff of Costs had been repealed and another item substituted therefor.

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In that case, Street, J., said at p. 419:

The plaintiffs have appealed from this ruling, and I am of opinion that the appeal should be dismissed, for the following reasons. The remuneration of a solicitor for the professional services rendered by him is fixed by tariff, and each particular service as it is performed entitled him to charge to his client the particular sum authorized by the tariff then in force for the particular service performed. Before I could hold that a solicitor who performs, in 1894, a service for which he is entitled under the tariff then in force to charge his client \$1, becomes entitled to increase his charge for that service performed in 1894 to \$2, because before he taxes his costs a new tariff has come into force, I should require to have my authority for so holding very clear indeed. It is argued that the authority for so holding is very clear indeed, because, all the tariffs previously existing having been abolished, the taxing officer must be governed by the one in force, to which he is referred to the exclusion of all others.

But the provisions of the Interpretation Act are, by Rule 5, made applicable to the Rules, and sec. 50 of that Act, which is indeed only declaratory of an accepted rule of construction, declares that the repeal of an Act shall not affect any rights existing or established under the repealed Act before the date of the repeal: see *Butcher v. Henderson*, (1868) L.R. 3 Q.B. 335. A solicitor, therefore, who performed services for his client before the Rules of September, 1897, came into force, retains, notwithstanding the repeal of the tariff under which they were performed, his right to be paid at the existing tariff rate, but at no higher rate, for what he did for his client; and the client's liability is not increased by the subsequent tariff for the work done for him under the earlier one. This seems to me to be the only reasonable and proper rule to be applied, and I am not surprised to learn from the taxing officer that it is the principle which has been applied at Osgode Hall during the many years over which his experience extends. The same principle must be applied to the portion of the tariff which relates to counsel fees, as to the portion of it which relates to the allowance to solicitors.

In *re Solicitors* (1), Meredith, C.J.C.P., considered the question of retrospectivity of an amended tariff of costs. He distinguished the case of *Delap v. Charlebois* because he thought that the note to the amended tariff, which he was considering, indicated that the latter had a retrospective effect and was applicable to all services rendered before as well as after such rules came into force.

At p. 626 he said:

Whether a statute, or Rule, is or is not retrospective, is, of course, a question of intention; it must be given effect according to its true meaning; and the character of the enactment or Rule, as well as other

(1) 6 O.W.N. 625.

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circumstances, may be very helpful in reaching a true interpretation. Generally statutes and Rules respecting procedure are considered retrospective, in criminal as well as, civil proceedings: see *Rez v. Chandra Dharma*, (1905) 2 K.B. 335.

My impression has always been that "costs are practice"; and I have some memory of an ancient decision in those words. The first work on the subject at hand, I now find, deals with it in these words: "Statutes governing costs are Rules of practice, and the power to award them, and the amount and items to be awarded, depend upon the statute in force, not at the commencement, but at the termination, of the controversy, or when the right to costs accrues. In the absence of any provision to the contrary, statutes regulating costs are usually held to apply to pending suits."

In my opinion, the defendant's right to tax its costs arose upon the filing of the Notice of Discontinuance and that right was to tax such costs upon the basis of the tariff then in force. The services that were rendered and the disbursements that were made were concluded before the tariff was amended. When the discontinuance was filed the proceedings were at an end and only an incidental matter—the taxation of costs—remained to be completed. But even if I am wrong in that conclusion, I think that at the very latest the bill of costs fell to be taxed in accordance with the tariff in existence at the time the taxing officer commenced the taxation on September 16, 1949. The bill as rendered and submitted for taxation was prepared under the then tariff and while the taxing officer reserved his findings, his consideration of the bill as a whole could not take into consideration any changes in the tariff made after he reserved his finding. The delay in finally determining the matter ought not, in my view, to affect the conclusions to be reached.

In Maxwell, 9th ed., pp. 234-5, it is stated:

But a new procedure would be presumably inapplicable, where its application would prejudice rights established under the old, or would involve a breach of faith between the parties. For this reason, those provisions of the repealed s. 32, Common Law Procedure Act, 1854, which permitted error to be brought on a judgment upon a special case and gave an appeal *upon a point reserved at the trial*, were held not to apply where the special case was agreed to, *and the point was reserved*, before the Act came into operation.

Where a special demurrer stood for argument before the passing of the Common Law Procedure Act, 1852 (c. 76), it was held that the judgment was not to be affected by that Act, which abolished special

demurrers, but must be governed by the earlier law. *The judgment was, in strictness, due before the Act, and the delay of the Court ought not to affect it.*

In my view, therefore, it was not open to the taxing officer to take into consideration the amendment to Rule 107 made on October 31, 1949.

I think, however, that the tariff in effect prior to amendment permitted the taxing officer to include Item 21 as a proper disbursement to be allowed the defendant. It is admitted that the services rendered by Marion & Marion—a firm of Patent Attorneys—were necessarily incurred by the defendant and its solicitors in preparing its defence and in preparation for trial, that it was not done prematurely or from an excess of caution, and that the amount of the item is reasonable considering the nature of the case and the services rendered.

The proper principle upon which party and party costs should be taxed is that the successful party should have an indemnity against costs reasonably incurred in prosecuting or defending the action (Halsbury 2nd ed., vol. 31, p. 214). That principle, however, is subject to the provisions of the applicable tariff. In this Court party and party costs are taxed pursuant to Tariff A, contained in the appendix to the Rules (Rule 263).

In Tariff A, under the heading "To Solicitors," it is provided:

Except where expressly provided for, disbursements are not included herein, but are left to be allowed by the taxing officer.

Disbursements which are not specifically mentioned are therefore left to the consideration and discretion of the taxing officer and are to be allowed or disallowed on the basis of the principles which I have mentioned. While the amount of Item 21 is substantial and forms about two-thirds of the total bill as taxed, it was a disbursement necessarily and properly incurred by the defendant and I am unable to find that in allowing it to the defendant the taxing officer proceeded upon any wrong principle. That being so, his discretion should not be interfered with on appeal (Halsbury, 2nd ed., vol. 31, p. 215).

I am advised by the taxing officer that it has long been the practice in this Court in taxing bills of costs in patent

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matters, and following a trial, to allow disbursements of the same kind as Item 21—expenses necessarily incurred in investigating relevant patents in Canada and elsewhere. I see no reason why upon a discontinuance the practice should be otherwise.

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The appeal will therefore be dismissed with costs to be taxed.

*Appeal dismissed.*

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BETWEEN:

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

AND

UHLEMANN OPTICAL COMPANY, . . . DEFENDANT.

*Patents—Action by Crown for declaration that patent invalid—The Patent Act, 1935, S. of C. 1935, c. 32, s. 60(1)—Eye-glasses—Two-point Numont mounting—Anticipation of invention by prior publication—Prior publication to be read in the light of common knowledge—Presumption of validity in favor of patent—Ease of putting item into practice not evidence of lack of invention—Evidence of commercial success coupled with evidence of a problem and its solution strong evidence of invention.*

The Crown brought action under section 60(1) of The Patent Act, 1935, for a declaration that the defendant's patent covering an invention relating to a mounting means for the temples of spectacles was invalid for lack of novelty and lack of subject matter.

*Held:* That lack of novelty and lack of subject matter as grounds for holding a patent invalid are closely related, but are not the same.

- That in order that an invention should be held to have been anticipated by a prior publication, the information as to the alleged invention given by the prior publication must, for the purposes of practical utility, be equal to that given by the subsequent patent. Whatever is essential to the invention or necessary or material for its practical working and real utility must be found substantially in the prior publication. It is not enough to prove that an apparatus described in it could have been used to produce a particular result. There must be clear directions so to use it. Nor is it sufficient to show that it contained suggestions which, taken with other suggestions, might be shown to foreshadow the invention or important steps in it. There must be more than the nucleus of an idea which, in the light of subsequent experience, could be looked on as being the beginning of a new development. The whole invention must be shown to have been

published with all the directions necessary to instruct the public how to put it into practice. It must be so presented to the public that no subsequent person could claim it as his own. The test is whether the man attacking the problem finds what he wants as a solution in the prior so-called anticipations.

3. That in considering whether an invention was anticipated by a prior patent, the prior patent must be read in the light of the common knowledge which a person skilled in the art would have had immediately prior to the alleged invention.
4. That there is a presumption of validity in favor of the patent by reason of its issue and the onus of proving that it is invalid for lack of invention is on the person attacking it.
5. That invention may be present notwithstanding the fact that there was no difficulty in putting the idea into effect once it had been conceived. *Hickton's Patent Syndicate v. Patents and Machine Improvements Company Ltd.* (1909) 26 R.P.C. 339 at 347 followed.
6. That evidence of the practical utility and commercial success of an invention coupled with evidence of the existence of a problem and its solution is strong evidence of invention. *Non-Drip Measure Coy., Ltd. v. Stranger's Ltd., et al* (1943) 60 R.P.C. 135 at 142 followed.
7. That if there were any doubt as to the validity of the patent by reason of lack of invention the commercial success of the defendant's mountings and its substantial displacement of mountings previously in use would be sufficient to turn the scale in its favor.

ACTION under section 60(1) of The Patent Act, 1935, for a declaration that defendant's patent is invalid.

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

*E. G. Gowling K.C.* and *G. F. Henderson* for plaintiff.

*Christopher Robinson, K.C.* for defendant.

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

THE PRESIDENT now (December 23, 1949) delivered the following judgment:

This action was taken at the instance of the Attorney General of Canada under section 60(1) of The Patent Act, 1935, Statutes of Canada, 1935, chap. 32, for a declaration that Canadian letters patent 381,380 and 392,499 and industrial design registration 58/12138, owned by the defendant, a corporation association under the laws of Delaware having its principal place of business in Chicago, Illinois, are invalid. The defendant withdrew its defence

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as it related to Canadian letters patent 392,499 and industrial design registration 58/12138 and judgment was given for the plaintiff in respect thereof, so that it is only as to Canadian letters patent 381,380 that a declaration of invalidity is now sought.

The patent in suit relates to an alleged new and useful improvement in eye glasses, and more specifically to a mounting means for the temples of spectacles. The application for the United States patent was made on April 22, 1937, and this is relied upon as the date of the invention. The application for the Canadian patent was filed on March 5, 1938, and it was issued on May 16, 1939. The defendant's mounting is commonly known as the 2-point Numont mounting.

The specification states, *inter alia*:

My invention relates to eyeglasses, and more specifically it relates to a mounting means for the temple.

and sets out the objects of the invention as follows:

One of the objects of my invention is to provide an improved temple mounting which prevents strain from being transmitted to the lenses.

A further object of my invention is to provide a temple mounting that requires a minimum amount of labour in attaching the mounting.

A further object of my invention is to provide an improved temple mounting which will be inconspicuous in appearance.

A further object of my invention is to provide an improved temple mounting which will result in a saving of material.

Further objects and advantages of the invention will be apparent from the description and claims.

The inventor then describes generally the figures in the drawings, in which he says that several embodiments of his invention are shown. Then there is a description of the various constructions shown in the figures, of which only the following need be set out:

The construction shown comprises a pair of channel-like straps 1 each having a lens-edge engaging portion with ears extending therefrom for embracing the edges and adjacent surface portions of the lenses 2, a bridge 3 secured to these straps, a pair of temple-supporting wires 4 having an anchorage portion thereof also secured to the straps 1, in general extending along, adjacent, and in the rear of the edges of the lenses 2, and a pair of temples 5 pivotally connected with the ends of the wires 4, the axes of said hinge connections being substantially vertical, whereby the temples will fold compactly. It will be noted that the supporting wires 4 which support the temples are supported solely or mainly by the bridge 3 and that any strain put on the wires by the temples will not be transmitted to the lenses but will be transmitted to and carried solely by the bridge 3.

In the construction shown in Figs. 1 to 3, incl., the supporting wire 4 is secured to the lens-edge engaging portion of the lens-supporting strap. For this purpose, the supporting wire is bent or offset, as shown at 6,

so as to extend from front to rear along the upper lens-edge engaging portion of the strap, as shown in Fig. 3, thence angularly or outwardly a short distance, thence upwardly and outwardly following the contour of the edge of the lens so as to be inconspicuous and so as not to interfere with vision.

In Fig. 6 is shown another method of securing the supporting wire to the strap. In this form, the end of the wire 4 extends along and is secured to the rear edge of the strap 1, in the plane of the lens-edge engaging portion thereof as by welding, soldering, or the like.

In Figs. 7 and 8 is shown a mounting in which the temple-supporting wires 4 are formed integral with the bridge 3. In this form the straps 1 which support the lenses 2 are secured in any suitable manner as by soldering or the like to the wire adjacent the junction of the bridge and temple-supporting wire. The temple-supporting wires extend from the portions secured to the lens-engaging portions rearwardly and angularly to follow the contour of the lens adjacent to and along the rear surface thereof. The wire may be oval or slightly flattened and may be bent at the bridge portion so that the flattened surface of the wire will lie substantially parallel with the nose of the wearer.

Further modifications will be apparent to those skilled in the art and it is desired, therefore, that the invention be limited only by the prior art and the scope of the appended claims.

It will be seen that in all of the forms disclosed, the temple supporting wire follows the contour of the edge of the lens so as not to interfere with the vision and so as to be inconspicuous. It will also be noted that in all of the forms the temple-supporting wire is supported by the nose-engaging means.

The specification ends with 6 claims, which read as follows:

1. A spectacle construction comprising a pair of lenses, a pair of channel-like straps embracing the edges of said lenses, respectively, at the nasal edge of the lenses, each of said straps including a lens-edge engaging portion, a bridge member for connecting said straps, and a pair of temple-supporting wire members each having an anchorage portion extending therefrom and being secured directly to the lens-edge engaging portions of the strap and extending rearwardly and angularly therefrom and following the contour of the lens adjacent to and along the rear surface thereof for connection with the temple of the spectacle.

2. A spectacle construction comprising a pair of lenses, a pair of channel-like straps embracing the edges of said lenses, respectively, at the nasal edge of the lenses, each of said straps including a lens-edge engaging portion, a bridge member for connecting said straps, and a pair of temple-supporting wire members each having an anchorage portion extending therefrom and being secured directly to the lens-edge engaging portions of the strap intermediate the ends thereof and extending rearwardly and angularly therefrom and following the contour of the lens adjacent to and along the rear surface thereof for connection with the temple of the spectacle.

3. A spectacle construction comprising a pair of lenses, a pair of channel-like straps embracing the edges of said lenses, respectively, at the nasal edge of the lenses, each of said straps including a lens-edge engaging portion, a wire bridge member connecting said straps, and a pair of temple-supporting wire members each being formed integrally with said

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wire bridge member and being secured to the lens-edge engaging portions of the strap and extending rearwardly and angularly therefrom to follow the contour of the lens adjacent to and along the rear surface thereof for connection with the temple of the spectacle.

4. A spectacle construction comprising a pair of lenses, a pair of channel-like straps embracing the edges of said lenses, respectively, at the nasal edge of the lenses, each of said straps having a lens-edge engaging portion, a bridge member for connecting said straps, and a pair of temple-supporting wire members each having an anchorage portion extending therefrom parallel to the lens-edge engaging portion of said channel-like straps and being secured directly to said straps, there being offsets extending from said portions in the direction of the lenses, said temple-supporting wire members extending from said offset portions and following the contour of the lens adjacent to and along the rear surface thereof for connection with the temple of the spectacle.

5. A spectacle construction comprising a pair of lenses, a pair of channel-like straps embracing the edges of said lenses, respectively, at the nasal edge of the lenses, each of said straps including a lens-edge engaging portion, a bridge member for connecting said straps, and a pair of temple-supporting wire members each being secured to the lens-edge engaging portions of the strap and extending rearwardly and angularly therefrom and following the contour of the lens adjacent to and along the rear surface thereof for a substantial distance, the free end portions of said temple supporting wire having a rearwardly extending portion terminating in a hinge for pivotally receiving the temple of the spectacle.

6. A spectacle construction comprising a pair of lenses, a pair of channel-like straps embracing the edges of said lenses, respectively, at the nasal edges of the lenses, each of said straps including a lens-edge engaging portion, a bridge member for connecting said straps, and a pair of temple-supporting wire members each having an anchorage portion extending therefrom and being secured to said straps in the plane of the lens-edge engaging portions thereof, said temple supporting wire member extending therefrom to follow the contour of the lens adjacent to and along the rear surface thereof for connection with the temples of the spectacles.

Two attacks are made on the patent, namely, lack of novelty, sometimes called anticipation, and lack of invention, usually referred to in the English cases as lack of subject matter.

Before either of these is considered it is, I think, desirable to describe the state of the prior art. This may be outlined briefly. Optical lenses as assembled with their mountings are mainly of two kinds, namely, eye glasses and spectacles. Eye glasses are rimless and held in position on the nose by a spring. Spectacles are rimless or framed, the frames being of metal or plastic. They ride on the nose by a bridge and differ from eye glasses in being held in position by temples extending over the ears. In addition



to eye glasses and spectacles there are also spectaclettes, a combination of both, being fastened on the nose by a spring and held in position by temples over the ears.

The principal objects sought to be achieved by the use of the various types of mountings were to hold the lenses in the proper position before the eyes, enable as wide a range of vision as possible, and make them comfortable to wear and inconspicuous in appearance. It was also desired to have a minimum of breakage or loosening of the lenses.

Eye glasses gave a wider range of vision and were less conspicuous than spectacles but there were serious disadvantages in their use. It was difficult to keep them in the proper position, the pressure on the nose made them uncomfortable and the lenses were subject to breakage. The result was that while they were in vogue prior to about 1916 very few of them are now sold. Plastic frame spectacles are comfortable to wear and less subject to breakage than any other kind. But they are not always easy to fit and it is difficult to keep them in the proper position, their tendency being to slide down on the nose. The rims are obstructive of vision and they are more conspicuous than other types of glasses. Metal frame spectacles have the great advantage of being easily adjustable to the proper position by means of the guard arms and easily kept in position by the temples. They are less restrictive of vision and less conspicuous than the plastic frame ones, almost as comfortable, being only slightly heavier, and almost as free from breakage. The rimless spectacles are as easy to adjust and keep in the proper position as the metal frame ones and are lighter and less conspicuous. They give a wider range of vision than either plastic or metal frame spectacles but less than eye glasses because of the straps at the outer edges of the lenses by which the temples are connected. Their greatest disadvantage is the heavy rate of breakage of the lenses and the loosening of them both at the nasal and at the temple ends.

Eye glasses, spectacles and spectaclettes were all well known long before the 2-point Numont mounting came on the market. The greatest development up to that time was the Ful-Vue type of spectacles with the temples attached above the centre of the line of vision or what is

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called the 180 line. These came into prominent use about or shortly after 1930. By that time eye glasses had almost become obsolete and spectaclettes were seldom seen. But there were many different makes of spectacles, rimless and framed, having the advantages and disadvantages described. They are represented generally by Exhibits B (metal frame spectacles), C (rimless spectacles) and D (plastic frame spectacles). These constituted the practical art in spectacles at or about 1930 and the situation remained substantially unchanged until the appearance of the Numont mounting in 1938.

Counsel for the plaintiff filed a number of patents as part of the evidence of the prior art. I enumerate them as follows, giving in each case the name of the inventor and the number and date of the patent; namely, Exhibit 6, J. E. Briggs, U.S. patent 443,160, dated December 23, 1890; Exhibit 7, J. Savoie, U.S. patent 915,487, dated March 16, 1909; Exhibit 8, F. A. Stevens, U.S. patent 953,304, dated March 29, 1909; Exhibit 9, J. Savoie, U.S. patent 988,666, dated April 4, 1911; Exhibit 10, F. W. Haviland, U.S. patent 1,380,957, dated June 7, 1921; Exhibit 11, O. B. Carson, U.S. patent 1,904,852, dated April 18, 1933; Exhibit 12, W. W. Ferris, U.S. patent 1,972,479, dated September 4, 1934; Exhibit 13, G. E. Nerney, U.S. patent 1,984,541, dated December 18, 1934; Exhibit 14, G. E. Nerney, U.S. patent 1,987,701, dated January 15, 1935; Exhibit 15, R. G. Stayman, U.S. patent 2,057,855, dated October 20, 1936; Exhibit 16, F. R. Bishop, U.S. patent 2,063,657, dated December 8, 1936; Exhibit 17, A. F. Williams, U.S. patent 2,069,347, dated February 2, 1937; Exhibit 18, A. F. Williams, U.S. patent 2,091,296, dated August 31, 1937; Exhibit 19, J. Savoie, Canadian patent 118,602, dated May 25, 1909, the Canadian equivalent of Exhibit 7; Exhibit 20, E. Reach, United Kingdom patent 15,461 of 1907; and Exhibit 21, B. Merth, United Kingdom patent 29,840 of 1912. In addition counsel filed two other patents, namely, Exhibit 4, E. E. Emons, Canadian patent 274,841, dated October 25, 1927; and Exhibit 5, C. E. McLeod, Canadian patent 331,430, dated April 4, 1933.

The evidence adduced on behalf of the plaintiff, including the patents referred to, shows that at an early date efforts were made to improve rimless spectacles. The

problem was to overcome their defects, namely, the high rate of breakage of the lenses and their tendency to loosening, and at the same time retain their advantageous features, namely, their lightness, wide range of vision and comparative inconspicuousness. The problem was primarily that of breakage and next that of loosening. It was also desired to reduce the inconspicuousness of rimless spectacles still further. There was certainly a clear recognition of the problem to be solved in the specifications of several of the patents such as, for example, the Stayman, Ferris and Nerney patents.

The evidence establishes that there was no practical contribution to the solution of the problem prior to the 2-point Numont mounting. The inventions covered by the patents, Exhibits 6 to 21, were in the main paper proposals or, where that was not so, had no commercial success. For example, Mr. Kemp for the plaintiff said that he had seen a pair of glasses embodying the structure shown in the Savoie patents, Exhibits 7 and 19, about twenty to thirty years ago. He was struck by the loose temples and remembered the mounting because "it was such an odd-looking thing". Otherwise his memory of it was vague, but he agreed that it was not a practical mounting—it would never stay on. Mr. Kemp also said that he had seen a mounting something like that disclosed in one of the structures in the Stevens patent, Exhibit 8, about twenty years ago, but his recollection of this was also vague. There was also the statement of Mr. Elliott for the plaintiff that he had used some German glasses between 1905 and 1908 which he thought were similar to those described in Exhibit 7 and Exhibit 8. His recollection of them was not clear but they were not at all like the 2-point Numont mounting and he agreed that they were not satisfactory. Of the patents issued after 1930 only two reached the market, namely, the Nerney patent, Exhibit 14, and the Bishop patent, Exhibit 16, but neither was a commercial success. The other Nerney patent, Exhibit 13, did not come into practical use until after it had been substantially modified as shown by Exhibit G described as a Shuron Shurset Rimway. This was in 1940. There was also only a slight use of Exhibit 18. The other patents, Exhibits 4 and 5, were concerned with other

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matters. Without discussing the patents in detail, I think that it may fairly be said that up to the time when the defendant's 2-point Numont mounting came on the market no satisfactory solution of the problem had been found.

When the defendant's mounting came into production in 1938 there was an immediate and wide demand for it and it almost swept other types of rimless spectacle mountings off the market. This was admitted by Mr. Elliott for the plaintiff who said that when it first came it was about 90 per cent of the optician's business. Mr. Goodwin for the defendant also stated that it was the greatest revolution in the optical frame business. The evidence indicates that since then there has been a great trend towards plastic frame spectacles and a great reduction in the use of metal frame spectacles. Several estimates of the extent of this trend and change in use were given by the witnesses but I think that the best evidence was that of Mr. Steg taken from the records of the American Optical Company from 1936 to 1946 and set out in Exhibit K. This shows that in 1936 out of the total frame and mounting shipments of the American Optical Company plastic frames made up 14 per cent, metal frames 45 per cent and rimless mountings 41 per cent. By 1946 plastic frames had increased to 40 per cent and rimless mountings including the 2-point Numont mounting to 47 per cent, while metal frames had decreased to 13 per cent. Mr. Uhlemann's evidence shows an even greater tendency towards plastic or shell frames. He took the records of the defendant's sales of various types of frames and mountings in July 1941 as compared with those in July 1947. In July 1941 rimless mountings made up 57 per cent of the sales, shell frames 25 per cent and metal frames 18 per cent; in July 1947 the rimless mountings had gone down to 33 per cent and the metal frames to 6 per cent, but the shell frames had gone up to 61 per cent. He thought that the shell frames had reached their peak. Mr. Trebilcock for the defendant said that in 1936 his sales were 20 per cent plastic frames, 30 per cent metal frames and 50 per cent rimless mountings and that in 1947 they were 35 per cent plastic frames, 5 per cent metal frames and 60 per cent rimless. In his opinion, the Numont construction had increased the sale of rimless glasses considerably. Although

there is some evidence to the contrary it is established by the weight of evidence that the defendant's 2-point Numont mounting has maintained its leadership in the field of rimless spectacle mountings even after the introduction of various Rimway mountings. In these the temple supporting wire is connected with the upper outer edge of the lens by a lug extending from the wire with a hole drilled through it and the lens and a screw holding the lug and the lens together. There is also a strap connection with the lens at the nasal end. Thus there are two points of connection for each lens making a 4-point mounting, instead of only one connection with each lens as in the case of the 2-point Numont mounting. The only evidence against Numont's leadership in the field was that of Mr. Kemp and Mr. Elliott for the plaintiff. Mr. Kemp said that the 2-point Numont mounting made up only about 2 per cent of R. N. Taylor's sales of rimless mountings but admitted that his estimate was pretty much of a guess. Mr. Elliott, a strong supporter of the superiority of the 4-point Rimway mounting, said that the 2-point mounting, although originally 90 per cent of the opticians' business, was now not 2 per cent of it, the four-point being 60 per cent and the rest shell. On cross-examination he said that he didn't sell 2-point mountings and didn't even keep any in stock. The evidence for the defendant is all the other way. Mr. Trebilcock said that he did not believe in the 4-point mounting and that his sales of it would be less than half of 1 per cent of his total sales; 95 per cent of his rimless mounting sales were Numonts. Three Ottawa optometrists and opticians gave evidence to the like effect. Mr. Ryde said that he sold or prescribed ten Numonts to one Rimway; Mr. Goodwin said that the 4-point compared with the Numont would be less than half of 1 per cent; and Mr. Bastien that his sales were 98 per cent Numont and 2 per cent Rimway. But the most comprehensive evidence was that which Mr. Steg set out in Exhibit L. This shows all the American Optical Company's Numont shipments expressed as a percentage of all its rimless mountings shipments. In 1938 Numont was 7 per cent of the total, in 1939 50 per cent, in 1942 and 1944 a high of 84 per cent and in 1946 76 per cent. There is also the evidence of Mr. Uhlemann as to the

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defendant's sales. It has sold 4-point Rimways ever since 1940. In July 1941 its sales of Numont mountings was 75 per cent of its total rimless sales and its sales of Rimways about 5 per cent. In July 1947 its sales of these mountings were respectively 88 per cent and 9 per cent of its total. There can, I think, be no doubt that the Numont mounting is the leader in the rimless mounting field. Moreover, its total production since its introduction has been tremendous. The mounting is made by licensees under the patent who pay a royalty to the defendant of 2 cents per mounting. Mr. Uhlemann gave particulars of the number of mountings on which such royalties had been paid in each year up to the end of 1946. The first commercial production was in 1938 when 239,081 mountings were made. This rose in 1939 to 1,212,562 and reached a peak of 3,301,510 in 1944. In 1946 the figure was 2,865,871 and by the end of that year the total number of mountings had come to 20,599,894. There is thus no doubt that the defendant's 2-point Numont mounting was a great commercial success.

The evidence also establishes that the 2-point Numont mounting went a considerable distance towards solving the problem to which the inventor had addressed himself. There was really no substantial dispute of this fact. Counsel for the plaintiff sought to establish that certain 4-point mountings, such as Exhibits E, F and G, which I refer to generally as Rimway mountings, that came on the market after the defendant's 2-point mounting did, were superior to it. In my view, this evidence was, strictly speaking, irrelevant to the issue before the Court. We are not here concerned with comparison between the 2-point Numont mounting and mountings covered by patents subsequent to the patent in suit but with the question whether the Numont mounting was an advance over the previous art for which a patent could validly issue.

The evidence is conclusive that the defendant's mounting made a substantial contribution to the solution of the problem of breakage. Mr. Trebilcock said that as compared with rimless spectacles of the existing type (Exhibit C) it cut the breakage more than 50 per cent and Mr. Uhlemann's evidence was to the same effect. There was no contradiction of this evidence by either of the plaintiff's

witnesses and I accept it as true. Mr. Elliott did express the opinion that there was more breakage of lenses with the 2-point Numont mounting than with the 4-point Rimway one. But even on this point the weight of evidence and opinion was against him. Mr. Trebilcock thought that the Numont construction would not break as easily as the 4-point. And Mr. Uhlemann, Mr. Ryde and Mr. Goodwin all gave it as their experience that there was less breakage with the Numont mounting than with the Rimway one.

It is also clear that there was much less loosening of the lenses with the 2-point Numont mounting than with the former rimless spectacles. There was no contradiction of this evidence. And it would appear from the evidence of Mr. Trebilcock, Mr. Ryde, Mr. Goodwin and Mr. Bastien that there was also less loosening of the lenses with the 2-point Numont mounting than with the 4-point Rimway one. On the other hand, there was evidence of a greater tendency towards lens sag in the case of the Numont mounting. Mr. Kemp found this a great disadvantage and said that it was necessary to correct it by drilling a hole in the lens at the upper outer corner and fastening it by means of a clip over the temple arm and embracing the lens secured with a screw through the clip and the lens. He could not tell how many clips he put on in a year. The witnesses for the defendant found little difficulty with lens sag and said that clips were seldom used. Mr. Trebilcock had used only half a dozen, Mr. Uhlemann only one in five hundred cases and Mr. Bastien some, while Mr. Goodwin had not seen them in use at all. Mr. Uhlemann gave the best evidence on the subject of lens sag. It was caused by the shoe or bottom or lens edge engaging portion of the strap becoming bent away from the edge of the lens and the ears of the strap becoming bent away from the sides. He agreed that there had been a great deal of work in the industry to overcome this such as by the use of special kinds of straps with springs in them. He did not consider that the use of clips would help, but rather that it would be harmful in that it would obstruct vision, weaken the lens and tend to revert back to the type of 4-point mountings with their liability to breakage from which the Numont mounting had sub-

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stantially escaped. In the meantime, the correction of the sag was a simple matter of adjustment which all opticians made freely. As I see it, the advance made by the defendant's mounting in solving the various problems of loosening, including lens sag, was substantial but not as great as that made in solving the problem of breakage.

Nor is there any doubt that the defendant's mounting by taking off the strap connection of the temple at the upper outer edge of the lens rendered the spectacles less conspicuous than either the old 4-point rimless ones or those with the 4-point Rimway mounting.

I now come to the question of what change there was in the 2-point Numont mounting from the prior art that made these results possible and whether such change was a patentable invention. But before this is dealt with it is desirable to refer to some of the parts of the mounting. They are basically nine in number, namely, two guard arms with pads, two straps, a bridge, two temple supporting wires or temple arms and two temples or end pieces. These are soldered or otherwise joined together to make one mounting before they are delivered to the optical trade. We are not in this case concerned with the guard arms with the pads that rest on the nose or the temples, being the end pieces which extend over the ears, but only with the straps, the bridge and the temple supporting wires or temple arms. A brief description of each may be helpful. The specification speaks first of the straps as "a pair of channel-like straps each having a lens-edge engaging portion with ears extending therefrom for embracing the edges and adjacent portions of the lenses". Each channel-like strap consists of two ears or wings for holding the sides of the lens joined by a bar or strip forming the bottom of the channel for engaging the edge of the lens and conforming to its curved shape. A cross section of this strap looks like a U, the uprights or legs embracing the sides of the lens between them and the bottom engaging its edge. The bar or strip forming the bottom of the channel is called the lens edge engaging portion of the strap. The back of this is soldered to the end of the bridge. The portions of the strap holding the sides of the lens were in various forms, such as the diamond-shaped ears in Exhibit 30, which Mr. Elliott described as lugs, or the longer



wings in Exhibit H which Mr. Uhlemann described. There were several ways in which the lens could be held in the strap. One was by drilling a hole in the lens and holding it by a screw through the diamond-shaped ears and the lens as in Exhibit 30. There was also the method described by Mr. Uhlemann and embodied in Exhibit H, namely, that slots were cut diagonally in the edge of the lens and lugs in the bottom of the strap were angled to fit into these slots making a dovetailed construction held tight with a thermoplastic cement. In this method no hole was drilled through the lens. This was called the Everloct strap. There was also a combination of the screw and cement strap. Moreover, there were variations in the lens edge engaging portion of the strap. In some cases it was equipped with springs, either diaflex or triflex, whereas in others the portion was rigid. Originally there were several widths of straps, but now there are only two in general commercial use. Moreover, straps were used not only for the connection of the lens at its nasal edge but also for its connection with the temple at the outer edge as in the case of the rimless spectacles, Exhibit C. The other parts may be referred to briefly. The bridge is a saddle bridge that rests on the nose, with its ends secured to the back of the straps. The temple supporting wires or temple arms are also anchored to the straps at their nasal end, as hereinafter amplified, and then follow along and behind the edge of the lens until they are joined to the temples or end pieces with a hinge that enables the mounting to be folded flat to fit into a case.

There was no novelty in any of the parts, all of which were well known in the art prior to 1930. No invention is claimed in respect of the straps or any part thereof or in any springs or method of engaging either the sides or edge of the lens or the bridge or the temple arms. So that whatever invention there may be in the defendant's mounting lies, not in any part or parts, but in the manner of attachment of some of them.

Counsel for the defendant referred to two of the objects set out in the specification, namely, to provide an improved temple mounting which prevents strain from being transmitted to the lenses and one which will be inconspicuous in appearance, these being the principal objectives that

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were being sought in the industry, and submitted that the Uhlemann invention consisted in the elimination of the connection of the temples at the outer edge of the lens and the connection of the temple supporting wires or temple arms to the lens edge engaging portion of the straps at the nasal edge. The desirability of having a single point connection with the lens, as, for example, in the Stayman patent, was not new. Nor was it a new idea to have the temple arms connected somewhere near the nasal side of the lens, as in the Savoie patents, Exhibits 7 and 19, or the Stevens and Savoie patents, Exhibits 8 and 9. The invention did not, therefore, consist in having a 2-point mounting instead of a 4-point one, or in having the temple arms connected somewhere near the nasal end of the lens. The inventive idea lay in having a mounting in which there is a single point connection with the lens and the temple arms are connected at a specific place near the nasal edge of the lens, namely, to the lens edge engaging portion of the strap. It was the essence of the invention to have the temple arms so connected. No one had thought of having a single point connection with the lens with the temple arms connected at this point until Uhlemann brought out his 2-point Numont mounting. It succeeded in preventing strain from being transmitted to the lenses with the result that there was a reduction of at least 50 per cent in breakage and a substantial reduction in loosening, while at the same time the spectacles were made less conspicuous and none of the advantageous features of the rimless spectacles were lost. The 2-point Numont mounting thus brought success where other attempts to reach the desired objectives had failed. The embodiment of the inventive idea is clearly shown in the drawings of the specification. In every case, except in figures 10 and 12, they show the connection of the temple arm as being to the lens edge engaging portion of the strap. And it is to the securing of the temple arm at the lens edge engaging portion of the strap that all the claims are directed. The structures shown in figures 10 and 12 are excluded from the claims. The thread which runs through all the claims is the connection of the temple arm to the lens edge engaging portion of the strap at the nasal edge of the lens. In my opinion, counsel for the defendant has correctly set

out the essence of the alleged invention. I do not think that any person skilled in the art who read the specification would have had any doubt about it or how to carry it into effect.

I now come to the attacks on the patent. Lack of novelty and lack of subject matter as grounds for holding a patent invalid are closely related, but are not the same. Lindley L.J. pointed out the difference in *Gadd and Mason v. The Mayor of Manchester* (1):

In considering subject-matter, novelty is assumed; the question is whether, assuming the invention to be new, it is one for which a patent can be granted. In considering novelty, the invention is assumed to be one for which a patent can be granted if new, and the question is whether on that assumption it is new. Has it been disclosed before? If there is an earlier specification for the very same thing, the second invention is not new; but if the two things are different, the nature and extent of the difference have to be considered. The question then becomes one of degree. But unless it can be said that the differences are practically immaterial; that there is no ingenuity in the second invention, no experiment necessary to show whether it can be usefully carried out or not, the second cannot be said to have been anticipated by the first.

The attack on the patent for lack of novelty was on the ground that the alleged invention had been anticipated by prior patents. The requirements that must be met before an invention should be held to have been anticipated by a prior publication have been discussed in many cases and may be stated briefly. The information as to the alleged invention given by the prior publication must, for the purposes of practical utility, be equal to that given by the subsequent patent. Whatever is essential to the invention or necessary or material for its practical working and real utility must be found substantially in the prior publication. It is not enough to prove that an apparatus described in it could have been used to produce a particular result. There must be clear directions so to use it. Nor is it sufficient to show that it contained suggestions which, taken with other suggestions, might be shown to foreshadow the invention or important steps in it. There must be more than the nucleus of an idea which, in the light of subsequent experience, could be looked on as being the beginning of a new development. The whole invention must be shown to have been published with all the directions necessary to instruct the public how to put it into practice. It must be so pre-

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(1) (1892) 9 R.P.C. 516 at 525.

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sented to the public that no subsequent person could claim it as his own. This statement is merely a summary of the views expressed by Lord Westbury L.C. in *Hill v. Evans* (1); Parker J. in *Flour Oxidizing Company Ltd. v. Carr & Co. Ltd.* (2); Fletcher Moulton L.J. in *British Ore Concentration Syndicate Ltd. v. Minerals Separation Ltd.* (3); and Lord Dunedin in *Armstrong, Whitworth & Co. Ltd. v. Hardcastle* (4); *British Thomson-Houston Co. Ltd. v. Metropolitan-Vickers Electric Co. Ltd.* (5); and *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ltd.* (6). In the last mentioned case Viscount Dunedin, who delivered the judgment of the Judicial Committee of the Privy Council, put the test in these words:

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"?

and later, at page 56:

Does the man attacking the problem find what he wants as a solution in the prior so-called anticipations.

*Vide* also the judgment of the Judicial Committee in *Canadian General Electric Co. Ltd., v. Fada Radio Ltd.* (7) where the resume of the decisions made by Maclean J. in this Court was said to be an accurate statement of the law on the subject.

It must be kept in mind, of course, that in considering whether an invention was anticipated by a prior patent, the prior patent must be read in the light of the common knowledge which a person skilled in the art would have had immediately prior to the alleged invention: *Vide King, Brown, and Co. v. The Anglo-American Brush Corporation* (8); *Savage v. Harris & Sons* (9); and *Van Berkel et al v. R. D. Simpson Ltd.* (10). If the prior publication would give such a person the same information, for practical purposes, as the patent under attack then it is an anticipation of the invention covered by it.

In support of his contention that the Uhlemann invention had been anticipated by prior patents counsel for the

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| (1) (1862) 4 De G, F & J 288<br>at 301. | (6) (1929) 46 R.P.C. 23 at 52.    |
| (2) (1908) 25 R.P.C. 428 at 457.        | (7) (1930) 47 R.P.C. 69 at 90.    |
| (3) (1909) 26 R.P.C. 124 at 147.        | (8) (1892) 9 R.P.C. 313 at 321.   |
| (4) (1925) 42 R.P.C. 543 at 555.        | (9) (1896) 13 R.P.C. 364 at 368.  |
| (5) (1928) 45 R.P.C. 1 at 23.           | (10) (1906) 23 R.P.C. 237 at 258. |

plaintiff relied primarily upon the Savoie patents, Exhibits 7 and 19. His submission was that Figure 2 of Exhibit 19 showed that the temple arm was connected to the shank of the bridge; that the bridge was integral with what he called the lens edge engaging means; that the only difference between Figure 2 of Exhibit 19 and claim 1 of the patent in suit was that in the former the connection of the temple arm was removed from the lens by the length of the shank of the bridge whereas in the latter it was closer to the lens; and that Mr. Kemp had said that there would be no technical difficulty in attaching the arm to the lens edge engaging means or to the strap. From this he argued that the said Savoie patents anticipated the invention covered by the patent in suit; that their disclosure of the connection of the temple arm at the bridge would give a workman skilled in the art the solution of the problem; and that putting the connection at the lens edge engaging portion of the strap would be obvious to him as merely a workshop improvement that did not involve the exercise of any inventive ingenuity. I am unable to accept this submission. Savoie was not concerned with the problem of breakage or loosening of lenses and his invention was not even remotely related to its solution. The specifications in Exhibits 7 and 19 show that the object of his invention was to devise a temple arm connection that would keep the lens at the proper distance from the eyes of the wearer. That being so it was clear that the temple arms had to be back from the lens. Any attachment nearer to it would, therefore, defeat its very purpose. In my judgment, no one reading the specifications could possibly be directed towards the idea of having the connection of the temple arm at the lens edge engaging portion of the strap or anywhere near the lens. On the contrary, he would be definitely led away from it. The information given by the Savoie patents, Exhibits 7 and 19, was materially and substantially different from that of the patent in suit and I find no support for the submission that the Uhlemann invention was anticipated by them.

It was also submitted that the Uhlemann invention was anticipated by the Stevens patent, Exhibit 8, and the Savoie patent, Exhibit 9. In both of these there was a temple arm secured near the nasal edge of the lens. In Figure 3 of

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Exhibit 8 there was really no strap and the end of the bridge, the lens and the head of the temple arm were all held together by one screw. In Figure 6 there was a strap and the head of the temple arm was held between one ear of the strap and the lens by a screw. In Figure 4 of Exhibit 9 the head of the temple arm was outside one of the ears of the strap and held with the strap and the lens by a screw. Counsel did not press his submission as to Exhibit 8 seriously, but did urge that Exhibit 9 was an anticipation of claims 4 and 6 of the patent in suit in that it showed the connecton of the temple arm at the strap as the said claims did; that any difference in construction was purely a workshop improvement; that there was no patentable distinction in the other claims, there being no invention involved in having the temple arm connected to the lens edge engaging portion of the strap, and that such a connection would be obvious from the Savoie invention. I do not agree. I accept Mr. Uhlemann's evidence that the construction shown in these two patents was quite impractical, but that is not necessarily the test of whether they were anticipations of the Uhlemann invention. The objection to the submission is more serious. In both of the patents the temple arm is so held at the nasal edge of the lens that any pressure on it would make it act like a lever and transmit strain to the screw and through it to the lens. This would inevitably result in loosening and breakage of the lenses, the very thing that Uhlemann was seeking to avoid. Certainly, if he had not made his own discovery and had had the Savoie and Stevens patents in his hand he would not have said, "That gives me what I wish." No one seeking to reduce the breakage and loosening of lenses could have found a solution of his problem in anything he saw in Exhibits 8 and 9. There was nothing anticipatory of the Uhlemann invention in either of them.

It was also urged that the Nerney patent, Exhibit 13, was an anticipation. But this was based on the contention that the claims of the patent in suit were broad enough to include a 4-point connection and that there was nothing to show that they were confined to a 2-point one. There is a simple answer to this. It is true that there is no claim which says expressly that the temple arm is connected to the lens edge engaging portion of the strap and is not con-

nected anywhere else. It is not necessary that an inventor should set out what is not included in his invention for what is not claimed is disclaimed. There is nothing in the specification to suggest that Uhlemann was thinking of a 4-point connection and no claim could reasonably be construed as extending to it. That, of course, disposes of the Nerney patent, Exhibit 13, as an anticipation of the Uhlemann invention. It showed a 4-point mounting and there was no strap. There was no information in it that would have led anyone to the Uhlemann invention. It was not an anticipation of it.

Nor, in my judgment, was there anything anticipatory of it in any of the other prior patents.

This leaves only the issue of subject matter. There is a presumption of validity in favor of the patent by reason of its issue and the onus of proving that it is invalid for lack of invention is on the person attacking it, in this case, the plaintiff. The onus is not an easy one to discharge. No one has really succeeded in defining, apart from the statutory definition, the difference between an advance that is obvious as a workshop improvement and one that involves inventive ingenuity. One of the difficulties is that there is no objective standard of invention. What one person might regard as inventive another would consider as obvious.

In the present case, counsel for the plaintiff submitted that Mr. Kemp had said that there would be no difficulty involved in attaching the end of the temple holding means in the Savoie patent to the strap instead of having it attached at the end of the shank of the bridge and contended that the connection of the temple arm to the lens edge engaging portion of the strap as claimed in the patent would be obvious as a workshop improvement to a person skilled in the art and did not involve any inventive step.

I have come to the conclusion, for several reasons, that this contention ought not to be accepted. This *ex post facto* analysis of the invention is not sound. I am supported in this view by the statement of Fletcher Moulton L.J. in *British Westinghouse Electric and Manufacturing Company Ltd. v. Braulik* (1):

I confess that I view with suspicion arguments to the effect that a new combination, bringing with it new and important consequences in

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the shape of practical machines, is not an invention, because, when it has once been established, it is easy to show how it might be arrived at by starting from something known, and taking a series of apparently easy steps. This *ex post facto* analysis of invention is unfair to the inventors, and in my opinion it is not countenanced by English Patent Law.

and the approval of it given in the House of Lords by Lord Russell of Killowen in *Non-Drip Measure Coy. Ltd., v. Stranger's, Ltd., et al* (1) with his additional remarks:

Whether there has or has not been an inventive step in constructing a device for giving effect to an idea which when given effect to seems a simple idea which ought to or might have occurred to anyone, is often matter of dispute. More especially is this the case when many integers of the new device are already known. Nothing is easier than to say, after the event, that the thing was obvious and involved no invention.

And in the same case Lord Macmillan said, at page 143:

It might be said *ex post facto* of many useful and meritorious inventions that they are obvious. So they are, after they have been invented.

The fact that it was easy to connect the temple arm at the point where Uhlemann did once the idea of doing so had been thought of is thus no evidence of lack of invention. There is support of this in *Hickton's Patent Syndicate v. Patents and Machine Improvements Company Ltd.* (2). There the Court of Appeal reversed the judgment of Swinfen-Eady J., who had held the patent invalid, and Fletcher Moulton L.J., at page 347, made the following comments with regard to the views expressed by the trial judge:

The learned Judge says: "An idea may be new and original and very meritorious, but unless there is some invention necessary for putting the idea into practice it is not patentable." With the greatest respect for the learned Judge, that, in my opinion, is quite contrary to the principles of patent law, and would deprive of their reward a very large number of meritorious inventions that have been made. I may say that this dictum is to the best of my knowledge supported by no case, and no case has been quoted to us which would justify it. But let me give an example. Probably the most celebrated Patent in the history of our law is that of *Bolton and Watt*, which had the unique distinction of being renewed for the whole fourteen years. The particular invention there was the condensation of the steam, not in the cylinder itself, but in a separate vessel. That conception occurred to *Watt* and it was for that that his Patent was granted, and out of that grew the steam engine. Now can it be suggested that it required any invention whatever to carry out that idea when once you had got it? It could be done in a thousand ways and by any competent engineer, but the invention was in the idea, and when he had once got that idea, the carrying out of it was perfectly easy. To say that the conception may be meritorious and may involve invention and may be new and original, and simply because when you have once got

(1) (1943) 60 R.P.C. 135 at 142.

(2) (1909) 26 R.P.C. 339.



the idea it is easy to carry it out, that that deprives it of the title of being a new invention according to our patent law, is, I think, an extremely dangerous principle and justified neither by reason, nor authority.

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Invention may, therefore, be present notwithstanding the fact that there was no difficulty in putting the idea into effect once it had been conceived.

Counsel for the defendant urged that there was evidence of invention in the fact that the 2-point Numont mounting solved a problem and supplied a want when other efforts to do so had failed and that when it came on the market it was a great commercial success. It is clearly established that the practical utility and commercial success of an invention may be a material factor in determining whether the new result produced by it was obvious or involved inventive ingenuity. Commercial success by itself, without the solution of a problem, is not sufficient to establish subject matter: *vide Longbottom v. Shaw* (1); *Heginbotham Brothers, Ltd., et al v. Burne* (2). But where there is evidence of a problem and a solution of it then commercial success is strong evidence of invention. That was the effect of the statement of Tomlin J. in *Samuel Parkes & Co. Ltd. v. Cocker Brothers Ltd.* (3):

Nobody, however, has told me, and I do not suppose anybody ever will tell me, what is the precise characteristic or quality the presence of which distinguished invention from a workshop improvement. . . . . The user of this particular clip has been large. Over 1½ millions were sold up to the end of 1927. The Railway Companies have adopted it as standard and to that extent it has beaten its competitors out of the field. The truth is that, when once it had been found, as I find here, that the problem had waited solution for many years, and that the device is in fact novel and superior to what had gone before, and has been widely used, and used in preference to alternative devices, it is, I think, practically impossible to say that there is not present that scintilla of invention necessary to support the Patent.

This statement was quoted with approval in the House of Lords by Lord Russell of Killowen in *Non-Drip Measure Coy., Ltd. v. Stranger's Ltd., et al* (4) where he said:

it is always pertinent to ask, as to the article which is alleged to have been a mere workshop improvement, and to have involved no inventive step, has it been a commercial success? Has it supplied a want?

Then, at page 143, after citing the statement of Tomlin J. as apposite, he went on:

As to the commercial success of the Plaintiff's patent there can, in my opinion, be no doubt. In 1935, 430 measures were sold; in 1936, 7,996;

(1) (1891) 8 R.P.C. 333 at 336. (3) (1929) 46 R.P.C. 241 at 248.  
(2) (1939) 56 R.P.C. 399 at 413. (4) (1943) 60 R.P.C. 135 at 142.

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in 1937, 16,700, and in 1938, 18,400. In the war years the sales naturally fell off, but the success of the machine was immediate and great. That there was a need for such a machine was clear from the defects in those already on the market. Nor should it be forgotten that as far back as the year 1908 *Newland* was trying to solve the problem of producing a machine which would deliver measured quantities of liquid without requiring one hand of the operator to be left free to operate the valve. He failed to produce a practical or marketable machine. It was not until some 27 years have elapsed that the successful machine is forthcoming which achieves the object at which *Newland* aimed. My Lords, if during that long period it only required a workman to be told to adapt *Newland* to upward pressure, for him to produce a machine as claimed in the Plaintiff's patent, it is hard to understand why the production was so long delayed. There can, I think, be only one explanation, and it is that before such a machine could be produced an inventive step had to be taken, and that those who took out the Plaintiff's patent were the first to take it.

Counsel for the plaintiff submitted that the present case fell outside the ambit of the principles laid down in these cases. His argument was that the commercial success of the 2-point Numont mounting was due to factors extraneous to the invention, such as extensive advertising and the inducement of high profits held out to the dispensers of the mountings; that there was no evidence of any problem or long-felt want; and that if there was any such problem or want there was no evidence that it had been solved or met by the alleged invention.

I am not able to agree. There is no evidence of any unusual or excessive advertising. The defendant's mounting was advertised by the American Optical Company and by individual licensees and, no doubt, a large amount of money was spent in promoting sales, but there is nothing to show that there was any unusually extensive promotional campaign. It is also true that the dispensers of spectacles were given a larger profit than they had made on the rimless spectacle mounting. It sold for \$8.00 and the dispenser paid \$2.90 for it, whereas the 2-point Numont mounting cost him \$4.85 and he had to sell it for not less than \$11.00. If he bought more than twenty-five mountings at a time the price was reduced to \$3.15 each and if his business reached a volume of \$10,000 he was entitled to big dealer discounts. Moreover, dispensers were freely and widely licensed. Undoubtedly, these were important factors in the commercial success of the mounting. But the evidence also shows that dealers made no larger profits by selling the 2-point Numont mountings than by selling the various 4-point Rimway ones

that came on the market later and in some cases the profit was less than in the case of the newer introductions. But while advertising, the inducement of large profits to dispensers and the wide licensing of them account for some of the commercial success they cannot account for all of it, nor the fact that the 2-point Numont mounting almost swept the former rimless spectacle, Exhibit C, mountings off the market and has maintained its unquestioned leadership in the rimless spectacle field even against the competition of the new 4-point Rimway mountings on which dealers made just as great a profit. It is, I think, reasonable to say that a substantial part of the commercial success of the mounting was due to the fact that it had succeeded in overcoming the disadvantages of the heavy rate of breakage and the tendency to loosening of lenses to which rimless spectacles were subject without sacrificing their advantages and had thus given satisfaction to its users who by the end of 1946 numbered over 20 million. Moreover, I am unable to agree with the argument that there was no evidence of a problem to be solved or a want to be supplied. As in the *Non-Drip Measure Company* case (*supra*) Lord Russell of Killowen held that the need for the patented machine was shown by the defects in machines already on the market so in this case the need for the 2-point Numont mounting is clear from the defects of breakage and loosening of lenses to which rimless spectacles were subject. And it is incorrect to say that there was no evidence of the existence of the problem. The specifications of the patents put in evidence on behalf of the plaintiff, such as the Stayman, Ferris and Nerney patents, show a clear recognition of it. And I have already found that the 2-point Numont mounting made a substantial contribution to the solution of the problem. The evidence is conclusive that it reduced the breakage that had occurred with rimless spectacles, Exhibit C, by over 50 per cent. Indeed, there is no evidence that denies that fact. And I also find on the weight of evidence that there was less breakage with the 2-point Numont mounting than with the various 4-point Rimway ones. The evidence is similar, as I have already pointed out, with regard to the loosening of lenses, subject to what has been said as to lens sag. The reduction in the rate of breakage

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and in the tendency to loosening was, in my judgment, clearly attributable to the Uhlemann invention of connecting the temple arm to the lens edge engaging portion of the strap. This, I think, achieved the object of preventing strain from being transmitted to the lenses. It might have been desirable to have had evidence of a scientific test of this, but I am satisfied from such tests as were made before me by the witnesses and from the evidence that there was less strain put on the lenses as the result of the invention than would otherwise have been the case. There can be no successful contradiction of this so far as the rimless spectacles, Exhibit C, are concerned. And the weight of evidence and opinion indicates that this was also true so far as the 4-point Rimway was concerned. As I see it this was really a re-inforced rimless. In the old rimless spectacles, Exhibit C, the strain from normal use and from bending the temples was almost all transmitted to the lenses, both at the temple and at the nasal ends, whereas in the 2-point Numont mounting it was taken from the lenses and transmitted to the back of the strap and thereby to the bridge, and in the case of the 4-point Rimway mountings some of the strain continued to be transmitted to the lenses. If the connection of the temple arm to the lens edge engaging portion of the strap, which thus produced the desired result of taking the strain off the lenses, was only a workshop improvement and would be obvious to any person skilled in the art it seems strange that no one should have thought of it before Uhlemann.

In my judgment, the facts of this case bring it within the ambit of the principles laid down by Tomlin J. in *Samuel Parkes & Co. Ltd. v. Cocker Brothers Ltd.* (*supra*) and Lord Russell of Killowen in the *Non-Drip Measure Company* case (*supra*) and I apply them accordingly. Under the circumstances, I am unable to find that there was no invention in what Uhlemann did. It would, I think, be more reasonable to say that the result accomplished by him did involve the taking of an inventive step and that he was the first to take it, and I so find.

I am also of the view that if there were any doubt as to the validity of the patent by reason of lack of invention the commercial success of the 2-point Numont mounting

and its substantial displacement of the rimless spectacle mountings previously in use would be sufficient to turn the scale in its favor. That was the view of the Supreme Court of the United States in *Smith v. Goodyear Dental Vulcanite Company et al* (1). There Mr. Justice Strong, delivering the opinion of the Court, said, at page 495:

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We do not say the single fact that a device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, establishes in all cases that the later device involves a patentable invention. It may, however, always be considered; and, when the other facts in the case leave the question in doubt, it is sufficient to turn the scale.

In any event, the plaintiff has not discharged the onus of proving that the patent was invalid and the presumption of validity in its favor continues. The plaintiff's action for a declaration of invalidity is, therefore, dismissed with costs.

*Judgment accordingly.*

THE ONTARIO ADMIRALTY DISTRICT

BETWEEN:

THE COLUMBIA TRANSPORTA-  
 TION COMPANY,..... }  
 PLAINTIFF;

1948  
 Feb. 2-4, 6, 9  
 Mar. 15-17  
 1950  
 Jan. 24

AND

THE F. P. WEAVER COAL  
 COMPANY LIMITED,..... }  
 DEFENDANT.

*Shipping—Damages—Ship damaged while manoeuvring around corner of dock—Duty of occupier of dock to owners of ships invited to use it—Duty of reasonable care to ensure that dock is reasonably safe for normal and proper use.*

The plaintiff sued for damage to its steamer the *J. R. Sensibar* incurred while manoeuvring around the north-east corner of the Hamilton Harbour Commission terminal wharf in the course of delivering coal to the defendant at that portion of the wharf of which it was the lessee and occupant.

*Held:* That the occupant of a wharf owes a duty to the owners of vessels which he invites to come to it to take reasonable care to ensure that it is reasonably safe for such vessels for their normal and proper use. There is no warranty that it is safe.

(1) (1876) 93 U.S. 486.

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2. That there is no difference in the duty of the occupant of the wharf or enlargement of its scope by reason of the fact that the occupant was the consignee of the coal which the shipowner was delivering pursuant to a contract to do so.
3. That there was no hidden or unusual obstruction or danger or defect in the condition of the dock prior to the arrival of the *Sensibar* that would make it unsafe for normal and proper use by ships invited to it but, on the contrary, that it was in a safe and proper condition for such use.
4. That the *Sensibar* came to her damage by her own manoeuvring.

ACTION against occupants of a wharf for damage incurred by plaintiff's steamer while manoeuvring around a corner of the wharf.

The action was heard before the Honourable Mr. Justice Thorson, President of the Court, at Toronto.

*W. E. McLean K.C.* and *E. Burson* for plaintiff.

*R. C. Holden K.C.* for defendant.

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

THE PRESIDENT now (January 24, 1950) delivered the following judgment:

In this action the plaintiff sues for damage to its steamer, named *J. R. Sensibar*, hereinafter called the *Sensibar*, incurred while manoeuvring around the north-east corner of the Hamilton Harbour Commission terminal wharf in the course of delivering coal to the defendant at that portion of the wharf of which it was the lessee and occupant.

Certain facts are not in dispute. The *Sensibar* in charge of Captain N. Larsen left Toledo, Ohio, at 8.20 p.m. on May 17, 1944, with a cargo of coal consigned to the defendant and arrived at the defendant's dock at Hamilton at 6.38 a.m. on May 19, 1944. She came in bow first making a broadside landing with the port side next to the north face of the dock. Three men were landed to handle her mooring cables and secure them to the mooring posts or spiles, properly called bollards, on the dock. When she was tied up her stern was about 150 feet north of the north-east corner of the dock. The north face

of the dock, called north for convenience although really west northwest, was 1128 feet long and the over-all length of the *Sensibar* including its fantail 552 feet. Instructions where the coal was to be placed were given by Mr. N. Spauldin, the defendant's dock superintendent. The coal from one compartment was to be landed from the north face of the dock and that from the remaining five compartments from the east face. This meant that Captain Larsen, after unloading the one compartment, had to manœuvre his ship into the slip beside the east face so that he could unload the rest of his cargo from there. He decided to do so by breaking or warping around the north-east corner and then backing into the slip stern first. His first step to this end was to shift the *Sensibar* eastward alongside the north face so that her stern was at the north-east corner. This operation was done exclusively with the ship's mooring cables, also called lines or wires, and her mooring winches without the use of her main engine. There were three lines out, the No. 2 wire from the forward part of the ship towards the after end secured to a bollard near the stern, the No. 3 wire from forward of the stern towards the bow secured to a bollard near the bow, and the No. 4 wire from the same location as No. 3 towards the stern secured to a bollard at the north-east corner. The next move was to shift the *Sensibar* further east. Before this was attempted the stern cable, called the No. 5 or fantail wire, was let out through the stern chock at the port side and secured to a bollard on the east side of the dock about 100 feet south of the north-east corner. When this was done the shift astern was made with the mooring lines and winches, the lines secured to the bollards on the north side of the dock being shortened and secured to bollards further east. When the *Sensibar* had been shifted as far east as Captain Larsen considered safe the next move was to break around the corner. In view of the fact that the wind, which was from the north-east, was on the ship's starboard side there was no need of the No. 2 wire to hold her bow against the side of the dock and its use was dispensed with. This left the bow free to swing out from the dock in an arc while the No. 5 wire pulled the stern into the slip towards the east face. The ship did not come around very fast

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or "as lively as it had done before at this dock," which Captain Larsen attributed to the force of the wind holding her bow, and he decided to assist the breaking around the corner by using the main engine. He first worked it slow astern, which increased the tension on the No. 5 wire and tended to swing the ship in more rapidly. After six to eight revolutions the engine was stopped and the wheel put in a hard right position to bring the bow to starboard and the stern to port. The main engine was then worked slow ahead for six to eight revolutions. This use of the engine was to aid the winches in bringing the ship around. Captain Larsen then alternated the slow astern on a midship rudder and the slow ahead on a hard right rudder for about six to eight revolutions each time, the No. 3 and No. 4 wires holding the ship on the corner and the No. 5 wire pulling the stern nearer the dock. These alternations continued until the hull was parallel with the east face. This completed the breaking around the corner. The *Sensibar* was then shifted back into the slip exclusively with the mooring lines and winches. The use of the No. 5 wire was dispensed with and the No. 3 and No. 4 wires were used to pull the ship as far back into the slip as was necessary to unload the coal where Mr. Spauldin had directed. The *Sensibar* was then tied to the east face in a manner similar to that in which she had been tied to the north face. Her bow was then about 300 to 400 feet south of the north-east corner. The unloading of the rest of the coal then began.

As the *Sensibar* was being shifted back into the slip and while her bow was still about 100 feet north of the north-east corner Captain Larsen who was on the bridge had his attention called to the corner by his third mate and saw what appeared like a sharp corner or projection about six or nine inches above the water level. After the ship was tied up and following a conversation with his third mate and his first mate he went down and looked at the port side of his ship. He noticed a heavy scoring in her plates from near the stern and extending forward about the length of seven plates, about 200 feet, all in the same horizontal plane about six or eight inches from the water. The scoring was about two inches wide with a maximum depth of half an inch. Where it had passed over rivets it had cut



the heads right off. The scoring was a partial cut through the steel and deeper at the frames than in between, but otherwise it was about the same in all the plates. Between the frames the plates were bent as well as scored. It was later shown that some of the ship's frames were also buckled.

A description of the dock may be given briefly. It was built by the Department of Public Works of Canada in 1940 and turned over to the Department of Transport and came under the administration of the Hamilton Harbour Commission. The defendant became a lessee of the north-east part in 1942. The dock consisted of concrete walls around an area filled with gravel and crushed rock. The north-east corner—as also the north-west corner—was chamfered or bevelled off with a face of three feet across the bevel making an angle of about 135 degrees with the north and east faces. On top of the walls there were cast iron bollards about 50 feet apart set in the concrete for use as mooring posts. The walls were 28 inches wide at the top with a bevel of about an inch at the outside edge to save mooring cables from being cut by a sharp edge. The faces of the dock including the bevel at the corners were vertical. In all of them 80 pound steel rails had been embedded into the concrete 30 inches from the top and flush with the face except that the rounded part protruded approximately a quarter of an inch. The rails in the long faces were fastened together with standard plates and bolts and so held rigidly in line. There were no connecting plates where the rail in the bevelled face at the north-east corner met the rails in the north and east faces, the ends being mitred to bring them close together. The rails were anchored every two feet by steel U-shaped tie rods seven feet long passed through holes burned through the web of the rail and then twisted and spread and embedded in the concrete. There were two such tie rods in the three-foot rail in the bevelled face each about six inches from the end. There was thus a continuous line of rails around the whole dock a little above the water level which served as a fender to protect the concrete faces against damage.

The scoring of the plates on the *Sensibar* was on the same horizontal level as the line of rails along the faces

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of the dock and it is in respect thereof that the plaintiff claims damages in the sum of \$13,982.58. No evidence of quantum other than that already referred to was given, it being understood that a reference to the registrar for an enquiry as to damages would be ordered if judgment went in favour of the plaintiff.

The plaintiff's allegations of the cause of the damage to its ship and its cause of action against the defendant appear in the amended statement of claim as follows:

8 Around the entire face of the Defendant's wharf, embedded in the concrete near the water line, there existed a fender consisting of a horizontal "T" shaped metal rail. At and near the corner where the East face of the said wharf meets the North face, the concrete had broken away, exposing the said fender from 1 to 1½ inches. In the alternative, if the concrete had not broken away exposing the said fender or rail as aforesaid at the commencement of the shifting of the Sensibar referred to in Paragraph 7, the concrete about the said fender or rail had become so cracked and/or deteriorated that it broke away during the said shifting exposing said fender or rail as aforesaid. Such cracking and/or deterioration of the concrete was caused by the ordinary and usual user of said corner by ships coming to and using said wharf by reason of the character of the construction of said corner and by the action of the elements and otherwise and such exposure was something which was likely to occur in the ordinary and usual user of said corner by ships.

9 In the process of shifting the Sensibar, as stated in paragraph 7 hereof, the port side was brought into contact with the exposed fender or with said fender or rail exposed by reason of the breaking away of the concrete as referred to in Paragraph 8, seriously scoring the port side from a point abreast the engine room forward a distance of approximately 100 feet, thereby causing grievous damage thereto.

10. By inviting or allowing the *Sensibar* to occupy and use the said wharf, the Defendant impliedly warranted that the same was in safe and proper condition for all ordinary purposes, including the manner of shifting the Sensibar resorted to by the Master thereof. The Defendant caused a breach of the said warranty by failing to keep and maintain the face of the wharf in a safe and proper condition, in consequence whereof the Sensibar sustained damage as aforesaid.

11 Alternatively, the Defendant failed to take reasonable care to ensure that the wharf was in a safe and proper condition for the use that was made of it by the Plaintiff, and failed to prevent the unusual danger created by the exposed fender or the exposure of the said fender or rail, referred to in Paragraph 8 hereof.

12 The Defendant failed to warn those in charge of the Sensibar that the said wharf was not in a safe and proper condition for the use which the Defendant should have expected would be made of it.

While there are no decisions directly on the question of liability for damage to a ship by reason of contact with the face of a wharf I see no reason why the principles applied in the so-called "foul" berth cases should not be

applicable. The law is, I think, correctly stated in Roscoe's Admiralty Practice, 5th edition, at page 85, as follows:

Harbour and dock authorities owe a duty to the owners of the vessels which they invite to enter and make use of the harbours, docks and berths under their control, to use reasonable care to ensure that such harbours and berths are reasonably safe for the vessels which they invite to them, or to give warning of any defect not known to the shipowner, or that they have not taken the steps necessary to satisfy themselves that the berth is safe, so as to negative the representation implied in the invitation to the vessel to make use of the berth \* \* \*

A like duty is owed by a wharfinger to the vessels which he invites to make use of his wharf, although the berth at which vessels lie whilst alongside the wharf is not subject to his control. The duty extends to the occupier of a wharf, and to a wharfinger who receives no direct benefit from the use of his wharf; in the latter case it is sufficient that he should enjoy some indirect advantage, such as the receipt of freight for the land carriage of goods discharged at his wharf \* \* \*

The duty is not an absolute duty in the nature of a warranty, but is limited to the taking of reasonable care to ensure the safety of the vessel.

The duty has been recognized in a great many cases, from as early as *The Lancaster Canal Company v. Parnaby* (1); and *The Mersey Docks Trustees v. Gibbs* (2); and including such cases as *The Moorcock* (3); *Tredegar Iron and Coal Company v. Owners of Steamship "Calliope"* (4); *The Bearn* (5); *The Devon* (6); *The Grit* (7); *The Lisa* (8); and *The Andelle* (9). Vide also *Steamer Livingstonia Co., Ltd., v. Dominion Coal Co., Ltd.* (10); and *Owners of ss. Panagiotis Th. Coumantaros v. National Harbours Board* (11). Nor is there any reason for finding that there is any difference in the duty of the occupant of the wharf or enlargement of its scope by reason of the fact that the occupant was the consignee of the coal which the shipowner was delivering pursuant to a contract to do so.

The issue in this case is thus one of fact, namely, whether there was any breach by the defendant of its duty to use reasonable care to ensure that its dock was reasonably safe for use by the *Sensibar* in the course of delivering her cargo of coal. The onus of proof of breach of duty rests on the plaintiff.

(1) (1839) 11 Ad. & E. 223.

(2) (1866) 1 H.L. 93.

(3) (1889) 14 P.D. 64.

(4) (1891) A.C. 11.

(5) (1906) P.D. 48

(6) (1923) 16 Asp. (N.S.) 268.

(7) (1924) P. 246.

(8) (1933) 46 Ll.L. Rep. 320

(9) (1938) 62 Ll.L. Rep. 260.

(10) (1925) Ex C.R. 151.

(11) (1942) S C.R. 450.

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The first thing to ascertain is whether there was anything wrong with the condition of the wharf prior to the arrival of the *Sensibar* that would make it unsafe for normal and proper use by her. If there was not the plaintiff's case falls.

There is no suggestion of any under-water or hidden obstruction. The plaintiff's sole complaint is against the condition of the dock at its north-east corner, that is to say, the condition of the concrete around the rail in the bevelled face of the corner. This is what is complained of in paragraph 8 of the statement of claim. There was no evidence that any concrete had broken away or that the rail or fender was exposed prior to the *Sensibar* breaking around the corner. Nor was there any evidence of any cracking or deterioration of the concrete about the rail or fender prior to her manoeuvre. In fact no evidence as to the condition of the dock prior to the arrival of the *Sensibar* was adduced on behalf of the plaintiff. The existence of the conditions alternatively alleged was left to be inferred from the nature of the damage to the ship and the condition of the corner after the accident.

There is a sharp divergence in the evidence on this point. Captain Larsen said that after he had examined the ship and noticed the scoring of her plates he went up to look at the corner. He looked down and noticed a projection or obstruction and that the concrete immediately around the rail in the bevelled face of the corner had been broken away at both ends for about six or eight inches away from it both above and below but no concrete was broken away at the centre. There was no loose broken concrete or pieces, and no flakes or indication that the dock had been recently broken. It had a darkened appearance of having been weathered. The rail was exposed at the north-west end but was otherwise intact. Except for the breaking away of the concrete at the mitre joints it was not pulled out or disturbed. The evidence of Captain V. Koski, the first mate, was to the same effect. The concrete was broken on both sides of the rail exposing it but was otherwise not disturbed from its normal condition. S. P. King, the third mate, said that after the ship had passed the corner he noticed that

the concrete had broken loose near each corner of the bevelled face exposing the point and had called it to Captain Larsen's attention.

The evidence of the defendant's witnesses was quite different. Mr. N. Spauldin, its dock superintendent, said that after the *Sensibar* had got in the slip and he had spotted her and they had started taking out the second part of the coal the mate called him over and told him that they had trouble getting around the corner and had damaged the boat and also the dock and had lost a cable. After he viewed the damage on the boat he walked to the corner and saw the damage that had been done. The corner piece of rail, that is, the rail on the bevelled face of the corner, had been struck and the north-west point of it was sticking out approximately three inches beyond the rail along the north face. There was damage to the concrete above and below it. It had been broken away and above the rail was flaky and loose and still hanging. The rail was not sticking out at the end near the east face. The damage to the concrete was definitely new damage. There was no discoloration of the broken parts. After looking at the corner Mr. Spauldin went back and saw Captain Larsen. They looked at the damage to the ship together and then went back to the corner together. Later Mr. Spauldin phoned Captain R. A. Bell, the harbour manager and port master, and the two of them viewed the damage. A few days afterwards a small part of the rail was cut off at the north-west end. The tie rod near the corner, which had been pulled out, was straightened and the rail was pushed back into position flush with the face. Mr. Spauldin did not see this work being done but saw what had been done half an hour after the repairs were made. Mr. Spauldin was vigorously cross-examined but his evidence remained unshaken. The rail was not bent but pulled out straight so that at the north-west end it was sticking out three inches from its former position. The concrete was disturbed both above and below the rail for its whole length, broken away for at least an inch above the rail and cracked above that right up to the top of the face. There was no disturbance on the east face of the dock but some of the rail along it was projecting out. Mr. Spauldin's evidence was substantially confirmed by Captain R. A.

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Bell. He said that the north-west end of the piece of rail in the bevelled face of the corner had been sprung out about three inches beyond its original position. The other end was still embedded in the concrete. The projecting end was forced out. Captain Bell also gave evidence that there was a large crack along the top of the wall of the bevelled corner extending in a jagged curve near the east wall widening to about 12 to 14 inches at the centre and then narrowing to between three and four inches at the corner near the north face. There was breakage of concrete below and above the rail. The damage looked new. The crack on top of the wall was a new one. The evidence of Mr. W. G. Burnside, the chief of the Hamilton Harbour patrol, was to the same effect. After the accident he went to see the corner. He could see that the rail was sticking out at the north-west corner of the bevelled face. The concrete where the rail had pulled out had broken away. It was a fresh crack. There was also a crack on the top of the dock across the bevelled corner. The rail was still in position at the south-east end of it.

I have no hesitation in accepting the evidence of Mr. Spauldin, Captain Bell and Mr. Burnside as to the condition of the corner after the accident rather than that of Captain Larsen and the two mates.

Moreover, the defendant's witnesses gave evidence of the condition of the dock prior to the arrival of the *Sensibar*. That of Mr. C. C. Jeffrey, the senior assistant engineer at Toronto of the Department of Public Works, who designed the dock and supervised its construction, was of a general nature. He said that it was a very substantially built, strong wharf, that it was the strongest dock in the Toronto District and that he did not think there was a stronger one on the Great Lakes. The outer corners were chamfered or bevelled off to save the concrete from chipping off as the result of alternate freezing and thawing. This was sound construction. The steel rail was used to protect the dock and was much better than the horizontal wooden fenders that had previously been used. The berths provided for ships at the faces of the dock were safe. In his opinion, no better mooring could be provided. There was also strong particular evidence that there was nothing wrong with the

north-east corner prior to the *Sensibar* breaking around it but that it was in good condition. Mr. Spauldin said that the dock was a good safe one to berth boats. He also stated that the damage which he saw after the *Sensibar* was tied up was definitely new damage, that the broken parts of the concrete were not discolored, that the rail had not been sticking out prior to May 19, that he went around the dock at least once a day and walked along the top of the revetment wall and that if there had been any damage or defect in the face of the wall he would have noticed it if it had been obvious. There was also the evidence of Captain A. R. Bell, that he walked around the docks in the Hamilton Harbour two or three times a week and as far as he was aware the defendant's dock was in perfect condition. He never noticed anything wrong with it. The last time he looked at it prior to the accident it was in good condition. If this was the only evidence as to the condition of the north-east corner it might not be wholly convincing, but it is supported by the clear cut and positive statement of Mr. Burnside. He and his men patrolled the harbour in a boat three times a day one of which patrols he made himself. He went out himself on the evening of May 18. It was one of the duties of the patrol to light the lamps on the outer corners of the dock in question and on this evening he did so himself. One of these lights was at the top of the dock at the north-east corner. He climbed up the north face near the corner by way of a recess in the wall where the light had formerly been. He saw the condition of the corner. I quote portions of his evidence:

Q. Well, did you see the bevelled corner that evening before, Mr. Burnside?

A. Yes, I keep my eyes on the dock, all the way, on all our own docks especially, all the way around.

Q. Well, can you say in what condition that north-east corner and this bevelled part at the corner were that evening before?

A. Just as good as the day it was put in there.

He was also asked as to the position of the rail and whether any concrete was broken away and gave this evidence:

Q. Can you say what the position of the rail was that evening before?

A. It was in perfect shape to my way of thinking. I could not see anything the matter with it.

Q. Do you know if there was any concrete broken away above or below that rail that evening before?

A. There was not.

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The inspection made by Mr. Burnside was between 8.00 and 9.00 o'clock. The night was calm and the visibility good. It was fairly light, just before dusk. I was favourably impressed with Mr. Burnside and have no hesitation in accepting his evidence. In my opinion, it is conclusive that there was nothing wrong with the north-east corner the evening before the accident, that no concrete was broken away from the rail in the bevelled face of the corner and that the rail was not exposed. In my view, Mr. Burnside's evidence completely disposes of the plaintiff's complaint as to the condition of the corner, as mainly alleged, and there is no evidence at all to warrant the alternative allegation of cracking or deterioration of the concrete.

There is further evidence of the safe condition of the dock in the fact that many ships, including the *Sensibar*, had previously broken around the corner without damage to themselves or to the dock. Exhibit D is a list of the ships that traded into the portion of the dock occupied by the defendant since it became an occupant early in 1942 and the evidence is that many of them broke around the corner. The list includes three ships almost as large as the *Sensibar* that came in April, 1944, loaded with more than one kind of coal and probably broke around the corner. In any event, it is relevant that prior to May 19, 1944, no report of any damage to a ship or to the dock had ever been made to Mr. Jeffery, Mr. Spauldin, Captain Bell or Mr. Burnside.

There was some suggestion that the defendant had been negligent in failing to put a cluster of piles at the north-east corner to protect ships from damage while breaking around it. Captain Larsen said that in most places this was done and that if there had been such protective piling his ship would not have been damaged. Captain Patterson also suggested that there should have been such protection. There was, in my opinion, no duty on the part of the defendant to provide any such piling. The corner was safe without it for any normal or proper use. Moreover, the evidence is against Captain Larsen's statement that most docks had clusters of piles at the corners. Mr. Jeffery said that of the hundreds of docks under his jurisdiction he did not know of one that had such clusters,



except that such clusters were driven at the corners of the dock in question after the accident. Captain W. E. Pringle said that most docks do not have such clusters and Captain J. Stephens said that it was the exception rather than the rule to have them. The only spring piling that he knew of except that put in at the defendant's dock after the accident was at the ferry dock in Toronto. He could not recall clusters of piles at the corner of concrete docks elsewhere. Captain Bell explained that clusters of piles were put in at the corners after the accident at his request to protect the dock against a similar accident. Mr. Jeffery gave the same explanation. I accept their statements.

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There was no need to warn the plaintiff of the presence of the railing in the faces of the dock. Captain Larsen had frequently come to the dock with the *Sensibar* prior to the accident and was familiar with it. The railing was visible and Captain Larsen knew that it was there. He had frequently broken around the corner without damage to his ship or the dock. There was nothing unusual about the use of such railing in a concrete dock. While its purpose was to protect the face of the dock from damage and not designed for the breaking of ships around the corner it was perfectly safe for such use if the weather conditions were suitable and the ship was properly handled.

Nor is there any merit in the criticism that the corner was defective in that the rail in the bevelled face was not fastened to the rails in the north and east faces with plates and bolts but that the ends were merely mitred to bring them close together. I find no defect in the manner of securing the short piece of rail. It was embedded in the concrete and strongly held by the two tie rods near the ends as already described.

On the evidence, I find that there was no hidden or unusual obstruction or danger or defect in the condition of the dock prior to the arrival of the *Sensibar* that would make it unsafe for normal and proper use by ships invited to it but, on the contrary, that it was in a safe and proper condition for such use. There was no breach of duty on the part of the defendant and no basis for the plaintiff's claim against it.

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This finding is sufficient for the dismissal of its action, but there is a further reason why it should not succeed. In my view, the evidence supports the conclusion that the *Sensibar* came to her damage not through any fault of the defendant but by her own manoeuvre. Counsel for the defendant submitted that the rail in the bevelled face of the corner was flush with the concrete and in perfect condition until the *Sensibar* got into difficulty while struggling to break around the corner in unfavourable weather, that she cracked and broke some of the concrete on the face right up to the top, that she was on the corner with such weight and pressure that she forced the short piece of rail out at one end and that it then acted as a blunt instrument that did the scoring and in so doing assisted in pulling it out further. There is plenty of evidence to warrant this explanation of how the damage happened.

There is no doubt that the weather conditions made Captain Larsen's manoeuvre a difficult one. His evidence was that they had a north-easterly wind, moderate to fresh, about 20 miles per hour, blowing directly against the starboard side of the ship. Later, he said that it was strong onto the dock. And Captain Koski, when asked whether there was anything unusual about the manoeuvre that morning, said that it took them quite a while longer than at other times. They had wind but while they had had wind on other occasions he would not say it was as strong as they had on this one.

The evidence is conclusive that the *Sensibar* had difficulty in breaking around the corner. Normally, the whole manoeuvre of shifting from one face to another took about half an hour, but this time it took about an hour. When the *Sensibar* started to break around the corner she did not come around very fast. Her bow had swung out into the bay only 10 or 20 degrees. She had gone a lot slower than ordinarily which Captain Larsen attributed to the wind holding her bow. He and Captain Koski determined that the use of the main engine was necessary. I have already described the alternate use of the main engine, first slow astern and then slow ahead. When it had been used previously in breaking around the corner ordinarily six alterations were sufficient but this morning more alterations were required. This was because of the wind.

And there is the further fact that the *Sensibar* lost one of her cables while she was breaking around the corner. I find this fact notwithstanding the denials by Captain Larsen and Captain Koski. I accept the evidence of Mr. Spauldin and Captain Bell on this point. I have already referred to Mr. Spauldin's statement that the mate called him over and told him that they had trouble getting around the corner and had damaged the boat and also the dock and had lost a cable. The mate in question must have been the third mate in view of Captain Koski's and Captain Larsen's denials that they had had any such conversation. Mr. Spauldin said that the mate had a couple of men trying to get the cable that was in the slip. One end of it, the eye, was on a bollard on the east side of the dock and the rest of it was in the water in the slip. Mr. Spauldin got a truck that was nearby to pull the cable out of the water, which it did after unhooking the eye from the bollard. Later, he saw it taken aboard the *Sensibar*. Captain Bell also said that as he was walking down to the north-east corner of the dock he saw a motor truck with the eye of a cable attached to the back pulling it out of the water, and was told by one of the ship's men that it came off the ship, came off the winch and fell into the water. The cable was in the east slip. He did not see what subsequently happened to it. I have no hesitation in believing Mr. Spauldin's and Captain Bell's statements, and it is not unreasonable to think that the loss of the cable contributed to the difficulty of the manoeuvre.

The evidence as to the state of the concrete on the bevelled face of the corner supports counsel's submission. I am unable to accept the view that the *Sensibar* was always held tight on the corner. The breaking of the concrete, which was of the strength of 3000 pounds to the square inch, and the cracking of the wall right up to the top could not have happened if the ship had been kept steadily on it. There must have been great pressure against it to cause the damage that was done. It is, I think, a reasonable inference that the *Sensibar* rocked against the corner and hit it with such force as to crack and break the concrete and force the rail out.

Moreover, the nature of the injury to the ship is against the theory that it was the exposure of the rail as the result of breaking of concrete away from it that caused the damage. That would not explain how the rail with the long tie

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rod by which it was secured came to be forced straight out of the strong concrete at one end. The scoring of the plates by a rail that was exposed as the plaintiff's witnesses said it was could not have done that. It was sharp and strong pressure by the ship against the wall that forced the rail out. That there was such pressure is strongly indicated by the damage done to the ship other than the scoring of her plates. In addition to such scoring the plates were buckled. And some 45 frames, that is to say, ribs, which are strength members, were also more or less buckled. This could not have happened except as the result of great pressure. I am satisfied that the *Sensibar* in the course of her difficulty in breaking around the corner because of the wind surged and rocked against it. It seems to me that only some such inference can explain both the manner in which she pulverized the concrete on the face of the corner and cracked the wall right up to the top and also the buckling of her plates and frames. In my judgment, the evidence points to the conclusion that the *Sensibar* was herself the author of the damage she sustained.

That being so, the defendant should not be held liable for it. This raises the question whether Captain Larsen's manoeuvre was a proper one under the weather conditions that existed. This was not the only manoeuvre that was open to him. It did not matter to the defendant whether the *Sensibar* came to the north face first or to the east face, or whether she landed port side to or starboard side to, or how she was moved from one face to the other, or whether she backed into the slip or came in bow first. These were matters of navigation for which Captain Larsen was solely responsible. The choice of manoeuvres was exclusively his. There is no doubt that he decided upon the one he made because it would give him the advantage of having his ship headed out after he had finished unloading. He had frequently made a similar manoeuvre previously and there is general agreement that it would have been in accordance with good marine practice under suitable weather conditions. But the north-east wind made it difficult and it certainly proved to be dangerous.

There was a sharp difference of expert opinion as to whether under the circumstances the manoeuvre was a

proper one in view of the fact that several other less difficult and safer courses were open. Captain H. A. Patterson said that it was accepted practice to break around the corner as Captain Larsen had done and thought that he had done an exceptionally good job. He was against the suggestion that he should have brought the *Sensibar* into the slip bow first. She had a 56-foot beam and the slip was only 110 feet wide. With the north-east wind at twenty miles per hour and in such a narrow channel a high boat like the *Sensibar* would, in his opinion, "set" over against the shoal on the other side of the slip and down on the corner and do more damage to the wall than would be done otherwise. It would be a chance he would not take. In his opinion, it was safer to go in stern first as Captain Larsen did than it would have been to go in bow first. The value of Captain Patterson's opinion is greatly reduced by the fact that the slip was not 110 feet wide, as Captain Larsen estimated, but 150 feet. This was the evidence of Mr. Jeffery and Captain Bell, confirmed in effect by Captain Koski. He said that when the *Sensibar* had been shifted east of the north-east corner preparatory to breaking around it the corner was abreast or just forward of the after cabin. According to the ship's measurements this was 140 feet from her stern. It was then, as Captain Koski said, 15 feet west of the black stake that marked the eastern boundary of the dredged channel that formed the slip. This would bring the width of the slip to 155 feet. Nor was I favourably impressed with Captain Patterson's statement that Captain Larsen had done an exceptionally good job. What would the extent of the damage have been if it had been badly done?

I prefer the expert opinion of Captain W. E. Pringle. In his view, the *Sensibar* would not have been subjected to any danger or had any difficulty in going into the slip bow first. It would have been better if she had done so and then backed out and broken around the corner and shifted back along the north face with the starboard side next to it. By so doing she could have taken full advantage of the 150 foot width of the slip for the outward swing of the bow without risk of damage to it, whereas such full advantage was not open to Captain Larsen in his manoeuvre by reason of the necessity of keeping a margin of safety between the ship's

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stern and the submerged bank that formed the eastern limit of the slip to prevent the propeller from hitting it. Moreover, the north-east wind would have assisted such a manoeuvre for it would have been against the longer part of the ship on the port side and helped to bring her stern close to the north face so that she could be shifted along it to the desired position with the mooring lines and winches. There would thus have been much less pressure against the north-east corner. There can, in my judgment, be no doubt that the course suggested by Captain Pringle would have been safer than that which Captain Larsen took. There was a second course that was open to him. If he had decided to go to the north face first it would have been better if he had landed there with the starboard side next to the face and then broken around the corner bow first for this would have enabled him to put the bow right up close to the bank, leaving less of the ship exposed to the wind. Moreover, it would be possible to dispose the mooring lines so as to have better control of both ends of the ship and swing her in the necessary arc more easily than Captain Larsen had been able to do. This would have put less pressure on the pivotal point at the corner. Finally, it was Captain Pringle's opinion that in view of the wind it would have been better if Captain Larsen after unloading part of his cargo from the north face had gone out into the bay and come into the slip bow first. He should have done so even after he began breaking around the corner when he discovered that he could not make the bow swing out any further than 10 or 20 degrees. But instead of doing so he chose to struggle around the corner with the use of the main engine. If he had taken any of the courses suggested by Captain Pringle he would have saved his ship and the dock from damage. It seems plain to me that the plaintiff's loss resulted from his failure to do so.

For the reasons given the plaintiff's action is dismissed with costs.

*Judgment accordingly.*

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BETWEEN :

ST. ANN'S ISLAND SHOOTING AND } CLAIMANT;  
FISHING CLUB LIMITED..... }

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Nov. 29, 30  
1949  
Jan. 26

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Crown—Indian Act R.S.C. 1906, c. 81, ss. 51 and 64—Non-compliance with, requirements of Act—Authorizing Order in Council as required by Act not passed—Lease invalid without authorizing Order in Council—Superintendent General of Indian Affairs not authorized to enter into a lease—No estoppel against the Crown herein.*

Claimant asks for a declaration that it is entitled to a renewal of a lease of Indian lands made between the Superintendent General of Indian Affairs and certain trustees pursuant to a renewal clause therein.

*Held:* That s. 64 of the Indian Act R.S.C. 1906, c. 81, did not confer on the Superintendent General of Indian Affairs original authority to enter into a lease of surrendered Indian lands as he was only the official named to complete those matters, such as execution of a lease, for which a valid authority existed; that s. 51 of the Act requires an Order in Council as the necessary preliminary to the validity of the lease entered into and no such Order in Council referable to that lease was passed at any time.

2. That the Crown is not estopped by anything that has been said or done by its officers or servants from alleging non-compliance with the Statute.

REFERENCE by the Minister of Mines and Resources of a question of law for the opinion of the Court.

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

*A. S. Pattillo and J. A. MacIntosh* for claimant.

*Lee A. Kelley, K.C. and W. R. Jackett* for respondent.

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

CAMERON J. now (January 26, 1949) delivered the following judgment:

In these proceedings the claimant asks for a declaration that it is entitled to a renewal of a lease dated May 19, 1925, made between the Superintendent General of Indian Affairs, of the First Part, and G. T. Clarkson and Walter

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Gow, in trust for St. Ann's Island Shooting and Fishing Club, of the Second Part, pursuant to a renewal clause therein and which I will later refer to more particularly. By letters dated the 12th day of April, 1944, and the 1st day of September, 1944, the lessees gave to the Superintendent General notice of their intention to renew the lease of the lands described in the said lease pursuant to the provisions thereof, but he refused to grant such renewal or to admit that the lessees therein were legally entitled to demand the same.

On November 1, 1945, the Minister, under section 37 of the Exchequer Court Act, referred the matter to this Court for adjudication. Pleadings were delivered. At the trial there was filed a statement of facts agreed to by counsel for the purpose only of having the following question of law submitted for the opinion of the Court, namely,

Is the claimant entitled to a renewal for a further period of ten years from October 1, 1944, of the lease dated 19th May, 1925, on and subject to the like terms, stipulations and provisions as are contained in the said lease subject to the provisions of the supplemental indenture dated 14th April, 1931, save as to rental.

It is to be noted that by indenture dated September 4, 1945, the said trustees mentioned in the lease dated May 19, 1925, duly assigned to the claimant all their right title and interest in the said lease, including the right to renewal thereof, and in a certain further supplemental indenture dated April 14, 1941, between the same parties, in which supplemental indenture the boundaries of the property were settled and agreed upon. It is admitted for the purposes of this reference that all the rights of the lessees in the lease of 1925 are vested in the claimant. The sole question for determination, therefore, is whether the claimant is entitled to a renewal for a further period of ten years from October 1, 1944, when the former lease expired, such renewal to be on the same terms as the lease of May 19, 1925, save as to rental. The respondent alleges that the documents on which the claimant bases its claim are wholly invalid. It is admitted that if the leases from time to time entered into between the parties hereto were or are valid, they have not been forfeited by breach of any of the terms thereof, or otherwise.

The lands in question are Indian lands (that is, portions of Indian reserves which have been surrendered to the



Crown) in the County of Kent, Ontario. No question arises as to the validity of the surrender or the acceptance thereof by the Crown. Under the terms of the various leases executed by or under the authority of the Superintendent General of Indian Affairs, the Club has been in possession of the lands in question since 1881. At various times it has expended very substantial amounts for the permanent improvement of its facilities as a hunting and fishing club, including the erection of a club house and other buildings and the opening up of ditches and channels. Inasmuch as I have reached the conclusion that the surrender was absolute, I do not consider it necessary to refer in detail to the rights and privileges granted to the Club or the limitations placed thereon, some of which varied materially from time to time. The surrender being absolute and no rights having been reserved to the surrendering Indian Bands, the Crown, in my view, had full power in granting a lease to vary the terms and conditions from those previously in effect, as was thought necessary.

Exhibits A to M are certified copies of all the documents (other than letters) which affect the matter in issue. Ex. A is a resolution of a council of the Chippewa and Pottawatomie Indians of Walpole Island, dated March 18, 1880, accepting the offer of the Club to lease St. Ann's Island and included these words:

The terms of the lease at ten years and privileged to renewal if everything satisfactory for another term.

The claimant does not rely in any way on this resolution, and in any event it would be of no force or effect because of the provisions of the Indian Act, 1880, ch. 28, s. 36, prohibiting the sale, alienation or leasing of any reserve or portion thereof until it had been released or surrendered to the Crown.

The first lease from the Superintendent General (Ex. B) is dated May 30, 1881. It is for a term of five years, renewable for a like term. Following the execution of that lease the officers of the Club raised certain questions as to the validity thereof and more particularly as to the validity of the surrender, the authority of the Superintendent General to execute the lease, and enquired as to whether an Order in Council had been passed accepting the surrender and authorizing the lease. In the result, a further

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meeting of the Indians was held on February 6, 1882, and a formal surrender executed in due form (Ex. C). On February 24, 1882, the Indian Superintendent at Sarnia wrote the Club Secretary (Ex. P) as follows:

The defect in the preliminary proceedings regarding the lease to the Club has been remedied by taking from the Indians a formal surrender of St. Ann's Island for the purposes of said lease.

That was followed by an Order in Council P.C. 529 of April 3, 1882. Both of these documents are hereinafter set out in full.

On April 18, 1882, the Department wrote the Club Secretary as follows (Ex. Q):

I have to inform you that the surrender made by the Walpole Island Indians of the shooting grounds covered by the lease to the St. Ann's Island Shooting and Fishing Club has been accepted by an Order of H. E. the Governor General in Council, dated the 3rd instant, and that the lease has been confirmed by said Order.

Both parties apparently considered that all necessary steps had been taken to validate the lease of 1882. Subsequently, new leases were entered into in 1884, 1892, 1894, 1906, 1915 (these being respectively Ex. E, F, I, J and K), and finally, in 1925, the lease containing the renewal clause on which the claimants now rely. The leases of 1884 and 1892 contained no provisions for renewal, but those of 1894, 1906 and 1915 each contained provisions for one renewal of ten years.

It may be noted that while the annual rental was originally \$250, it had been increased to \$750 in 1904 for the same property. The rental has remained at the latter figure since 1906, but by mutual consent the lease of 1915 excluded very substantial parts of the property originally leased, and that of 1925 excluded an additional area. By the supplemental indenture of April 14, 1931 (Ex. M), the parties mutually agreed that the property intended to be included in the lease of May 19, 1925, was as set out in the plan attached thereto; and in all other respects confirmed that lease.

Inasmuch as counsel for the claimant relies on the terms of the surrender and of P.C. 529, I think it advisable to set these out in full.

The surrender was in the following terms:

Know all men by these presents, that we the Chiefs and principal men and Warriors of the Chippewa & Pottawatomie Indians of Walpole Island, being this day assembled in our Council House in presence of our visiting Superintendent—and referring to a meeting of Council held at this place

on the 18th day of March A.D. 1880—at which meeting it was duly resolved by a majority of those present at said meeting—that the assent of these Bands should be given to the issue of a lease by the Indian Department in favour of certain gentlemen who had applied therefor—of certain lands and marshes hereinafter described—And considering that consent thereto was then and there duly given:

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We now do surrender & yield up to our Sovereign Lady the Queen and her Successors—All that certain parcel or tract of land and marsh, situated in the Province of Ontario and County of Kent, bounded by the Chenail E-carté, Johnston's Channel, and the navigable waters of Lake St. Clair; and which may be described and known as St. Ann's Island, and the marshes adjacent thereto.

To the end that said described territory may be leased to the Applicants for the purpose of shooting & fishing for such term and on such conditions as the Superintendent General of Indian Affairs may consider best for our advantage—

AND having heard read and explained a lease executed by the Deputy Superintendent of Indian Affairs in favor of Christopher Robinson, Esquire, of the City of Toronto, and certain other gentlemen in such lease named—And believing that such lease was executed in good faith and in accordance with our consent duly given in Council as aforesaid—

We hereby accept of said lease and confirm and establish the same.

In testimony whereof we have hereto set our hands and Seals this sixth day of February A.D. 1882.

Done in the name and on behalf of the Chippewas and Pottawatomes of Walpole Island.

P.C. 529 was as follows:

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 3rd April, 1882.

On a Memorandum, dated 7th March 1882, from the Superintendent General of Indian Affairs, submitting for acceptance by Your Excellency in accordance with the provisions of the Indian Act 1880, Section 37, Subsection 2, a Surrender, dated 9th February 1882, made to the Crown by the Chippewa and Pottawatomie Indians of Walpole Island, of that portion of their Reserve known as "St. Ann's Island" and the marshes adjacent thereto, for the purpose of the same being leased for the benefit of said Indians to the "St. Ann's Island Shooting and Fishing Club" for shooting and fishing purposes, and in confirmation of a lease covering said premises issued by this Department on the 30th of May 1881, to the aforesaid "St. Ann's Island Shooting and Fishing Club."

The Committee advise that the surrender be accepted and submit the same for Your Excellency's approval.

(Signed) A. M. Hill,
 Asst. Clerk of the Privy Council.

In answering the questions submitted to the Court, I think that consideration must first be given to the law in effect when the lease of 1925 was entered into with the Superintendent General, that lease containing the following provisions for renewal:

And it is further hereby agreed between the parties hereto that the said parties of the second part, their successors in trust or assigns, shall

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on the expiration of the term hereby granted be entitled to renewal leases of the demised premises for further successive periods of ten years each at rentals to be fixed for each renewal (in case the parties cannot agree) by three arbitrators or a majority of them, one to be chosen by each of the parties and the third to be appointed by such two nominees—and in arriving at the rental to be paid the value of any buildings theretofore erected or paid for or improvements made or paid for by the parties of the second part, their successors in trust or assigns, shall not be taken into account, it being intended that such rental shall be the fair rental value of the demised premises had such buildings not been erected or improvements made. And the said party of the first part for himself and his successors in office covenants and agrees that should said parties of the second part, their successors in trust or assigns, desire such renewal leases or any of them, the same will be granted on and subject to the like terms, stipulations and provisions as are herein contained save as to rental which is to be agreed upon or fixed as aforesaid.

By section 51, ch. 81, R.S.C., 1906 (The Indian Act), it was provided that:

All Indian lands which are reserves or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part.

I am of the opinion that the validity of the 1925 lease and of its provisions for renewal must depend upon compliance with the provisions of that section. Counsel for the claimant referred me to the provisions of ch. 48, Statutes of Canada, 1924, being an Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian reserve lands, and the corresponding Ontario Act of the same year. He pointed out that by the provisions of those Acts and of certain decisions in the Privy Council, the beneficial interest in surrendered Indian lands in Ontario was in the Province rather than in the Dominion, that by the provisions of those Acts the administration of such lands was in the Dominion and that upon their surrender such lands might be sold, leased or otherwise disposed of by Letters Patent under the Great Seal of Canada, or otherwise under the direction of the Government of Canada, the proceeds to be disposed of as therein provided. I shall not stop to consider whether the lands here in question do or do not fall within the provisions of those Acts. It is sufficient to indicate that whether they do or do not, section 51 (*supra*) was still in effect in 1925, and laid down the procedure to be followed.

It is submitted by counsel for the claimant that the provision which required a direction by the Governor in Council for the management, lease and sale of surrendered Indian lands is not absolute, and, that if, in the conditions of surrender or in the provisions of Part I of the Act, authority is given to the Superintendent General as to the leasing of such lands, then no Order in Council is required. He then refers to the document of surrender of 1882 (*supra*) which he says confers authority on the Superintendent General to determine the term and conditions of any lease as he thinks best, and submits that by reason of that provision no Order in Council was necessary. He also argues that by section 64, ch. 81, R.S.C., 1906 (The Indian Act), the Superintendent General had a power, without an Order in Council, to execute leases binding on the Crown and that, therefore, no Order in Council was necessary to validate such lease, as the provisions of section 64 come within the words "*subject to the conditions of surrender and the provisions of this Part.*" That section 64 is as follows:

When by law or by any deed, lease or agreement relating to Indian lands, any notice is required to be given, or any act to be done by or on behalf of the Crown, such notice may be given and act done by or by the authority of the Superintendent General.

I am unable, however, to agree with that interpretation of section 51. I am of the opinion that that section is imperative in its requirements that only by a direction of the Governor in Council can surrendered Indian lands be validly managed, leased or sold, and that the disposition of surrendered Indian lands is thereby placed directly under the control of the Government. The words "subject to the conditions of surrender" are not to be interpreted as doing away with the necessity of a direction from the Governor in Council in any case, but, in my view, they require the Governor in Council when so dealing with the lands to take into consideration any conditions of the surrender, so that any directions given would be subject to such conditions. The reservation by the Indians of a right of way, or of use of water power in a stream, might be examples of such conditions; and the surrender, when accepted by the Governor in Council with such conditions, would to that extent limit the manner in which the lands could be managed, leased or sold.

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But in the surrender itself, I can find no such or any conditions which would be binding on the Crown. Claimant's counsel himself agrees that the surrender was absolute, the Indian Bands giving up to the Crown all their usufructuary interest in the lands, and that was the only interest they had therein (see *St. Catherines Milling & Lumber Co. v. The Queen* (1)). A careful examination of the surrender shows that no such conditions were attached and that it was intended to be, and was in fact, an absolute surrender. It is true that the purpose of the surrender was indicated, namely, that the property should be leased to the Club for fishing and shooting; that the Superintendent General was named as the one who should determine the term of the lease and its conditions; and that approval was given to the lease of 1881. But in the view that I have taken of the meaning of section 51 (then s. 40, ch. 28, of the Indian Act of 1880), the surrendering Indian Bands had no power to do any of these things and their efforts to do so were wholly abortive. The statutory authority of the Governor in Council to manage, lease and sell could not be fettered in any such way, nor its authority and duty diverted to anyone named by the surrendering Indians.

The provisions of section 64 (*supra*) in my opinion do not confer on the Superintendent General the power to make leases of surrendered lands without the authority of an Order in Council as a necessary preliminary. To interpret them in that way would be to altogether negative the provisions of section 51. They must be read together and when so read the import of section 64 is clear. It means that when by law, or by any deed, lease or agreement relating to surrendered lands any notice or act is required to be done, such notice may be given or act done by, or by the authority of, the Superintendent General. If, for example, the lease of 1925 and all its terms, including the provisions for renewal, had been authorized by the Governor in Council, then the Superintendent General would be the party designated to execute the original lease and, without a further Order in Council, the renewal of such lease.

(1) (1889) 14 A.C. 46.

The section does not confer on him any original authority but names him as the person to carry out those things for which a valid authority exists.

It is admitted that there was no Order in Council which specifically authorized the Superintendent General to execute the lease of 1925. But it is submitted by the claimant, in the alternative, that if an Order in Council were necessary, P.C. 529 of 1882 was sufficient authorization for all subsequent leases entered into between it and the Superintendent General. With that contention I cannot agree. It might well be argued that the closing words of P.C. 529, "The Committee advises that the surrender be accepted, and submit the same for Your Excellency's approval," did nothing more than accept surrender. But I do not find it necessary to determine that point. Giving the Order in Council the widest possible meaning that could be attributed to it, and taking into consideration that the memorandum submitted for the consideration of the Governor in Council included the words, "in confirmation of a lease covering said premises issued by this Department on the 30th of May, 1881, to the aforesaid St. Ann's Island Shooting and Fishing Club," it is quite clear that if anything was authorized, the Order in Council retroactively authorized the lease of 1881 only, and that lease was for a term of five years with the right of renewal for a further period of five years only. P.C. 529 could not possibly be construed as validating a lease entered into forty-five years later. It may here be noted that in the memorandum submitted to Council, nothing is said as to that part of the surrender which purported to give to the Superintendent General power to determine the term and conditions of any lease. That matter was never before the Governor in Council.

My opinion, therefore, is that section 51 requires an Order in Council as the necessary preliminary to the validity of the lease of 1925, and that no such Order in Council referable to that lease was passed at any time.

Counsel for the claimant, however, submits that by reason of what has occurred, the respondent is estopped from denying the validity of the tenancy of the claimant. He points out that the Superintendent General, a Minister of the Crown, by executing the various leases, including

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that of 1925, and by correspondence between the parties, held himself out as having authority to represent the Crown and to enter into the various leases; that as a result the claimant paid rent which was accepted by the respondent, and expended large sums of money on improving the lands for its purposes in the belief that such representations were well founded. He also refers to certain correspondence after the first lease was executed in 1881, when the trustees raised questions as to the validity of the surrender and the acceptance thereof, and the necessity of having an Order in Council authorizing its lease, at which time they were advised that the necessary steps to validate the lease had been taken. I have considered the cases on which he relies in respect of his argument that estoppel in pais may apply as against the Crown.

I have reached the conclusion on this point, that, in view of the statutory requirement of a direction by the Governor in Council, that the respondent is not estopped by the foregoing. Reference may be made to Phipson on Evidence, 8th ed., 667, where it is stated that:

Estoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect.

The problem was considered in the case of *Maritime Electric Co. Ltd. v. General Dairies Ltd.* (1), in which it was

*Held*, that the appellants were not estopped from recovering the sum claimed. The duty imposed by the Public Utilities Act on the appellants to charge, and on the respondents to pay, at scheduled rates, for all the electric current supplied by the one and used by the other could not be defeated or avoided by a mere mistake in the computation of accounts. The relevant sections of the Act were enacted for the benefit of a section of the public, and in such a case where the statute imposed a duty of a positive kind it was not open to the respondents to set up an estoppel to prevent it.

An estoppel is only a rule of evidence, and could not avail to release the appellants from an obligation to obey the statute, nor could it enable the respondents to escape from the statutory obligation to pay at the scheduled rates. The duty of each party was to obey the law.

The judgment in that case was delivered by Lord Maugham. At p. 620 he said:

the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision.

(1) (1937) A.C. 610.



And at p. 621:

If we now turn to the authorities it must be admitted that reported cases in which the precise point now under consideration has been raised are rare. It is, however, to be observed that there is not a single case in which an estoppel has been allowed in such a case to defeat a statutory obligation of an unconditional character. The text-books have regarded the case as one closely analogous to the cases of high authority where it has been decided that a corporation could not be estopped from contending that a particular act was *ultra vires*.

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He referred also to *In re a Bankruptcy Notice* (1), in which Atkin, L.J., stated:

Whatever the principle may be (referring to a contention as regards approbation and reprobation) it appears to me that it does not apply to this case, for it seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid.

Reference may also be made to *Ontario Mining Company v. Seybold* (2), in which at p. 83 Lord Davey, in delivering the judgment in the House of Lords, said:

But it was contended in the Courts below, and at their Lordships' bar was suggested rather than seriously argued, that the Ontario Government, by the acts and conduct of their officers, had in fact assented to and concurred in the selection of, at any rate, Reserve 38 B, notwithstanding the recital to the contrary in the agreement. The evidence of the circumstances relied on for this purpose was read to their Lordships; but on this point they adopt the opinion expressed by the learned Chancellor Boyd that the province cannot be bound by alleged acts of acquiescence on the part of various officers of the departments which are not brought home to or authorized by the proper executive or administrative organs of the Provincial Government, and are not manifested by any Order in Council or other authentic testimony. They, therefore, agree with the concurrent finding in the Courts below that no such assent as alleged had been proved.

In my view the respondent cannot be estopped by anything that has been done from alleging that there has not been a compliance with the statutory requirements of section 54.

Having found that the requirements of the statute have not been complied with and that the respondent is not estopped by anything that has been done or said by its officers or servants from alleging non-compliance with the statute, it becomes necessary only to consider the result of such non-compliance.

(1) (1924) 2 Ch. 76.

(2) (1903) A.C. 73.

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Reference may be made to the judgment of the Judicial Committee of the Privy Council in *The King v. Vancouver Lumber Company* (1). In that case a lease was entered into between the Crown, acting through the Minister of Militia and Defence, and the Company, the demise being for twenty-five years "renewable." The grant of the lease was made under a statutory authority which provided that the Governor in Council might authorize the sale or lease of any lands vested in Her Majesty not required for public purposes, and for the sale or lease of which there was no other provision in the law. An Order in Council was passed giving authority to lease for twenty-five years. Subsequently, the solicitor for the Company opened negotiations with the Minister in regard to variations in the lease. As a result endorsements were made on the former lease and signed by the Minister, varying its terms and giving rights of renewal for successive periods of twenty-five years. No Order in Council was passed approving of these changes, although there was some evidence that the agent of the Company had been assured by the Minister that an Order in Council had been passed authorizing the new terms. In fact, no such Order in Council was passed at any time. It was held that the signature of the Minister was an insufficient compliance with the terms of the statute and that, in the absence of an Order in Council, the new terms were void.

In the case of *British American Fish Company v. The King* (2) (affirmed 52 D.L.R. 689), Cassels, J., in this Court held that a lease for fishing privileges, and executed by the Minister of Marine and Fisheries for a term of twenty-one years with an option of renewing for a further period of twenty-one years, was totally invalid as to the option, the same not having been authorized by the Order in Council which had recommended the granting of the lease for twenty-one years only.

In *Gooderham & Worts Ltd. v. Canadian Broadcasting Corporation* (3), it was held that a clause in the lease which was unauthorized by the Order in Council was void *ab initio*. In that case Lord MacMillan also pointed out that the alleged estoppel was against pleading of a statute.

(1) 50 D.L.R. 6.

(2) 44 D.L.R. 750.

(3) (1947) A.C. 66.

Reference may also be made to *The Queen v. Woodburn* (1), *The King v. McMaster* (2), *Easterbrook v. The King* (3), and *Booth v. The King* (4).

Following these decisions, I have reached the conclusion that as the lease of 1925 was never authorized by an Order in Council, there has been non-compliance with the imperative provisions of section 51 and that the lease and the provisions for renewal therein are wholly void.

Counsel for the respondent also alleged invalidity of the lease of 1925 on the ground that the property therein demised (as amended by the agreement of 1931) included property not contained in the surrender of 1882. The burden of proof thereof is on the respondent, and on the somewhat meagre evidence before me I am quite unable to find as a fact that such is the case. In fact, the only affirmative evidence is to the contrary. I would further point out that even if it were so established, there has been no evidence to indicate that the respondent had not the right to include the additional parts in the lease; such additional parts may have been acquired by the Crown otherwise than by the surrender referred to. On this matter I must find that the respondent fails.

I therefore answer the question submitted in the negative. Under all the circumstances I think each party should bear its own costs.

Having reached the above conclusion on the question submitted for determination, I think I should make a further comment. The respondent has succeeded in securing a declaration of invalidity solely because of the failure to pass the requisite Order in Council, and not because the claimant had failed to do anything which was within its powers to do. The evidence indicates that the buildings erected by the claimant, or the former trustees of the Club, exceeded \$25,000 in value and that, in addition, very substantial amounts have been laid out in digging ditches and channels. Some disposition of the property will have to be made by the respondent. Inasmuch as the claim to a perpetual lease has now been disposed of adversely to the claimant, and as the question of fixing a fair rental for the future is now open, it would

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(1) (1898) 29 S.C.R. 112.

(2) (1926) Ex.C.R. 68.

(3) (1931) S.C.R. 210.

(4) 51 S.C.R. 20.

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seem but fair and reasonable that the claimant be given an opportunity to protect its investment by a new and valid lease for a limited term.

*Judgment accordingly.*

The Supreme Court of Canada on February 21, 1950, not yet reported, dismissed an appeal herein.

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BETWEEN :

ALFRED MOREAU ..... PLAINTIFF;

AND

ROLAND ST. VINCENT, carrying on  
 business under the firm name of }  
 Loisir Favori Enregistré..... } DEFENDANT.

*Copyright—Infringement—Copyright Act, R.S.C. 1927, c. 32—No copyright in ideas—Copyright in a literary work not dependent on registration—No copyright in arrangement, system, scheme or method—Plaintiff in infringement of copyright action must show copying of his literary work.*

The plaintiff, a partner and manager of a firm carrying on business in Montreal under the firm name of L'Information Sportive, its business being the publication and sale of a weekly sports paper called "L'Informative Sportive", conducted a weekly competition called "Concours: Recrutement d'Abonnés", the details of which were published in the paper, and claimed to be the owner of copyright therein. The defendant, a former distributor of "L'Information Sportive", began to carry on business under the firm name of Loisir Favori, his business being the publication of a leaflet called "Mots Croisés", and conducted a weekly competition called "Quizz général de la publication Loisir Favori Enrg.", the details of which were published in the leaflet. The plaintiff claimed that the defendant's "Quizz général de la publication Loisir Favori Enrg." was a plagiarism of his "Concours: Recrutement d'Abonnés" and an infringement of his copyright and sought an injunction and damages.

*Held:* That an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own. Every one may freely adopt and use the ideas but no one may copy his literary work without his consent.

2. That under the Copyright Act copyright in a literary work does not depend on registration but arises automatically from authorship. The registration of a copyright does not confer upon the author of a literary work any right that did not already belong to him by virtue of his authorship.
3. That no person has any copyright in any arrangement or system or scheme or method for doing a particular thing even if he devised it himself. It is only in his description or expression of it that his copyright subsists. *Hollinrake v. Truswell* (1894) 3 Ch. D. 420 at 427 followed.
4. That to succeed in an action for infringement of copyright the plaintiff must show that his literary work has been copied. It will not be enough to prove that his ideas have been adopted or that an arrangement or system devised by him has been used. The copying need not be word for word if there is colorable imitation.

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ACTION for alleged infringement of copyright.

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

*J. Perrault* and *A. Vincent* for plaintiff.

*H. Gérin-Lajoie, K.C.*, and *E. Angers* for defendant.

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

The President now (February 15, 1950) delivered the following judgment:

This is an action for infringement of copyright. The facts are not in dispute. The plaintiff is a partner and manager of a firm carrying on business in Montreal under the firm name of L'Information Sportive, its business being the publication and sale of a weekly sports paper called "L'Information Sportive". On October 2, 1947, the plaintiff and his associates, who were then Louis Daniel, J. L. Letourneux and Ch.-Roger Poitras, applied to the Commissioner of Patents for the registration of a copyright under the Copyright Act, R.S.C. 1927, Chapter 32, in what they called "Concours: Recrutement d'Abonnés", declaring that for the purpose of promoting subscriptions to the paper "L'Information Sportive" they had devised a system of distribution of prizes to subscribers for which they requested the grant of copyright, and on October 6, 1947, the Commissioner issued a certificate that copyright in

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a literary unpublished work called "L'Information Sportive" by the plaintiff and his associates had been registered in their names, the name of Ch.-Roger Poitras being misspelt. Subsequently, on June 25, 1948, the plaintiff and Mr. Poitras wrote to the Commissioner pointing out that the registration of October 6, 1947, was erroneous and requesting its correction with the result that the certificate was annulled and a new one issued in its place, dated back to October 6, 1947, certifying that copyright in a literary unpublished work called "Concours: Recrutement d'Abonnés" by the plaintiff and his associates had been registered in the name of L'Information Sportive.

Subsequently, on November 3, 1947, Mr. Daniel and Mr. Letourneux renounced their rights in the firm in favor of the plaintiff and Mr. Poitras, and on November 5, 1948, Mr. Poitras transferred his rights in the copyright to the plaintiff. The plaintiff now claims to be the sole owner of the copyright. After the registration of the copyright the firm commenced to publish its paper "L'Information Sportive" and to conduct a weekly competition for prizes to its subscribers which it called "Concours: Recrutement d'Abonnés" the details of which were published in each issue. The paper was sold for 25 cents per copy and a numbered receipt was issued to the purchaser of each copy.

The plaintiff stated that he had devised the competition in order to promote the sale of the paper, and had used three elements in an original arrangement of them. The elements said to have been thus brought together were described in the letter from L'Information Sportive to the Commissioner of Patents, dated October 2, 1947, to which I have referred, and also in the paper. The elements forming the system on which the competitions were based were three, namely, a numbered subscription receipt, a copy of the paper with two lists of sports clubs, one giving the results of contests already had and compilations of numbers from such results and another giving the scheduled contests for the following week the results of which were to serve as the basis of the compilation of numbers for the competition of that week, and a questionnaire or quiz relating to sports topics to be answered by the holders of subscription receipts carrying numbers corresponding to

those compiled from the results of the sports contests given in the first list in the paper. The details and conditions for each competition appeared in substantially the same form on page 9 of each issue of "L'Information Sportive", except, of course, for necessary differences, such as the names of the sports clubs selected, the results of the contests and the questions in the quiz. Likewise, the receipts continued to be issued in the same form, the only difference being in their numbers.

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The defendant was in the employ of L'Information Sportive as a distributor of its paper under a contract with it for one year, dated December 30, 1947, subject to cancellation on thirty days notice. On May 12, 1948, he sent it a telegram of resignation effective on June 27, 1948. On the same day he filed a declaration of carrying on business under the firm name of Loisir Favori. And on the same day his solicitors forwarded his request for the registration of a copyright in an original literary unpublished work called "Loisir Favori", and copyright in the said work was registered on May 13, 1948, and a certificate to that effect sent to him. On July 3, 1948, the defendant commenced the publication of a weekly leaflet called "Mots Croisés", which he sold at 25 cents a copy, the purchaser receiving a numbered receipt. The leaflet contained a number of cross-word puzzles. With each issue the defendant conducted a competition called "Quizz général de la publication Loisir Favori Enrg.", the details of which were published in the leaflet. The defendant did not hesitate to solicit distributors and vendors of the paper "L'Information Sportive" to handle his leaflet and several of them did so. Some of them said that their customers preferred it. Moreover, the defendant sold his leaflet in the same area as "L'Information Sportive" had previously found its market. The result was that the sales of "L'Information Sportive," which had been approximately 50,000 copies per week, had by September 12, 1948, been reduced by over 14,000 copies per week.

No attempt was made by the plaintiff to prove the quantum of his damages, it being understood that if judgment went in his favor there would be a reference to the registrar for an enquiry as to damages.

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The plaintiff alleges, *inter alia*, that the defendant's "Quizz général de la publication Loisir Favori Enrg." is a plagiarism of his "Concours: Recrutement d'Abonnés" and an infringement of his copyright and that its publication has caused him damage and should be restrained, and claims, *inter alia*, a declaration recognizing his copyright in the original arrangement constituting "Concours: Recrutement d'Abonnés" and the defendant's infringement of it, an injunction restraining the defendant from further publication of "Quizz général de la publication de Loisir Favori Enrg." or other infringement of his copyright, damages in the sum of \$44,131.25 and costs.

Counsel for the defendant took a number of objections to the plaintiff's action before putting forward his main defence. In view of the conclusion which I have reached on the main issue it will be sufficient to refer to the objections briefly. It was submitted that the plaintiff's title to the copyright claimed by him was not established but that, on the contrary, the evidence showed that he was not its sole owner and that its owners were not all before the Court. I make no finding on this objection beyond saying that if the only flaw in the action was that the plaintiff was not the sole owner of the copyright I would consider an application for the addition of the necessary parties so that the action would not fail for misjoinder of parties.

Counsel's next objection was that there was no originality in the plaintiff's system or arrangement of elements. There was a good deal of evidence on this subject. The plaintiff stated that he devised the arrangement of elements on which the competitions were based. He admitted that the elements themselves were public property but asserted that his arrangement of them was original. Mr. H. Robert, who was one of the plaintiff's associates in L'Information Sportive but expressly disclaimed any interest in his copyright, said that the plaintiff's arrangement was original in its selection of two lists of clubs, one giving the results of games already played and the other the schedules of the games to be played by the clubs selected for the following week, and that the plaintiff's system was the first one he had seen embodying such a feature until he saw the same feature in the defendant's publication, and Mr. J. L. Le-



tourneux, who had been one of the plaintiff's earlier associates, also gave evidence of a general nature that there was no other publication like "L'Information Sportive". On the other hand, it was shown for the defendant that there was nothing original in putting on a competition or draw with the winning of prizes dependent on the results of sports contests. There was, for example, the system which Mr. P. Gauthier claimed as his and there were many others on the market under various names, such as Union Four Way, Royal Five Way, Reliable Fair Way, Dominion Card. In each of these the purchase price of an entry card or ticket was 25 cents. Some of these did not involve any competition at all in that there was no questionnaire but were merely schemes or systems in which the participants bought a chance and the winners were determined by the results of sports contests. I need not decide whether there was anything original in the plaintiff's arrangement of elements or not. That question is, in my opinion immaterial and all the evidence bearing on it was, strictly speaking, irrelevant and inadmissible. It is, I think, an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own. Every one may freely adopt and use the ideas but no one may copy his literary work without his consent. Riddell J. A. of the Ontario Court of Appeal in *Deeks v. Wells* (1) adopted the following statement of principle:

There can be no copyright in ideas or information, and it is no infringement of copyright to adopt the ideas of another or to publish information derived from another, provided there is no copying of the language in which those ideas have, or that information has, been previously embodied.

Thus, even if it were conceded that the plaintiff had devised a novel arrangement of elements this cannot help him for the novelty of an idea cannot be the subject of copyright protection.

A third objection submitted by counsel was that the Commissioner of Patents had no statutory power to annul

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(1) (1931) O.R. 818 at 834.

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the first certificate of registration and issue a second one in its place for a different work and in the name of a different person and that the second certificate was of no effect. I express no opinion on this objection, but even if it were sound it would not affect the plaintiff's cause of action, if he has one. Under the Copyright Act copyright in a literary work does not depend on registration but arises automatically from authorship. If, therefore, the plaintiff had any copyright he could bring an action for its infringement even if he had never obtained any certificate of registration. The registration of a copyright does not confer upon the author of a literary work any right that did not already belong to him by virtue of his authorship.

It is plain from the statement of claim and the evidence that the plaintiff has misconceived the nature of his copyright and the extent of the protection that it affords. While it was stated that the object of the competitions, both that of the defendant as well as that of the plaintiff, was to promote the sale of their respective publications, I could not help feeling that the parties were primarily concerned with the success of their competitions rather than the sale of their publications. I find it difficult, to say the least, to believe that any one would pay 25 cents for a copy of either "L'Information Sportive" or "Mots Croisés" if that was all he was getting. What the so-called purchaser of the paper or leaflet was really doing was buying a chance to win a prize in the so-called competition. It seems clear to me that what the plaintiff was really seeking was protection of his competition against the encroaching competition run by the defendant. Undoubtedly, it was this competition that ate into the profits he had made from his own competition when he was exclusively in the field. Thus, what the plaintiff was attempting to protect was the arrangement or system for conducting a competition that he said he had devised. Unfortunately for him, the law of copyright does not give him any such protection. Just as an author has no copyright in the ideas he has expressed even although they are original, but only in his expression of them, so also no person has any copyright in any arrangement or system or scheme or method for doing a particular thing even if he devised it himself. It is only in his description or expression of it that his copyright

subsists. This principle was tersely put by Lindley L.J. in the leading case of *Hollinrake v. Truswell* (1) as follows:

Copyright, however, does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed.

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and there has never been any departure from this principle. I am, therefore, of the view that in seeking to protect his system for conducting a competition from encroachment by the defendant the plaintiff was attempting to use the law of copyright for a purpose to which it is not applicable. He claimed more than the law permits.

If the plaintiff has any copyright it must be in some original literary work. He was hard pressed on his cross-examination to identify the literary work to the protection of which his copyright is restricted and appeared to be torn between the description of his arrangement given in the letter of October 2, 1947, to the Commissioner of Patents in which the request for registration of a copyright was first made and the text giving the details and conditions of his "Concours: Recrutement d'Abonnés" that appeared on page 9 of each issue of "L'Information Sportive", but counsel for the plaintiff in an able argument contended that the literary work in which the plaintiff had his copyright consisted of the article or writing on page 9 of each issue of "L'Information Sportive" together with the subscription receipt that went with it. It was in these two documents that the plaintiff expressed and described his arrangement and system for conducting his competition. I see no reason why this identification of the literary work in which the plaintiff has his copyright should not be accepted. It is only for this work, and not for any ideas or any arrangement or system for conducting a competition expressed or described in it, that the plaintiff has any protection. If he is to succeed in an action for infringement of copyright he must show that his literary work has been copied. It will not be enough to prove that his ideas have been adopted or that his arrangement or system has been used.

It is plain from this statement of the nature of the plaintiff's right that substantial amendments of the statement of claim are required to make it accord with the proven facts. If it had been necessary to do so I would have

(1) (1894) 3 Ch.D. 420 at 427.

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given further consideration to the application of counsel for the plaintiff for leave to make the necessary amendments, subject to proper terms, but in view of the conclusion I have reached I need not deal with it.

There is, in my judgment, no doubt that the defendant's competition was similar in its essential principles to that conducted by the plaintiff. He made use of similar elements, namely, a numbered receipt, lists of clubs and the results of sports contests and a questionnaire and his arrangement of the elements and his system of conducting his competition were likewise similar. And it may well be that he acquired his knowledge of the arrangement and system he used for his competition from the expression and description contained in the plaintiff's literary work. If he did, there is nothing in the law of copyright that prevents him from so doing.

To succeed in his claim the plaintiff must show that the defendant copied, not his ideas or his arrangement or system, but his literary work. This, in my opinion, he cannot do. Counsel made much of certain facts and actions of the defendant prior to embarking on his own publication as indicative of his intentions. Undoubtedly, he was thoroughly familiar with the details of the plaintiff's competition and very deliberate in his preparations to leave the employ of L'Information Sportive and start a competition of his own. It is clear that he was concerned with the extent of the plaintiff's rights under his copyright for he made a special trip to the Copyright Office at Ottawa to enquire about the matter. Then he began to solicit distributors and vendors to see whether they would handle his publication if he brought one out. Then on the same day as he sent his telegram of resignation he registered his declaration of firm name and applied for registration of his own copyright. Then he had a discussion with Mr. Robert in which he questioned the value of the plaintiff's copyright and asked him to go in with him. Then they consulted two lawyers whose views as to the protection given by the plaintiff's copyright differed. Far from indicating an intention to infringe the plaintiff's copyright these actions of the defendant suggest carefulness on his part not to do so. Obviously, there must be similarities between the defendant's "Quizz général de la publication

Loisir Favori Enrg.” and the plaintiff’s “Concours: Recrutement d’Abonnés” to the extent that both are based on an arrangement of elements and a system for conducting a competition that are essentially the same but a comparison of the two literary works show that the former is not a copy of the latter. The lists of the clubs are different and the results of the sports contests are set out differently; the texts of the conditions and rules for the two competitions are not the same; the questions in the plaintiff’s questionnaire relate to sports, whereas those in the defendant’s quizz are of a general nature. The receipts likewise, although necessarily similar in that both are receipts, are different in text, type and appearance. Nor can the fact that in one issue of the plaintiff’s paper the word “engagement” was used erroneously for “agencement” and a similar error appears on the back of the defendant’s leaflet in the form of “engensement” outweigh the other evidence of difference. And while I have not overlooked the fact that copying need not be word for word if there is colorable imitation. I am also of the view that there should be no anxiety to find copying in a case such as this and thereby indirectly give protection to a system of competition such as that conducted by the plaintiff when the law does not give it directly.

Under the circumstances, I have no hesitation in finding that the defendant has not copied the plaintiff’s literary work or otherwise infringed his copyright and that the plaintiff’s action must be dismissed with costs.

*Judgment accordingly.*

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ROBERT JOHN GINN, by his  
next friend FLORENCE GINN,  
and FLORENCE GINN.....

} SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Crown—Petition of Right—Damage for injury to infant suppliant from picking up a No. 69 close action grenade—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c), 50A—Crown not responsible unless statutory conditions of liability proved to have been present—Onus of proof on suppliant—Liability of Crown not to be determined on basis of conjecture—No duty on Crown to explain presence of bomb—Negligence of officer or servant of Crown not to be presumed.*

On March 30, 1945, the infant suppliant, a boy of 13, while walking along part of the river bed of the Rideau River, the water being low and leaving a considerable distance between the river bank and the water's edge, picked up a No. 69 close action grenade thinking it was a bottle. While he was holding it in his right hand and jumping from stone to stone to keep out of the mud it exploded with the result that he was seriously hurt and lost his right hand and right eye.

*Held:* That unless there is evidence of negligence of an officer or servant of the Crown while acting within the scope of his duties or employment the Crown cannot be held responsible for the suppliant's injury under section 19(c) of the Exchequer Court Act and there is no liability apart from it. The Crown's liability is a statutory one and cannot arise until all the conditions of liability fixed by the statute have been proved to have been present.

2. That there was no evidence of how or when the grenade came to be where the suppliant found it or who had thrown it there. There was no proof that it was thrown there by any officer or servant of the crown while acting within the scope of his duties or employment. The opinion of a witness that it was thrown as a demonstration to troops or in the course of a tactical scheme is no more than speculation or surmise and cannot take the place of the evidence of fact that must be given to discharge the onus of proof that lies on the suppliant.
3. That it is not permissible to determine the liability of the Crown under section 19(c) of the Exchequer Court Act on the basis of conjecture that the conditions of liability fixed by it were present.
4. That there was no duty on the part of the Crown to explain how the grenade came to be where the suppliant found it and that negligence on the part of an officer or servant of the Crown should not be presumed from the absence of such explanation. In a claim under section 19(c) of the Exchequer Court Act the suppliant must prove not only that his injury resulted from the negligence of an officer or servant of the Crown but also that such officer or servant was negligent while acting within the scope of his duties or employment. *The King v. Moreau* (1950) S.C.R. 18 followed.

5. That no No. 69 grenades were issued to the Ottawa area depot prior to May 21, 1945. Consequently, whoever threw the grenade must have brought it into the area from outside. If he did so it could not have been thrown in the course of duty.
6. That there was no evidence of lack of care in the issue or handling of the grenades on the part of the military authorities.

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PETITION OF RIGHT by the suppliants seeking damages for injury to infant suppliant from picking up a No. 69 close action grenade.

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

*A. Macdonald, K.C.* and *G. J. Gorman* for suppliants.

*E. G. Gowling, K.C.* and *A. H. Laidlaw* for respondent.

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

THE PRESIDENT on the conclusion of the trial (February 7, 1950) delivered the following judgment:

In the afternoon of March 30, 1945, the suppliant Robert John Ginn, then 13 years of age, and two companions, Jack Calderwood and Junior Cameron, aged 12 and 11 years respectively, were on the Bowesville Road south of Ottawa. When they were near Mooney's Bay on the Rideau River they left the road and went down to the Bay. The water was low and there was a considerable distance between the river bank and the water's edge. The boys walked along this part of the river bed. One of them found a crab and then they looked for something in which to put it. The suppliant Robert John Ginn found what he thought was a bottle lying in the mud and picked it up. He shook it and heard a rattling noise inside. He tried to open the bottom, which had a base plug in it. He held the object in his left hand and tried to unscrew the plug with his right but was unable to do so. He called the other boys over and showed them what he had found. They looked at it and then turned towards the water to continue their search for a container. The suppliant then jumped from stone to stone to keep out of the mud, holding the object in his right hand. He had taken only a few steps when it exploded.

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The suppliant was very seriously hurt as the result of the explosion. His right arm was badly mangled and his hand and part of his forearm above the wrist had to be amputated. Fragments of the exploded object had penetrated his right eye and it had to be removed. There were also abrasions and lacerations about his face and forehead, which have left some scars, and some abrasions on his left leg at the knee and ankle. He suffered severe pain and nervous shock. While he was not rendered unconscious by the explosion, there was some concussion. Although the X-rays did not show any skull fracture Dr. Pennock, who attended him, thought that the outer table of his skull had been fractured. The suppliant was in the Ottawa Civic Hospital for about six weeks and then confined to his home for about another month. Apart from being somewhat underweight he is now, except for his permanent injuries, in fairly good health but still has some pain in the head and leg and is easily upset. He wears an artificial eye and an artificial arm but neither of these is satisfactory and both will have to be replaced. He is now a student in his third year at the Ottawa Technical High School taking a course in Commercial Art. He must adjust himself to his disabilities. He had intended to be a photographer but this is no longer possible. He has also had to give up his music in which he showed promise. He was right-handed and has had to learn to draw with his left hand. He is under a very serious handicap by reason of the loss of his eye and hand.

The suppliant Florence Ginn has incurred hospital and medical expenses as follows:

|                             |          |
|-----------------------------|----------|
| Dr. Pennock .....           | \$200.00 |
| Ottawa Civic Hospital ..... | 219.60   |
| Dr. C. C. Smart .....       | 37.00    |

making a total of \$456.60.

It is for the injuries thus suffered that this petition of right is brought by the suppliant Robert John Ginn by his widowed mother Florence Ginn as his next friend and by the suppliant Florence Ginn for the hospital and medical expenses incurred by her.

If I were of the opinion that the suppliants are entitled to any of the relief sought in the petition of right I would



award the suppliant Robert John Ginn the sum of \$12,000 as general damages and the suppliant Florence Ginn the sum of \$456.60 for hospital and medical expenses.

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The suppliants' claims are made under section 19(c) of the Exchequer Court Act, R.S.C. 1927, chapter 34, as amended, which reads as follows:

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.

To succeed in their claims the suppliants must prove not only that the injuries suffered by the suppliant Robert John Ginn resulted from the negligence of an officer or servant of the Crown but also that such negligence occurred while the officer or servant was acting within the scope of his duties or employment. The onus of proof of these matters lies on the suppliants. The onus is not a light one.

The suppliant Robert John Ginn did not know what the object he picked up was or what it was made of and no pieces of it were produced. He had never seen a similar object before and did not suspect that it was dangerous. He was shown an object, filed as Exhibit 3, which counsel for the respondent admitted was a No. 69 close action grenade and said that it resembled the object he picked up. It was black and shiny like Exhibit 3 but he could not say whether there was a safety or protective tape on what he picked up such as there was on Exhibit 3. It could have been without a cap and tape. The evidence of Jack Calderwood was that there was no tape on what he saw when the suppliant called him over. It looked exactly like Exhibit 3 without the cap and tape. I am satisfied that what the suppliant picked up, thinking it was a bottle, was a No. 69 close action grenade without the safety cap and protective tape.

The No. 69 close action grenade was originated and made in Great Britain for use as an infantry close action combat weapon. Towards the end of the war, as will appear later, it was also made in Canada for the use of the Canadian army. It contains several kinds of explosives. The main charge is baratol, a high explosive consisting of 80 per cent

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trinitrotoluene and 20 per cent barium nitrate inserted in powder form into the body of the grenade by a vacuum process. The baratol is an inert compound and cannot be set off without a detonator. The detonator, a very sensitive one, contains a base charge of tetrol and a primary charge of a mixture of lead azide and lead styphnete. This is set off by a flash from an ignition cap which contains a mixture of mercury fulminate and potassium chlorate. The ignition cap has to be struck by a striker, a steel firing pin. The substances referred to are not affected by freezing and thawing and while the permeation of water in them may reduce their explosive effect and cause a misfire it cannot wholly destroy it. The casing of the grenade is made of black bakelite, a plastic substance that retains its glossy appearance.

The structure and mechanism of the No. 69 grenade, illustrated by a chart, Exhibit 6, was explained by Captain A. Piper, pensions officer of the Canadian Legion and a war veteran, who was an experienced instructor in the use of various small arms, including the No. 69 grenade, both overseas and in Canada. The grenade has a safety cap on top. When it is issued for immediate use there is a strip of adhesive tape around this cap. It screws on and covers the neck of the grenade. Around this a protective tape is wound. This has a leaden weight at its outer end and a metal pin at its inner one. This goes through a hole in the neck of the grenade and a hole in the striker and holds it up. The striker is also held in place by a creep spring. Above the striker there is a round metal ball and below it the ignition cap and below the cap the detonator. The detonator is inserted into the centre of the grenade through a hole in the bottom into which a base plug is screwed. The bottom of the detonator rests on a rubber plug inserted into the top of the base plug and the top is open towards the ignition cap. The detonators are packed separately and are inserted in the grenades out on the range before their issue for use. When the grenade is to be thrown the adhesive tape around the safety cap is removed and the safety cap unscrewed. The grenade is then thrown with the index finger curled around the protective tape so that it will not unravel until it is in flight. When it is flight the lead weight

causes the tape to unravel and pull out the pin that holds up the striker. The grenade normally explodes on impact with a hard surface. The striker with the added weight of the metal ball overcomes the resistance of the creep spring and hits the ignition cap. The flash from it is directed into the detonator and sets it off. The detonation waves travel down through the detonator and set off the main charge and it explodes. The casing breaks up into very small fragments and the metal parts also break up but not into such small pieces. The explosion made by the grenade is a loud one. The grenade is dangerous only at close quarters, its danger area being 30 yards. If the grenade does not explode through landing on soft ground or for any other reason it is called a blind, but this does not mean that it has ceased to be a source of danger to some one who picks it up. The grenade cannot explode so long as the protective tape is around its neck with the pin holding up the striker. The fact that the grenade exploded while the suppliant held it in his hand while jumping from stone to stone indicates that the protective tape was not on it and that it had been thrown but was a blind. That is also indicated by the fact that the grenade rattled when the suppliant shook it for it cannot rattle if the tape is on it and the safety pin holds up the striker.

It is important to describe the place where the suppliant found the grenade. It was west of the Bowesville Road and a short distance north of the intersection of the Walkley Road. A plan of the locality was filed as Exhibit 1. On this the suppliant Robert John Ginn marked with an X the spot where he found the object that caused his hurt. The evidence is that immediately west of the Bowesville Road highway there is a narrow level strip of land and then a steep slope of from ten to fifteen feet down to the river bank. Along part of this bank there was a low stone wall about 200 feet long and from two and a half to three feet high that had been built as a retaining wall or breakwater to protect the bank. It served as part of the river bank. The usual summer water level of the river was about six feet higher than at the date of the accident. The river bed comes right up to the stone wall. After heavy rains the water comes almost up to the top of it. It was in the mud

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of the river bed west of this stone wall that the suppliant found the grenade. He remembered the spot because it was near the stone wall. It was lying on its side in the mud about three-quarters of an inch deep. The spot was approximately 20 feet from the water's edge. The mud of the river bed was soft. Mr. Currie, to whose evidence further reference will be made, said that he saw a small hole where the bomb had been dug up. He placed it on Exhibit 1 farther away from the stone wall than the suppliant did. The evidence also shows that a short distance south of the stone wall there is a swimming beach to which many people come in the summer.

There was no evidence of how or when the grenade came to be where the suppliant found it or who had thrown it there.

Counsel for the suppliants adduced evidence to show that military manoeuvres had taken place not far from the scene of the accident and that members of the armed forces of Canada, deemed to be servants of the Crown by section 50A of the Exchequer Court Act, had frequently been in the district. Mr. George Otterson, a dairy farmer on land south of the Walkley Road and west of the Concession Road, shown on a plan of the district filed as Exhibit 2, said that land in the area had been quite extensively used for military manoeuvres and referred particularly to a manoeuvre on the farm to the north of his land owned by Mr. Bebek. This was in the spring of 1943 or 1944. He remembered a number of trucks and that the soldiers carried rifles and that he had heard rifle shots. On other occasions he had heard loud explosions like those of dynamite. He could tell the difference between the sound of dummy cartridges and live ammunition but could not state and did not suggest that live ammunition had been used at any time. He had often seen troops marching on the Walkley Road and convoys on the Bowesville Road. In the winter he had seen ski troops on the river coming south from Hog's Back. He also remembered seeing tracks in the snow about 100 feet from the stone wall which he thought were those of Bren gun carriers but had never seen any such vehicles there. In nice weather soldiers often sat on the stone wall while eating their lunch. Mr. Alex Bebek, a farmer owning land immediately north of Mr. Otterson's, said that one spring, the

year of which he did not remember, an officer had asked permission to go on his land and that soldiers had come and been there all day engaged in war games. They carried rifles and he heard the sounds of rifle fire but didn't pay any attention. He had often seen troops on the Concession Road carrying rifles but did not notice any other weapons. He had also seen tanks there. The manoeuvre on his land was a long time before the date of the accident. Mr. William C. Graham, another dairy farmer, who lived right at the intersection of the Bowesville Road and the Walkley Road said that in 1943 and 1944 he had frequently seen troops in the area, in trucks or on foot, and had seen ski troops in the winter time. He saw the troops in the manoeuvre on Mr. Bebek's property but did not hear or see anything unusual. He had heard shots in the locality but did not know where they came from and did not hear any explosion that did not sound like a rifle shot. And Mr. G. F. Currie, a retired civil servant, who lived a short distance south of the junction of the Bowesville Road and the Walkley Road and had heard the explosion and rushed over to help the suppliant Robert John Ginn after he had been hurt, had frequently seen troops in the area, marching or in trucks, going up the Walkley Road or up the Bowesville Road to the Airport. He had also seen Bren gun carriers and amphibious ducks practising in the water. In the winter there were ski troops crossing the ice from the Prescott Road side of the river. There had been practice manoeuvres in the area east of the railway tracks. He had heard rifle fire that sounded like blank ammunition and other sounds like those of Mills bombs with a small charge. The manoeuvres he had heard were about a year before the accident. Mr. K. J. Matheson, formerly a general staff officer in the Directorate of Staff Duties (Weapons), also gave evidence that in the autumn of 1944 or in the spring of 1945 he had seen a demonstration at Mooney's Bay of two vehicles, one an amphibious truck, dukw, commonly known as a duck, and the other an amphibious jeep, given for the benefit of a number of staff officers who had not seen such vehicles. This was right near the junction of the Bowesville Road and the Walkley Road. There was no evidence that any ammunition was used or carried in connection with this demonstration.

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There is nothing in the evidence of any of these witnesses that could fasten any negligence on any officer or servant of the Crown while acting within the scope of his duties or employment. But unless there is evidence of such negligence the Crown cannot be held responsible in law under section 19(c) of the Exchequer Court Act for the suppliant's regrettable misfortune and there is no liability apart from it. The Crown's liability is a statutory one and cannot arise until all the conditions of liability fixed by the statute have been proved to have been present.

Counsel for the suppliants relied strongly on the evidence of Captain Piper. He gave evidence of the mechanism and operation of the bomb, his experience with it and the practice and regulations relating to its use for training purposes, and expressed the opinion that the grenade which the suppliant picked up was thrown there as a demonstration to troops or in the course of a tactical scheme. There is no evidence at all that it was so thrown. And Captain Piper's opinion cannot take the place of the evidence of fact that must be given to discharge the onus of proof that lies on the suppliants. It is no more than speculation or surmise. It is not permissible to determine the liability of the Crown under section 19(c) of the Exchequer Court Act on the basis of conjecture that the conditions of liability fixed by it were present. This was decided recently by the Supreme Court of Canada in *The King v. Moreau* (1). There a young boy had picked up a fuse in a ditch beside a road and was later hurt by it. While the facts of that case are distinguishable from those of this one I refer to it because of the remarks of Michaud C.J., then Deputy Judge of this Court, who held the Crown liable for the injury to the boy and awarded substantial damages, and the reversal of his decision by the Supreme Court of Canada. Michaud C.J. assumed that there was a duty of explanation of how the fuse came to be in the ditch and that in the absence of any such explanation negligence could be presumed. He said:

In the absence of any excuse or explanation from the army officers charged with the custody of such dangerous explosives, one is driven to the conclusion that someone along the line from Ordnance Headquarters down to some commissioned or non-commissioned officer in charge of target or mortar firing practices did not keep a proper check of these

(1) (1950) S.C.R. 18.

bombs entrusted to his care. Such failure on the part of an officer or servant of the Crown is negligence while acting within the scope of his duties or employment.

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The Supreme Court of Canada unanimously took a different view. Rinfret C.J., delivering the judgment of the Court, said, at page 23:

je ne puis m'accorder avec l'honorable juge à l'égard du principe qu'il pose qu'il appartenait aux officiers du camp d'expliquer la présence de la fusée dans le fossé du chemin conduisant de Rimouski au camp d'entraînement et que, en l'absence de cette explication, la conséquence irrésistible était qu'il y avait eu négligence de la part des officiers en charge dans l'exercice de leurs fonctions. Je crois que par là la Cour est entrée plutôt dans le domaine des conjectures que dans celui des présomptions qu'un tribunal est justifié de tirer des faits prouvés.

La doctrine et la jurisprudence sont bien arrêtées sur ce point et ne souffrent plus de discussion. Elles exigent que les présomptions sur lesquelles peut valablement se fonder une conclusion de ce genre soient graves, précises et concordantes.

And at page 24, the Chief Justice put the principles to be followed in a claim under section 19(c) of the Exchequer Court Act as follows:

Or, le raisonnement du juge de première instance, en posant le principe qu'il incombait aux officiers militaires en charge de fournir une explication ou une excuse pour la présence de la fusée dans le fossé, pêche donc, à mon humble avis, par deux côtés essentiels: premièrement, il suppose que la Couronne avait le fardeau de la preuve et qu'elle devait se disculper, alors que l'article 19(c) ne permet le maintien d'une réclamation contre la Couronne, à raison de la mort ou du dommage causé à la personne ou à la propriété, que dans le cas où elle résulte de la négligence de l'officier ou du serviteur de la Couronne. Il faut évidemment, dès lors, que le pétitionnaire, ou le réclamant, prouve cette négligence. Cette preuve ne peut résulter de conjectures ou de suppositions comme celles que nous avons ici. Je ne trouve aucun fait qui puisse donner lieu à des présomptions; et, en plus, il faudrait que telles présomptions fussent graves, précises et concordantes. Il n'y a rien de tel dans l'espèce actuelle.

Deuxièmement, toujours en vertu de l'article 19(c), il ne suffisait pas à l'intimé de prouver la négligence d'un officier ou d'un serviteur de la Couronne, mais il fallait, en plus, qu'il prouvât que cet officier, ou ce serviteur négligent, agissait dans les limites de ses devoirs ou de ses fonctions.

These remarks might well be applicable in this case. The adoption of Captain Piper's opinion of how the grenade came to be in the bed of the river would thus be a venture into the realm of conjecture which the law does not permit.

Moreover, I am of the view, even if his opinion were admissible as proof, that there is no sound basis for it. I am unable to believe that the grenade came to be where it was in either of the ways suggested by Captain Piper.

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The evidence adduced for the respondent proves that the first No. 69 grenades made in Canada came to the Ordnance Depot at Petawawa on August 3, 1944. They had been in common use in England before then but were not used in Canada. Petawawa received their shipment from the first month's production of the grenades in Canada. Then on August 12, 1944, the Chief of the General Staff of the Canadian Army issued Canadian Army Routine Order 4769, applicable to active formations, units and personnel of the Canadian Army. This reads as follows:

4769—GRENADES No. 69—USE OF FOR TRAINING PURPOSES—4769

1. The following safety rules for use of the No. 69 grenades for training purposes will be strictly adhered to:—

- (a) All ranks concerned must be well acquainted with the details of this grenade as laid down in Small Arms Training, Vol. I, Pam. No. 13 (1942) Lesson 5.
- (b) The No. 69 grenade will only be used for training purposes as follows:—
  - (i) During weapon training periods when men are actually being trained in throwing live grenades.
  - (ii) During exercises when live ammunition is being used, e.g. battle practices and field firing.
  - (iii) During properly supervised assault courses.
  - (iv) During exercises with troops when live ammunition is not being used, No. 69 grenades will not be thrown except by instructors or umpires and then only if no thunder-flashes are available.
- (c) When used in place of thunderflashes during exercises the grenades will, whenever possible, be thrown behind banks and into ditches. They will be thrown behind rather than in front of troops, to minimize the risk of eye injuries from flying fragments.
- (d) No. 69 grenades will never be thrown at advancing troops.
- (e) The grenades will be regarded as having a danger area of 30 yards.
- (f) They will never be used at night for training purposes.
- (g) These grenades will be thrown only on such ground as will ensure their being readily found if a blind occurs. All blinds are dangerous and must invariably be destroyed where they lie in the same way as other types of grenades. For this reason grenades must not in any circumstances be thrown into water.

2. Serious accidents have recently occurred during training through ignorance of the capabilities of the No. 69 Bakelite grenade and from non-adherence to safety rules.

3. Commanding Officers of units carrying out training with the No. 69 grenade will, therefore, ensure that the safety rules as detailed above are strictly adhered to, and that all ranks are informed that this grenade is a lethal weapon and must not be moved once it has been thrown and is in an armed condition.

4. Attention is drawn to R.O. 4768 covering removal of detonators from No. 69 grenades.

(H.Q. 54-27-35-301)



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This order was widely circulated and would reach the attention of all persons concerned with training in the use of the grenade. Certainly, instructors in its use would be made familiar with it. Under the circumstances, it would be unreasonable to assume that any instructor would throw a grenade into Mooney's Bay as a demonstration to troops. Certainly, Captain Piper would not have done so. It was a most unlikely place for such a demonstration. The Bowesville Road is a well travelled highway just a few feet from the Bay and there are houses not far away. And Order No. 4769 expressly says that the grenades must not in any circumstances be thrown into water. Moreover, it would not have been possible for an instructor to throw the grenade in the course of duty, for the evidence for the respondent shows that there were no No. 69 grenades issued to No. 26 Central Ordnance Depot, the Ottawa area depot, prior to May 21, 1945, almost two months after the accident. Consequently, no instructor in Ottawa could have obtained any grenades in the Ottawa area prior to the date of the accident. The suggestion that an instructor threw the grenade into the river as a demonstration to troops is, in my view, a preposterous one. It is equally preposterous to suggest that he would throw it into the soft mud, if the water was low, and leave it there without taking any steps to destroy it.

The suggestion that the grenade landed in the spot where the suppliant picked it up in the course of a tactical scheme is equally untenable. There was no evidence of any tactical scheme at Mooney's Bay, let alone a scheme involving the use of live ammunition. It is quite unreasonable to think that any tactical scheme involving the use of live ammunition would be ordered at such a place, adjacent to a busy highway and with houses nearby. Moreover, if any tactical scheme had been ordered for that area no No. 69 grenades could have been available for it from the Ottawa area prior to the date of the accident for there were no grenades in store in the area at that time. And no tactical scheme involving the use of No. 69 grenades would be held at any place other than an official range, such as for example, the Connaught ranges at South March.

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There is no substance in the submission that the grenade came to be where it was through having been thrown there as Captain Piper suggested.

While no grenades were issued to No. 26 Central Ordnance Depot until May 21, 1945, there were issues to the District Ordnance Depot at Kingston prior to the date of the accident and to other depots. It would, therefore, seem clear that whoever threw the grenade must have brought it into the Ottawa area from outside. If he did so it could not have been thrown in the course of duty. But who that person is and when and why he threw the grenade where he did remain unanswered questions, and speculation as to possible answers is idle.

In any event, there is no proof that the grenade was thrown there by any officer or servant of the Crown while acting within the scope of his duties or employment. This distinguishes the present case from that of *The King v. Laperriere* (1).

Nor is there any evidence of lack of care in the issue or handling of the grenades on the part of the military authorities. On the contrary, the evidence shows that great care was taken to see that they were properly issued and accounted for and that reasonable efforts were made to ensure that grenades that did not explode when thrown were destroyed. Unfortunately, notwithstanding such care this accident happened.

Under the circumstances, since the suppliants have not been able to satisfy the requirements of section 19(c) of the Exchequer Court Act the Court has no alternative other than to find that the Crown is not liable in law for the injury suffered by the suppliant Robert John Ginn and judgment must be given that neither of the suppliants is entitled to any of the relief sought by them. The respondent is entitled to costs.

*Judgment accordingly.*

BETWEEN:

THE B. F. GOODRICH COMPANY.....APPLICANT;

AND

J. A. & M. CÔTÉ LIMITÉE.....RESPONDENT.

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 Sept. 17, 18
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 1949  
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 Dec. 30
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*Trade Mark—The Unfair Competition Act, 1932, 22-23 Geo. V, c. 38, ss. 2(k), 2(l), 23, 26(1)(f)—“Shuglov”—“Footgluv”—Application to expunge—Whether marks similar—Whether wares similar—Intention to abandon trade mark “Shuglov” not established.*

Alleging similarity of the two marks and of the wares on which they were respectively registered, the B. F. Goodrich Company, an American corporation and the owner of the trade mark “Shuglov” as applied to “footwear, particularly rubber boots and shoes and rubber overshoes” registered in October, 1932, but very scarcely used or advertised in Canada, sought to have expunged from the register the trade mark “Footgluv” registered in May, 1942, by respondent as applied to “footwear in the form of boots and shoes” and, since July, 1945, by amendment to “leather boots and shoes”.

*Held:* That the respondent’s wares are not similar to those of applicant and they are not likely to be associated with each other by dealers in them or users thereof so as to cause such dealers or users to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin.

2. That the parties’ trade marks are not so similar that the contemporaneous use of both would create confusion among dealers in their wares or users thereof.
3. That the intention by the applicant to abandon its trade mark “Shuglov” has not been established.

APPLICATION for an order expunging respondent’s trade mark from register of Trade Marks.

The application was heard before the Honourable Mr. Justice Angers, at Montreal.

*Christopher Robinson, K.C.* for applicant.

*H. Gérin-Lajoie, K.C.* and *Gérald Fauteux, K.C.* for respondent.

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

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ANGERS J. now (December 30, 1949) delivered the following judgment:

In its action the applicant prays that an order be made in the terms of the originating notice of motion filed herein, striking out the entry in the register of trade marks relating to the registration of the trade mark "Footgluv" No. N.S. 18206/69.

Written pleadings were ordered and duly filed.

In its statement of claim the applicant alleges in substance:

the applicant is a corporation of the State of New York, one of the United States of America, having its principal office in the City of New York, in the said State, and the respondent is a corporation of the Dominion of Canada, having its principal office at St. Hyacinthe, in the Province of Quebec;

on October 8, 1932, the applicant obtained under the Trade Mark and Design Act the registration of a trade mark consisting of the word "shuglov" No. 258/55426 for use on footwear, particularly rubber boots and shoes and rubber overshoes, and the register under the said Act forms part of the register maintained under the Unfair Competition Act so that no person was entitled after the coming into force of the last mentioned Act to adopt the same or a similar trade mark for the same or similar goods;

since before the date of the said registration until prevented by war regulations affecting rubber the applicant continuously used the said mark on footwear of which rubber was the principal material, but simulating in appearance footwear made of other materials and between the years 1932 and 1940 inclusive expended an average of about \$22,000 annually in advertising the said footwear in the magazines "Esquire", "Good Housekeeping", "Harper's Bazaar", "Vogue", "Women's Home Companion", "Ladies' Home Journal" and "Life", each of which publications has a substantial circulation in Canada, samples of such advertisements being on file in this Court as exhibits to the affidavit of A. C. Brett sworn on March 13, 1945;

the respondent on May 8, 1942, obtained registration at Folio N.S. 18206 of Register 69 in the register of trade marks maintained under the Unfair Competition Act, 1932,

of the trade mark "Footgluv" in respect of wares described as "Footwear in the form of boots and shoes", and on July 11, 1945, the respondent amended the said registration by substituting the word "Leather" for the word "Footwear" in the statement of wares herein above-quoted;

the marks "Shuglov" and "Footgluv" are similar as are also the wares for use on which they are respectively registered.

In its statement of defence the respondent pleads in substance:

it admits the designation of the parties contained in paragraph 1 of the statement of claim:

it admits that on October 8, 1932, the applicant obtained under the Trade Mark and Design Act the registration of a trade mark consisting of the word "Shuglov" No. 258/55426 as applied to "footwear, particularly rubber boots and shoes and rubber overshoes", and that the register under the said Act forms part of the register maintained under the Unfair Competition Act, 1932, but denies the remainder of the paragraph as drawn;

it denies that since before the date of the said registration the applicant has continuously used the trade mark "Shuglov" and it avers that the applicant has failed to ever make use of the said mark "Shuglov" to any appreciable extent, particularly in Canada, that, if the said mark has ever been used by the applicant, it has since a number of years become abandoned, particularly in Canada, that at no time have war regulations affecting rubber, either in Canada or the United States, prevented the applicant from manufacturing and selling rubber overshoes or from otherwise making use of the said mark, that whatever use may have been made of the said mark by the applicant was exclusively on rubber overshoes and that the applicant in its advertisements stressed the point that such rubber overshoes are not shoes, but "smart rubbers";

it admits that the respondent on May 8, 1942, obtained registration in the register of trade marks maintained under the Unfair Competition Act, 1932, of the trade mark "Footgluv" in respect of wares described as "Footwear in the form of boots and shoes", except that the amendment of its trade mark "Footgluv" made on July 11, 1945, con-

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sisted in substituting the word "Leather" for the words "Footwear in the form of", so that the respondent's mark now applies to leather boots and shoes;

it denies that the marks "Shuglov" and "Footgluv" and the wares for use on which they are registered are similar;

the said marks "Shuglov" and "Footgluv" are not similar within the meaning of the Unfair Competition Act, 1932, and do not lead to confusion;

the applicant is a well-known manufacturer of and dealer in rubber products exclusively, carrying on business as such throughout the United States and Canada, and such use as it may have made of its mark "Shuglov" has been exclusively in connection with the sale of rubber overshoes;

the respondent is a boot and shoe manufacturer carrying on business throughout Canada and has used its mark "Footgluv" exclusively in connection with leather boots and shoes;

the respective wares to which the applicant's mark and the respondent's mark apply are not similar within the meaning of the Unfair Competition Act, 1932;

the applicant's trade mark "Shuglov" has become abandoned and, subsidiarily, its registration as covering footwear generally and not being restricted to rubber overshoes and to rubber boots and shoes is too broad and covers more than that to which the applicant might be entitled and proceedings have been instituted and are pending before this Court in which the present respondent is plaintiff and the present applicant is defendant, praying that the mark "Shuglov" be expunged and struck out from the register or, in the alternative, that the said entry be amended by restricting the wares in association with which the mark is used to "rubber boots and shoes and rubber overshoes", which proceedings have been joined to the present case for the purposes of proof and hearing;

since the registration of its mark "Footgluv" on April 15, 1942, the respondent, to the applicant's knowledge and without any opposition on his part, has made at great expense an extensive and ever increasing use and advertising, as applied to the sale of leather boots and shoes, of its said mark, which has come to be widely known throughout Canada as identifying the respondent's goods, and the

applicant's present demand to have the respondent's mark expunged and struck out from the register is made too late and the applicant is estopped from so proceeding;

the respondent therefore prays, under reserve of its said proceedings against the applicant pending before this Court, that the applicant's present demand be dismissed.

A brief review of the evidence seems to me apposite.

[Here the learned judge reviews the evidence and proceeds]:

The facts are simple and may concisely be summed up as follows.

On October 8, 1932, The B. F. Goodrich Company, a corporation of the State of New York, one of the United States of America, having its principal office in the City of New York, obtained under the Trade Mark and Design Act the registration of a trade mark consisting of the word "Shuglov" for use on "footwear, particularly rubber boots and shoes and rubber overshoes". A duly certified copy thereof was produced. The register under the said Act forms part of the register kept under the Unfair Competition Act, in accordance with subsection (1) of section 23 of the latter Act, which provides:

The register now existing under the Trade Mark and Design Act shall form part of the register maintained pursuant to this Act, and, subject as hereinafter provided, all entries therein shall hereafter be governed by the provisions of this Act, but shall not, if properly made under the law in force at the time they were made, be subject to be expunged or amended only because they might not properly have been made hereunder.

On May 8, 1942, J. A. & M. Côté Limitée, a corporation organized and existing under the laws of the Dominion of Canada, having its head office and principal place of business in the city of St. Hyacinthe, in the Province of Quebec, obtained under the Unfair Competition Act, 1932, the registration of a trade mark consisting of the word "Footgluv", in respect of "footwear in the form of boots and shoes". A duly certified copy thereof was produced and marked D.

From an entry on the back of the certificate it appears that the record of registration was, on July 11, 1945, amended, in accordance with section 42 of the Act, by deleting therefrom the words "footwear in the form of" and substituting therefor the word "leather".

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By his action the applicant, as already stated, seeks to have an order striking out from the register No. 69, folio N.S. 18206, the entry relating to the registration of the trade mark "Footgluv".

Subsection (1) of section 26 of the Unfair Competition Act enacts (*inter alia*) that:

(1) Subject as otherwise provided in this Act, a word mark shall be registrable if it

(f) is not similar to, or to a possible translation into English or French of, some other word mark already registered for use in connection with similar wares.

The word "similar" is defined in paragraphs (k) and (l) of section 2 of the Act, which read as follows:

(k) "Similar", in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin;

(l) "Similar", in relation to wares, describes categories of wares which, by reason of their common characteristics or of the correspondence of the classes of persons by whom they are ordinarily dealt in or used, or of the manner or circumstances of their use, would, if in the same area they contemporaneously bore the trade mark or presented the distinguishing guise in question, be likely to be so associated with each other by dealers in and/or users of them as to cause such dealers and/or users to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin;

It was submitted on behalf of applicant that there is similarity of marks and of wares and that, at the time of service of the originating notice of motion, the wares in respect of which the two trade marks were registered were identical.

I may note incidentally that the amendment by J. A. & M. Côté Limitée of its trade mark to limit it to leather boots and shoes seems to me an indication of good faith. Counsel for applicant willingly declared that he did not question the good faith of respondent. After hearing the evidence, I may say that respondent's sincerity appears to me beyond doubt.

The only difference between the applicant's wares and those of respondent is that the former are made of rubber and the latter of leather. This was admitted by counsel for applicant.



To the observation by counsel for respondent that the word "particularly" in the description of the wares in applicant's trade mark is restrictive counsel for applicant retorted that it is not and that the reason for indicating these specific wares is merely to afford a guide to the registrar in determining whether a similar trade mark in a field outside footwear should be registered or not. He specified that, if the "Shuglov" registration only mentioned footwear, the possibility of confusion between footwear and rubber garments might not suggest itself to the registrar, but that with the particularization of rubber boots and shoes and rubber overshoes there might be a suggestion to the registrar that there could be confusion between goods which were not footwear but were rubber garments and, on the other hand, rubber footwear, whereas if the mark had been used on footwear made of some other material, then there could not be as much risk of confusion between that footwear and other garments made of rubber. Contrary to the spontaneous impression gathered at the hearing I think that the word "particularly" is in this case restrictive in that it limits the nature of the wares covered by the trade mark to wares of the same category. The mark "Shuglov" indicates an article of footwear designed to protect the boot or shoe from snow, rain or moisture. It applies to rubber footwear as rubbers, rubber boots, rubber shoes and rubber overshoes. In fact those are the only articles which the applicant has made before and after it obtained the registration of the mark "Shuglov". On the other hand, the word "Footgluv" designates an article of footwear adaptable to the foot itself.

Regarding the question of similarity in relation to wares counsel for applicant relied on *Walpamur Co. Ltd. v. Sanderson & Co. Ltd.* (1); *Vasenolwerke v. Commissioner of Patents* (2); *Procter & Gamble Co. of Canada Ltd. v. LeHave Creamery Co. Ltd.* (3).

The facts in *Walpamur v. Sanderson* (*supra*) are somewhat similar to those in the present case, with this difference however that the trade marks therein involved both applied to the manufacture and sale of paint in the general

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(1) (1926) 43 R.P.C. 385, 393.

(3) (1943) S.C.R. 433.

(2) (1935) Ex.C.R. 198, 201.

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sense of the term, viz. paints, enamels and varnishes. I deem it proper to quote the headnote, which is fairly accurate:

The proprietors of two Trade Marks consisting of the word "Mirabol", one in capital lettering and the other in script lettering on a label, and both registered in Class 1 in respect of enamels, paints and varnishes, brought an action for infringement of the marks against the proprietors of a Trade Mark consisting of the word "Muralol", and registered in Class 1 in respect of colours, paints and varnishes. The Plaintiffs also alleged in the Statement of Claim that the Defendants had passed off goods by the use of the word "Muralol", but early in the proceedings the Plaintiffs informed the Defendants that they did not intend to rely upon any specific acts of passing off. The Defendants admitted that they had sold flat oil paints under the name "Muralol", but alleged that the Plaintiffs had sold under the name "Mirabol" only under-coating and enamel, flat and glossy, not flat oil paint, and they denied that they had infringed the Trade Marks or passed off goods. The Plaintiffs gave notice of motion to remove the Defendants' Mark from the Register, and the Defendants gave notice of motion to limit the registration of the Plaintiffs' Mark.

*Held:* that the Defendants had chosen the name "Muralol" honestly; that the Defendants' goods were sold only to the trade, and there had not been any actual deception, but that the Defendants' word "Muralol" was calculated to deceive; that an injunction to restrain infringement must be granted; that the Plaintiffs' motion must succeed and the Defendants' motion must fail; and that the Plaintiffs ought not to have alleged that the Defendants had passed off, but that, having regard to the Plaintiffs' admission, a special Order as to costs on that issue could not be made. The defendants were ordered to pay the costs of the action and Motions.

On page 393 Mr. Justice Astbury makes the following observations:

What I have to decide is, whether, having regard to the fact that both these firms carry on the business of making and selling paint in the general sense of the term, paints, enamels and varnishes being the sort of thing that manufacturers of paints would be expected to make and sell, this word "Muralol", especially when written in script form, is so near the Plaintiffs' word as to be calculated to deceive. On the whole, I have come to the conclusion that it is; if the Defendants were now seeking to register "Muralol", I feel satisfied that the registration would be refused at the instance of the Plaintiffs on the ground of the nearness between the two words; they look very much alike, and they sound very much alike, and they are both used in respect of goods made and sold in a paint-maker's business, and, in my judgment, one is an infringement, or a colourable imitation, of the other.

Further on the learned judge expresses this opinion (p. 394):

Then it is said, because the Plaintiffs have hitherto only used their Trade Mark in connection with enamel goods, or enamels, either glossy or flat, and, as the Defendants are only selling under "Murabol" oil paints

for walls, which the Plaintiffs sell under a different Trade Mark, the case still falls within the principle of *Edwards v. Dennis*, and the Plaintiffs' registration ought to be confined to the goods that they have hitherto sold. For that Hart's case (L.R. (1902) 2 Ch. 621) is referred to; it is also part of this contention of the Defendants, that the intention of the Plaintiffs at the time of registration was only to use their word for enamels; that they have for five years only used it for that class of goods, and that, therefore, under Section 37 of the Act, the registration ought to be limited to the goods which they intended to sell, and which they have actually sold. In my opinion, this contention as applied to this case is unsound. The Plaintiffs have registered this Mark for the ordinary things which a manufacturer of paints sells.

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The marks "Mirabol" and "Muralol" applying to the same class of goods, the latter, subsequently registered, was found liable to deceive and an order restraining infringement was granted. This case differs appreciably from the one now pending. I do not believe that we can place the goods manufactured by the applicant in the same class as those made by the respondent. The B. F. Goodrich Company has produced and still produces solely rubber footwear, viz. rubbers, rubber boots, rubber shoes and rubber overshoes, intended for the protection of boots, shoes or other footwear of the same nature against snow, rain and moisture generally. J. A. & M. Côté Limitée, on the other hand, has since its inception made only and still makes only leather boots and shoes. Its trade mark "Footgluv" indicates clearly, in my opinion, that the company's footwear is meant to cover the foot itself and not an inner article of footgear.

In the case of *Vasenolwerke Dr. Arthur Köpp Aktiengesellschaft v. The Commissioner of Patents and Chesebrough Mfg. Company (supra)* it was held that the marks "Vasenol" and "Vaseline" are similar and the registration of the word "Vasenol" would be calculated to deceive.

The late president, Maclean, J., made appropriate comments, which I consider apposite to quote (p. 203):

There are two points to decide, first, are the words Vaseline and Vasenol if applied to similar wares, so similar as to cause confusion, and secondly, whether the wares mentioned by the applicant in its application are similar to those made and sold by Chesebrough. If those wares are not similar within the intendment of the statute, then the applicant would, I apprehend, be entitled to registration. If they are similar then the question for decision is whether the two marks in question are so similar as to be in conflict and liable to cause confusion.

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The learned judge, after citing paragraph (d) and (f) of subsection 1 of section 26, paragraph (d) of subsection 1 of section 28 and paragraphs (k) and (l) of section 2, adds (p. 204):

Now, I think, the wares manufactured and sold by the applicant and Chesebrough respectively, under their respective registered trade marks, are similar; they have common characteristics, the purposes for which they are to be used are much alike, and they probably would be dealt in and distributed to the consuming public through the same trade channels. The applicant describes generally its manufactures and sales, as I already observed, as "remedies, medical, pharmaceutical, hygienic and cosmetrical preparations and toilet articles," much as Chesebrough describes its products. For the purposes of the Unfair Competition Act I think it can fairly be said that the wares for which Chesebrough is registered in Canada, and the wares for which the applicant seeks registration in Canada, are similar.

In this case the wares were similar and the marks sufficiently so as to be liable to lead into confusion. The facts however differ materially from those existing in the present instance and I do not think that the decision can carry much weight on the matter now at issue.

The facts in *Procter & Gamble Co. of Canada Ltd. v. LeHave Creamery Co. Ltd.* (*supra*) may be summarized as follows:

On August 1, 1934, the appellant caused to be registered in the register of trade marks the words "White Clover" as applied to hydrogenated cottonseed and vegetable oils, which are used for shortening in baking. On November 1, 1941, the respondent caused to be registered the same mark as applied to butter. In May 1942 the appellant applied to the Court, under subsection 1 of section 52 of the Unfair Competition Act, 1932, for an order expunging the trade mark "White Clover" as applied to butter. The late President of the Court, Mr. Justice Maclean, dismissed the application. The appellant appealed to the Supreme Court and the latter, by a majority of three against two, reversed the judgment of Maclean, J.

The majority judgment of Rinfret, Kerwin and Tasche-reau, JJ. was delivered by Kerwin, J. In the latter's notes we find the following observations (p. 438):

The three reasons referred to above and set forth in clause (1) of section 2 are: (1) the common characteristics of the wares, (2) the correspondence of the classes of persons by whom they are ordinarily dealt in or used, and (3) the manner or circumstances of their use.

As to (1), the constituent elements, as well as the appearance, of butter and hydrogenated cottonseed oil are entirely different, so that the first reason need not be further considered. However, as to (2) and (3), it is proved that the articles are dealt in by wholesale and retail grocers, and in the stores of the latter very often appear alongside of each other; both are purchased by the general public and butter is used for shortening although, in view of the difference in price, possibly not to the extent suggested by the appellant.

From a consideration of all the evidence, I am of opinion that retail grocers would infer that the appellant who had for some years put out shortening under the name "White Clover", had manufactured butter sold under the same name. The wrappers on the two articles indicate clearly the names of the respective manufacturers and it may be that particularly careful housewives or other purchasers of shortening and butter would examine the wrappers to ascertain who were the manufacturers; but the two articles are so associated with each other as to cause the great majority of the purchasing public to infer that the same person assumed responsibility for their character and quality.

The Chief Justice, who dissented, said that he agreed with the conclusion of the President of the Exchequer Court and also concurred with the observation of Davis, J.

The latter, after relating the facts, citing an extract from the judgment of Maclean, J., and quoting subsections 1 and 2 of section 52 of the Unfair Competition Act, 1932, stated (p. 440):

I do not think that this summary procedure was ever intended to be used in cases such as this where substantial issues of fact may lie at the very foundation of the right to the relief sought. That is what I think the late President had in mind when in his judgment he used the phrases "at least upon the evidence before me" and "upon the material before me".

But the application was so heard and determined, apparently without objection. Quite apart from the procedure taken, the findings of the trial judge are such that this Court would not be justified, in my opinion, in interfering with the judgment whereby the appellant's application to have the respondent's mark expunged from the Register was dismissed.

Opinions being equally divided and the facts being to a large extent different from those with which we are concerned, I do not think that this decision can affect the result herein.

In the case of *Edwards v. Dennis* (1) the comments of Lindley, L.J. at page 476 and of Fry, L.J. at page 478 are material and relevant.

Reference may also be had to *In the matter of Belgo Canadian Manufacturing Company Ltd. and Trade Mark "Oxford"* (2), where I discussed the question of similarity

(1) (1885) 30 Ch. D. 454.

(2) (1945) 4 Fox Pat. C. 143.

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of wares and reviewed certain decisions relating thereto, to *Dunlop Pneumatic Tyre Company Ltd.* (1) and *In the matter of an Application by Ladislav Jelinek for the registration of a Trade Mark* (2).

In the last case Ladislav Jelinek applied to register the device of a panda together with the word "Panda" for shoe polish. The application was opposed by Chissick & Ker-shenstein Limited, proprietors of a similar "Panda" mark registered in respect of shoes. It was held (*inter alia*):

(i) That shoes and shoe polish were not goods of the same description and the registration would not offend against Sec. 12 (I).

(ii) That at the date of the application the Opponents had not established any reputation amongst the public for shoes under the mark "Panda" and that there was therefore no likelihood of confusion.

After giving the matter careful consideration, I have reached the conclusion that the respondent's wares are not similar to those of applicant and that they are not likely to be associated with each other by dealers in them or users thereof so as to cause such dealers or users to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin.

This, I believe, disposes of the problem of the similarity of the wares.

Regarding the subject of similarity of the trade marks it was urged by counsel for applicant that the respondent has admitted the similarity by the amendment which it made to the registration, because, if the marks were not similar, there was no reason why both could not have remained on the register for identical wares, namely footwear. I cannot agree with this opinion. By this amendment the mark itself was not modified. It was the description of the wares to which it applied that was restricted. The change was apparently made in order to avoid the possibility of regarding the mark as applicable to rubber footwear.

Are the marks "Shuglov" and "Footgluv" similar? The suffix only is alike in sound, notwithstanding the difference

(1) (1907) 24 R.P.C. 572.

(2) (1946) 63 R.P.C. 59.

in the spelling; the prefix differs. The word "Shuglov" suggests an article of footwear meant to wrap up a boot or shoe, as "Footgluv" implies a piece of footgear destined to cover the foot itself. Both objects are intended to protect the foot. Both are sold by the same retailers, but generally made by different manufacturers.

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We are confronted with a rather unusual state of things. The applicant is a large American corporation of the State of New York, having its head office in the City of New York, engaged in the manufacture of all kinds of rubber footwear, boots, shoes, overshoes, sandals, etc., as established by Martin and the catalogues exhibits 1 and 2. It has manufactured and still manufactures all its products in the United States. None have ever been made in Canada. It advertised its goods in American magazines (Esquire, Good Housekeeping, Harper's Bazaar, Vogue, Women's Home Companion, Ladies' Home Journal and Life), all of which had a substantial circulation in Canada; the proof however does not disclose that the company ever published any advertisements in Canadian papers or magazines; no reason has been given for this abstention.

At the close of applicant's evidence, counsel agreed to file admissions concerning the magazines in which the B. F. Goodrich Company advertised its wares; they were classified beforehand as exhibits 8 and 9. Copies of these admissions were only produced on September 8, 1949, after several requests by one of the deputy registrars in accordance with my instructions. This unavoidably delayed the judgment. These admissions read thus:

The parties hereto admit for the purposes of this action that the magazines "Esquire", "Good Housekeeping", "Harper's Bazaar", "Vogue", "Women's Home Companion", "Ladies' Home Journal" and "Life" are published in the United States and circulate in the ordinary course among the general public in Canada.

Sales were made in Canada on a very small scale, to wit for a total of \$4,015, from 1932 to 1941 inclusively, as compared with an amount of \$5,229,153 for the sales in the United States. The sales in Canada were rather scanty. Except the year 1937 which yielded the fabulous sum of

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\$1,293, the sales in that period did not reach \$1,000 annually. It seems obvious that the B. F. Goodrich Company was not keenly interested in the Canadian market nor anxious to push the sale of its products in Canada.

In 1932, the year in which the company registered its trade mark, the entry regarding the sales in Canada is "Records destroyed" and Martin, the manager of footwear of the Hood Rubber Company, a division, as previously noted, of the parent company, could not supply any information about the destruction of the records. He admitted that the statement exhibit 1 had been prepared by a clerk of the company and handed to him. He first contended that he had controlled the figures of the sales in the United States but it may be implied from the cross-examination that he did not really control them. The evidence on this point is not convincing.

In 1940, the eighth year since the introduction in Canada of applicant's wares and the registration of the mark "Shuglov", the sales in Canada totalled \$63. The figures concerning the sales in Canada from 1932 to 1941, contained in the statement exhibit 6, clearly show that the use of the mark "Shuglov" in Canada was extremely limited.

According to this statement the total expenditure for magazine advertising of the mark "Shuglov", for the years 1932 to 1940, amounted to \$198,658. It was incumbent on the applicant to prove sales or advertisements in Canada made or published, as the case may be, prior to October 8, 1932, date of the registration of the mark "Shuglov". This was not done. The only sheets in exhibit 7 bearing a date are those of the magazine "Esquire", one published in October 1937 and the other in November 1938, both subsequent to the registration of the trade mark.

It appears from the evidence that since 1940 there has been no advertising and that since 1941 the mark has not been used in the United States nor in Canada. Martin declared that his company curtailed its advertising in 1940 due to the unsettled conditions at that time. He attributed the lack of usage of the mark after 1941 to State control and war restrictions. He explained the almost negligible



quantity of sales in Canada as compared with those effected in the United States by the statement that the "Shuglov" was a new and comparatively high-priced item and that it is the policy of the company to establish the product in the United States before trying to implant it in Canada or in any other export market. Be that as it may, the fact remains that the applicant's footwear bearing the mark "Shuglov" has not been widely distributed nor has it received much publicity in Canada since 1932.

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It was submitted by counsel for respondent that, when the trade mark "Footgluv" was used for the first time, his client was unaware of the mark "Shuglov", which had not been advertised in the United States nor in Canada since 1940. This contention seems to me consistent with the evidence.

Counsel drew the attention of the Court to the fact that J. A. & M. Côté Limitée, since the adoption of its mark "Footgluv", has made a very substantial use of it in the trade in Canada, as shown in the statement exhibit E, the first page whereof is hereinabove reproduced. The only drop in the affairs of the company occurred in 1944 when, during the war, the Federal Government required it to increase its production of footwear for the armed forces. The amount of the sales declined then from \$70,709.55 in 1943 to \$60,892.05. In 1945 the sales rose up to \$87,601.16. On March 30, 1946, the respondent had in hand orders totalling \$138,340.41.

The dispute is between an American corporation holding a trade mark, registered in Ottawa on October 8, 1932, but very scarcely used or advertised in Canada, and a Canadian company which has made and is still making an extensive use of its trade mark. It is only after J. A. & M. Côté Limitée had for two years utilized its mark that the B. F. Goodrich Company took steps to compel the respondent to discontinue its use.

Dealing with the similarity of the marks counsel for respondent referred to a number of cases, some of which it may be apposite to review briefly.

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[The learned judge here reviews the following decisions dealing with similarity of marks, namely, *Fine Foods of Canada Limited v. Metcalfe Foods Ltd.* (1), *Yamaska Garments, Limited v. The Registrar of Trade Marks* (2), *Lever Brothers, Limited v. Wilson* (3), *Lever Brothers, Limited v. Pizzuti et al* (4), *Kirstein Sons & Company v. The Cohen Brothers, Limited* (5), *Coca-Cola Company of Canada Limited v. Pepsi-Cola Company of Canada Limited* (6), *In the matter of a trade mark of The United Chemists' Association, Limited* (7), *Battle Pharmaceuticals v. The British Drug Houses, Limited* (8), *Aristoc, Ltd. v. Rysta, Ltd. et al* (9), *W. T. Blackwell & Company v. W. E. Dibrell & Company* (10), *In the matter of London Lubricants (1920) Limited's application to register a trade mark* (11), and continues.]

As previously noted, the prefixes in the two marks with which we are concerned are different; only the suffixes resemble one another.

After giving the matter careful consideration, I have reached the conclusion that the parties' trade marks are not so similar that the contemporaneous use of both would create confusion among dealers in their wares or users thereof.

There remains the question of the alleged abandonment by The B. F. Goodrich Company of its trade mark "Shuglov" and the curtailment of the advertising. The evidence discloses that the applicant has not used it, in the United States as well as in Canada, since 1941. This lack of usage has been attributed by Martin to the company's inability to get rubber latex owing to government orders restricting the use of rubber. The proof concerning those orders is not the best available. There were a fairly substantial amount of sales of the product "Shuglov" in the United States from 1933 to 1941; thereafter sales ceased entirely, according to the evidence adduced, verbal and written. The magazine advertising expenditure, fairly considerable between 1933 and 1940, was completely cancelled

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|------------------------------------------------------|------------------------------------------------------------|
| (1) (1942) 2 Fox Pat. C. 113.                        | (7) (1923) 40 R.P.C. 219.                                  |
| (2) (1945) 5 Fox Pat. C. 112;<br>(1945) Ex.C.R. 223. | (8) (1946) S.C.R. 50.                                      |
| (3) (1932) Ex.C.R. 69.                               | (9) (1945) 1 All E.R., 34.                                 |
| (4) (1932) Ex.C.R. 79.                               | (10) (1878) U.S. Pat Official<br>Gazette, vol. 14, p. 633. |
| (5) (1907) 39 S.C.R. 286.                            | (11) (1924) 42 R.P.C. 264.                                 |
| (6) (1942) 2 Fox. Pat. C. 143,<br>148, 149, 150.     |                                                            |

after 1940. Abandonment cannot be presumed. Mere disuse of a trade mark does not amount to abandonment. The intention to abandon must be established: *Mouson & Co. v. Boehm* (1); *Madame Irene v. Schweinburg* (2); *Western Clock Co. v. Oris Watch Co. Ltd.* (3); *Baglin v. Cusenier Co.* (4). It may however be inferred from long disuse: *In re Ralph's trade mark* (5); *Edwards v. Dennis* (6); *Grossmith's trade mark* (7); *Daniel & Arter v. Whitehouse* (8); *John Batt & Co. v. Dunnett et al.* (9); *In re Ashton's trade mark* (10); *In re the registered trade mark of Maurice John Hart* (11); *In the matter of a trade mark of James Crean & Son Ltd.* (12); *Good Humor Corp. of America v. Good Humor Food Products Ltd. et al.* (13).

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*In re Ralph's trade mark (supra)* the following observations by Pearson J. are, as I think, apposite (p. 198):

It is said that Mr. Ralph does not come within it for this reason, that since February, 1882, he has been prevented by illness and other causes, but principally by illness, from doing that which he is minded to do, if he can carry into effect certain treaties that he is engaged in at the present moment either to manufacture by himself, or other persons, this machine; and really the only question I have to determine is whether one year and nine months is sufficient cesser on the part of Mr. Ralph to show that he comes within the 33rd rule, and is not a person engaged in any business concerning the goods, within the same class as the goods, with respect to which this trade mark is registered. I am of opinion that one year and nine months is quite sufficient. If I had any doubt about it I am able by analogy to say that I should not be wrong in concluding that one year and nine months is sufficient, from the fact that under the Companies Act you may wind up a company if it has ceased to carry on business for a year. The Legislature in that has shewn by its enactment when a business is supposed to be carried on, and what amount of cesser shews that the business is not being carried on. For nearly double that period Mr. Ralph has not carried this business by himself or any other person. I am of opinion, therefore, and I so decide, that this trade mark must be removed from the register on the ground that Mr. Ralph is not engaged in any business concerning the goods within the same class.

In the case of *Daniel & Arter v. Whitehouse (supra)*, Gorell Barnes, J. at page 689 made the following comments:

My opinion is \* \* \* that the case falls within the well-known class of authorities which have been referred to in the course of the argument,

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|-----------------------------------------------------------|----------------------------------------------------|
| (1) (1884) 26 Ch. D., 398, 406.                           | (8) (1898) 1 Ch. D., 685.                          |
| (2) (1912) U.S. Pat. Official Gazette, vol. 177, p. 1043. | (9) (1898) 15 R.P.C. 534;<br>(1899) 16 R.P.C. 411. |
| (3) (1931) Ex.C.R. 64 at 69.                              | (10) (1899-1900) 48 W.R. 389.                      |
| (4) 221 U.S. 580, at 597.                                 | (11) (1902) 2 Ch. D., 621.                         |
| (5) (1884) 25 Ch. D., 194.                                | (12) (1921) 38 R.P.C. 155.                         |
| (6) (1885) 30 Ch. D., 454.                                | (13) (1937) Ex.C.R. 61 at 78.                      |
| (7) (1889) 6 R.P.C. 180.                                  |                                                    |

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which decide that a person who has acquired a right by user to consider a certain description of goods as identified with his name is entitled to prevent other people who use that name from using it so as to pass goods off to the public and buyers as goods made by him. Although I do not find any case precisely like this case \* \* \* still it seems to me that if a trade drops out of the use of a party, as it has done in this case out of the defendant's use, and while that state of things prevails another gains the reputation in the trade for goods made under the particular name, and his name is associated with the mark and the mark associated with his name, so that everybody who deals in the goods considers that when they see the mark they see goods made by that particular maker, then the original position of the competitor using the same mark has practically disappeared.

*In the matter of a trade mark of James Crean & Son Ltd.* (*supra*) the reasons of Sargent, J. at page 161 (1. 17 to 52) may be consulted beneficially. The same remark applies to the notes of Byrne, J. *in re The registered trade mark of Maurice John Hart* (*supra*) on page 627.

The intention to abandon a trade mark may derive from the circumstances of the case. According to Martin the applicant did not produce wares bearing the trade mark "Shuglov" in the United States since 1941 on account of the company's inability to procure rubber latex due to Government orders restricting the use of rubber during the war. The statement of claim appears to have been filed on September 21, 1945. The case was heard on September 17 and 18, 1946. The evidence does not reveal that the applicant had recommenced to manufacture, distribute and advertise its products. I may assume that, had it been the case, the applicant would have endeavoured to prove it. Nevertheless, with the scant evidence on the subject which I have before me, I do not think that I would be justified in declaring that the applicant has abandoned its mark. I must say that I adopt this opinion rather hesitatingly.

After reviewing and annotating the evidence and perusing the exhaustive argument of counsel, the law and the precedents, I am satisfied that the respondent's trade mark is not similar to that of applicant within the meaning of The Unfair Competition Act, 1932, that the registration of the respondent's trade mark "Footgluv" is valid and that the recording thereof in the register of trade marks, register 69, N.S. 18206, should remain therein. The applicant's demand is accordingly dismissed, with costs.

*Judgment accordingly.*

BETWEEN:

J. A. & M. CÔTÉ LIMITÉE.....APPLICANT;

AND

THE B. F. GOODRICH COMPANY.....RESPONDENT.

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*Trade Mark—The Trade Mark and Design Act, R.S.C. 1927, c. 201, s. 45—  
The Unfair Competition Act, 1922, 22-23 Geo. V, c. 33, s. 52(1)—  
“Footgluv”—“Shuglov”—Application to expunge or to have trade mark  
registration restricted to certain wares—Ownership in trade mark  
created by its adoption and its use—Registration mere confirmation  
of title.*

Applicant, owner of the trade mark “Footgluv” as applied to “leather boots and shoes,” sought to have expunged from the register the trade mark “Shuglov” previously registered by respondent in respect of “footwear, particularly rubber boots and shoes and rubber overshoes” or, in the alternative, to have the trade mark registration restricted to “rubber boots and shoes and rubber overshoes”, on the grounds that the trade mark “Shuglov” did not accurately define the existing rights of respondent.

*Held:* That one can only obtain the registration of a mark which has already been used. It is the adoption of a trade mark and its use which create a right of ownership therein and the registration merely confirms the title.

2. That the trade mark registration “Shuglov”, appearing in the name of the respondent, should be expunged and struck out from the register.

APPLICATION for an order expunging respondent’s trade mark from the register of Trade Marks or, in the alternative, restricting the trade mark registration to certain wares.

The application was heard before the Honourable Mr. Justice Angers, at Montreal.

*H. Gérin-Lajoie, K.C.* and *Gérald Fauteux, K.C.* for applicant.

*Christopher Robinson, K.C.* for respondent.

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

ANGERS J. now (December 30, 1949) delivered the following judgment:

By notice of motion dated July 10, 1945, and filed on July 12 the applicant notified the respondent that pursuant to section 52 of the Unfair Competition Act, 1932, a motion will be made on behalf of the applicant for an order

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directing the striking out of the entry in the trade mark register relating to the registration by the respondent of the trade mark "Shuglov" for use on "footwear, particularly rubber boots and shoes and rubber overshoes", made on October 8, 1932, in the trade mark register No. 258, folio 55,426, or in the alternative for an order directing the amendment of the said entry by restricting the wares to which the said trade mark applies to "rubber boots and shoes and rubber overshoes".

Written pleadings were ordered and duly filed.

In its statement of claim the applicant alleges in substance:

the applicant is a corporation organized and existing under the laws of the Dominion of Canada and having its head office in the City of St. Hyacinthe, Province of Quebec;

the respondent is a corporation organized under the laws of the State of New York, one of the United States of America, having its head office in the City and State of New York;

on October 8, 1932, the respondent obtained the registration in its name, at the office of the Commissioner of Patents, of a specific trade mark, under the Trade Mark and Design Act, consisting of the word "Shuglov" as applied to the sale of "footwear, particularly rubber boots and shoes and rubber overshoes", the said registration having been made in register No. 258, folio 55,426;

the trade mark "Shuglov" does not accurately define the existing rights of the respondent, who appears as the registered owner of the mark;

the respondent has failed to ever make use of its trade mark "Shuglov" to any appreciable extent, particularly in Canada, and if the said trade mark has ever been used by the respondent, it has since a number of years become abandoned;

the respondent is a well-known manufacturer of and dealer in rubber products exclusively, carrying on business as such throughout the United States and Canada, and such use as may have been made by it of the trade mark "Shuglov" has been exclusively in connection with the sale of rubber overshoes;

subsidiarily and under reserve of all other grounds alleged herein, the said trade mark registration in respondent's name, covering footwear generally and not being restricted to rubber overshoes and to rubber boots and shoes, is too broad and covers more than that to which the respondent might be entitled;

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the applicant is a boot and shoe manufacturer carrying on business in Canada and since April 15, 1942, it has used, in connection with the manufacture and sale of leather boots and shoes, a trade mark consisting of the word "Footgluv", registered in the applicant's name on May 8, 1942, in register No. N.S. 69, folio 18,206, as applied to "footwear in the form of boots and shoes";

the use by applicant of its trade mark "Footgluv" being and having been exclusively in connection with leather boots and shoes, the said trade mark registration was amended, at the applicant's request, in the register of trade marks, as of July 11, 1945, by the deletion therefrom, in the statement of wares in association with which the mark is used, of the words "footwear in the form of" and the substitution therefor of the word "leather";

in virtue of the said amendment, the applicant's trade mark registration "Footgluv" now applies, since July 11, 1945, to "leather boots and shoes", instead of "footwear in the form of boots and shoes";

since the registration of its trade mark "Footgluv", on April 15, 1942, the applicant has made an extensive use, as applied to "leather boots and shoes", of its said trade mark, which has come to be widely known throughout Canada as identifying the applicant's goods;

proceedings, which are still pending, have been instituted before this Court by the present respondent against the present applicant for an order directing the striking out from the register of the trade mark "Footgluv", by reason of the prior registration in the present respondent's name of the trade mark "Shuglov" and of the alleged similarity of the two trade marks and of the wares in respect of which they have been registered and used;

for the above reasons the respondent's trade mark "Shuglov" should be struck out or, in the alternative, the entry should be amended by restricting the wares in asso-

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ciation with which the mark is used to "rubber boots and shoes and rubber overshoes" and the applicant has an interest in praying that it be so ordered;

wherefore the applicant claims:

- a) That it may be ordered and declared that the trade mark registration "Shuglov" in trade mark register No. 258, folio 55,426 on October 8, 1932, in the name of respondent, be expunged and struck out;
- b) that, in the alternative, it may be ordered and declared that the said entry be amended by restricting the wares in association with which the mark is used to "rubber boots and shoes and rubber overshoes" instead of "footwear, particularly rubber boots and shoes and rubber overshoes".

In its statement of defence the respondent alleges in substance:

it admits the designation of the parties contained in the statement of claim;

it admits that on October 8, 1932, it obtained the registration in its name of a specific trade mark under the Trade Mark and Design Act, consisting of the word "Shuglov", as applied to the sale of "footwear, particularly rubber boots and shoes and rubber overshoes";

it admits that the word "Footgluv" was registered in applicant's name;

it admits the use by applicant of its trade mark "Footgluv" being and having been exclusively in connection with leather boots and shoes, the said trade mark registration having been amended, at the applicant's request, on July 11, 1945, by the deletion therefrom, in the statement of wares in association with which the mark is used, of the words "footwear in the form of" and the substitution therefor of the word "leather";

it admits that in virtue of the said amendment the applicant's trade mark "Footgluv" applies since July 11, 1945, to "leather boots and shoes" instead of "footwear in the form of boots and shoes";

it admits that proceedings, still pending, have been instituted by the present respondent against the present applicant for an order directing the striking out from the register of the trade mark "Footgluv", by reason of the



prior registration in the present respondent's name of the trade mark "Shuglov" and of the similarity of the two trade marks and of the wares in respect of which they have been registered and used;

the registration No. 258/55426 of the mark "Shuglov" accurately defines the existing rights of the respondent, which has made substantial use of the said mark, principally in the United States, on wares of the kind described in the registration;

the trade mark "Shuglov" has never been abandoned;

the footwear upon which the trade mark "Shuglov" has been used has been principally composed of rubber, but the said footwear is intended to simulate and does simulate in appearance footwear made of other materials, as appears from advertisements of the said footwear published from time to time by the respondent, between the years 1932 and the imposition of war restrictions on the use of rubber, in the magazines "Esquire", "Good Housekeeping", "Harper's Bazaar", "Vogue", "Woman's Home Companion", "Ladies' Home Journal" and "Life", each of which has a substantial circulation in Canada; the average expenditure by respondent on advertisements in the said magazines between the years 1932 and 1940 was about \$22,000 annually;

footwear principally composed of rubber for trade mark purposes is similar to footwear of other materials such as leather, canvas and the like;

the respondent therefore prays that this action may be dismissed with costs.

A brief review of the evidence seems to me apposite. I may note that the present case was joined for proof and hearing to that of The B. F. Goodrich Company and J. A. & M. Côté Limitée, No. 21010, it being agreed by counsel that the evidence would enure to both.

[Here the learned judge reviews the evidence and proceeds]:

The facts are simple and may concisely be summed up as follows:

On October 8, 1932, The B. F. Goodrich Company, a corporation of the State of New York, one of the United States of America, having its principal office in the City

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of New York, obtained under the Trade Mark and Design Act the registration of a trade mark consisting of the word "Shuglov" for use on "footwear, particularly rubber boots and shoes and rubber overshoes". A duly certified copy thereof was produced. The register under the said Act forms part of the register kept under the Unfair Competition Act, in accordance with subsection (1) of section 23 of the latter Act, which provides:

The register now existing under the Trade Mark and Design Act shall form part of the register maintained pursuant to this Act, and, subject as hereinafter provided, all entries therein shall hereafter be governed by the provisions of this Act, but shall not, if properly made under the law in force at the time they were made, be subject to be expunged or amended only because they might not properly have been made hereunder.

On May 8, 1942, J. A. & M. Côté Limitée, a corporation organized and existing under the laws of the Dominion of Canada having its head office and principal place of business in the city of St. Hyacinthe, in the Province of Quebec, obtained under the Unfair Competition Act, 1932, the registration of a trade mark consisting of the word "Footgluv", in respect of "footwear in the form of boots and shoes". A duly certified copy thereof was produced.

From an entry on the back of the certificate it appears that the record of registration was on July 11, 1945, amended, in accordance with section 42 of the Act, by deleting therefrom the words "footwear in the form of" and substituting therefor the word "leather".

By his action the applicant, as already stated, seeks to have an order striking out from the register No. 258, folio 55426, the entry, bearing date October 8, 1932, relating to the registration of the trade mark "Shuglov".

Section 45 of the Trade Mark and Design Act enacts (*inter alia*):

The Exchequer Court of Canada may, on the information of the Attorney General, or at the suit of any person aggrieved by any omission without sufficient cause, to make any entry in the register of trade marks or in the register of industrial designs, or by any entry made without sufficient cause in any such register, make such order for making, expunging or varying any entry in any such register as the Court thinks fit; or the Court may refuse the application

2. In either case, the Court may make such order with respect to the costs of the proceedings as the Court thinks fit.

I may note incidentally that section 52 of the Unfair Competition Act contains a provision to the same effect, although differently worded; it reads thus:

(1) The Exchequer Court of Canada shall have jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

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It was submitted on behalf of applicant that, under the Trade Mark and Design Act, one can only obtain the registration of a mark which has already been used. This submission seems to me well founded. It is the adoption of a trade mark and its use which create a right of ownership therein and the registration merely confirms the title: *Partlo et al v. Todd* (1); *Smith v. Fair* (2); *Groff v. The Snow Drift Baking Powder Company* (3); *in re "Vulcan" Trade Mark* (4); *The Bayer Company Limited v. American Druggists' Syndicate Limited* (5); *United States Steel Products Company v. Pittsburg Perfect Fence Co.* (6); *Gold Medal Furniture Manufacturing Company Limited v. Gold Medal Camp Manufacturing Company* (7); *Robert Crean and Company Limited v. Dobbs & Company* (8); *The Gottfried Company v. The Comfort Kimona and Dress Manufacturing Company* (9). It was incumbent on the respondent to prove sales or advertisements made or published in Canada, as the case may be.

It was argued on behalf of applicant that, if the mark "Shuglov" belonged to some one, it did not belong to the respondent, because the latter had never used it nor made it known in Canada prior to October 8, 1932, date of registration of the trade mark. According to Martin's testimony it was either Hood Rubber Company or Goodrich Footwear Corporation which owned the mark. In the advertisements we find the words "Shuglov by Goodrich" and "B. F. Goodrich Footwear Division, Watertown, Mass." or "Goodrich Footwear, Watertown, Mass." On the samples exhibits 4 and B appear the words "Shuglov—by Goodrich, made in U.S. of America". At the bottom of the tag

(1) (1888) 17 S.C.R. 196.

(2) (1888) 14 O.R. 729.

(3) (1889) 2 Ex.C.R. 568.

(4) (1915) Ex.C.R. 265;

(1915) 51 S.C.R. 411, at 420.

(5) (1924) S.C.R. 558 at 569.

(6) (1917) 19 Ex.C.R. 474 at 483.

(7) (1928) Ex.C.R. 65.

(8) (1930) S.C.R. 307, 317.

(9) 8 Fox Pat. C., 111, 119;

(1948) Ex.C.R. 611.

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exhibit C are inscribed: "B. F. Goodrich Corp.,—Water- town, Mass." One must not overlook the fact that in its statement of claim the applicant, B. F. Goodrich Com- pany, is described as a corporation of the State of New York, one of the United States of America, having its principal office in the City and State of New York. If there are relations between B. F. Goodrich Company, Goodrich Footwear Corporation and Hood Rubber Company they have not been disclosed. Even if there were, I believe that these companies are distinct entities: *Robert Crean & Company Limited v. Dobbs & Company* (1); *Bowden Wire Limited v. Bowden Brake Company* (2).

After reviewing and annotating the evidence and perus- ing the exhaustive argument of counsel, the law and the precedents, I have reached the conclusion that the trade mark registration "Shuglov" in Trade Mark Register No. 258/55426, appearing in the name of the respondent, should be expunged and struck out from the register. The appli- cant will be entitled to its costs against respondent.

*Judgment accordingly.*



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Nov. 22, 23,  
24, 25, 26  
—  
1950  
Mar. 1  
—

BETWEEN:  
FAWCETT PUBLICATIONS INC..... PLAINTIFF;  
AND  
ALEXANDER VALENTINE..... DEFENDANT.

*Trade mark—Infringement—Passing off—Registrability—The Unfair Com- petition Act 1932, 22-23 Geo. V, c. 38, ss. 2(k), 2(m), 11, 26(1)(c), 28(1)(d), 29, 32—Mark lacking registrability expunged from the register—Claim based on infringement dismissed—Claim based on passing off dismissed—"True Confessions"—"Startling Confessions"— "Sensational Crime Confessions"—"Similar"—Secondary and dis- tinctive meaning—Get-up of magazine common to the trade—Motion for declaration under s. 29 of The Unfair Competition Act, 1932, dis- missed—Failure to prove that word has become recognized "generally" by Canadian dealers as attaching responsibility to the owners—Costs.*

In an action for infringement of a trade mark and passing off the Court found that at the time of registration of the plaintiff's trade mark it lacked registrability as being in contravention of s. 26(1)(c) of The Unfair Competition Act, 1932, and that it did not comply with s. 28(1)(d) of the Act nor was any application made under s. 29 of the Act, nor was the procedure required under s. 32 of the Act followed.

(1) (1930) S.C.R. 307, 316. (2) (1914) 31 R.P.C. 385.

In considering plaintiff's claim for passing off on the ground that defendant's magazines published under the names of "Startling Confessions" and "Sensational Crime Confessions" resemble plaintiff's mark "True Confessions" the Court found that the evidence did not establish that actual confusion had arisen; nor did the evidence indicate that the combination of the features of the magazine, all common to the trade, as used by the plaintiff had in Canada become distinctive of or identified with the plaintiff's trade.

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*Held:* That the plaintiff's mark lacking registrability must be expunged from the Register of Trade Marks and plaintiff's claim based on infringement fails.

2. That the evidence did not establish that the mark "True Confessions" or "Confessions" had through use in Canada acquired a secondary and distinctive meaning nor that the defendant had passed off or had attempted to pass off his magazines as those of the plaintiff or that the defendant had practised any fraud and that on the whole of the evidence the titles of the defendant's magazines are not "similar" to that of the plaintiff within the meaning of the definition in s. 2(k) of the Act and the claim for passing off fails.
3. That a motion for a declaration under s. 29 of The Unfair Competition Act must be dismissed since the evidence in support fails to establish that the word mark "True Confessions" has become recognized "generally" by Canadian dealers as attaching responsibility to the owners.

ACTION for infringement of word-mark, passing off and damages.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

*Cuthbert Scott* for plaintiff.

*G. E. Maybee* and *Mrs. Iva S. Goldstick* for defendant.

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

CAMERON J. now (March 1, 1950) delivered the following judgment:

This is an action for infringement, passing off, damages and other incidental relief. The plaintiff is a Delaware corporation having its head office at New York City. Since its inception in 1924 it has been engaged in a very substantial way in the publication and distribution of monthly and other periodical magazines. Since that date it has been the owner of the trade name and trade mark

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“True Confessions”, to be used in connection with the sale of periodical publications, which trade mark was registered by its predecessor in title in the United States Patent Office on January 23, 1923, under the Act of 1905, and was renewed in the name of the plaintiff in 1943 for a period of twenty years. The plaintiff also registered that mark in Canada on May 17, 1941, as No. N.S.-15636-Register 60, for use on wares described as a periodical publication. That registration was *not* made under the provisions of section 28(1)(d) of The Unfair Competition Act, 1932. Since 1922 the plaintiff and its predecessor in title have published in the United States a monthly magazine entitled “True Confessions.” It has been widely circulated in the United States since that date and, as will be seen later, was first circulated in Canada in 1932 and has been circulated here at intervals since that date.

The defendant is a publisher residing in Toronto. It is established—and, in fact, admitted—that in 1946 the defendant published in Toronto three issues each of magazines entitled respectively “Startling Confessions” and “Sensational Crime Confessions”. (There is no evidence, however, that the defendant ever published a magazine entitled “Daring Confessions” as alleged in the Statement of Claim.)

The plaintiff alleges that by publishing such magazine with such titles, the defendant has infringed its trade mark, and that by the use of the word “Confessions” thereon and by adopting, imitating and copying the form and get-up of the plaintiff’s magazine, the defendant was thereby fraudulently passing off his magazines as those of the plaintiff. The defendant denies that he has in any way interfered with the plaintiff’s rights, and, alleging invalidity of the plaintiff’s registered mark in Canada, asks that it be expunged from the Register.

By order dated February 26, 1948, this action and another action brought by the plaintiff against Pastime Publications Limited were consolidated and at the trial, by consent, evidence in both cases was heard.

I shall consider first the question of infringement. On that branch of its case the plaintiff can succeed only if it has a valid registered mark, and the question of the validity of the registration of “True Confessions” is challenged. The

defendant alleges that it should not have been registered as the words "True Confessions" are clearly descriptive—or, alternatively, misdescriptive—of the character or quality of the plaintiff's magazine, "True Confessions," and that such registration, therefore, is in contravention of section 26(1)(c) of The Unfair Competition Act which is as follows:

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26. (1) Subject as otherwise provided in this Act, a word mark shall be registrable if it

(c) is not, to an English or French speaking person, clearly descriptive or misdescriptive of the character or quality of the wares in connection with which it is proposed to be used, or of the conditions of, or the persons employed in, their production, or of their place of origin.

Now, as I have said, plaintiff has used its word mark as the title of one of its magazines and in no other way. It becomes necessary, therefore, to ascertain whether the mark as so used is descriptive (or, alternatively, misdescriptive) of the character or quality of that magazine. It is in evidence that about 40 per cent of the space in the magazine is taken up with advertisements from which a very large revenue accrues to the plaintiff; that about 27 per cent has to do with articles concerning women's dress, cosmetics, home and gardens, and matters of that sort; and that confession stories comprise about one-third of the total space. While, therefore, the "Confessions" part of the title does not perhaps accurately describe all the contents of the magazine, there can be no doubt whatever that it sufficiently describes the main features of the reading material, and of course it is for the purpose of reading that material that the magazine is primarily purchased. The plaintiff throughout has stressed the "Confessions" character of the contents by the blurb on the front cover. A few such cover blurbs selected at random from the exhibits filed are "A Chorus Girl's Romance," "Famous Sheik Tells Secrets of His Life," "Autobiography of a Forger," "Why Wives go Wrong—By One Who Did," "Diary of a Discarded Wife," and "I Didn't Know Enough About Love." The Shorter Oxford English Dictionary gives one meaning of "Confession" as "a making known or acknowledging of one's fault, wrong, crime, weakness, etc.," and that definition would aptly describe the nature of the stories to which I have alluded.

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Further, the stories are written in the first person singular and purport to be true confessions. In fact, a substantial number of the issues contained in Exhibit 1 assert that they are, in fact, true, and certainly in no place is it indicated that they are otherwise. The evidence at the trial, however, was that they were written by professional authors and while said to be "true to life", were, in fact, not true.

The second part of the word mark therefore aptly and clearly describes the character of the plaintiff's wares in that they are confessions; the first part also aptly and clearly describes—or misdescribes—the nature of the confessions, according to whether they are in fact true or untrue. The word mark as a whole alludes directly and unmistakably to the contents of the magazine and to nothing else, and *prima facie* does not meet the negative requirements of section 26(1)(c) (*supra*). It does not come within the class of invented words which may be registrable even though containing a covert and skilful allusion to the character or quality of the goods; the *Solio* case (1). The word mark, therefore, per se, lacked registrability.

It is of interest to note that in the case of *Crime Confessions v. Fawcett Publications, Inc.*, before the Court of Customs and Patent Appeals of the U.S. (2), the Court had occasion to comment on the plaintiff's mark as follows:

It would seem obvious to all that the terms "Crime Confessions" and "True Confessions" are descriptive. While we cannot pass upon that question in this kind of proceeding, it seems proper to suggest that since the registration of purely descriptive trade-marks is clearly a violation of the law, it would be better for the Patent Office to comply with the law rather than to follow the precedents that have been followed throughout the years.

Counsel for the plaintiff submits, however, that at the time of the application for registration, the mark had acquired a secondary and distinctive meaning and that, therefore, the registration was valid. Now, as I have said, the mark was registered under The Unfair Competition Act of 1932 and must be considered under the provisions of that Act. Under the provisions of the old Act—The Trade Mark and Designs Act—a special provision was made by Rule X which permitted the Commissioner to consider (*inter alia*) whether a mark, unregistrable because it was clearly descriptive, had at the time of the application for registration acquired a secondary meaning and

(1) (1898) 15 R.P.C. 476 at 486.

(2) (1944) 139 F. 2d. 499.



become adapted to distinguish the goods of the applicant, and upon being satisfied that such was the case, to register the mark.

But The Unfair Competition Act materially changed the law in that regard. Nowhere in the Act, nor in any regulations promulgated by the Governor-in-Council under section 60, is any such power conferred on the Registrar to consider that question. Section 29 of The Unfair Competition Act, however, recognizes that certain marks, otherwise unregistrable, have by use become distinctive of the manufacturer or dealer, or of the conditions under which or the class of persons by whom they have been produced, or of their place of origin, and provides for their registration following a declaration by the Court.

As I have said, the plaintiff's registration was not effected under the provisions of section 28(1)(d) of the Act; the procedure required under section 32 was not followed. Nor was an application made under the provisions of section 29. As pointed out by the President of this Court in *J. H. Munro Limited v. Neaman Fur Co. Ltd.* (1), at p. 15:

If the plaintiff must rely upon a secondary and distinguishing meaning of the word mark as denoting only the wares of the plaintiff to support the registration of its alleged trade mark, it must show not only that the words had acquired such meaning at the time of the registration but also that the application for it had been made under the provisions applicable thereto.

In this case the required procedure was not followed and in my opinion, therefore, the plaintiff is not entitled to support its registration of the mark on the ground that at the time of registration it had, in fact, acquired a secondary and distinctive meaning. The mark, therefore, at the time of registration lacked registrability as being in contravention of section 26(1)(c), should not have been registered, and the defendant's claim to have it expunged from the Register will be granted. It follows from that conclusion that the plaintiff's claim insofar as it is based on infringement must fail. *Partlo v. Todd* (2); *J. H. Munro and Neaman Fur Co. Ltd.* (*supra*).

I may state, however, that quite apart from these somewhat technical considerations, had I given consideration to the evidence as to the acquisition of a secondary meaning at the time of registration, I would have found that the

(1) (1947) Ex. C.R. 1 at 15.

(2) (1888) 17 S.C.R. 196.

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plaintiff had failed to established its case. That evidence was confined to that given at the trial. Counsel for the plaintiff asked leave to use the declarations filed on his alternative application under section 29, but I ruled that such were inadmissible as evidence on the main matter and, later, counsel agreed that he could take no objection to that ruling. My reasons for stating that the plaintiff had failed to establish its case will more fully appear later herein.

I may further add that had I found that the plaintiff's mark was validly registered, I would have reached the conclusion that there was no infringement thereof by the defendant. The reasons for my so stating will be apparent from my conclusions on the passing off branch of the case.

I turn now to the question of passing off. The plaintiff's rights on this aspect of the matter do not depend on the validity of its registration. The basis of the right to restrain "passing off" was described by Farwell, J. in *Maclean's, Ltd. v. J. W. Lightbown and Sons, Ltd.* (1), as follows:

No trader can complain of honest competition, but no trader is entitled to steal the property of his rival by endeavouring to attract to his goods members of the public by inducing them to believe that the goods that are being offered for sale are the goods of a rival firm.

The Unfair Competition Act, 1932, provides statutory authority for that principle in sections 3 and 11 which are as follows:

3. No person shall knowingly adopt for use in Canada in connection with any wares any trade mark or any distinguishing guise which

- (a) is already in use in Canada by any other person and which is registered pursuant to the provisions of this Act as a trade mark or distinguishing guise for the same or similar wares;
- (b) is already in use by any other person in any country of the Union other than Canada as a trade mark or distinguishing guise for the same or similar wares, and is known in Canada in association with such wares by reason either of the distribution of the wares in Canada or of their advertisement therein in any printed publication circulated in the ordinary course among potential dealers and/or users of such wares in Canada; or
- (c) is similar to any trade mark or distinguishing guise in use, or in use and known as aforesaid.

11. No person shall, in the course of his business,

- (a) make any false statement tending to discredit the wares of a competitor;
- (b) direct public attention to his wares in such a way that, at the time he commenced so to direct attention to them, it might be

(1) (1937) 54 R.P.C. 230 at 239.

reasonably apprehended that his course of conduct was likely to create confusion in Canada between his wares and those of a competitor;

(c) adopt any other business practice contrary to honest industrial and commercial usage.

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There is no dispute that the titles which the defendant used are subject to the above prohibitions if they are "similar" to the plaintiff's mark. The other requirements as to "knowingly" (under s. 10) and similarity of wares are established.

The word "similar" in relation to trade marks is defined thus:

2. (k) "Similar," in relation to trade marks, trade names or distinguishing guises, describes marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin.

The contemporaneous use of the plaintiff's and defendant's marks in association with wares of the same kind is not in dispute. The question for decision may therefore be stated thus—"Do the words used by the defendant, namely, 'Startling Confessions' and 'Sensational Crime Confessions' so resemble the plaintiff's mark 'True Confessions,' or so clearly suggest the idea conveyed by it that their use is likely to cause dealers in or users of magazines to infer that the plaintiff assumed responsibility for their character or quality or place of origin?"

The two main submissions made by the plaintiff are that the defendant has no right to use the word "Confessions" as part of the title of its magazines; and that by the use of the word "Confessions" and the similarity of the "get-up" of the defendant's magazines to that of the plaintiff's, confusion is likely to occur. I shall consider the matters separately.

The plaintiff asserts that "Confessions" is the conspicuous part of its trade mark, that its magazines have come to be known as "Confessions" and that no other magazine publisher is entitled to use that word as part of the title of a magazine. It is established that the plaintiff has been active in asserting that claim and in the United States has successfully objected to the use of the word "Confessions"

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as part of the title of magazines in conjunction with the words "intimate," "thrilling," "real life," "real," "candid," and "secret." In Canada proceedings were taken in respect of the titles "Fireside Confessions," "Rare Confessions," "Romantic Confessions" and "Whispered Confessions," and, by consent, judgments were entered enjoining the use of the word "Confessions" in those titles and their registrations were expunged. Under threat of proceedings by the plaintiff, the publishers of "Personal Confessions," "True Life Confessions," "Rare Confessions," "Wordly Confessions" and "Private Confessions" agreed to discontinue the use of the words "Confession" and "Confessions" in their titles. In effect, the plaintiff claims a monopoly in the use of "Confessions" as applied to magazines.

Now, as I have said above, the trade mark "True Confessions" is not a "fancy" word but is *prima facie* descriptive. The plaintiff must therefore show that it has acquired a distinctive meaning amongst those who are purchasers of the goods in question within a definite area, and if the word still continues to be used and understood with its original and descriptive meaning by any considerable section of such persons, it cannot be monopolized: Kerly on Trade Marks, 6th Ed., 590. The principles of law applicable to a case where the plaintiffs are endeavouring to establish—as here—that their mark had become distinctive were summarized in the case of *Burberrys v. J. C. Cording & Co. Ltd.* (1), where Parker, J. said:

The principles of law applicable to a case of this sort are well known. On the one hand, apart from the law as to trade marks, no one can claim monopoly rights in the use of a word or name. On the other hand, no one is entitled by the use of any word or name, or indeed in any other way, to represent his goods as being the goods of another to that other's injury. If an injunction be granted restraining the use of a word or name, it is no doubt granted to protect property, but the property, to protect which it is granted, is not property in the word or name, but property in the trade or good-will which will be injured by its use. If the use of a word or name be restrained, it can only be on the ground that such use involves a misrepresentation, and that such misrepresentation has injured, or is calculated to injure another in his trade or business. If no case of deception by means of such misrepresentation can be proved, it is sufficient to prove the probability of such deception, and the Court will readily infer such probability if it be shown that the word or name has been adopted with any intention to deceive. In the absence of such intention, the degree of readiness with which the Court will infer the probability of deception must depend on the circumstances of each particular case, including the nature of the word or name, the use of which

(1) (1909) 26 R.P.C. 693 at 701.

is sought to be restrained. It is important for this purpose to consider whether the word or name is prima facie in the nature of a fancy word or name, or whether it is prima facie descriptive of the article in respect of which it is used. It is also important for the same purpose to consider its history, the nature of its use by the person who seeks the injunction, and the extent to which it is or has been used by others. If the word or name is prima facie descriptive or be in general use, the difficulty of establishing the probability of deception is greatly increased. Again, if the person who seeks the injunction has not used the word or name simply for the purpose of distinguishing his own goods from the goods of others, but primarily for the purpose of denoting or describing the particular kind of article to which he has applied it, and only secondarily, if at all, for the purposes of distinguishing his own goods, it will be more difficult for him to establish the probability of deception. But whatever be the nature of history of the word or name, in whatever way it has been used, either by the person seeking the injunction or by others, it is necessary, where there has been no actual deception, to establish at least a reasonable probability of deception. In such cases the action is, in effect, a quia timet action, and unless such reasonable probability be established, the proper course is, in my opinion, to refuse an injunction, leaving the plaintiff to his remedy if cases of actual deception afterwards occur.

I can find nothing in the evidence which establishes that there has been any actual deception or confusion. Birk, a witness called by the plaintiff, is the Manager of E. H. O'Brien News Company of Hamilton and has been distributing "True Confessions" for about twelve years to two hundred and forty retailers. His firm also distributed the magazines of the defendant. While stating that from personal observation he knew that the magazines of both the plaintiff and defendant were sold from the same rack, he gave no evidence as to actual confusion having arisen or as to the probability that such might arise.

R. F. Hendry, a clerk in his father's cigar store and newsstand in Toronto, stated that his firm sold "True Confessions" and "Startling Confessions," as well as "Vivid Confessions" and "Unusual Confessions." He said that he knew that when a customer asked for "Confessions" magazine he knew that "True Confessions" was meant, but that "If I were busy or in a hurry I probably would not ask them and they might get another copy and hand it back to me and say that was not what they wanted, that they wanted 'True Confessions'." This evidence is not helpful to the plaintiff as Hendry did not say that the defendant's magazines were the ones he handed in error to the customer; they were not identified in any way. Inasmuch as Hendry states that he knew that "Confessions" meant

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"True Confessions," there was no confusion on his part and the handing over of the wrong magazine was merely an error caused, as he says, "by my being busy." It does establish, however, that the purchaser of the magazine knew exactly what was wanted—namely, "True Confessions," and could immediately distinguish it from the other "Confession" magazine received in error. I cannot accept this statement of Hendry as in any way establishing actual or probable confusion between the plaintiff's and defendant's magazines.

Mr. D. Fleishman, a tobacconist and newsstand proprietor in Toronto, has sold "True Confessions" for fifteen years. He says that customers occasionally referred to it as "Confessions" and that he would re-order it by that name. He has also sold many other magazines, the titles of which included the word "Confessions" such as the defendant's, and "Daring," "Candid" and "Vivid." His only evidence as to confusion was put in this way, "A person would come in, buying for someone else, or a child, and would ask for 'Confessions' magazine, you see, and they would—sometimes they would ask and sometimes they would pick it up themselves, and they would come back and say, 'That is not the correct one.'" Again, that evidence is not helpful to the plaintiff. It does not indicate what magazine was intended to be purchased or what was delivered. Neither the magazine of the plaintiff or the defendant is in any way identified with that confusion. It is to be noted further that the error arose only on occasions when the purchase was being made by a child or by a person buying for someone else, in both of which cases errors would be most likely to occur.

R. Sinnott, a witness called by the plaintiff, is Manager of Sinnott News Company at Toronto and has been with that firm for twenty-nine years. It is engaged in the wholesale distribution of magazines. It has twenty-eight hundred retail outlets in Ontario and since 1937 has distributed "True Confessions," at times as many as sixteen thousand per month. He says that on occasions his firm would be asked by dealers for "Confessions" and as he handled only "True Confessions," he understood the order to mean "True Confessions." He frequently visits his outlets and has seen there the defendant's magazines and

also "Daring Confessions." He has never heard of any actual confusion resulting from the contemporaneous sale of the magazines of the plaintiff and defendant.

James Burgin is the proprietor of a cigar and magazine store in Toronto. For twelve years he has sold "True Confessions" and for some time has sold six or seven other magazines the titles of which include the word "Confessions," such as the defendant's, and "Vivid" and "Candid." He says that at first there was confusion when the new "Confession" magazines came out and described it as follows:

You see, there was a short period when there were no "Confession" books, not even "True Confessions"; and then when these others came out, the women saw them, the "Confession" books, and they said, "Oh, here is 'Confessions' back," and they would buy them. But they only did that maybe two or three times and then they stopped, because I have had it said to me that the quality of these other "Confession" books printed here was so poor they would not bother with them.

This evidence is scarcely sufficient to establish any actual confusion and does not purport to identify the defendant's magazines as the ones purchased.

The defendant called several witnesses selling the magazines of both plaintiff and defendant and all agreed that there had been no confusion of any sort. None of the witnesses—either those of the defendant or the plaintiff—ventured to say that the defendant's titles could reasonably be mistaken for the plaintiff's title.

As I have noted, the plaintiff submits that the mark "True Confessions" has acquired a secondary and distinctive meaning. It is well settled that there are words which have a direct relation to the character or quality of goods which nevertheless may lose their primary meaning and acquire in a particular trade a secondary meaning as indicating to people interested, whether as traders or as the public in the trade, the goods of the particular manufacturer; *Application of J. & P. Coats Ltd. for the Registration of "Sheen"* (1). The difficulty of establishing that such a secondary meaning has been acquired in such a case is pointed out in *Cellular Clothing Co. Ltd. v. Maxton & Murray* (2), where at p. 343 Lord Davey said:

But there are two observations which must be made: one is that a man who takes upon himself to prove that words, which are merely descriptive or expressive of the quality of the goods, have acquired the

(1) (1936) 53 R.P.C. 355 at 384. (2) (1899) A.C. 326.

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secondary sense to which I have referred, assumes a much greater burden—and, indeed, a burden which it is not impossible, but at the same time extremely difficult, to discharge—a much greater burden than that of a man who undertakes to prove the same thing of a word not significant and not descriptive, but what has been compendiously called a “fancy” word.

It is well established that the plaintiff’s magazine was well known and widely circulated. Its predecessor was the first to use the words “True Confessions” as the name of a monthly magazine. It has been published continuously in the United States since 1922 and its sales have increased from a monthly average of 60,000 in 1925 to over 2,000,000 in 1945, and to 1,680,000 in 1947. The plaintiff’s gross income from the magazine in 1946 was in excess of three and one-third million dollars. It was widely advertised in American publications and over the radio.

The circulation in Canada has not been continuous. It commenced in March, 1932, and continued to January, 1933, the last issue having a circulation of about 21,000 copies. Distribution in Canada was then discontinued until 1937 (in which year the average monthly circulation was 33,400) and continued from that year until January, 1941, in which month the circulation was 62,426. At that time the importation of the “Confessions” type of magazine into Canada was barred on account of wartime conditions. In 1944 circulation was resumed in Canada and increased from a monthly average in that year of 21,115 to 74,349 in 1947. About the beginning of 1948, due to Canadian Foreign Exchange Regulations, the distribution in Canada had to be dropped. Later in that year arrangements were made to print a Canadian edition and distribution was thereupon resumed.

Sales in Canada were made almost entirely from newsstands. Until production commenced here in 1948 the magazine was consigned by the plaintiff company to its Canadian distributors who in turn distributed it to the various newsstands in the district. There are approximately 9,700 retailers in Canada alone and the evidence clearly indicates that the magazine was sold in Canada from coast to coast. In the city of Toronto alone there are approximately 1,200 retailers selling the magazine.

I have examined carefully the evidence of all the witnesses on this point. Dacks, a defence witness who operates



a magazine and tobacco shop in Toronto said, "I know it (True Confessions) is a Fawcett publication. I was not sure before whether Fawcett published it or not, but I know now. I never worried who published the magazines. They are delivered to us and we sell them."

That evidence is not helpful to the plaintiff on this point. So far as I can recall the only witness who gave any evidence relating to this matter was A. M. Adams, the Circulation Manager of the plaintiff and in its employment since 1934. In the period 1937 to 1938, he was District Manager for the plaintiff, supervising circulation of its products in eleven western states and the four western Canadian provinces. In answer to the somewhat leading question, "To your knowledge during the years you came to Canada, was 'True Confessions' known in the trade as the publication of your company?" he answered:

"True Confessions" was synonymous with Fawcett Publications during the time I worked for the company in Canada

That statement, made by an executive of the plaintiff company and entirely unsupported by any other evidence, is totally inadequate to establish that the word mark "True Confessions" had through use in Canada acquired a secondary and distinctive meaning. That witness could speak only for himself, and being then and still an employee of the plaintiff, would, of course, know that the magazine "True Confessions" was one of its products. No doubt all the distributors in Canada who received their goods direct from the plaintiff also knew that the plaintiff was the publisher of the magazine. But mere knowledge of that fact does not in any way indicate that the word as used had become distinctive of the plaintiff's goods; *Channell Co. v. Rombough* (1). My impression at the trial was that most of the retailers were like the witness Dacks and did not concern themselves in any way with the publisher of the magazine. Their dealings were entirely with local distributors, each of whom handled a great variety of magazines and determined what should be supplied to the retailer. There is no evidence whatever that purchasers of the magazine had at any time asked for it as a product of the plaintiff company.

In *Mathieson v. Sir Isaac Pitman & Sons Ltd.* (2), action was brought to restrain the defendants from selling or

(1) (1924) S.C.R. 604.

(2) (1930) 47 R.P.C. 541.

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offering for sale two books which they had recently put upon the market, entitled "How to appeal against your rates within the Metropolis;" and "How to appeal against your rates outside the Metropolis," as being books offered for sale under titles likely to be confused with two books published by the plaintiff entitled "How to appeal against your rates in the Metropolis," and "How to appeal against your rates outside the Metropolis." In that case Maugham, J. said at p. 550:

It is often said that in cases of this kind you have to consider whether the descriptive words under which the goods are sold have acquired a secondary or a special meaning. In connection with the title of a book, that means this: does the title used indicate to the minds of the public the specific work in question in connection with the author of it, or it may be in some rare cases in connection with the publisher of it? For instance, taking such a work as we have to deal with here: if we are going to use the words "secondary meaning" in connection with a book published for all these years by the Plaintiff on "How to appeal against your rates," that secondary meaning is not proved by saying that anybody who asked "How to appeal against your rates" before January of the present year must mean, if he knows anything about the work, the book written by Mr. Lawrie. That does not show a secondary meaning. The secondary meaning in this connection must connote that in the market, where such books are purchased and among the members of the public who are buyers of these books, the mere title "How to appeal against your rates" indicated the work of Mr. Andrew Douglas Lawrie, and perhaps further indicated that it was published by Effingham Wilson; and unless that can be established as a fact, it seems to me that the case of the Plaintiff must fail.

In *International Press Ltd. v. Tunnell* (1), Rowell, C.J.O., when considering a similar matter, after referring to the cases which I have cited and other cases, said at p. 417:

In all these cases there was evidence of some confusion in the minds of the public, growing out of the use of the same descriptive name by two different producers of similar articles, and in some of them there was a great deal of evidence to show that by long advertising and publicity the name of the article had become associated with the name of the firm manufacturing it, but, notwithstanding this evidence, it was held in all these cases that the words being descriptive words had not acquired a secondary meaning. The very heavy onus referred to in the Reddaway case had not been discharged.

The evidence submitted does not in my opinion establish that either "True Confessions" or "Confessions" have in Canada acquired a secondary and distinctive meaning.

It is of interest to note that in *Fawcett Publications, Inc. v. Bronze Publications, Inc., et al.* (2), the Court

(1) (1938) 1 D.L.R. 393.

(2) (1949) 81 U.S.P.Q. 175 and 519.

of Appeal, 5th Circuit, held that "Confessions" is a mere descriptive or generic term, that the trade mark "True Confessions" for monthly magazines did not contemplate or grant exclusive right to the use of "Confessions," there being no deception or fraud of the public shown, and that "Confessions" does not have a secondary meaning identifying only the publication "True Confessions."

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I turn now to the "get-up" of the magazines, it being alleged that the defendant has imitated that of the plaintiff. Exhibit 26 is the issue of "True Confessions" for November, 1947, and it is admitted that it is typical of the plaintiff's magazine. The evidence is directed only to the alleged similarity of the front cover and the backspine. It is pointed out that on the front cover there appears "a pretty girl," that the price is prominently displayed, that there are cover blurbs indicating the nature of the leading articles, that the background is of a solid colour and that, while the whole title is "True Confessions," the second part, "Confessions," extends throughout the whole width of the cover. The backspine has the full name of the magazine, date of issue and the price, the obvious purpose being to give an intending purchaser this information when the magazine is in stacks and the backspine only in view. "Startling Confessions" (Exhibit 19) includes all these features except that the price (fifteen cents) is in the upper right corner, whereas in "True Confessions" the price (ten cents) is more central and at the left. The word "Startling," while prominently displayed in the title, is in somewhat smaller type than "Confessions" and does not extend across the page.

"Sensational Crime Confessions" (Exhibit 23) also includes the features of "True Confessions" which I have mentioned, except for the fact that the pictures thereon are not in the category of "a pretty girl," and that on the issues of April and July the prominent word on the title is "Crime," above which is the word "Sensational," and below and in smaller print, the word "Confessions." On the other issue, that of January, 1946, the word "Confessions" is emphasized, but above it is the word "Sensational," and the word "Crime" is superimposed on the

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first two letters of "Confessions." The background colour used in both the defendant's magazines is different from that on Exhibit 26.

Now it is admitted that each of these features is common to the trade. But it is submitted that while there is no monopoly in the individual things, that they are so combined by the defendant as to pass off its magazine as those of the plaintiff. The plaintiff in that case must prove that the get-up has become associated with his goods, that its use by others is calculated to deceive. The fact that the peculiarities of get-up which are relied on by the plaintiff have become identified with and distinctive of its trade must be proved as in any other case of passing off. I find nothing in the evidence which would indicate that the combination of the features (all common to the trade) and as used by the plaintiff, had in Canada become distinctive of or identified with the plaintiff's trade. None of the Canadian witnesses referred to the matter of get-up in any way, and the only evidence given on this point was by two officials of the plaintiff company residing in the United States, and no part of their evidence on this point was directed to the situation in Canada.

One small matter has not previously been mentioned. It is pointed out that in "True Confessions" (Exhibit 26) the first letter of "Confessions" is in red (the rest being on a different colour) and that it is overlapped by the "T" of True. In "Startling Confessions" the "C" of Confessions is the same colour as the rest of the word but is much larger and overlaps the "T" of Startling above. It is not admitted that this feature of "True Confessions" is common to the trade but in the absence of any evidence that in Canada it has become distinctive of the plaintiff's goods, I must consider it to be a matter of no importance at all.

I have already said that there is no proof of actual confusion having arisen, nor do I think that the use of the defendant's titles with or without the get-up which I have described is calculated to deceive purchasers of the goods into believing that they are getting the plaintiff's goods. The evidence is that the plaintiff has always used the full title of "True Confessions" both on the magazine itself and in its very extensive advertising. All the magazines

are sold in newsstands where they may receive full cover display when space permits, or where at least the titles may be seen in whole or in part where space is more limited. Almost invariably the purchaser makes his own selection, and presumably being able to read, would not have the slightest difficulty in distinguishing "Startling Confessions" and "Sensational Crime Confessions" from "True Confessions." It is in evidence and is a matter of common knowledge that there are many magazines bearing titles which are in part composed of the same word; for example, journal, digest, sports, movie, film, police, western, detective and the like; and others conveying the same idea such as "Look," "See," "Glance." All of these are common English words descriptive of the contents of the magazines and the public has become accustomed to discriminate between them. The plaintiff has not proven that the defendant has passed off or attempted to pass off his magazines as those of the plaintiff, and I am quite unable to find that there is any likelihood of any confusion arising because of their contemporaneous use in the same area. While the publisher's name of the defendant's magazine does not appear on the cover, it appears on the contents page; all the advertisements there are of Canadian firms, those of the plaintiff being of American companies. The defendant's magazines are of different size, poorer paper and quite inferior print. It is impossible to say that on isolated occasions some slight confusion might not occur, but I think it extremely unlikely. If it should occur, it would be the result of the plaintiff having chosen for its title two common English words to describe the contents of the magazine. It is in evidence that the word "Confessions" has been used in Canada for many years as the title or part of the title of books, and since 1940 as part of the title of magazines.

Reference may be made to *Office Cleaning Services, Ltd. v. Westminster Window and General Cleaners, Ltd.* (1). In that case the House of Lords held:

(1) That the differentiation between the two names ('Office Cleaning Services, Ltd.' and 'Office Cleaning Association') was sufficient to avert any confusion which might otherwise arise from the use of two ordinary descriptive words, "office cleaning."

(2) That where a trader adopts a trade name containing words in common use, some risk of confusion may be inevitable, but that risk

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must be run unless the first trader is allowed an unfair monopoly, and in such cases the Court will accept comparatively small differences as sufficient to avert confusion.

In that case Lord Simonds, after pointing out that there was a close analogy between trade names and trade marks, said at p. 43:

So long as descriptive words are used by two traders as part of their respective trade names, it is possible that some members of the public will be confused whatever the differentiating words may be. I am ready to believe that in this case genuine mistakes were made. I think they ought not to have been made. In the *Vacuum Cleaner* case it appeared that ninety per cent of its customers had addressed the Plaintiffs, the *British Vacuum Cleaner Coy., Ltd.* as the "*Vacuum Cleaner Coy.*" In spite of this fact and of instances of actual confusion Parker J. refused to grant an injunction to restrain the *New Vacuum Cleaner Coy., Ltd.* from using the words "vacuum cleaner" in conjunction as part of its registered or other name. So in *Turton v. Turton* (42 Ch D 128) the possibility of blunders by the public was held not to disentitle the defendant from trading in his own name though the plaintiff had long traded in the same name. It comes in the end, I think, to no more than this, that where a trader adopts words in common use for his trade name, some risk of confusion is inevitable. But that risk must be run unless the first user is allowed unfairly to monopolise the words. The Court will accept comparatively small differences as sufficient to avert confusion. A greater degree of discrimination may fairly be expected from the public where a trade name consists wholly or in part of words descriptive of the articles to be sold or the services to be rendered.

The plaintiff has not shown any fraud on the part of the defendant or that he in any way intended to pass off his goods as those of the plaintiff. On the whole of the evidence I must find that the titles of the defendant's magazines are not "similar" to that of the plaintiff within the meaning of that word as defined in section 2(k) of the Act, and the claim of passing off must also fail.

In the result the plaintiff's action will be dismissed with costs.

As I have intimated above, the plaintiff launched a motion asking the Court, in the event that its registered mark was expunged from the Register (as has been done), for a declaration under section 29 of the Act that:

The said word mark "True Confessions" has been so used by it as to become generally recognized by dealers in and/or users of the class of wares in association with which the said word mark has been used, as indicating that Fawcett Publications Incorporated assumes responsibility for their character or quality throughout Canada, and that the said registration should extend to the whole of Canada.

The plaintiff relies not only on the evidence given at the trial but on twelve affidavits filed on this motion. These

affidavits are made by individuals from all provinces in Canada except Newfoundland, and in every case the affiant is or has been associated with a firm which distributes or did distribute "True Confessions."

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It was agreed by counsel for both parties that on this motion all the relevant evidence given on the main issues, as well as the affidavits filed on the motion, should be considered.

As stated above, I find nothing in the evidence on the main issue which would establish that the trade mark of the plaintiff had in Canada acquired a secondary and distinctive meaning. My consideration must therefore be directed to the affidavits now filed.

The application is made under the provisions of section 29(1) which is as follows:

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

One of the most recent cases in our Courts where the provisions of section 29 have been considered is that of *Registrar of Trade Marks v. G. A. Hardie & Co. Ltd.* (1). In that case it was held by a majority of the Court that the word "Super-weave" was a laudatory epithet of such common and ordinary usage that it could never become "adapted to distinguish" within section 2(m) of the Act. Rand, J., referring to the provisions of section 29, said at p. 493.

But the proof required by the section is both the fact that the mark has become adapted to distinguish certain goods from other goods of the same class as required by the definition and that the owner of it has become generally known as assuring quality or character, etc.

In referring to the expression, "has become adapted to distinguish," as found in the definition of a trade mark in section 2(m) of the Act, he said at p. 492:

The expression "has become adapted to distinguish" includes then any case in which the word mark has in fact become the identifying badge of the article to which it is attached; that when it is presented to the mind associated with goods of a particular trade, whatever primary meaning it

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may have had is submerged, and only the trade designation remains: J. & P. Coats, Ltd., (1935) 53 R.P.C. 355. If, therefore, a word is used which describes or imports characteristics or qualities of goods, that connotation must have so disappeared before it can be said to have become so adapted; and when it is proposed to withdraw an ordinary word from the common use the task of establishing that exclusive secondary meaning becomes greater according to the extent of that use.

In considering the evidence submitted in regard to the word "Super-weave," he said further, at p. 493:

What, then, is the evidence of these matters offered to the Court? There are eight affidavits by customers of the applicant who are familiar with the wares and who say, incorporating the language of the section, that in effect "Super-Weave" means to them the goods of the applicant. There is also evidence of considerable advertising over the period of its use. What is asked for is the monopoly of this mark throughout the Dominion. The purchasers generally are laundries, dry cleaners, linen suppliers, hotels, hospitals and other institutions; but that the exclusiveness of the identifying sense of the word is in fact present to the minds of the customers, apart from that part of the trade which has not spoken, is by no means made out; and much less has it been shown to be recognized "generally" by Canadian dealers as attaching responsibility to the owner. Obviously, to customers purchasing these goods over some years the word would be associated with their origin; but that is short of the identification with the goods in which the descriptive sense of the word has disappeared. Neither that nor the general recognition required has, in my opinion, been made out and the application fails.

All but one of the twelve affidavits filed by the plaintiff include the following paragraph, or words to the same effect:

That the name and title "True Confessions" indicates to me a magazine or publication of the romance story type written in the first person and published by said Fawcett Publications, Inc., and has no other meaning to me.

These statements it seems to me are most significant, indicating as they do that even to the distributors of the magazine (who, as such, have a direct contact with the publishers), the title of the magazine has not lost the descriptive sense in which it was first used to indicate the main contents of the magazines. They are all in agreement as to that. The original connotation has not disappeared but still remains and, as pointed out by Rand, J. in the "*Super-Weave*" case (*supra*), it cannot therefore be said to have become "adapted to distinguish."

The fact that in all these affidavits the affiants have stated that the title also means to them a product of the plaintiff falls far short of establishing that the word has become recognized "generally" by Canadian dealers as



attaching responsibility to the owners. There are thousands of retailers throughout Canada selling the plaintiff's magazine and not one of them has stated that the word to him indicated merely the goods of the plaintiff.

The defendant, on the other hand, has filed affidavits in opposition to the motion. Marie Crawford of Victoria Harbour, Ontario, a waitress, has for many years been reading women's magazines, particularly those which contain romantic stories. She says, "The title 'True Confessions' describes the kind of stories which are published in that magazine. Most of them are written in the first person singular and describe romantic experiences which are usually of a sinful or wrongful kind. The stories are written in a way which makes the reader think that the writer is admitting her sin and is telling her story as a warning to others."

Irving Lederman of Toronto, the proprietor of a book and cigar store, has been selling popular magazines for about four years. He says that the magazine contains stories which sound like confessions and which seem to be true, although he is unable to state whether they are, in fact, true or not. Margaret Gonneau of Toronto, has for many years been a reader of romantic type stories, including "True Confessions," as well as other magazines bearing the word "Confessions" as part of their title. She says that the title "True Confessions" has always seemed to her to describe a type of magazine in the same way as the word "Digest"; that the stories in "True Confessions" are mostly confessions and are written as though they are true and that they relate to romantic experiences. Gloria M. Dawkins, of Unionville, Ontario, has been reading different confession magazines for over ten years, including "True Confessions." She states that to her the title "True Confessions" describes the kind of story which is published in the magazine. Harry Krauss, the manager of a drug-store in Toronto, has for many years been engaged in selling magazines, including "True Confessions," as well as many other magazines using the word "Confession" as part of the title. He believes that such magazines contain stories which sound like "confessions" and seem to be true, although he does not know whether, in fact, they are true. Keith Elliot Sinclair of Toronto has been connected with

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the distribution of popular magazines. He states that for many years he has been familiar with the magazine "True Confessions" and also has known a good many other magazines using the word "Confessions" as part of their title, published in Canada since 1939. He states that to him "True Confessions" describes the magazine in the same way that "Home Journal" describes "Ladies' Home Journal" and "Canadian Home Journal."

In my opinion, the evidence adduced is quite insufficient to warrant the declaration asked for by the plaintiff. The motion will therefore be dismissed with costs to be taxed as hereinafter provided.

In view of the consolidation of this matter with that of *Fawcett v. Pastime* and that at the hearing the same counsel appeared for both defendants, I think it necessary to give special directions as to the taxation of the defendant's costs.

The defendant's costs up to and including the issue of the order for consolidation will be taxed on the usual scale.

All subsequent costs of the trial and the motion made under section 29, up to but not including the entry of judgment, will be taxed in the usual way, but only one-half thereof and of the costs now fixed will be allowed to the defendant in this matter, except as hereinafter provided. Included therein will be (a) the costs of the motion made by the plaintiff for leave to use affidavit evidence on the main issue, which motion was dismissed with costs and which I now fix at \$20; (b) the costs of the plaintiff's motion to use affidavit evidence on the hearing of the motion under section 29, which motion was granted, and the costs of which will be taxed by the taxing officer.

The defendant herein will be entitled to the full costs of a further motion made by the plaintiff for leave to amend its statement of claim in this matter only, the costs of which, by consent, were to be to the defendant in the cause. I fix these costs, including the consequent amendment of the statement of defence, at \$25.

The defendant is also entitled to his full costs for the entry of this judgment.

*Judgment accordingly.*

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

AND

FRANK H. ALLISON.....DEFENDANT.

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*Revenue—Excise Tax—Excise Tax Act, R.S.C. 1927, c. 197, ss. 101 (a), 108 (1) (8) and (9), 113 (8) (a and b)—Evidence of Minister's signature—"Document" referred to in s. 108 (8) of the Act—Amendment one of procedure and applicable to pending action.*

*Held:* That a document in accordance with s. 108 (8) of the Excise Tax Act setting out the opinion of the Minister of National Revenue that a person required to do so has failed to keep records or books of account and making an assessment against such person, and having attached thereto the Certificate of the Deputy Minister as required by s. 108 (9) of the Act, is proper evidence of the opinion formed by the Minister and of his assessment.

- 2. That the document referred to in s. 108 (8) of the Excise Tax Act includes the signature of the Minister, and when certified by the Deputy Minister is evidence of such signature in the manner directed by the Statute.
- 3. That the amendment to the Act as set out in ss. 8 and 9 of s. 108 deals with procedure and applies to an action begun before and pending at the time the amendment was enacted.

INFORMATION exhibited by the Attorney General of Canada to recover from defendant excise tax alleged due to the Crown under the provisions of the Excise Tax Act R.S.C. 1927, c. 197.

The action was tried before the Honourable Mr. Justice Kelly, Deputy Judge of the Court, at Winnipeg.

*Arni G. Eggerston, K.C., and A. H. Laidlaw* for plaintiff.

No one for defendant.

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

KELLY D.J. now (April 14, 1950) delivered the following judgment:—

This is an information by the Honourable the Attorney General of Canada to recover from the defendant retail purchase taxes allegedly due under Part XVII (since repealed), of the Excise Tax Act, Cap. 179, R.S.C. 1927, as amended.

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The defendant, at all relevant times, carried on business, at the City of Winnipeg, as a jeweller and it is alleged that he failed to affix and cancel stamps to the amount of retail purchase taxes imposed in respect of goods sold by him.

The imposition of retail purchase taxes was authorized by Part XVII of the Excise Tax Act and such obligation was to be discharged by affixing and cancelling an excise stamp or stamps to the amount of the tax imposed.

In addition to penalties for failure to affix or cancel such stamps, the Excise Tax Act provides:—

101 (a) Every person who, being required by or pursuant to this Act to affix or cancel stamps, fails to do so as required is liable to His Majesty for the amount of stamps he should have affixed or cancelled and that amount shall be recoverable in the Exchequer Court of Canada, or in any other court of competent jurisdiction as a debt due to His Majesty.

108 (1) All taxes or sums payable under this Act shall be recoverable at any time after the same ought to have been accounted for and paid, and all such taxes and sums shall be recoverable, and all rights of His Majesty hereunder enforced, with full costs of suit, as a debt due to or as a right enforceable by His Majesty, in the Exchequer Court or in any other court of competent jurisdiction.

The defendant filed a Statement of Defence herein, denying liability, but at the trial counsel for the defendant stated that the latter would not appear and thereupon withdrew from the case.

It appears that the Minister of National Revenue, being of opinion that the defendant had failed to keep records and books of account, as required so to do by S. 113 (1) of the Excise Tax Act, assessed the amount of stamps that the defendant was required to affix and cancel, as aforesaid. This assessment was in the following form:—

I, James Joseph McCann, of the City of Ottawa, Minister of National Revenue for the Dominion of Canada, having considered audit reports made by Excise Tax Auditor N. W. Kennedy, and having considered the replies made by Frank H. Allison, Esq., on July 5th, 1948, and his solicitor, G. Lyman Van Vliet, Esq., of the City of Winnipeg, on July 23rd, 1948, in response to departmental letter of June 24th, 1948, for representations regarding or objections to a proposed assessment of \$14,146.77 for retail purchase tax, and the said Frank H. Allison, Esq., and his solicitor having been advised during the course of the Inquiry hereinafter mentioned that the amount of the proposed assessment had been increased to \$14,844.33, and having considered the evidence taken at an Inquiry held under Section 116 of the Excise Tax Act by J. S. Rankin, Esq., as Commissioner, the report made by the Commissioner, the reports made by A. G. Eggertson, Esq., K.C., Counsel for the Commissioner, and the representations made by G. Lyman

Van Vliet, Esq., on behalf of the said Frank H. Allison, and having made further enquiries and having given full consideration to the matter and being of the opinion that the said Frank H. Allison, Esq., while carrying on business as a jeweller in the City of Winnipeg, failed to keep records or books of account as required by Subsection 1 of Section 113 of the Excise Tax Act during the period from July 1st, 1944, to July 8th, 1946, by virtue of the powers vested in me do hereby assess pursuant to the provisions of Section 113 (8) of the Excise Tax Act, R.S.C. 1927, Chapter 179 and amendments thereto, the said Frank H. Allison, Esq., carrying on business as aforesaid for the said period, the amount of \$14,844.33 as the amount of stamps that he was required by or pursuant to Part XVII of the Excise Tax Act to affix or cancel in or in respect of that period.

This assessment of \$14,844.33 shall be in addition to the amount of stamps, if any, already affixed or cancelled in respect of the said period.

Dated at Ottawa, this 28th day of June, 1949.

(sgd.) 'James J. McCann'

James J. McCann.

Minister of National Revenue.

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The Minister's authority to make such assessment is contained in s. 113 (8) of the Act, as follows:—

113. (8) Where a person has, during any period, in the opinion of the Minister, failed to keep records or books of account as required by subsection one of this section, the Minister may assess

(a) the taxes or sums that he was required, by or pursuant to this Act, to pay or collect in, or in respect of, that period, or

(b) the amount of stamps that he was required, by or pursuant to this Act, to affix or cancel in, or in respect of, that period

and the taxes, sums or amounts so assessed *shall be deemed* to have been due and payable by him to His Majesty on the day the taxes or sums should have been paid or the stamps should have been affixed or cancelled.

It is clear that, upon such assessment being made by the Minister, the taxes, sums or amounts so assessed became a debt due and payable by the defendant in respect of which proceedings could be taken by the Crown. This is the result of the latter part of s. 113 (8) which reads, in part, as follows:—

. . . and the taxes, sums or amounts so assessed *shall be deemed* to have been due and payable by him to His Majesty on the day the taxes or sums should have been paid or the stamps should have been affixed or cancelled.

It would seem that the action of the Minister in making such an assessment is not open to review by the Courts if it is found to be an administrative function conferred upon him by Parliament and I do so find.

In the case of *The King v. Noxzema Chemical Company of Canada, Limited* (1), the question for consideration was

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the right of the Minister, under s. 98 of the Special War Revenue Act, Cap. 179, R.S.C. 1927, to fix fair prices upon which sales and excise taxes should be paid. Kerwin, J., at p. 185 says, in this regard:—

. . . we cannot be aware of all the reasons that moved the Minister and, in any event, his jurisdiction under section 98 was dependent only upon his judgment that the goods were sold at a price which was less,—not, be it noted, less than what would be a fair price commercially or in view of competition or the lack of it,—but less than what he considered was the fair price on which the taxes should be imposed. The legislature has left the determination of that matter and also of the fair prices on which the taxes should be imposed to the Minister and not to the court. In my view, section 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal. In such a case the language of the Earl of Selborne in *Spackman v. Plumstead District Board of Works* (1885) 10 App. Cas., 229 at 235, appears to be particularly appropriate:

“And if the legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, *prima facie*, especially when it forms, as here, part of the definition of the case provided for, that would be binding”.

In any event, it is quite clear that the Minister acted honestly and impartially and that he gave the respondent every opportunity of being heard, and, in fact, heard all it desired to place before him. Whatever might be the powers of the Exchequer Court, if proceedings had been taken under subsection 4 of section 108, as to which it is unnecessary to express any opinion, the taxes, if properly payable, are recoverable under subsection 1 of section 108 as a debt due to or as a right enforceable by His Majesty in the Exchequer Court or in any other court of competent jurisdiction. In view of the wording of section 98, nothing, I think, need be shown other than what appears in the present case and the obligation of the respondent to pay taxes on the basis of the prices determined by the Minister.

There is to be considered the question of the evidentiary value of the document purporting to be signed by the Minister of National Revenue, whereby the assessment of the defendant was made. This document, duly certified as follows:—

DEPUTY MINISTER OF NATIONAL REVENUE  
 Customs and Excise

Ottawa, February 23, 1950.

I hereby certify that the document dated the 28th day of June, 1949, annexed hereto, is a document signed by the Honourable the Minister of National Revenue.

(sgd.) ‘D. Simi’

D. Sim,

Deputy Minister of National Revenue  
 for Customs and Excise.

(Seal)

was filed, without further proof, by Counsel for the Crown.

In the case of *Rex v. Pacific Bedding Company Limited* (1), the Court of Appeal in British Columbia held that a similar document, under the hand of the Minister, was not admissible in evidence on a prosecution for non-payment of tax; that it was not evidence of the facts stated therein nor of the assessment of the Minister within the meaning of s. 113 (8) of the Excise Tax Act, and that it was not a certificate made under the authority of any Act. Sloan C.J.B.C., says at p. 578:—

It will be noted that the document signed by the Minister purports to be an assessment in the exercise of the authority vested in him by said sec. 113 (8). Is then the production of this document and proof of the Minister's signature conclusive or even *prima facie* evidence of such assessment?

and at p. 579:

The document signed by the Minister is not, in my opinion, a "certificate made under the authority of any Act." The "certificate" contemplated in that phraseology would be something in the nature of an analyst's certificate relating to drugs and given evidentiary value by sec. 18 of the Opium and Narcotic Drug Act, 1929, ch. 49, or, e.g. customs certificates under sec. 260 of the Customs Act, RSC, 1927, ch. 42. To give other provincial examples, the certificate of an analyst as to the percentage of alcohol in any liquor is made *prima facie* evidence by sec. 90 of the Government Liquor Act, RSBC, 1948, ch. 192, and would therefore fall within the definition as would a certificate of the provincial inspector issued under the authority of sec. 22 of the Milk Act, RSBC, 1948, ch. 208, showing the grades of a dairy farm. In the absence of statutory sanction these certificates, or any "certificate of a mere matter of fact, not coupled with any matter of law" is not admissible as evidence: *Omichund v. Barker*, (1774), Willes, 549, 550.

And at p. 581:—

It is sufficient for me to say in this case that in a criminal proceeding and in the absence of any express legislative provision authorizing its use the mere production of a signed document of this character cannot, in my view, be regarded as either conclusive or *prima facie* proof of the facts contained therein. That being so the document has no evidentiary value and ought not to have been admitted in evidence.

Following the decision in the *Pacific Bedding* case, the Excise Tax Act was amended by adding to s. 108 of the Act, the following subsections:—

(8) Where any question arises in a proceeding under this Act as to whether the Minister has formed a judgment or opinion or made an assessment or determination, a document signed by the Minister stating that he has formed the judgment or opinion or made the determination or assessment is evidence that he has formed the judgment or opinion or made the determination or assessment and of the judgment, opinion, determination or assessment.

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(9) In any proceedings under this Act a certificate purporting to be signed by the Deputy Minister that a document annexed thereto is a document or a true copy of a document signed by the Minister shall be received as evidence of the document and of the contents thereof.

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This amendment was assented to on 10th December, 1949, and was obviously intended to meet the difficulties of proof as laid down by the *Pacific Bedding* case. I am invited by counsel for the Crown to say whether or not the amendment achieves the purposes intended.

The common law rule, in this regard, was thus:—

At common law, certificates of matters of fact not coupled with matters of law are usually said to be inadmissible . . . ; Halsbury (2nd Ed.) Vol. 13, p. 661; Taylor on Evidence (12th Ed.), p. 1123, and Phipson on Evidence, (8th Ed.), p. 356, citing *Omichund v. Barker*, (1774), Willes, 538, 549 and 550.

The rule appears to be the same whether applied to certificates of matters of fact or to certified or authenticated copies of documents which contain matters of fact.

However, Parliament has varied the common law rule, in many instances, by giving evidential value to both certificates and certified copies of documents, by designated public officials. As to these it is said:—

The certificates, letters or returns of public officers, *intrusted by law with authority for the purpose*, are *prima facie*, but not generally conclusive, evidence of the facts authorized to be stated, but not of extraneous matters . . . (Phipson on Evidence, 8th ed., p. 356).

As to documents, 13 Halsbury (2nd Ed.) says, at p. 654:—  
 . . . And by virtue of statutory provisions a number of documents can now be proved by means of copies of a prescribed kind.

Referring to the amendment in question, it will be seen that, “a document signed by the Minister stating that he has formed the judgment or opinion or made the determination or assessment *is evidence*,” not only of the fact that the Minister has exercised the administrative functions vested in him but also of the *judgment, opinion, determination or assessment* which he has reached or made.

Looking at s. 113 (8) of the Excise Tax Act, it is apparent that the Minister may, where in his opinion there has been a failure to keep records or books of account, assess the taxes or sums or amounts payable, and by the amendment his opinion and the assessment may be set forth in a document signed by him. Such



document becomes of evidentiary value when accompanied by a certificate purporting to be signed by the Deputy Minister identifying the document in question.

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The document, filed herein, has attached thereto the required certificate by the Deputy Minister, and sets out the opinion of the Minister as to the failure of the defendant to keep records or books of account and thereafter makes an assessment of \$14,844.33 as the amount of stamps required to be affixed or cancelled by the defendant.

I must hold that the document filed is proper evidence of the opinion formed by the Minister and of his assessment against the defendant, having regard to the amendment, referred to.

During argument herein, I queried whether or not proof of the Minister's signature was still necessary. I should have thought that the concluding words of ss. 9, as added by the amendment, would have had greater clarity if they had read thus:—

. . . shall be received as evidence of the document and of the contents thereof *and of the Minister's signature thereto.*

Upon further consideration of the matter, I have reached the conclusion that the "document", which is made evidence, includes the signature of the Minister or in other words everything contained therein, within the delegated power of the Minister. Further, the Deputy Minister is required to certify that the document or true copy of a document, as the case may be, is one signed by the Minister. This has been done in the present case and is, therefore, evidence of such signature in the manner directed by the Statute.

I might mention, in conclusion, that while this action was commenced on 15th September, 1949, the amendment, referred to, was not assented to until the later date. This raises the question as to the retrospective operation of the amending Statute. The law on this point is stated in Craies on Statute Law (3rd Ed.) at p. 324:—

It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction.

and at p. 330:—

It is a well "recognized rule that statutes should be interpreted, if possible, so as to respect vested rights," . . .

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and at p. 332:—

But there is no vested right in procedure or costs. Enactments dealing with these subjects apply to pending actions, unless a contrary intention is expressed or clearly implied.

“It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure, and do not extend to rights of action,” (Jessel, M.R. in *Re Joseph Suche & Co., Ltd.* (1875), 1 Ch.D. 48, 50.) For “it is perfectly settled that if the Legislature forms a new procedure, that, instead of proceeding in this form or that, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be”, (Lord Blackburn in *Gardner v. Lucas* (1878), 3 App. Cas. 582, 603.) “A statute cannot be said to have a retrospective operation because it applies a new mode of procedure to suits commenced before its passing”, (Sir James Wilde in *Watton v. Watton* (1866), L.R. 1 P. & M. 227, 229.) In other words, if a statute deals merely with the procedure in an action, and does not affect the rights of the parties, “it will be held to apply *prima facie* to all actions, pending as well as future”, (Blackburn J. in *Kimbray v. Draper* (1868), L.R. 3 Q.B. 160, 163.)

It cannot be doubted that the amendment is one dealing with procedure and I so hold. Its sole purpose was to deal with a matter of evidence and evidence has been held to come under procedure: *Prendergast, C.J.M., in Rex v. Kumps* (1).

In result there will be judgment against the defendant for the sum of \$14,844.33 and costs.

*Judgment accordingly.*

BETWEEN:

1950  
Apr. 12  
Apr. 14

THE ROYAL CITY SAWMILLS  
LIMITED .....

} APPELLANT;

AND

THE MINISTER OF NATIONAL  
REVENUE .....

} RESPONDENT.

*Revenue—Excess Profits Tax Act 1940, s. 15A—Standard profits—Controlled company—Amount of standard profit fixed by s. 15A of the Act—Appeal dismissed.*

*Held:* That the standard profit of a controlled company is fixed at an amount not exceeding \$5,000 by s. 15A of the Excess Profits Tax Act, 1940, notwithstanding that such company may have been formerly granted a greater standard profit.

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APPEAL under the Excess Profits Tax Act, 1940.

The appeal was heard before the Honourable Mr. Justice Sidney Smith, Deputy Judge of the Court, at Vancouver.

—  
Sidney  
Smith  
D.J.A.  
—

*J. T. Jackson* and *W. J. Hulbig* for appellant.

*W. S. Owen, K.C., A. H. Laidlaw* and *W. R. Mead* for respondent.

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

SIDNEY SMITH, D.J. now (April 14, 1950) delivered the following judgment:—

This is an appeal from the Minister of National Revenue with respect to the standard profits of the appellant. It turns wholly upon the construction of sec. 15A of the Excess Profits Tax Act. The section reads as follows:—

15A. Notwithstanding anything in this Act contained, in any case where a company has a controlling interest in any other company or companies (hereinafter called controlled company or companies) incorporated in 1940 or thereafter . . . and the sum of the capital employed by such company and such controlled company or companies at the time of incorporation is not in the opinion of the Minister of National Revenue substantially greater than the capital employed by such first-mentioned company prior to the incorporation of such controlled company or companies, the standard profits of all such controlled companies taken together shall not exceed \$5,000 in the aggregate, and shall be allocated to each of such controlled companies in such amounts as the Minister of National Revenue may direct.

In any such case a reference to the Board of Referees shall not be made notwithstanding the provisions of section five of this Act.

The appellant was incorporated on 13 April 1940. On 17 September 1941 it applied to have its standard profits determined under section 5 of the Excess Profits Tax Act. There was a reference to the Board of Referees, the decision of the Board awarding a standard profit of \$28,500 per year was approved by the Minister, and the appellant was so notified on 31st March, 1942. Section 15A of the Act was assented to on 20th May, 1943, and made applicable to the profits of the 1942 taxation period and of fiscal periods ending therein and of subsequent

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periods. For the years 1944 and 1945 the appellant was assessed excess profits tax based on standard profits of \$5,000 only. The appellant argues that it does not fall within the operation of sec. 15A *supra*.

In my opinion there can be no doubt that, from first to last, this was a controlled company in the sense of this section (indeed the point was not contested); that in the opinion of the Minister of National Revenue (and, I may add, in my own as well) the sum of the capital of parent and offspring was not substantially greater than the capital of the parent company at the relevant time; and that its date of incorporation and chargeable accounting periods come within the statutory time. How, then, can it be said that the company falls outside the wide net of this section?

The main argument was that having had its standard profits fixed at \$28,500 in 1941, the section could not now operate to reduce them to \$5,000; that this would be tantamount to retrospective legislation; and that the section left much room for doubt as to whether this was the intention.

But the section introduced a new standard profit for certain companies of which this was one. It contains no hint that Parliament intended that the section should not apply to companies within its ambit whose standard profits had previously been fixed by some other measure. If such had been the intention nothing would have been easier than to say so. In the absence of such language the qualification of its terms by any such implication is not legitimate. The provision may seem harsh to the appellant company, but if the provision is clear the Court has no jurisdiction to mitigate such harshness, if any there be.

In my opinion this statutory provision interpreted according to income tax principles and to the actual terms of the language used amounts to saying: "If you are a controlled company your standard profits shall not exceed \$5,000 notwithstanding any machinery in the Act which may hitherto have given you a greater standard profit."

The appeal must be dismissed with costs.

*Judgment accordingly.*

BRITISH COLUMBIA ADMIRALTY DISTRICT

1950  
Feb. 27 & 28  
March 1 & 2  
March 28

BETWEEN:

GREATER VANCOUVER WATER DISTRICT, ..... } PLAINTIFF,

AND

THE SHIP SPARROWS POINT and NATIONAL HARBOURS BOARD.... } DEFENDANTS.

*Shipping—Damage to water mains owned by plaintiff caused by defendant ship’s anchor—Failure of ship to comply with regulations governing operation of second Narrows Bridge at Vancouver requiring ship to “remain at a safe distance” until green light appears—“Safe”—Liability at common law—Costs incurred by co-defendant payable by ship.*

Defendant ship in approaching the second Narrows Bridge at Vancouver, B C., failed to comply with the regulations governing the operation of the bridge which require a ship approaching the bridge to “remain at a safe distance” until the green light appears. She found it necessary to drop her anchor to take her way off. The anchor dragged across the water-mains owned and laid by plaintiff under statutory authority causing considerable damage.

*Held:* That “safe distance” in the regulations means a safe distance for every one concerned including any one affected by emergency measures.

- 2. That aside from the regulations at common law the ship would not be justified in proceeding against a barrier, having no assurance when it would be removed to a point where, if the barrier remained, she could not save herself except at the expense of a third party’s property.
- 3. That defendant National Harbours Board having been added as a co-defendant by the ship any costs incurred by plaintiff to the National Harbours Board must be repaid it by the ship.

ACTION by plaintiff against defendant ship for damage to water-mains caused by ship’s anchor: defendant National Harbours Board made co-defendant by the ship.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

*Douglas McK. Brown and R. E. Ostlund* for plaintiff.

*Alfred Bull, K.C., and D. S. Montgomery* for defendant ship.

*A. C. DesBrisay, K.C., D. M. Owen and J. I. Bird* for defendant—National Harbours Board.

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

SIDNEY SMITH, D.J.A. now (March 28, 1950) delivered the following judgment:—

At the end of the trial I gave judgment for the Water District against the ship, but found in favour of the defendant Harbours Board. I stated my reasons shortly, and promised to amplify them later. I now do so.

The plaintiff owns water-mains laid by statutory authority across the sea-bed of Burrard Inlet in an area paralleling the Second Narrows Bridge and 1,000 to 1,600 feet east of it. These mains are clearly marked on the chart, and the chart bears a warning against them. The various sailing directions for the locality also warn against them. Those navigating the defendant ship knew of them. This action arises out of the ship's damaging the mains by dropping anchor while trying to pass through the bridge, which is operated by the defendant Board. I will outline the events that led to this mishap.

The *Sparrows Point* (with a local pilot on board) was bound westward shortly after 3 a.m. on 26th of December, 1948. She whistled at Berry Point, one and a half miles from the bridge, to have the bridge-span raised. The visibility was then not too bad; for the ship could see the traffic lights on the bridge. But the weather was generally dark and hazy; there were fog banks; and I find that on the higher levels at the bridge at the relevant time the fog was denser and heavier than elsewhere, though at lower levels the visibility was relatively good.

The regulations that govern the operation of the bridge are authorized by Order-in-Council and bind all navigators.

They provide:—

36-H (10) (a) Every vessel desiring the lift span of the bridge to be raised shall give three prolonged blasts with her sounding device and repeat such signal until acknowledged by the bridge operator.

(10) (b) .....

- (ii) a red light on either side of the operating house indicates that the vessel's signal has been heard and understood;
  - two red lights on the operating house, not less than ten feet apart vertically, indicates that the vessel must not approach the bridge;
  - a green light on either side of the operating house indicates that the lift span has been raised.

(9) Every vessel which has signalled for the lift span of the bridge to be raised shall remain at a safe distance from the bridge until the bridge operator signals that the lift span has been raised.

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When the span is raised, the red light rises with it; and when the span is raised to the full extent needed, then the red light is replaced by a green light, showing that the ship may pass through. After the *Sparrows Point* whistled, the bridge showed its red light, so that the ship knew her signal had been heard. But until the green light appeared she was bound to "remain at a safe distance". Actually she crept closer to the bridge, and then found she must drop anchor to take her way off, because she still could see no green light. She did this when approximately 1,500 feet from the bridge. Her anchor dragged across the water-mains doing damage, claimed to be \$70,000.00. Right after this she saw the green light, hove in, and passed safely under the raised span at 4.35 a.m.

There was some contention about the strength of the ebb tide at the time, but I find this did not exceed  $\frac{3}{4}$  knot and was not a factor. A master mariner was called and put the tide at 3 knots. But I do not accept this. While he was no doubt a competent navigator it was not shown that he had any special knowledge of tides at this bridge, or even that he had ever taken a ship through it. I accept the contrary evidence of the pilot and others used to passing through the bridge.

I also accept the evidence of the bridge-operators, who in the course of their duties noted in their logbook what occurred. They had been notified by telephone to expect the ship, and saw her when she whistled at Berry Point. In three minutes they had raised their span to its full elevation of 120 feet; the red light had changed to green, and all was in order for the ship to pass through. Unhappily the dense fog on the upper level prevented those on the ship from seeing the green light. The bridge-operators knew this, and several times tried to enlighten the ship by announcements through their loud-speaker that the bridge was open. Unluckily the ship could not hear them clearly. I do not think the bridge-operators were bound to do even this much; they certainly cannot be criticized for not doing more. I find they were not at fault.

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I should here mention that witnesses from the ship testified that they continued to see the red light until they had dropped anchor. But I am satisfied that they were mistaken, and that since both the red and green lights rose with the span into the fog above, they could see neither. I should like to repeat what I said at the conclusion of the trial: that the pilot, undoubtedly a man of great experience, gave his evidence in a most satisfactory and seaman-like fashion; but that he, too, was mistaken in the matter of the red light.

It was argued that the lone red light, showing that the ship's signal was heard, was an invitation to come on so long as two were not shown. This claim ignores the role of the green light under the regulation. Under that, the ship, even when she knows her signal has been heard, must "remain at a safe distance" till the green light shows the span has been raised. The meaning of "safe" here has been queried. But the regulations are for seamen, and I cannot doubt that seamen would understand a safe distance as one safe for everyone concerned, including anyone affected by emergency measures. Here those controlling the ship knew that the mains were there, and that they must avoid any position of hazard that might force them to damage other property in order to save their vessel. They quite failed to preserve the proper margin of safety.

Even if the ship's story had been true, and the bridge had failed to give them the signal of safety when the way was really clear, I think the ship would still have been the culpable party. For if she had obeyed the regulations, and kept a safe distance till she saw the green light, then the damage would not have been done. It seems to me, moreover, that even at common law she would probably be liable. Even at common law she could not justify proceeding against a barrier (having no assurance of when it would be removed) to a point where, if the barrier remained, she could not save herself except at the expense of a third party's property.

I have examined the cases referred to me but, as I understood counsel to admit, they are not close enough in point to be really helpful.



I reserved one question of costs arising from the defendant Board's success. The writ was issued against the ship alone; later she had the Harbours Board added as co-defendant, over a preliminary objection of the plaintiff. In my opinion the ship should repay to the plaintiff any costs that it must pay to the Harbours Board.

The learned Registrar will assess the damages.

*Judgment accordingly.*

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BRITISH COLUMBIA ADMIRALTY DISTRICT

1950  
March 3, 4 & 6  
March 17

BETWEEN :

PUGET SOUND NAVIGATION COMPANY Owner of the Motor Vessel *Chinook*,..... } PLAINTIFF,

AND

THE SHIP *DAGMAR SALEN*,.....DEFENDANT.

AND

REDERIAKTIEBOLAGET PULP Owner of the Ship *Dagmar Salen*, } PLAINTIFF,

AND

THE MOTOR VESSEL *CHINOOK*,.....DEFENDANT.

*Shipping—Collision—Both ships proceeding at too great speed in fog-shrouded area—Radar aid to navigation only—Failure to reduce speed when made aware of each other's presence—Defendant ship mainly at fault in violating customary rule for passing—Apportionment of fault—Damages.*

In an action for damages arising from a collision between plaintiff and defendant ship in a narrow fog-shrouded channel the Court found both ships to blame. Both ships were proceeding at too great a speed, plaintiff originally and defendant ship as she approached the fog-shrouded area. Both ships failed to reduce speed sufficiently when their respective radars indicated the other's approach on a bearing that changed little, if at all.

*Held:* That in a dense fog the most extreme degree of caution must be exercised.

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2. That radar is an aid to navigation only and does not over-ride the general principles applicable to navigation in fog, the first of which is moderate speed and second great care.
3. That defendant ship was more at fault than plaintiff ship in choosing to pass starboard to starboard thereby violating the customary rule for north and south bound vessels to pass port to port.
4. That the establishment of different degrees of fault must be a conclusion proved by evidence judicially arrived at and sufficiently made out; conjecture or sympathy or a leaning in favour of one ship rather than the other will not do; nor will the question be answered by deciding who was the first wrongdoer nor even of necessity who was the last.
5. The liability to make good the damages or loss shall be in proportion to the degree in which each vessel was in fault, that is in fault as regards the collision; if she is in fault in other ways which had no effect on the collision such matters are not to be taken into consideration.

ACTION for damages resulting from collision between two ships.

The action was heard before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

*F. A. Sheppard, K.C.* and *W. S. Lane* for M.V. *Chinook*.

*W. S. Owen, K.C.* and *J. I. Bird* for the Ship *Dagmar Salen*.

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

SIDNEY SMITH, D.J.A. now (March 17, 1950) delivered the following judgment:

This consolidated action arises out of a collision in fog between the American Motor Vessel *Chinook* and the Swedish Motor Vessel *Dagmar Salen*, which occurred in Puget Sound, in American waters, about 8.15 p.m. on 28th September, 1947. The Swedish vessel was arrested in Vancouver, B.C., and thus this Court became seized with jurisdiction. She is now represented by a bond for \$65,000 to secure the *Chinook* damages. Her own damage was much less, approximately \$5,000. The navigation at time of collision was governed by the Inland Water Rules of

the United States; but these, on all relevant points here, are the same as the International Rules. All courses and bearings mentioned in this judgment are magnetic.

The case for the *Chinook*, of 4,106 tons gross and 2,792 net, 273 ft. long, 65 ft. beam, built and registered at Seattle, and then less than one year old, is that she left Victoria at 5.16 p.m. on 28th September, 1947, carrying some cargo and many passengers, on one of her usual scheduled voyages to Seattle. Outside Victoria and crossing the Strait of Juan de Fuca she encountered patches of fog, at times with fair visibility, at other times with very little. Entering the narrow and much frequented waters between Point Wilson and Admiralty Bay she ran into dense fog; and so it was to Marrowstone Point and Bush Point, south and to the westward of which the collision occurred. Her log does not differentiate between any varying densities of fog during the passage. It is simply marked "fog" throughout. During this time, almost 3 hours, she was proceeding at full speed, with the exception of some slowing down between Marrowstone and Bush Points, when passing another vessel. Her speed for the passage, and up to the time when there began the sequence of events which led to the casualty, was approximately 17 knots. I find, after making all due allowance in her favour for radar equipment and unusual power in stopping and reversing, that this speed was clearly excessive. At this stage her speed had no consequences, but nevertheless I think it proper to comment on it now.

The stretch of water between Marrowstone Point and Double Bluff lies roughly northwest and southeast, and is contained between Marrowstone Island and part of Quimper Peninsula on the west, and Whidbey Island on the east. Marrowstone Point is at the northerly end of Marrowstone Island, and Bush Point and Double Bluff are to the southward, on Whidbey Island. From Marrowstone Point to Bush Point is a distance of  $5\frac{1}{2}$  miles; from Bush Point to Double Bluff 5 miles. The Channel at Marrowstone Point is  $3\frac{1}{2}$  miles wide; at Bush Point  $2\frac{1}{2}$  miles; at Double Bluff 5 miles. Mutiny Bay is an indentation in the coast line, one mile deep, two miles long, just to the north of Double Bluff. Although it was pleaded that the Channel hereabouts was a narrow channel within

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Art. 25, the point was not argued; but it was admitted that a well-established practice existed (at least at Double Bluff and Bush Point) for meeting vessels to pass port to port. I think that, independently, I should have held that this was good practice on account of the lay of the land and the run of the traffic.

When at Bush Point at 8.04 p.m. the Master of the *Chinook* picked up in his radar screen an object 30° on his port bow, about five miles distant, and in the neighbourhood of Double Bluff. This proved to be the *Dagmar Salen*. He testified that the *Chinook* was then a mile and a quarter off Bush Point. I think it was rather less—certainly not more than one mile. He said, too, that he was mistaken in thinking the object was 30° on the bow; this seems true; for that bearing would have put the *Dagmar Salen* high on the headland of Double Bluff, or out of sight in Useless Bay beyond. Continuing, the Master said that he ran on this then course 133° (roughly SE) for an extra two minutes, and then starboarded 17° to 150° so as to give the other vessel extra sea-room, at the same time reducing to half speed, and a minute later to slow speed. At the end of another three minutes he heard a fog signal from the *Dagmar Salen* and stopped his engines. This was at 8.10 p.m. One-half minute afterwards he went full astern, and another half-minute later he saw the lights of the *Dagmar Salen* on his port bow, and in yet another half-minute the stem of that vessel rammed the *Chinook* on the port side, at the wing of the bridge. I am satisfied that at the time of the collision neither vessel had more than trifling headway, that each was blowing the appropriate fog signals, and that each gave the full astern signal.

I regret to say that I do not altogether accept the evidence given by the *Chinook's* Master and Chief Officer, who were both in the wheel-house at the critical time. My impression was that there was no clear demarcation of duty between them; that the Master had too much to do, the Chief Officer too little. I think the latter could have been usefully occupied in steady observation of the radar screen. As it was, he paid no attention to it, except when he went on watch at 7.50 p.m. Nor am I convinced that the Master paid any proper attention to the radar

screen during the vital eight minutes preceding the collision. I think he made this plain by his testimony, both at the trial and on examination for discovery. Nor can I accept at its face value the deck log-book of the *Chinook*. It was written up for the most part on the evening after the collision, partly from the meagre earlier records in the log, partly from the engine-room bell-book, and partly from subsequent memory of how it must have been. I think the log-book can be relied on only up to the moment when the *Chinook* reached Bush Point. At the same time I have no criticism of the habit of writing up beforehand the headlands to be passed and the courses to be steered, provided any departure from these is properly and instantly noted.

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The case for the *Dagmar Salen* of 5,000 tons gross, 405 feet long, 51 feet beam, and registered at Stockholm, was that she left Seattle for Vancouver, B.C. at 6 p.m. on the day in question, in overcast but clear weather; proceeded without incident as far as Double Bluff, and was off the buoy there one-half mile at 8 o'clock, with thickening weather ahead. There and then, or very shortly thereafter, she altered course to 304° (roughly NWxW). The visibility was approximately two miles; they could see into Mutiny Bay, but there was fog at Bush Point. The Chief Officer was with the pilot on the bridge and his chief duty was to attend to the radar. This he did. Just after passing Double Bluff, both the Chief Officer and the pilot saw in the radar screen a vessel at Bush Point bearing 5° or so on their starboard bow, and on a closely parallel course to their own. This vessel turned out to be the *Chinook*, which they estimated as being one-half mile off Bush Point. At 8.05 p.m. the pilot altered course 5° to port, to give the vessel a wider berth and to make sure of a starboard to starboard passing. The visibility lessened; so engines were put at stand-by and fog signals blown. Up till then the ship was going full speed, namely 12 knots, with a two mile ebb tide in her favour, making an over-the-ground speed of 14 knots. Two minutes later she was reduced to half-speed, and a minute afterwards the engines were stopped. This brings the time to 8.08 p.m., and at that moment the pilot altered course a further 10° to port. This brought her head to 289°. They were then in fog.

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After the engines were stopped the pilot and Chief Officer heard for the first time the fog signal of the *Chinook*. The bearing of the whistle, they testified, indicated what the radar also showed: that the *Chinook* was then say 20° on the starboard bow and that the two vessels were safely passing starboard to starboard. Till then and for the ensuing three minutes they had no apprehension of coming danger. But at the end of the three minutes, at 8.11 p.m., their frame of mind suffered a rude shock, for the radar showed a change of course on the part of the *Chinook* and her whistle signals verified this. It was then evident that her bearing was narrowing on the bow and that she was heading towards them. The *Dagmar Salen* at once went full astern and continued so until the collision at 8.14 p.m. (her time). One-half minute before that the *Chinook* had come into sight on the starboard bow, crossing ahead from starboard to port. A second emergency full astern was then rung down to the engineroom. Captain Henshaw, the American pilot on the *Dagmar Salen*, gave his evidence on these points in a straightforward fashion that was altogether admirable.

These converging courses cannot be plotted on the chart with pin-point precision. The evidence of each ship varied to some extent in her pleadings, in previous examinations and at the trial. But the foregoing is accurate enough for determining the issues involved. My task is not so much to reconcile the minor conflicts in evidence given by each vessel, or to decide between stories, but rather to determine, on the known facts and in the light of the regulations, what principles of good seamanship were infringed.

The over-the-ground speeds of the two vessels when each first saw the other in her radar screen, differed very little. The *Chinook* at 17 knots had an estimated 3 knots tide against her; the *Dagmar Salen* at 12 knots had a 2 knot tide in her favour. It must be noted, too, that at that time their courses intersected at an angle of only 8°. I think there can be little doubt that the *Chinook* then had the *Dagmar Salen* closely on her port bow, while the *Dagmar Salen* had the *Chinook* very slightly on her starboard bow; and that these relative bearings changed but little before the *Chinook's* alteration of 17° to starboard, and the *Dagmar Salen's* alteration of 10° (making a total

of 15°) to port. After these alterations the angle of course intersection was 40°. The angle of impact was greater, no doubt due to the ships' changing headings when going astern.

Both vessels must be held blameworthy. Both were proceeding at too great speed, the *Chinook* originally, and the *Dagmar Salen* as she approached the fog-shrouded area. Both failed to reduce sufficiently when their respective radars (properly observed) gave indication of the other's approach on a bearing that changed but little, if it changed at all. American and British Courts alike have stated, again and again, that in dense fog the most extreme degree of caution is exacted; that, with traffic about, it is very easy to go too fast, very difficult to go too slow. No doubt they were each lulled into a sense of security by their radar bearings. But radar is an aid to navigation only. It does not over-ride the general principles applicable to navigation in fog, the first of which is moderate speed and the second great care. Moreover, I am satisfied that if proper use had been made of the radar on the *Chinook*, her Master would have seen the *Dagmar Salen* instead of broadening, was narrowing on his port bow. On the *Dagmar Salen* the bearings were observed more continuously and accurately. But they, too, changed too narrowly to permit of a safe distance for passing in fog. The fact is that during the critical period, and until their respective alterations of course, the two ships were very nearly head-on to each other; and I take it that the sudden narrowing of the bearing observed by the *Dagmar Salen* was the consequence of the 17° alteration to starboard in the course of the *Chinook*. The exact time when the *Chinook* made this alteration is one of the unsettled features of her evidence.

I think however that the main fault (apart from excessive speed) lay with the *Dagmar Salen*. She knew that the customary rule was for north and south bound vessels to pass port to port, yet she chose to pass starboard to starboard. The explanation given to me by her pilot for this decision was this: that he was rather close to Double Bluff (due to alteration of course for a previous passing steamer); that the object he saw in the radar was rather close to Bush Point; that he could not then

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determine what type of craft she was or whither bound; and that in a deeply laden ship he was apprehensive of the shallow water a mile south of Bush Point. But I find all that unconvincing. He was in the better position at Double Bluff, for there the fog lay ahead and he could still see a distance of a mile or two. He could see into Mutiny Bay. He might, after reducing to mere steerage way, have drawn to starboard there in complete safety until the *Chinook's* movements became clarified. I have anxiously reflected whether this finding imposes on the *Dagmar Salen* too exacting a standard of conduct, having in mind her difficulties then and the fact that I view them now with after-the-event knowledge. But reflection has confirmed my first opinion. The pilot had time to spare and to fully appreciate the situation, and to realize that by porting he was almost bound to confuse the other vessel. If the *Chinook* were to alter course at all her natural reaction in the circumstances was to alter to starboard. And so the *Dagmar Salen* should have done.

How must the fault be apportioned? The relevant considerations were stated in the House of Lords by Lord Sumner in *The Peter Benoit* (1) thus:

The conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at, and sufficiently made out. Conjecture will not do: a general leaning in favour of one ship rather than of the other will not do: sympathy for one of the wrongdoers, too indefinite to be supported by a reasoned judgment, will not do. The question is not answered by deciding who was the first wrongdoer, nor even of necessity who was the last. The Act says, "having regard to all the circumstances of the case". Attention must be paid not only to the actual time of the collision and the manoeuvres of the ships when about to collide, but to their prior movements and opportunities, their acts, and omissions. Matters which are only introductory, even though they preceded the collision by but a short time, are not really circumstances of the case but only its antecedents, and they should not directly affect the result. As Pickford, L.J. observes: "The liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault". That must be in fault as regards the collision. If she was in fault in other ways, which had no effect on the collision, that is not a matter to be taken into consideration.

With these considerations in mind I think the *Dagmar Salen's* was the greater fault. I cannot extenuate the effect of her original error in departing from a well-known route. In my judgment she must be held  $\frac{2}{3}$ ds to blame and the *Chinook*  $\frac{1}{3}$ rd to blame, with corresponding costs.

(1) (1915) 13 Asp. M.C. 203 at 208.



I have given my views fairly fully because I was informed at the trial that an enquiry had been held by Coastguard Officials in Seattle; and in case I should have the misfortune to differ from these gentlemen, I should at least like them to know my reasons—be they good or bad.

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The learned Registrar will assess the damages.

*Judgment accordingly.*

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

THE OWNERS OF THE SHIP  
*ISLAND PRINCE* ..... APPELLANT;  
AND  
NATIONAL HARBOURS BOARD..... RESPONDENT.

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18, 20  
Mar. 23

*Shipping—Appeal from assessment of damages—Loss due to failure on part of appellant to transship goods or charter other vessels—Claim for loss of profits of substitute vessel too remote—Appeal dismissed.*

An appeal from the disallowance by the Registrar, British Columbia Admiralty District, of two items in an assessment of damages claiming for loss of earnings through interruption of scheduled service and loss of profits of a substitute vessel placed on the run of the damaged vessel was dismissed.

*Held:* That the failure of appellant to transship freight to other lines and to charter other available vessels was the direct cause of whatever loss it sustained by way of decreased subsequent earnings rather than the collision with respondent's bridge.

2. That the loss of profits claimed through the service of the substitute vessel was the result of an error in judgment of appellant in making its dispositions of its vessels and cannot be charged to respondent.

APPEAL from an assessment of damages made by the Registrar, British Columbia Admiralty District.

The appeal was heard before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

*D. N. Hossie, K.C., and Ghent Davis, for appellant.*

*W. S. Owen, K.C., and J. I. Bird, for respondent.*

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

SIDNEY SMITH, D.J.A., now (March 23, 1950) delivered the following judgment:—

On Thursday 9th December, 1948, the S.S. *Island Prince* was damaged by the negligent operation of the defendant's bridge, and the following June this Court gave judgment on the question of liability in her favour. On 14th and 16th December, 1949, the learned Registrar assessed the damages, and from his findings this appeal is brought.

The plaintiff called three witnesses on the reference, viz., Mr. G. B. Clark and Capt. Harry Terry, respectively the president and the manager of the owning Company (The British Columbia Steamships, Ltd.), and Mr. P. N. Goode, a chartered accountant, who audited the Company's books. The defendant called no witnesses.

The owners submitted their statement of damages under the following heads:—

|                                                                                                                                                                                                  |                       |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|
| 1. Repair to vessel—B.C. Marine Shipbuilders...                                                                                                                                                  | \$ 14,447 53          |
| 2. Night watchman—27 days at \$6 per day—<br>December 9th to January 5th.....                                                                                                                    | 162 00                |
| 3. Owner's Surveyor .....                                                                                                                                                                        | 125 00                |
| 4. Noting Protest .....                                                                                                                                                                          | 5 00                  |
| 5. Charter Hire substitute vessels while <i>Island Prince</i> undergoing repairs M.V. <i>Squamish Queen</i> —Charter Hire plus Stevedoring expense loading cargo from <i>Island Prince</i> ..... | \$ 1,200 00<br>198 75 |
|                                                                                                                                                                                                  | \$ 1,398 75           |
| Less freight earnings on cargo handled.....                                                                                                                                                      | 857 42                |
|                                                                                                                                                                                                  | 541 33                |
| 6. S.S. <i>Alaska Prince</i> —Charter Hire.....                                                                                                                                                  | \$ 2,400 00           |
| Dec. 15-Dec. 18 both inclusive—4 days at \$600 per day (plus cost of operation)—                                                                                                                 |                       |
| Dec. 28-Jan. 1 both inclusive—4 days at \$600 per day.....                                                                                                                                       | 2,400 00              |
|                                                                                                                                                                                                  | 4,800 00              |
| Less freight earnings on cargo handled.....                                                                                                                                                      | 1,062 30              |
|                                                                                                                                                                                                  | \$ 3,737 70           |

|                                                                                                                                                                                                                     |              |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| 7. S.S. <i>Island Prince</i> —Time lost while undergoing repairs at B.C. Marine Shipbuilders Ltd.—27 days at \$350 per day—Gross.....                                                                               | 9,450 00     |
| <i>Credit</i> —                                                                                                                                                                                                     |              |
| Wages: First Officer—15 days at.....                                                                                                                                                                                | \$ 230 00    |
| Per month, including board.....                                                                                                                                                                                     | 115 00       |
| Winchman—20 days at.....                                                                                                                                                                                            | 174 00       |
| Per month, including board.....                                                                                                                                                                                     | 116 00       |
| Quartermast—20 days at.....                                                                                                                                                                                         | 174 00       |
| Per month, including board.....                                                                                                                                                                                     | 116 00       |
| Deck hand—20 days at.....                                                                                                                                                                                           | 165 00       |
| Per month, including board.....                                                                                                                                                                                     | 110 00       |
|                                                                                                                                                                                                                     | \$ 457 00    |
| Stevedoring (averaged over a period of 4 months).....                                                                                                                                                               | 425 24       |
| Fuel oil—27 days—194 barrels. Average monthly consumption of fuel oil covering previous six months period                                                                                                           | 1,390 00     |
| Fuel oil consumed during the 27 days in question .....                                                                                                                                                              | 800 65       |
|                                                                                                                                                                                                                     | 590 00       |
| Balance—Credit .....                                                                                                                                                                                                | 590 00       |
|                                                                                                                                                                                                                     | \$1,472 24   |
|                                                                                                                                                                                                                     | \$ 7,977 76  |
| 8. Loss of Trade on <i>Island Prince</i> , scheduled run through interruption of scheduled service (substitute vessels unable to serve all points on this run, no scheduled voyage, January 1st to April 30th)..... | \$ 22,231 11 |
| 9. Loss of profits S.S. <i>Alaska Prince</i> while serving as substitute vessel on <i>Island Prince</i> scheduled run (estimated) .....                                                                             | 5,000 00     |
|                                                                                                                                                                                                                     | \$ 54,223 43 |
| Less allowance for possible delays and trading conditions .....                                                                                                                                                     | 4,486 77     |
|                                                                                                                                                                                                                     | \$ 49,740 66 |
| Claim limited by writ to.....                                                                                                                                                                                       | \$ 46,986 78 |

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The learned Registrar allowed the amounts claimed under heads 1 to 7. Under head 8 he allowed \$5,000.00 and disallowed the rest; and he disallowed the whole of head 9. The appeal is brought with respect to these disallowances.

The owning Company had two steamers, viz., the *Island Prince*, 123 feet long, 11 feet mean loaded draft (11½ feet max. draft) and a carrying capacity of 500 tons; and the

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Alaska Prince, 192 feet long, 12 feet mean loaded draft (15 feet max. draft) and a carrying capacity of 750 tons.

Following the accident the *Island Prince* was under repair from 9th December, 1948, to 5th January, 1949—a period of 27 days. Before the accident she was, and still is, employed on a scheduled voyage from Vancouver to various points on the mainland and Vancouver Island as far north as Alert Bay. This was known as the “logging run”. On these runs she was loaded to about one-half, more or less, of her capacity, and her cargoes consisted of 15 per cent lumber, 15 per cent machinery, 15 per cent trucks and machinery, 25 per cent oil, and 30 per cent general.

Prior to December, 1948, the *Alaska Prince* had been on a run to Prince Rupert, B.C., Alaska and way points; but at the time of the accident she was in drydock, being overhauled, preparatory to making several voyages, during December and January, to the West Coast of Vancouver Island with fish meal and fish oil. This is known as the West Coast run, and was regarded as very profitable business.

The Plaintiffs adduced evidence showing a falling-off of earnings on the part of the *Island Prince* during the early months of 1949, and contended this was due to the interruption of her service and customers’ goods going to other ships. They contended further that by using the *Alaska Prince* to carry out part of the *Island Prince’s* run, the former vessel was deprived of the profits she otherwise would have made on the West Coast run.

When the accident happened the *Island Prince* was at the beginning of one of her scheduled voyages, laden with a normal cargo—rather less than 250 tons. Part of this cargo was shipped to its destination on the *Squamish Queen*, of 150 tons, specially chartered by the owner for that purpose; part was returned to shippers; and part left on board till completion of repairs and, presumably, carried on the first voyage thereafter.

In the period from 9th December to 5th January the *Island Prince* would normally have made four “logging runs”. In the circumstances the first was made by the *Squamish Queen*; two were later made by the *Alaska Prince* and one, the Christmas run, was missed altogether. But

the *Alaska Prince* was not a suitable vessel for this route. With greater draft, it is claimed she could not make the smaller places of call, and moreover she did not have suitable equipment for the run. Nevertheless, the owners put her on this run, but extended her trips to Prince Rupert, and other ports to pick up whatever further cargo might there be available. This seems to me to have been a thoroughly unsatisfactory arrangement which made the worst of all worlds. She should have been left to undertake the alleged profitable business on the West Coast run.

There were other vessels on the "logging run" serving the same ports as did the *Island Prince*; and also on scheduled weekly voyages; notably the *Island King*, owned by the Waterhouse Company, and equipped like the *Island Prince*; and the *Chelosin* owned by the Union Steamship Company. The former sailed every Thursday night and the latter every Monday. So far as I can ascertain from the evidence, there was nothing to hinder the *Island Prince's* cargo then on board, and also the cargoes likely to be carried on the ensuing three weekly trips, being transhipped in one or both of these vessels; for they, too, sailed only partially loaded. The reason why this was not done is stated many times in the evidence. One passage from the testimony of Clark will suffice. Replying to a question by the Registrar as to why this was not done, he said:—

We would have been practically turning our business over to our competitors. We would have been helping him to take it away from us, if we turned the business over to the Waterhouse Company . . .

We would not have any business if we did that two or three times. They (the shippers) would see their Bill of Lading and accept the bill and say 'The B.C. Steamship is not running any more.'

It is clear that they refrained from so transshipping because of fear of losing their business to the other companies. It was this "fear" that was the direct cause of whatever loss (if any) in the shape of decreased subsequent earnings they may have suffered; it was not the collision with the bridge. This "fear" was not reciprocal, for Clark also testified that when the Waterhouse Company had an excess of cargo for the West Coast run, they did not hesitate to approach him to carry some of it. This is how he expressed it:—

I am quite certain that the Waterhouse Company would have been very glad to have given us a lot of their surplus tonnage when they had to go and employ a foreign vessel.

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and later

Waterhouse tried to see if we were available and when we were not available he secured the American boat.

I do not think the fear of losing some of their business is a good ground for failing to trans-ship on these other vessels on the same run. They could quite well have remained prominently before their shippers by issuing their own Bills of Lading, as was submitted by Mr. Owen for the defendant, without contradiction. And the day or two's alteration in the scheduled runs could not have made any difference. It may be noted that on the "accident trip" the *Island Prince* was one day late on her own scheduled time for sailing. I am of opinion that by doing so they would have retained, perhaps with added prestige, the respect of their own customers, and their business would have been on hand on 5th January, 1948, when the *Island Prince* was ready to resume the service.

Nor is it clear on the evidence that they could not have chartered other vessels. The *Squamish Queen* (10th to 13th December) took part of the "accident trip's" cargo. The rest of that particular cargo could have been trans-shipped as above mentioned. The Waterhouse Company seem to have had their S.S. *Eastholme* (200 tons capacity) available for charter on Monday 13th December. She could have made that week's trip, with perhaps some help from the scheduled vessels on the run. For the third and fourth trips, there is nothing to show why they could not have chartered an American ship (all else failing) as did the Waterhouse Company for the West Coast run. So that either by trans-shipping the whole, as first mentioned, or by chartering, as now suggested, they could have delivered their cargoes substantially on scheduled times, and no question of subsequent losses due to interrupted service would have arisen.

Since loss of actual profits was allowed for under head 7, the claim under head 8 is really one for loss of good-will. I am far from satisfied that there was any real loss, and that the general falling-off experienced after the *Island Prince* resumed operations was not due to the bad weather at the time, which would affect logging operations. Certainly any allowance that I might make under head 8 would not exceed the \$5,000.00 that the Registrar allowed.

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I think the Registrar was quite right in holding that head 9 was too remote. There was no tangible basis for the claim; the *Alaska Prince* had contacts but no contracts. Moreover, I think this claim duplicates head 6, which was allowed on the basis of the vessel's earning power. The plaintiff claims \$9,800.00 for the value of a vessel that was at all times available for use, but which in actual use only earned \$1,062.30. If it were so valuable at its own work as was claimed, clearly it should never have been taken off that, and put to earning a paltry (by comparison) \$1,062.30. I think the plaintiff must bear the result of its own bad judgment in making its dispositions and cannot charge them up to the defendant.

One other point remains: The plaintiff claims interest at 5 per cent from date of judgment. This was conceded by the defendant. This claim was not put forward on the reference, so its allowance now will not affect the matter of costs.

The appeal is dismissed. The plaintiff will have its costs of the reference; the defendant its costs of this appeal.

Judgment accordingly.

BETWEEN:

KING FEATURES SYNDICATE, } PLAINTIFFS;
INC., et al..... }

1950
Feb. 1
May 3, 4

AND

BENJAMIN H. LECHTER,..... DEFENDANT.

Copyright—Infringement—Copyright Act, R S.C., 1927, c. 32, ss. 2(j), 3—Title as subject matter of copyright—"Infringing"—The Unfair Competition Act, 1932, 22-23 Geo. V, c. 38, s. 3(b) 52—Passing off—Plaintiffs' mark not registered in Canada—Registration of defendant's mark obtained by means of a false representation expunged.

Plaintiff King Features Syndicate Inc is owner of the Canadian Copyright in a well-known comic strip consisting of drawings and text, the copyright extending to both. The most widely known character in the comic strip is "Popeye" and that word has been used at times as the title of the strip. Defendant is the registered owner in Canada of the trade mark "Popeye".

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Plaintiffs allege that defendant, a wholesale and retail dealer in watches and jewellery carrying on business in Montreal, P.Q., without the authorization or consent of plaintiffs in 1948 was advertising and selling in Canada watches bearing on their dials reproductions of the characters in the above mentioned comic strip and that such were advertised and sold as "Popeye" watches.

In an action for infringement of plaintiffs' copyright defendant admitted that the plaintiffs were the owners or licensees of the four characters so reproduced on the dials of defendant's watches and that the reproduction of such characters on his watches infringed plaintiff's copyright in such characters. The Court found that in addition to this admission the use of the word "Popeye" in connection with such characters constituted an infringement of plaintiffs' rights. The Court also found that the evidence did not establish that the plaintiffs—or any of them—had acquired any common law trade mark rights in the word "Popeye" in Canada and they had no registered trade marks for that word in Canada.

Held: That the very limited use of the dial in plaintiffs' "Popeye" watch does not constitute such distribution of the wares in Canada as to bring the name "Popeye" used in connection therewith, within the ambit of s 3(b) of The Unfair Competition Act, 1932.

- 2 That mere intent to deceive is not enough, there must be grounds of apprehending actual deception, and plaintiffs are not entitled to restrain defendant from using the trade mark "Popeye" unless that word be used in association with the characters or literary work in which plaintiffs have a copyright, or a copy or a colourable imitation thereof.
3. That since the entry in the register of trade marks does not accurately express or define the existing rights of the defendant as there was no user by him prior to registration it should be expunged.

ACTION for infringement of copyright.

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

Hazen Hansard, K.C. and *André Forget* for plaintiffs.

Christopher Robinson, K.C. for defendant.

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

CAMERON J. now (February 1, 1950) delivered the following judgment:

In this matter the plaintiff, King Features Syndicate, Inc.—a New York corporation—is the owner of the Canadian copyright in the well-known comic strip entitled at various times "Thimble Theatre," "Thimble Theatre

Starring Popeye,” and “Popeye.” The strip consists of drawings and text and the copyright extends to both. The said copyright was first registered in Canada on May 29, 1934. Further registrations were obtained at weekly intervals as the comic strip was published, the last of such registrations being effected on the 27th of April, 1936. The material so registered included a great many drawings and representations of the characters in the strip including “Popeye”, “Olive Oyl”, “Wimpy”, and “Sweetpea”. The Hearst Corporation—the second named plaintiff—is made a party due to the fact that when it assigned the copyright to King Features Syndicate, Inc., in 1943, it retained an exclusive licence therein, subject to the terms of the contract dated December 31, 1943. The third named plaintiff—Harman Watch Company, Inc., on June 3, 1947, received a licence from the Hearst Corporation to reproduce the characters of the said comic strip and to utilize the names of the said characters in connection with the sale of watches *inter alia* throughout the United States, Canada and Mexico; that licence renewed a former agreement of a similar nature date 24th January, 1944, between the Hearst Corporation, Inc., and Harman Watch Corporation—then a partnership.

The defendant carries on business at Montreal as a wholesale and retail dealer in watches and jewellery. It is alleged that without the authorization or consent of the plaintiffs, the defendant in 1948 was advertising and selling in the United States and Canada watches bearing on their dials reproductions of the characters “Popeye”, “Olive Oyl”, “Wimpy” and “Sweetpea”, and the word “Popeye”, and that such watches were advertised and sold as “Popeye” watches.

The plaintiffs claim a declaration that the reproduction by the defendant of the drawings representing the characters from the said comic strip on watches, advertising matter, packages and the like, and the use of the names of said characters in connection with the advertising and sale thereof constitute an infringement of the plaintiff’s copyright; an injunction, damages or an accounting of profits, and the delivery up for destruction of all infringing watches, containers, packages, advertising and other literature. They also ask for an order directing the Registrar of

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Trade Marks to expunge from the register, Registration No. 81 N.S. 21020, purporting to be a registration by the defendant of the word "Popeye" as a trade mark for watches.

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It may be noted at once that there is no evidence that the defendant sold or advertised his "Popeye" watches other than in Canada.

Cameron J.

I think it is clear, also, that in considering the rights of the plaintiffs it is necessary to limit such consideration to such rights as may be vested in King Features Syndicate, Inc., or which by reservation or assignment from King Features Syndicate Inc., have become vested in the other two plaintiffs, the latter being mere licensee of King Features Syndicate, Inc.

The primary right of the plaintiffs, King Features Syndicate, Inc., in its copyright is defined in section 3 of the Copyright Act, R.S.C. 1927, c. 32 as amended.

the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever.

That right extended to its licensees.

After some years of planning and preparation the Harman Watch Company delivered the first of its "Popeye" watches to its dealers in the early part of 1948. Exhibit 47 is a sample of that watch. Its dial bears reproductions of the four characters "Popeye", "Wimpy", "Olive Oyl" and "Sweetpea", the figure "Popeye" being much the largest of the four characters. The word "Popeye" does not appear thereon but the words "King Features Syndicate" appear at the bottom of the dial.

In August, 1948, the defendant commenced to advertise and sell watches of which Exhibit 1 is a sample. The dials thereon were prepared to his order by another firm, but do not bear the name of any manufacturer or vendor. Each of the dials, however, has on it a perfect reproduction in miniature of the four characters which I have named; and, except that it bears the word "Popeye" and does not bear the words "King Features Syndicate", is identical throughout with the dial put out by the Harman Watch Company—Exhibit 47. The reproduction of Exhibit 47 in Exhibit 1 is so perfect and complete that—as stated by one witness—Wimpy's whiskers in each case are made up of exactly nine hairs.

After all the evidence had been submitted, counsel for the defendant admitted that the plaintiffs were the owners or licensees of the copyright in the four characters so reproduced on the dials of the defendant's watches (Exhibit 1) and that the reproduction of such characters on his watch did infringe the plaintiff's copyright in such characters.

This admission of infringement, however, is limited to the reproductions of the four characters on watch dials similar to those in Exhibit 1. The plaintiffs, however, submit that the use of the word "Popeye" in connection with the said characters, one of which is the character known as "Popeye" or "Popeye the Sailor man", is also an infringement of their copyright. "Popeye", as I have said, has been used at times as the title of the plaintiff's comic strip but is also the name of one of the characters in the strip, perhaps the one most widely known.

The broad principle is that in general a title is not by itself a proper subject matter of copyright; but there may be particular cases when the title is on so extensive a scale or of so important a character as to be a proper subject of protection against being copied. The general principle, however, has been modified in Canada to a limited extent by an amendment to the Copyright Act. By section 2 of the Copyright Amendment Act, 1931, subsection (v) is added to section 2 of the Act. By that amendment "work" shall include the title thereof when such title is original and distinctive." The effect of this amendment was considered in the Privy Council in *Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp. Ltd.*, (1). In that case the plaintiffs claimed copyright in a song entitled "The Man Who Broke the Bank at Monte Carlo," and claimed that the use of those words as the title of a motion picture film infringed their copyright in the musical work. At p. 124 Lord Wright said:

Their Lordships are prepared to assume for purposes of this appeal that the amendment applied to existing copyrights: they will likewise assume that the title was original in the sense that it had not been copied from another work. They are content for purposes of this appeal to adopt the definition given by Maclean J. in *Kantel v. Frank Grant, Nisbet & Auld Ltd.*, (1933) Ex. C.R. 84, though they wish to reserve the question how far that definition can be accepted as sufficient in other cases. It is, however, difficult to define satisfactorily the word "distinctive", since it cannot mean merely that the title is used to identify the particular

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work. In this connection regard must be had to s. 3 of the Act of 1921 which defines copyright as the "right to produce or reproduce the work or any substantial part thereof." The definition (v) does not, in their Lordships' judgment, mean that the title of a work is to be deemed to be a separate and independent "work". Work is to include "the title thereof", that is to say, the title is to be treated as part of the work, provided that it is original and distinctive whatever these words may connote. When that definition is read with s. 3, the result is that to copy the title constitutes infringement only when what is copied is a substantial part of the work. This view would agree in effect with what was said by Jessel M.R. in *Dick v. Yates* in the words quoted above and would apply to a case such as a title covering a whole page of original matter, or something of that nature, but would not justify such a wide extension of copyright as the appellant company has contended for, or the holding of McEvoy J on this point. It is said that so to construe the definition is to treat it as adding nothing to the law. But the definition may have been inserted to settle doubts and to avoid it being said that in no circumstances could a title receive protection. In any event their Lordships do not think that the new definition (v) entitles the appellants to succeed in *this* case.

In the case at bar the evidence establishes that the title "Popeye" was original in that it was the word coined by the plaintiffs or their predecessors in title and had not been copied from any other work; and that it was also distinctive. The defendant's admission that the use of the four characters constitutes infringement of the plaintiff's copyright therein is sufficient, I think, to establish that what the defendant copied was "a substantial part of the work" in which the plaintiffs had copyright. That is sufficient, in my view, to bring the title "Popeye", when used in conjunction with the four characters, within the protection afforded by section 2(v). I find, therefore, that not only was there infringement by the defendant by the reproduction of the four characters as shown in Exhibit 1 (as now admitted by the defendant), but also that the use of the word "Popeye" *in connection with such characters*, constituted an infringement of the plaintiff's rights.

Following a conference with solicitors for the plaintiffs, the defendant says that on September 20, 1948, he discontinued the manufacture and sale of watches with dials such as Exhibit 1. But almost immediately thereafter he advertised, manufactured and sold other "Popeye" watches of which Exhibit 9 is a sample. The dial on that watch has four characters thereon, similarly disposed as in Exhibit 1 and Exhibit 47. The word "Popeye" appears prominently and is so placed that it might be considered as the name of

the watch or, alternatively, as the name of the character on each side of which one-half of the word appears. The plaintiffs allege further that the defendant has no right to use the name "Popeye" on watches; and, secondly, that the characters represented on Exhibit 9, while not identical with the four characters reproduced on Exhibit 47, are so similar thereto that they constitute a substantial reproduction of the plaintiff's work and that their use by the defendant with or without the word "Popeye" should be prohibited.

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The defendant is the registered owner in Canada of the trade mark "Popeye." On September 8, 1945, he applied for its registration as applied to watches, alleging that that word had been used by him on watches since June 1, 1945, to indicate that such wares were sold by him. His application was granted on December 14, 1945, as appears by the Registrar's certificate, Exhibit 13. It must be kept in mind that this is not an action for infringement of trade mark, none of the plaintiffs having registered "Popeye" as its mark in Canada in connection with any wares.

In considering whether the dial in Exhibit 9 constitutes an infringement of the plaintiff's copyright, it is necessary to keep in mind the definition of "infringing" as found in the Act. It is as follows:

Sec. 2. (j). "Infringing," when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act.

That definition is in exactly the same words as section 35(1) of the English Act. In Copinger & James on Law of Copyright, 8th ed., the author says at p. 123.

Various definitions of "copy" have been suggested, but it is submitted that the true view of the matter is that, where the Court is satisfied that a defendant has, in producing the alleged infringement, made a substantial use of those features of the plaintiff's work in which copyright subsists, an infringement will be held to have been committed; if he has made such use, he has exercised unlawfully the sole right which is conferred upon the plaintiff. If this view is correct, it follows that the degree of resemblance between the two works is not in itself the test of infringement but is only one factor in determining whether an unlawful use of the plaintiff's work has been made. For example, assume two cases in which advertising posters resemble the plaintiff's original and that, in the one case in which the resemblance is less close, it is proved aunde that the defendant's artist had the plaintiff's work in front of him and slavishly imitated certain specific features of the design, but, in the other, though the general appearance is closer, the artist is able to establish

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that, though he made use of the plaintiff's basic idea, his execution was quite independent; it is submitted that the former and not the latter would be an infringement.

An inspection of the dial on Exhibit 9 shows that like Exhibits 1 and 47 there are four characters similarly disposed. I do not consider that fact in itself to be of any importance as the plaintiffs had no copyright in all characters or in their disposition on watch dials. The largest figure extends from 12 o'clock on the dial to a point below where the hands are joined and it is also identified by the word "Popeye," one-half of which appears on each side thereof. That figure is not in all respects the same as the character "Popeye" in which the plaintiff has copyright. The bulging cheeks and the well-known pipe are missing, and a red necktie and arms akimbo have been added. But the amended version of "Popeye" still has many of its old characteristics—the bulbous nose, the red cap and the large blue sailor jacket. But above all, the defendant has himself identified the character by the use of the word "Pop-eye." Could anyone doubt that it was intended to be a colourable imitation of the original character? I think not.

Now the defendant gives no explanation as to how he conceived the idea of the characters in Exhibit 9. It appeared immediately after he agreed to discontinue the use of the dial in Exhibit 1. He was thoroughly acquainted with the popularity of all the "Popeye" characters. I have not the slightest doubt that in bringing out the dial in Exhibit 9 he intended to use a character which purchasers without too close a scrutiny would accept as being the original "Popeye," but which he at least hoped would be so dissimilar as to enable him to avoid a suit for infringement. That he was quite prepared to adopt the characters of the plaintiffs is established by his own evidence. When planning the dials to be used in watches such as Exhibit 1, he forwarded copies of the plaintiffs' comic strips in colour to watch makers in Switzerland with instructions to reproduce them accurately. From those firms he procured samples of dials which in turn he submitted to other firms in Toronto; the latter in turn submitted further samples—or the same ones—which he then sent to New York firms. Their samples—or the same ones—were in turn handed over by the defendant to a firm in Montreal which finally turned

out the dials as in Exhibit 1 (and later the dials as in Exhibit 9). That dial, as I have said, except for the use of the name "Popeye," is precisely the same as the plaintiffs' dial on Exhibit 47, so much so that it is admitted by all parties that they must have had a common origin. Without any hesitation whatever, I accept the evidence of the plaintiffs that the dial as in Exhibit 47 was originated entirely by them, Harman working in conjunction with the officials of King Features Syndicate. They said that their original sketch was sent to Switzerland, that the engraver there who had possession of it could not later be discovered for some time; that, therefore, they sent an exact copy of the sketch to another firm in Switzerland which made the dials as in Exhibit 47. I reject entirely the suggestion made on behalf of the defendant that the plaintiffs in some unexplained manner came into possession of his dial. The reasonable inference is that in some manner, one or other of the firms with which the defendant had dealings, came into possession of the sketch originally sent by the plaintiffs to Switzerland and which was lost there. Keeping in mind, therefore, that the defendant has not explained the origin of the dial in Exhibit 9, that the defendant was not above appropriating to his own use the work of the plaintiffs—as shown by the infringement now admitted—that just prior to bringing out Exhibit 9 he had spent money in advertising "Popeye" watches, that the main figure on the dial of Exhibit 9 bears many and substantial resemblances to the original "Popeye," and is, in fact, identified as being the character "Popeye" by the use of the word "Popeye" adjacent thereto, there can be no doubt—in my mind at least—that Exhibit 9 is a colourable imitation of the features of the plaintiff's work in which copyright subsists. In the words of Bayly, J., in *West v. Francis*, (1) and cited with approval by Viscount Maugham in *King Features Inc. v. Kleemann Ltd.*, (2)—it is a copy which comes so near to the original as to give every person seeing it the idea created by the original. The similarity here is sufficiently substantial to constitute *prima facie* evidence of copying; that evidence has not been refuted by any evidence of the defendant to establish that notwithstanding the similarity there was no copying but independent creation; see the

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(1) (1822) 5 B. & Ald. 737.

(2) (1941) 2 A.E.R. 406.

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opinion of Lord Wright at p. 414 in *King Features Inc. v. Kleeman Ltd.*, (*supra*). The defendant has exercised unlawfully the sole right which is conferred on the plaintiffs and should be enjoined therefrom. Moreover, I find that as the copying of the plaintiffs' work was substantial, that the use of that work with the title "Popeye" on Exhibit 9 constitutes an infringement of the plaintiffs' rights for the reasons which I have stated above.

As to the other three characters displayed on the dial of Exhibit 9, I need say but little. They appear to be identical copies of the head only of the main character thereon ("Popeye"), the lower one located at 6 o'clock having the same red sailor cap, and the other two, facing inwardly at 3 and 9 o'clock, having blue caps. They are so dissimilar to the characters in which the plaintiffs have copyright that, when used as characters only, they cannot be held to be an infringement of the plaintiffs' copyright.

Turning now to the question of the use of the title of "Popeye" alone, I must say that in my opinion this question falls to be considered under the trade mark law rather than that applicable to copyright. There is no evidence that the watch put out by the Harman Watch Co. Inc.—or its predecessor—was ever in use in Canada or was known in Canada within the meaning of section 3(b) of The Unfair Competition Act, 1932. The plaintiffs have led evidence intended to establish that about 1935 a watch made by Montgomery Ward & Co. under license from the Hearst Corporation was distributed in Canada and was therefore known in Canada within section 3(b). W. J. O'Neil, Secretary-Treasurer of Paramount Film Services, Ltd., states that about that year his firm received from the parent company—Paramount Pictures Inc. of New York—a small number of watches similar to Exhibit 22 for distribution gratis among his firm's employees in Toronto for advertising purposes in connection with "Popeye" film cartoons, and that he or his family received two or three of them, one of which was still in his possession but was not produced. That watch has but one character, that of "Popeye," and the dial bears the name "Popeye" in red ink adjacent to the figure. There is no evidence that that "Popeye" watch was ever advertised or sold in Canada. I am of the opinion that

the very limited use of that dial in that way does not constitute such distribution of the wares in Canada as to bring the name "Popeye", used in connection therewith, within the ambit of section 3(b).

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The plaintiffs also claim that the defendant has no right to use on his wares in any manner the names of the four characters in which they have copyright, that is the names of "Popeye", "Wimpy", "Sweetpea" and "Olive Oyl." They submit that the defendant did not adopt the trade mark "Popeye" in good faith but as part and parcel of his infringement and in order to obtain for himself a weapon with which to compel the plaintiffs to grant him a license for the production of watch dials bearing those characters. Their contention is that the use of such names constitutes a species of passing off and that the public, by reason of the very extensive use of the "Popeye" strip in magazines, newspapers, comic books, films and radio, and the extensive advertising thereof throughout Canada, the United States and elsewhere have learned to associate the names of the characters with the characters themselves and with the products put out by the plaintiffs, and would therefore be deceived by the defendant's watches bearing the names and would erroneously assume that they were getting the products of the plaintiffs. It is well established that both in Canada and the United States the plaintiffs have licensed the use of the names and characters in the manufacture and sale of a great number of novelties which have been widely distributed. Further, while admitting that there is no copyright in the name as such, they submit that the word "Popeye" is a purely fancy name denoting only the name of the character, and that, having copyright in the character itself (which is admitted) that under copyright law they have such a right in the name itself that no others may use it.

It seems to me that the claims of the plaintiffs under this heading may properly be considered to be one of passing off. I am unable to find anything in the evidence which would indicate that the plaintiffs—or any of them—had acquired any common law trade mark rights in the word "Popeye" in Canada and they had no registered trade

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marks for that word in this country. In my opinion, therefore, their rights in regard to the use of the word must be considered only under the law relating to copyright.

Now under some circumstances, an author may be able to prevent others from using the title of his work. In Copinger & James on Law of Copyright, 8th ed., the author refers to that right on p. 83 as follows:

It will be observed from the foregoing that, although an author has probably no copyright in his title and cannot restrain its use in all cases, he has a valuable right, in that he may be able to prevent its use upon any similar publications, and that this right is akin to that in a trade mark.

At p. 80 he says,

As has been seen there is, in general, no sufficient labour of composition involved in the title of a book to justify its protection as a literary work. But titles of books are in certain circumstances protected from imitation by means of a "passing-off" action.

The action for "passing-off" lies where the defendant has represented to the public that his goods or business are the goods or business of the plaintiff. A defendant may make himself liable to this action by publishing a work under the same title as the plaintiff's, or by publishing a work where title and "get up" so resembles that of the plaintiff as to deceive the public into the belief that it is the plaintiff's work.

And at p. 82 the author refers to a case in which Bacon, V.-C. was of the opinion that to support a claim to restrain the use by another of a name on the ground of it being a quasi trade mark, it was necessary to show that the wares offered for sale were so nearly identical that the use of the particular trade mark or name might mislead unwary purchasers.

Now the publications in which the plaintiffs have copyright were originally those of the "Popeye" comic strip, some of which were registered under the Act and filed as exhibits herein; later they probably acquired an automatic copyright by further publications of the comic strip, comic books, cinema films and radio scripts. But at no time in Canada have any of the plaintiffs used or made known any of their "*published literary work*" in connection with the manufacture, sale or distribution of watches. In commercial circles the use of the word "Popeye" in association with watches was not known in Canada until the defendant's watch went on the market in 1948. The publications of the plaintiffs and the watches of the defendant in the mind of any reasonable person would be quite dissimilar.

Reference may be made to *Derek McCulloch v. Lewis A. May (Produce Distributors) Ltd.*, (1). In that case the plaintiff was a well-known broadcaster under the name "Uncle Mac" and the author of books and periodicals. He alleged that the defendant, trading under the name of "Uncle Mac" in the sale of breakfast cereals, would cause confusion to himself and damage to his professional reputation. Wynn-Parry, J., in a judgment dismissing the action said at p. 64:

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It is of the essence of an action for passing off to show, first, that there has been an invasion by the defendant of a proprietary right of the plaintiff, in respect of which the plaintiff is entitled to protection, and, secondly that such invasion has resulted in damage or that it creates a real and tangible risk that damage will ensue.

It is with the first part of that proposition that I am immediately concerned. It is established beyond argument that under the law of England a man is not entitled to exclusive proprietary rights in a fancy name in vacuo; his right to protection in an action for passing off must depend on his showing that he enjoys a reputation in that name in respect of some profession or business that he carries on or in respect of some goods which he sells. Further, he must show that the acts of the defendant of which he complains have interfered or are calculated to interfere with the conduct of his profession, business, or selling goods, in the sense that those acts of the defendant have led or are calculated to lead the public to confuse the profession, business or goods of the plaintiff with the profession, business, or goods of the defendant. The element of confusion is essential, but the element of confusion necessitates comparison.

And at pp. 66 and 67:

I have listened with care to all the cases that have been cited and upon analysis I am satisfied that there is discoverable in all those in which the Court has intervened this factor, namely, that there was a common field of activity in which, however remotely, both the Plaintiff and the Defendant were engaged and that it was the presence of that factor that accounted for the jurisdiction of the Court.

With those considerations in mind, I turn again to the relief claimed in this action. It is: "An injunction to restrain the Defendants, their servants and agents from selling, offering for sale or advertising puffed wheat or any other product in such a manner as is calculated to suggest that the Plaintiff is responsible for or associated with the production or marketing of such puffed wheat or other product."

Upon the postulate that the Plaintiff is not engaged in any degree in producing or marketing puffed wheat, how can the Defendant, in using the fancy name used by the Plaintiff, be said to be passing off the goods or the business of the Plaintiff? I am utterly unable to see any element of passing off in this case. If it were anything, it were libel, as to which I say nothing. Passing off, in my judgment, it certainly is not. If I were to accede to the Plaintiff's claim I should, as I see it, not merely be

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extending quite unjustifiably the scope of the action of passing off, but I should be establishing an entirely new remedy; and that I am quite unprepared to do.

I therefore conclude that the Plaintiff in this case established no cause of action.

Reference has already been made to the case of *Francis Day & Hunter, Ltd., v. Twentieth Century Fox Corp., Ltd.*

In that case it was held,

That the respondents had not been "passing off" the exhibition of their motion picture as a performance of the song. The thing said to be passed off must resemble the thing for which it is passed off, and the song and the motion picture were completely different and incapable of comparison in any reasonable sense.

I have been referred to an American case, *Paramore v. Mack Sennett, Inc.*, (1). In that case the plaintiff was the author of a poem entitled, "The Ballad of Yukon Jake," and the defendants had made a cinematographic film entitled "Yukon Jake", the plot of which bore no relation to the poem. In enjoining the use of the name and awarding damages, the Court said at p. 68:

Plaintiff here satisfied the requirements I have indicated as necessary to protect his right to the exclusive use of the name "Yukon Jake". His contention is, and the probabilities agree with him in that, that the use of the title "Yukon Jake", attached to a motion picture, even though the picture itself depicted none of the incidents of his story, would affect greatly the salability of his scenario. This for the principal reason that the public, familiar with the poem and its story, would be impelled to view any picture exhibited under the title "Yukon Jake" in the belief that it would portray the characters and incidents in the plaintiff's poem; that upon the exhibiting of the defendant's picture, occurring before plaintiff had sold his scenario, there would no longer be the same demand for a second picture under a title containing the words "Yukon Jake", and the marketability of plaintiff's scenario would thus be proportionately destroyed.

That decision while of interest is not binding on me and would appear to be in conflict with the decisions which I have cited. In any event, it is to be noted that there is a much greater degree of similarity between two literary productions such as a poem and a film story than exists between comic strips and watches.

Counsel for the plaintiffs also cited *Philco Corporation of Canada, Ltd. v. Bialik*, (2). In that case the defendant was restrained from making use of the trade name "Philco" in connection with the manufacture or sale of cravats or neckties at the suit of a competitor having prior rights to

(1) (1925) 9F. 2d 66.

(2) (1946) 5 Fox's Canadian Patent Cases, 139.

that trade mark as applied to radios and other analogous wares. That, however, was entirely a trade mark case, the plaintiffs having various trade mark registrations covering the word "Philco", including certain types of fabrics.

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I have no doubt whatever that the defendant, herein used the trade mark "Popeye" with the intention of indicating that in some way his wares were associated with those of the plaintiffs and thereby to deceive the public. But as stated in *Copinger & James* at p. 81, "mere intent to deceive is not enough, there must be grounds of apprehending actual deception". Applying the principles laid down in the cases I have referred to, I have reluctantly reached the conclusion that on this point the plaintiffs must fail. They are not entitled to restrain the defendant from using the trade mark "Popeye" unless that word be used in association with the characters or literary work in which the plaintiffs have copyright, or a copy or a colourable imitation thereof.

The plaintiffs also ask for an order that the defendant's registered trade mark "Popeye" be expunged from the register. That part of the claim is made under section 52 of the Unfair Competition Act, 1932, which is as follows:

52(1). The Exchequer Court of Canada shall have jurisdiction on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

This application is made on the ground that the registration was made upon a misrepresentation of fact in that in his application therefore the defendant alleged that he had used the mark on watches "since June 1, 1945". The burden of proof, of course, is on the plaintiffs. They rely on the judgment of O'Connor, J., in *Standard Brands Ltd. v. Staley*, (1). In that case the defendant's registered mark was struck out on the ground that he had stated in his application that the mark had been used since a specified date—a statement found to be untrue. It was further held in that case:

(2) That registration under the Unfair Competition Act merely serves to confirm title to a trade mark which has already been established by use, and no trade mark right can be acquired by registration made under the Act before use since valid registration cannot be obtained unless there has been use

(1) (1946) Ex C.R. 615

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It is necessary, therefore, to consider the evidence to ascertain, whether the defendant prior to his application had, in fact, used his trade mark "since June 1, 1945", or at all. The only evidence on this point is that of the defendant himself and I must say at once that I approach the examination of his evidence with very considerable doubts as to his credibility, as will later appear. On his examination for discovery, after being questioned as to the dials on Exhibits 1 and 9 which were not in production prior to July or August, 1948, he was asked whether he had sold any other watches under the trade mark "Popeye" without drawings, and his answer was that he had sold some in the year 1934. Nowhere in his evidence is there the slightest suggestion that between 1934 and July, 1948, he had manufactured, advertised or sold any watches bearing the word "Popeye" on the dial, and on the whole of the evidence I am satisfied that he did not. His statement on his application that he had used the word on watches "since June 1, 1945" is false and registration was granted upon a false and material representation.

However, as I have said, he alleges a user of the word in 1934 or 1935. He states that about that time, having heard that children were interested in watches with dials bearing the word "Mickey Mouse," and having some acquaintance with the character known as "Popeye the Sailor;" he conceived the idea of putting the word "Popeye" on his dials. He says that having some watches on hand, he instructed his assistant Katz to write that word in ink on a number of the dials and later disposed of them. That assistant, though still in the defendant's employment, was not called in corroboration. The whole story, is so vague and uncertain and his evidence in regard to that and other matters is so full of contradictions and evasions, that I am quite unprepared to accept it as the truth. If he had used the word as a trade mark in 1935, why did he not give that date as the date of first user on his application for registration? He had no clear recollection of the exact year in which the watches were made. He was uncertain as to the number and had no records of any sort either as to sales or purchases. He could not give the name of any firms to whom the watches had been sold but stated that they had gone out of business.

If he knew that they had gone out of business I think he would quite clearly know their names. He said on his examination for discovery that some children, whose names he could not recall and whom he had not seen, had asked him to prepare watches of that type, but at the trial he said he got that idea from his nephews and nieces. In his examination-in-chief, he said he had never seen watches that were marked with pen and ink markings on the dial. In cross-examination he stated that on his instructions markings of that type had been made by his assistant on all the "Popeye" watches sold in 1935. Now each of these inconsistencies may individually seem to be but of minor importance, particularly as they refer to events that occurred some twelve or thirteen years ago. But cumulatively they are of such importance as to lead me to the conclusion that the whole evidence of the defendant on this point, quite uncorroborated by any other evidence, is unworthy of belief. But there is another and very important part of his evidence which quite satisfies me that the defendant's evidence is not to be believed. On his examination for discovery he referred to the firm of Cameo Craft in Montreal, the makers of the dials as in Exhibit 1. He said then (no doubt thinking that it was in his interest to do so) that that firm made the drawings for the dials, that he had not given them a drawing from which to work, and that he did not know "where they copied the designs." He said that they submitted the design to him and he approved it. At the trial he admitted in cross-examination that these statements were totally untrue and that he personally had supplied Cameo Craft with one of the dials made to his order by a New York firm, with instructions to reproduce it. His examination for discovery took place within a year of these occurrences, all of which were of a most important nature and must have been within his knowledge at the time of his examination for discovery.

In my opinion, the defendant's story as to the use of the word "Popeye" on his watches in 1935 is a complete fabrication and I reject it entirely. It follows, therefore, that as he had not used the word "Popeye" on watches at any time prior to his application for its registration, that he had no right to apply for its registration. The grant of registra-

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tion was made on that misrepresentation and on the facts now disclosed should not have been granted. The entry in the register does not accurately express or define the existing rights of the defendant and should therefore be expunged.

The plaintiffs, therefore, are entitled to a declaration that the reproduction by the defendant of the drawings representing the characters "Popeye", "Wimpy", "Olive Oyl" and "Sweetpea" on watches, advertising matter, packages and the like, and with or without the use of the names of the said characters, and specifically the reproductions of the said characters or any of them with the name of such characters on the dials of watches as Exhibit 1 and Exhibit 9 constitute an infringement of the plaintiffs' rights. The plaintiffs are also entitled to an injunction permanently restraining the defendant from further infringement thereof.

The plaintiffs also ask for damages or an accounting of profits as they may elect. It should be pointed out that on January 19, 1949, the solicitors for the defendant gave notice that the defendant had paid into Court \$450.18 and alleged in the notice "that that sum is enough to satisfy the plaintiffs' claim for damages for infringement of the plaintiffs' rights in the drawings forming the subject matter of the copyright referred to in these proceedings, but denies liability therefor."

The plaintiffs rejected the offer contained in such notice, alleging that the notice and the payment-in were irregular, null and void. The plaintiffs have succeeded in certain of their claims other than that for which payment-in was made.

The plaintiffs are entitled to a reference to the Registrar of this Court to ascertain and report the amount of the damages sustained by the plaintiffs by reason of the defendant's infringement; or, alternatively, to take an accounting of the profits made by the defendant by the sale of such infringing watches, and to report the same, as the plaintiffs may elect.

The plaintiffs are further entitled to the usual order for delivery for destruction of all infringing watches such as Exhibit 1 and Exhibit 9, together with infringing containers, packages, advertising and other literature.

There will also be an order directing the Registrar of Trade Marks to expunge from the register the registration of the trade mark "Popeye", granted to the defendant on December 14, 1945, as No. 81 N.S. 21020.

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The defendant must also pay the taxed costs of the plaintiffs up to and including the entry of judgment. The costs of the reference and of any subsequent proceedings will be reserved to be disposed of following the report of the Registrar.

The monies paid into Court by the defendant will be applied in payment of the plaintiffs' costs and of any amount which the plaintiffs may be found entitled to following the reference. Should there be any surplus after payment thereof, the balance will be paid out to the defendant.

If the form of the order cannot be agreed upon, the matter may be spoken to.

Judgment accordingly.

BETWEEN:

ALFRED CURZON DOBELL,.....APPELLANT;

AND

THE MINISTER OF NATIONAL }
REVENUE, } RESPONDENT.

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Revenue—Income Tax—Gift Tax—An Act to amend the Income War Tax Act, 1917, St. of C. 1926, c. 10, s. 7—Income War Tax Act R.S.C. 1927, c. 97, ss. 32(2), 38—Marriage contract wherein separation as to property is stipulated—Donation inter vivos and irrevocable by a future consort to the other—Arts. 755, 819, 821, 1257, 1422 cc.—Grant in fulfilment of donation not a transfer to evade taxation and not subject to provisions of s. 32(2) of the Income War Tax Act—Appeal allowed.

By his marriage contract entered into on June 7, 1911, wherein separation as to property was stipulated, D., domiciled in the Province of Quebec, gave to his future wife, by donation *inter vivos* and irrevocable, a sum of \$10,000 and as security for said sum he mortgaged and hypothecated an immovable property. D. paid his wife a first instalment and in 1943 the balance, namely \$9,000, by handing over to her Dominion of Canada Victory bonds and Province of Quebec bonds and obtained from her a release and discharge of the mortgage.

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D. was assessed for the year 1943 in respect of income derived from the said bonds and in respect of gift tax, and from such assessments he appealed.

Held: That the grant made by Dobell to his future wife was not a transfer to evade taxation: it is not subject to the provisions of s. 32(2) of the Income War Tax Act, R.S.C. 1927, c. 97. The grant was effected in fulfilment of the donation which Dobell had made and had the right to make to his wife by his marriage contract. *Molson et al v. The Minister of National Revenue* (1937) Ex. C.R. 55 followed. *David Fasken Estate v. The Minister of National Revenue* (1948) Ex. C.R. 580 disapproved.

APPEAL under the provisions of the Income War Tax Act.

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

Roger Letourneau, K.C. for appellant.

Fernand Choquette, K.C. and *Edouard Belleau, K.C.* for respondent.

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

ANGERS J. now (June 6, 1950) delivered the following judgment:

In his statement of reasons for appeal the appellant says:

the appellant's marriage contract is valid as to form, having been made and executed in accordance with the law of England where it was actually entered into and signed;

the domicile of the husband at the date of the marriage and the matrimonial domicile of the parties being in the Province of Quebec, the rights and obligations deriving from the marriage contract are to be governed by the law of the said province;

according to the law of the Province of Quebec, gifts *inter vivos* of present and future property can be validly made in a marriage contract (articles 778, 819 and 1257 c.c.) and a donor may stipulate for the return to him of the property given, in the event of the donee dying before the donor (article 779 c.c.).

under the law of the Province of Quebec, the legal effect of a gift *inter vivos* is to divest the donor by mere consent of the parties and without the necessity of delivery of his ownership in the property given and to vest the donee with the said ownership (articles 777 and 795 c.e.).

the gift from the appellant to his wife of the sum of \$10,000 was a valid and irrevocable disposition *inter vivos*, duly accepted by the donee and fully and effectively made and completed long before the coming into force of the Income War Tax Act;

from the date of the marriage contract, namely June 7, 1911, the appellant's wife became the legal owner of the property given, viz. the sum of \$10,000, the precarious possession of which only remained with the appellant, who, from that date, became legally indebted to his wife for the said sum;

the payment by appellant to his wife, in 1943, of the sum of \$9,000, in order to be valid under the law of the Province of Quebec, must necessarily be related to the marriage contract of 1911 and both the said contract and the said payment form one complete non-severable transaction which cannot be governed by The Income War Tax Act of 1917 and the amendments thereto;

since the coming into force of paragraph 2 of section 32 of The Income War Tax Act there has been no transfer of property from the appellant to his wife, either with or without intent to evade taxation, and there could have been no valid transfer of property from him to her under the law of the Province of Quebec;

since the coming into force of section 88 of The Income War Tax Act and amendments thereto there has been no transfer of property from the appellant to his wife "by way of gift or donation";

a similar situation arose in 1933, after the death of *Kenneth Molson* and both the Exchequer Court and the Supreme Court of Canada held that the payment of a debt arising from a valid gift made by marriage contract was not a transfer of property within the purview of paragraph 2 of section 32 of the Income War Tax Act;

wherefore the appellant submits:

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that he is not liable to income tax in respect of the income derived, since 1943, from the Dominion of Canada and Province of Quebec bonds handed over to his wife as payment of his debt to her;

that he is not liable in any way for the gift tax imposed by section 88 of the Income War Tax Act in respect of the value of the said bonds;

that the two assessments hereby appealed from, dated October 9, 1946, for \$122.47, and October 29, 1946, for \$446.24, should be withdrawn and cancelled.

The Minister of National Revenue, through his Assistant Deputy Minister, on January 16, 1948, affirmed the said assessments on the ground that income tax was correctly assessed in accordance with subsection 2 of section 32 of The Income War Tax Act and a gift tax in accordance with section 88 thereof and "by reason of other provisions of The Income War Tax Act".

A notice of dissatisfaction, dated February 5, 1948, was mailed by the appellant to the Minister in compliance with the provisions of section 60 of The Income War Tax Act.

After reiterating the facts recited in the notice of appeal and reaffirming the statutory reasons for appeal therein contained, the appellant adds:

that the transfer of property involved herein was legally effected and accepted prior to his marriage with Helen Maffett, so that there never was and could not be a transfer of property between consorts as contemplated by subsection 2 of section 32 of the Act;

that the payment by him to his wife, in 1943, of \$9,000, mentioned in the notice of appeal, is not a transfer of property within the meaning of said subsection 2 of section 32, nor is it a transfer by way of gift or donation within the meaning of section 88.

In his reply the Minister of National Revenue, through the Deputy Minister of National Revenue for Taxation, denies the allegations in the notice of appeal and notice of dissatisfaction in so far as incompatible with the statements contained in his decision and affirms the assessment as levied.

The attorney for appellant produced a copy of a deed of deposit done and passed before W. Noble Campbell, Notary Public, on July 31, 1911, and of an indenture of agreement or contract of marriage entered into between Alfred Curzon Dobell, of St. Colomba of Sillery, Province of Quebec, and Helen Maffett, of the City of Kingston, County of Dublin, Ireland, on June 7, 1911; a copy of those two documents was marked as exhibit 1. The marriage contract is valid according to article 7 c.c.; its validity is admitted in paragraph 1 of the defence. The matrimonial domicile of appellant and his wife has always been in the Province of Quebec.

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Clause 1 of the marriage contract stipulates separation of property; it reads thus:

That there shall be no community of property (communauté de biens) between the said intended consorts, any law, usage or custom of the said Province of Quebec or of any other Province, State or Country to the contrary notwithstanding, and the said Alfred Curzon Dobell and Helen Maffett shall be separate as to property (séparés de biens) and the property now belonging or which may hereafter belong or accrue to either of them shall be and continue the sole and distinct property of each respectively, and neither of them shall be liable for the debts of the other.

Clause 6 relating to the donation of the sum of \$10,000 is worded as follows:

In further consideration of the renunciation aforesaid and of the Love and Affection which he beareth towards her, the said Alfred Curzon Dobell did and doth hereby give and grant unto the said Helen Maffett accepting thereof the sum of Ten thousand dollars (\$10,000) payable from time to time in and by instalments at the option of the said Alfred Curzon Dobell as his means shall permit, during the continuation of the said intended marriage, and which said sum of Ten thousand dollars shall be a first claim upon the following described property of the said Alfred Curzon Dobell who did and doth hereby for the purpose of securing the said amount and each and every instalments thereof unto the said Helen Maffett, bind, pledge, mortgage and hypothecate unto her the said property, that is to say.

The designation of the property follows; I do not deem it necessary to reproduce it.

Clause 6 then contains this provision:

And the present mortgage is hereby granted as aforesaid in order to secure unto the said Helen Maffett the absolute and undisputed possession of the present gift of Ten thousand dollars which is hereby declared to be made by way of aliment and not liable to seizure for any of the debts of her the said Helen Maffett.

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Clause 7 provides that, in the event of the said Helen Maffett predeceasing her husband without issue of their intended marriage surviving her, all the linen, china and glass ware and the sum of money or the investments representing the same hereby given shall revert to the said Alfred Curzon Dobell in full ownership from the time of the death of the said Helen Maffett.

By deed passed before Yves Montreuil, N.P., on May 4, 1943, a copy whereof was filed as exhibit 2, Helen Maffett declared to have received from the appellant the sum of \$10,000 in full payment of a mortgage for the same amount by the said Dobell in her favour under and in virtue of the marriage settlement dated at Leeds, Yorkshire, England, on June 7, 1911, of which a copy was marked as exhibit 1. The deed states that in consideration of this payment the said Helen Maffett grants a release pure and simple and requests from the registrar of the said registration division the cancellation of the hypothecary inscriptions of the said deed in her favour.

The case is governed by the civil code of the Province of Quebec, particularly articles 754, 755, 819, 821 and 1257.

The donation *inter vivos* of the sum of \$10,000 made by Alfred Curzon Dobell to his future wife Helen Maffett, by their marriage contract, is legal and valid.

Article 755 c.c. defines the gift *inter vivos* thus:

Gift *inter vivos* is an act by which the donor divests himself, by gratuitous title, of the ownership of a thing, in favour of the donee, whose acceptance is requisité and renders the contract perfect. This acceptance makes it irrevocable, saving the cases provided for by law, or a valid resolute condition.

Article 819 c.c. enacts:

Subject to the same rules, when particular exceptions do not apply, future consorts may likewise by their contract of marriage give to each other, or one to the other, or to the children to be born of their marriage, property either present or future.

Article 821 c.c. stipulates that gifts of present property by contracts of marriage are, like all others, subject to acceptance *inter vivos*. It adds that the acceptance is presumed in the cases mentioned in the second section of this chapter, namely Chapter Second.

Article 1257 provides as follows:

All kinds of agreements, may be lawfully made in contracts of marriage, even those which, in any other act *inter vivos*, would be void;

such as the renunciation of successions which have not yet devolved, the gift of future property, the conventional appointment of an heir, and other dispositions in contemplation of death.

Alfred Curzon Dobell and his wife Helen Maffett are separate as to property in virtue of their marriage contract. The wife separate as to property has the full ownership of her property, retains the entire administration of it and has the free enjoyment of her revenues. Article 1422 c.c. stipulates:

When the consorts have stipulated by their marriage contract that they shall be separate as to property, the wife retains the entire administration of her property moveable and immoveable, the free enjoyment of her revenues and the right to alienate, without authorization, her moveable property. She cannot, without authorization, alienate her immoveables, or accept a gift of immoveables.

The marriage contract, as already said, was duly registered.

The donation therein stipulated was unquestionably made in good faith and not for the purpose of evading taxation, as it was effected prior to the coming into force of The Income War Tax Act, 1917, on September 20, 1917.

The claim of the Minister is based upon subsection 2 of section 32 of the said Income War Tax Act (R.S.C., 1927, chap. 97). Prior to the revision of the statutes in 1927 subsection 2 of section 32 was paragraph (b) of subsection 4 of section 4 as enacted by 16-17 Geo. V, chap. 10. Subsection 2 of section 32 and paragraph (b) of subsection 4 of section 4 are literally the same and read thus:

Where a husband transfers property to his wife, or vice versa, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

It seems to me evident that the object of subsection 2 of section 32 is, as, before the revision of the statutes in 1927, the object of paragraph (b) of subdivision 4 of section 4 was, to tax in the hands of transferor property transferred for the purpose of evading taxation.

The grant made by Alfred Curzon Dobell to his future wife was not a transfer to evade taxation and it is not, in my judgment, subject to the provisions of subsection 2 of section 32 of the Income War Tax Act. It was effected by said Dobell in fulfilment of the donation of \$10,000 which he had made and had the right to make to his wife by his marriage contract.

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Counsel for appellant relied on the case of *Molson et al. v. The Minister of National Revenue* (1). The material facts in that case were very similar to those existing in the present one. The testamentary executors of one Kenneth Molson, of Montreal, appealed from the assessments dated April 11, 1933, whereby additional taxes were levied against the estate for the years ending December 31, 1925 to 1931 inclusive, the said assessments having been, as usual, affirmed by the Minister of National Revenue. The head note fairly accurate and comprehensive contains, after a short recital of the facts, this summary of the decision:

Held: That the conveyance made by Kenneth Molson to his wife was not a transfer to evade taxation; it was made in fulfilment of his marriage contract and from the date of transfer he had no further interest in the shares transferred to his wife and was no longer liable to taxation on the income derived therefrom.

The Minister appealed; the appeal was dismissed (2).

Counsel for respondent pointed out that four members of the Supreme Court had not expressed any opinion on the question set forth in the judgment *a quo* and that Cannon, J. alone had dealt with it. I do not think that this can affect the merit of the judgment appealed from, if merit there be. The appeal of the executors was allowed and the assessments set aside.

The reasons of Duff, C.J., Davis and Hudson, JJ. are summed up in the abstract of the judgment, which reads in part as follows:

Sec. 32 of c. 97, R.S.C., 1927, had not the effect of making M. liable to be taxed on the income derived in 1930 from the property transferred by him to his wife in 1925, in the circumstances mentioned, because s 32, as it stands in the Revised Statutes, can have no application to properties transferred prior to the original enactment of it in 1926.

Cannon, J., in his notes, after relating the facts, expresses the following opinion (p. 224, in fine):

Prior to the institution of the appeal, it was agreed between the parties that the decision of the Exchequer Court with reference to the notice of assessment No. 88893 for the taxation period for 1930 shall apply to and include six similar notices of assessment, all bearing date the 11th April, 1933, and covering the other taxation periods included from the 23rd March, 1925, to the 31st December, 1931.

For that period of 1930, we must apply to the above facts parag. 2 of sec. 32, R.S.C., 1927, c. 97, which says:

(1) (1937) Ex. C.R. 55.

(2) (1938) S.C.R. 213.

(Text of paragraph 2 of section 32, R.S.C. 1927, chap. 97 quoted)

I take it that the "transfer of property" means and contemplates a valid and real transfer. This section, when property is transferred gratuitously between husband and wife or vice versa, cannot apply to consorts governed by the Quebec law . . .

(Article 1265 c.c. referred to)

In order to favour and encourage marriages, article 1257 of the Code says:

All kinds of agreements may be lawfully made in contracts of marriage, even those which, in any other act *inter vivos*, would be void; such as the renunciation of successions which have not yet devolved, the *gift of future property*, the conventional appointment of an heir, and other dispositions in contemplation of death."

Article 778 reads as follows:

Present property only can be given by acts *inter vivos*. All gifts of future property by such acts are void, as made in contemplation of death. Gifts comprising both present and future property are void as to the latter, but the cumulation does not render void the gift of the present property.

The prohibition contained in this article does not extend to gifts made in a contract of marriage.

Both litigants have considered the transfer as valid and binding on the parties. It appears from the above quotations that, in order to be valid and binding, the transfer made in 1925 must necessarily be related and linked to the ante-nuptial contract of March, 1913, whereby was created the obligation and indebtedness of the future husband to his future wife, and the deed of conveyance of the 28th March, 1925, which evidences the payments, satisfaction and discharge of this pre-nuptial obligation cannot be considered apart from the other, as they must, to be valid and legal under the law of Quebec, form but one complete non-severable transaction. The legislation which is now sought to be applied originated in 1917, years after the ante-nuptial contract; and subsection 4 of section 4 of 7 & 8 Geo. V, c. 28, applied only to a person who, "after the first day of August, 1917, has reduced his income" by the transfer of any movable or immovable property to such person's wife or husband, as the case may be, if the Minister was satisfied that such transfer or assignment was made for the purpose of evading the taxes imposed under the Act.

I deem fair to note incidentally that my judgment in this case was disapproved by the President of the Court in *The Executors of the estate of David Fasken and The Minister of National Revenue* (1), as was also that of the Supreme Court. With due deference, I must say that I adhere to my opinion.

In the case of *The Minister of National Revenue v. National Trust Company Limited* (2) an appeal was made

(1) (1948) Ex. C.R. 580.

(2) (1946) Ex. C.R. 650.

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by the company from an item in an assessment under the Dominion Succession Duty Act, 4-5 Geo. VI, chap. 14, as amended. The item in question consisted of certain securities in a trust fund established by a deed of settlement dated December 8, 1930, to take effect on January 1, 1931, between one Edward Rogers Wood, referred to as the settlor, and F. Fisher and Hastie as trustees and the daughter of the settlor, Mildred P. S. Fleming, referred to as the donee. The deed of settlement was amended on February 1, 1937. The Dominion Succession Duty Act was assented to on June 14, 1941. The settlor died on June 16, 1941.

In an Act to amend the Dominion Succession Duty Act, 6-7 Geo. VI, chap. 25, assented to on August 1, 1942, there is a clause relating to the application of the Act which reads thus:

11. The provision of this Act shall apply retrospectively to successions derived from persons dying on or after the fourteenth day of June, one thousand nine hundred and forty-one.

O'Connor, J., in his reasons for judgment, stated that the Dominion Succession Duty Act must be considered in the form in which it stood at the date of the settlor's death.

The subject matter of the tax is obviously not the same as in the case now pending and the law applicable thereto is different. The underlying principle however is similar and for this reason I believe that the judgment of O'Connor, J., is relevant. It was affirmed by the Supreme Court (1).

In the matter of *The Royal Trust Company et al. and The Minister of National Revenue* (2) the headnote of the judgment of Cameron, J., fully comprehensive, reads as follows:

By an antenuptial contract dated May 25, 1916, F. obligated himself *inter alia* during the existence of his intended marriage to D. to pay to her the sum of \$20,000 for her own use and enjoyment. F. and D. were married on June 1, 1916. F. died on April 23, 1943, predeceasing his wife. By his will he had directed his executors to pay to his wife any indebtedness remaining unpaid under the terms of the marriage contract. The executors claimed a deduction from succession duties of the said sum of \$20,000, none of which F. had paid to his wife during his lifetime. This deduction was disallowed by the respondent and the executors appealed to this Court.

(1) (1949) S.C.R. 127, 131.

(2) (1948) Ex. C.R. 34.

Held: That any property transferred, settled or agreed to be transferred or settled in consideration of marriage, prior to April 29, 1941, is not a succession within the meaning of the Dominion Succession Duty Act.

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2. That the bare possibility of future rights to community property and to dower, in non-existing estates, is not a subject of value at the date of an antenuptial contract, and the release of such a possibility is not one "for full consideration in money's worth" within s. 8(2) (a) of the Dominion Succession Duty Act.

The judgment of Mr. Justice Cameron was affirmed by the Supreme Court (1).

The summary of the latter judgment, fairly exact and complete, is thus worded:

By antenuptial contract made in 1916, the husband obligated himself during the existence of his intended marriage, to pay his wife \$20,000, in consideration of her renunciation of community and dower. This sum remained unpaid at the husband's death in 1943. His executors claimed to deduct this from the value of his estate for the purpose of the Succession Duty Act of the Dominion. The deduction was disallowed by the Minister but restored by the Exchequer Court.

Held: (Kerwin J. dissenting), that the agreement did not fall within the definition of "succession" in s. 2(m) of the Dominion Succession Duty Act.

Held, further, (Kerwin J. dissenting), that property transferred or agreed to be transferred in consideration of marriage, prior to April 29, 1941, is not deemed to be a "succession" under s. 3 (1) (j) of the Act.

Per The Chief Justice and Taschereau J.: The renunciation of community and dower is a "consideration in money or money's worth" within the meaning of s. 8(2) (a).

Per Kerwin, J. (dissenting): As the widow became entitled upon the husband's death, it is a "succession" within s. 2(m) of the Act. It is not a debt under s. 8(2) (a), because it was not created "for full consideration in money or money's worth".

The notes of Taschereau, J., on pages 731 and 732 are material and to the point.

See also *Connell v. Minister of National Revenue* (2).

The report discloses that prior to his marriage the appellant transferred certain securities to trustees for his future wife and that by a marriage settlement he directed the trustees to allot shares to her immediately after the marriage and to hold other securities in trust with the income thereof to be paid to her during her lifetime. The Minister of National Revenue assessed the appellant on the income received by his wife from such securities. It was held (*inter alia*):

That a transfer of securities by a taxpayer to trustees for his intending wife with instructions in a marriage settlement, executed prior to the marriage, that immediately after the marriage certain shares should be

(1) (1949) S C R. 727.

(2) (1946) Ex. C R. 562.

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transferred to his wife and other securities held in trust with the income to be paid to her for life is not a transfer of property by a husband to his wife within section 32(2) of the Income War Tax Act and the taxpayer is not liable to income tax on the income derived by his wife from such securities.

The following observations of the President are relevant (p. 567):

The assessments of the appellant for the income received by his wife from the securities referred to can be supported only if it can be shown that it was income derived from property transferred by a husband to his wife. In order that the Minister may bring such income within the letter of the law, so that the words of section 32(2) may reach it, he must show that the dispositions by the appellant of the securities referred to were transfers of property from a husband to his wife. The only kind of transfer of property that is caught by section 32(2) is a transfer by a husband to his wife, or vice versa, that is to say, a transfer between spouses. At the time of the transfer the transferor and the transferee must be married to one another and the rights to the transferred property must pass to the one spouse by the transfer from the other. Unless a disposition of property meets these requirements it is not within the letter of the law as expressed by section 32(2) and the income derived therefrom is not reached by its words.

Reference may be had beneficially to *Mignault, Droit civil canadien*, vol. 4, p. 196, and vol. 6, p. 139; *Billette, Traité de Droit civil canadien*, vol. 1, p. 7; *Viger and Kent et al. and Lecavalier and Trudel* (1); *Morin and Bédard and Hamel et al.* (2); *Denis and Kent & Turcotte and Lafontaine and Lynn* (3); contra, *Page v. Beauchamp & Beauchamp* (4).

I do not think that the validity of the clause stipulating reversion in favour of the donor in case of the predecease of the donee is questionable: articles 779 and 824 c.c.; *Mignault*, vol. 4; p. 114; *The Minister of National Revenue and National Trust Company* (*supra*).

Counsel for appellant submitted that the conventional hypothec provided in the marriage contract is valid; in support of his contention he relied upon the judgment in the case of *Morin v. Albert* (5) and the decision of the Court of King's Bench of the Province of Quebec in *Plourde v. Dagenais* (6), reversing the judgment of the Superior Court. No hypothec was constituted in the latter case, which consequently has no pertinence, unless it be inferred

(1) (1888) 16 R.L. 565.

(2) (1889) 17 Q.L.R. 30.

(3) (1900) R.J.Q. 18 S.C. 436.

(4) (1901) 7 R. de J. 337.

(5) (1948) R.J.Q., S.C. 299,

306 et seq.

(6) (1935) R.J.Q. 59 K.B., 335.

that a hypothec was established by the marriage contract. The first case is more to the point; on page 307 we find the following reason in the judgment of Côté, J.:

Il n'y a pas de doute que si la pleine et entière désignation légale avait été insérée au contrat de mariage, aucune discussion sur la validité de l'hypothèque ne pourrait être élevée.

I may say that the validity of the hypothec does not seem to me to have any materiality herein.

After giving the matter my best consideration I have reached the conclusion that the appeal must be allowed and the assessments set aside.

The appellant will be entitled to his costs against the respondent.

Judgment accordingly.

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BETWEEN:

BERT W. WOON, APPELLANT;

AND

MINISTER OF NATIONAL REVENUE, } RESPONDENT.

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Dec. 22

Practice—General Rules and Orders, Rules 95 and 96—General denials—Evasive denials—Specific denials—Pleadings.

Held: That in this case these paragraphs of the statement of defence cannot be deemed general denials of the facts alleged in the statement of claim. They are specific in denying each and every one of the allegations referred to in the specifically named paragraphs of the statement of claim. The appellant is not left in doubt as to what is meant by these clauses in the defence. They mean that he will be required to prove each statement of fact which is so denied.

MOTION to strike out certain paragraphs of the statement of defence—or alternatively for particulars—as contrary to the provisions of Rules 95 and 96 of the General Rules and Orders of this Court.

The motion was heard before the Honourable Mr. Justice Cameron at Toronto.

John Jennings, K.C. for the motion.

G. W. Mason, K.C. contra.

1950_ CAMERON J. now (December 22, 1948) delivered the
 WOOD following judgment:
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 Cameron J. as follows:

5. Denies the allegations set forth in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 thereof.

8. Denies the allegations contained in paragraphs 17, 18, 19, 20, 21, 22 and 23 thereof.

The appellant moves to strike out the statement of defence—or alternatively for particulars—on the ground that the pleading in this form is contrary to the provisions of Rules 95 and 96 of the General Rules and Orders of this Court. These Rules are as follows:

95. *Allegations of fact must not be demed generally.* It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the information, petition of right or statement of claim, but he must deal specifically with each allegation of fact of which he does not admit the truth.

96. *Allegations not to be denied evasively.* When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. And when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.

It is alleged that the clauses are merely general denials of the allegations in the statement of claim, that they are evasive and do not answer the point of substance, and that therefore the appellant and his counsel are unable to understand the issues they will be called upon to meet at the trial “unless and until the respondent sets forth in a proper pleading the facts and circumstances upon which he relies by way of defence to the allegations set forth in the statement of claim.”

I have carefully read the statement of claim and the statement of defence, and in my opinion the facts and circumstances on which the respondent proposes to rely at the trial to support his denial of the allegations in the statement of claim are clearly set forth and should present no difficulty to counsel for the appellant in ascertaining what he is required to approve or to meet at the trial. The respondent makes certain admissions of fact, admits others

with qualifications and corrections as to date, asserts the validity of the assessment now in appeal and concludes with the following paragraph:

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9. With respect to the whole of the Statement of Claim, the Respondent says that on the winding-up, discontinuance or re-organization of the business of Arrow Bedding Limited the Appellant was deemed to have received a dividend of \$78,165 87 in 1944 on the distribution of the property of the said Arrow Bedding Limited in accordance with the provisions of subsection 1 of section 19 of the Income War Tax Act; that therefore the Appellant was correctly assessed for Income Tax under the provisions of the said Act.

I have read carefully all the cases to which I have been referred by counsel for the appellant. In *Merriman v. Diamond* (1), Orde, J., in considering an appeal from the Master, held that a paragraph in the statement of defence reading, "But save as hereinafter expressly admitted denies all the other allegations contained therein and puts the plaintiff to the proof thereof," should be struck out as offending against the provisions of Rule 142 of the Rules of Practice of Ontario (which in many ways is similar to Rule 95 of this Court) in that it was a general denial. In the same proceedings a new statement of defence was delivered, and therein the defendant denied specifically the allegations contained in seven named paragraphs of the statement of claim and put the plaintiff to the proof thereof. The Master allowed this statement of defence to stand and his decision was affirmed by Lennox, J. Notwithstanding certain comments made by Mowat, J., who gave leave to appeal, the Court of Appeal confirmed the order of Lennox, J.

Orde, J., in that case dealt with certain other paragraphs of the statement of defence and at p. 357 said:

Counsel for the plaintiff contended that in answering the allegations of the plaintiff as to the defendant's alleged false and fraudulent statements, it was incumbent upon the defendant to set forth the statements which the defendant is willing to admit or asserts that he did in fact make. But this must depend upon the nature of the defence which the defendant intends to make out at the trial. The burden of proof in an action of deceit is upon the plaintiff, and as a matter of pleading the defendant may make out a sufficient defence if he denies the allegations of the plaintiff in accordance with the Rules. He must not deny generally, which means that, if he denies, his denial must be specific. The real vice of para. 2 is not so much that the denial is of a general character, but that it is evasive.

(1) (1922) O.L.R. 354.

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It appears, therefore, that what the defendant must set forth depends upon the nature of the defence which the defendant intends to make out at the trial. In this appeal the burden of proof is on the appellant and as a matter of pleading the respondent may make out a sufficient defence if he denies specifically the allegations in the statement of claim, without evasion and in accordance with the Rules. If, for instance, one is charged with something which he has not done and with which he has had no connection whatever, the only allegation of fact which he can plead is that he did not do it.

Paragraphs 5 and 8 of the statement of defence, in my view, cannot be deemed "general denials" of the facts alleged in the statement of claim. They are specific in denying each and every one of the allegations referred to in the specifically named paragraphs of the statement of claim. The appellant is not left in any doubt as to what is meant by these clauses in the defence. They mean that he will be required to prove each statement of fact which is so denied.

It may be convenient to consider paragraphs 5 and 8 of the statement of defence with regard to the paragraphs in the statement of claim to which they refer. Generally speaking, they fall into two classes. Paragraphs 5, 6, 7, 8, 9, 13, 14, 15, 16 and 17 set out certain circumstances in the affairs of the appellant and the companies with which he was formerly connected. These are all matters entirely within the knowledge of the appellant and not within the knowledge of the respondent. Particulars in regard to these matters could not, therefore, be directed. Nor does the respondent desire to set up any facts or circumstances in connection therewith beyond those raised by the appellant himself. He merely puts the proof thereof on the appellant, as he is entitled to do.

Paragraphs 10 to 12, and 19 of the statement of claim refer to certain interviews with the former Commissioner of Taxation and the Deputy Minister (Taxation) at which certain rulings, suggestions and proposals are alleged to have been made, and one or more of these rulings or offers are said to have been acted on by the appellant and his company. Paragraph 18 alleges that by reason of what occurred the respondent is estopped from questioning the

legality and sufficiency of the steps taken, and from including in the income of the appellant the sum now added by the respondent. Again, all of these alleged facts are within the knowledge of the appellant. The respondent denies them all, not generally, but specifically as to each allegation in each of the paragraphs. The appellant cannot be in any doubt as to what he will be required to do at the trial—he must prove each of the allegations which he has made. The issue of estoppel is raised by the appellant and clearly met by the respondent in his denial that the respondent is estopped. No doubt objection will be taken to any evidence as to what was said or done by either of the two gentlemen referred to and the question of estoppel as against the Crown will be argued. But those matters are clearly raised in the proceedings and can cause no surprise to appellant's counsel.

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If, for example, the respondent desired to rely at the trial on the fact that the officials named had given rulings or offers other than those put forward by the appellant, that would be a fact or circumstance that the respondent would have to refer to in his statement of defence. But he has not chosen to do so, and as admitted by Mr. Mason, could not introduce evidence on that point in the present state of the pleadings.

Paragraphs 20, 21 and 22 contain allegations that the appellant has paid all income tax to which he could be properly assessed for the year 1944. Paragraph 23 contains a statement that the appellant proposes to pay into Court a certain sum of money without prejudice to his claim that he is not liable to any tax beyond what had previously been paid. All these allegations are properly dealt with by the denial contained in clause 8 of the Statement of Defence, coupled with clause 9 thereof which I have quoted above.

On the facts of this particular case I find that the statement of defence is in conformity with the rulings of this Court. The motion will therefore be dismissed, with costs to the respondent in the cause.

Judgment accordingly.

1949
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 Oct. 11, 12

JOHN KOSCHUK ..... CLAIMANT;

AND

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 Mar. 30

HIS MAJESTY THE KING.....DEFENDANT.

*Revenue—Excise Act, Statutes of Canada, 1934, c. 52, ss. 112(1)(2), 169—
 Forfeiture—Res judicata—Burden of proof—Onus on claimant—
 —Claimant entitled to succeed if on all the evidence he shows there
 is a preponderance of probability in that which he is called on to
 establish—Claim dismissed.*

Held: That the quashing by the Manitoba Court of Appeal of a conviction by the city magistrate that the claimant had had liquor unlawfully in his possession is not *res judicata* in his favor of the fact that his automobile had not been unlawfully used for transportation of liquor contrary to the Excise Act.

2. That under s. 112 of the Excise Act the onus is on the claimant and he is entitled to succeed if upon all the evidence he has satisfied the Court that there is a preponderance of probability in that which he is called upon to establish; the claimant having failed to do so his claim must be dismissed.

INFORMATION by the Attorney General of Canada to have it declared that a certain vehicle seized under provisions of section 169 of the Excise Act is forfeited to His Majesty.

The action was tried before the Honourable Mr. Justice Cameron at Winnipeg.

A. R. Micay for claimant.

John L. Ross, K.C., and A. J. MacLeod for defendant.

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

CAMERON J. now (March 30, 1950) delivered the following judgment:—

This is an Information exhibited by the Attorney General of Canada on behalf of His Majesty claiming to have the automobile above mentioned condemned as forfeited to the Crown. On December 11, 1948, at Winnipeg, it was seized as forfeited to the Crown under the provisions of section 169 of the Excise Act (ch. 52 of the Statutes of Canada, 1934, and amendments thereto) and it is alleged

that at the time of such seizure it had been or was being used for the purpose of transporting a quantity of spirits unlawfully manufactured, in violation of the said Act. Following the filing of the Information and the posting of the notices required by section 115 (1) of the Act, John Koschuk of Winnipeg, the owner of the car, asserted his claim thereto alleging illegality of the seizure and other matters which will be referred to, and asking the Court for an order releasing the car with its tires and accessories to him, for compensation for loss of its use and his costs. Pleadings were delivered.

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At the opening of the trial a question arose as to whether the burden of proof was on the Crown or the claimant. After hearing argument, I ruled that under section 112 of the Act (which will be later referred to) the burden was on the claimant. The witnesses for the claimant were then heard and counsel for the Crown then moved for a dismissal of the claim. I dismissed that motion and evidence was then given for the Crown.

The claimant pleaded and relied on the principle of *res judicata*. It was admitted that the Court of Appeal of the Province of Manitoba on April 29, 1949, unanimously allowed his appeal from and quashed his conviction under the judgment of Magistrate S. H. Garton, rendered in the City of Winnipeg Police Court on January 12, 1949, on the charge that he:—

On the 11th day of December A.D. 1948, did unlawfully and without lawful authority have liquor in an automobile, Serial No. 9509105, bearing Manitoba License No. 90853, at the rear of 167 Gomez Street in the City of Winnipeg, which was not purchased from the Commission contrary to the Provisions of the Statutes in such cases made and provided.

Exhibit 1 is a certified copy of the judgment of the Court of Appeal. Prior to the trial it was agreed by counsel for both the claimant and the Crown that it would be filed by consent, that the parties therein referred to are the same parties that are now before this Court and "that the matter involved before the Court of Appeal arose out of the same circumstances as are now before the Exchequer Court."

For the claimant it is submitted that the judgment of the Court of Appeal must have been based on a finding

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of fact, namely, that Koschuk did not have the spirits in this automobile; that the parties there were the same as in the present case and that, therefore, the Crown is estopped by record from alleging that Koschuk did, in fact, have spirits in this car. I do not think it necessary to discuss fully the question as to whether in both cases the parties are the same. It may be noted merely that the proceedings in the Police Court were initiated by one Cafferty under the provisions of the Liquor Control Act of Manitoba.

I do not know what facts were determined by the judgment of the Court of Appeal. The judgment itself does not set out any findings of fact but merely allows the appeal, quashes the conviction and disposes of the costs of the proceedings. But even assuming that the judgment was based on a finding that Koschuk did not have spirits on that day in that car, that is not the issue before this Court. This is an action *in rem* in which the Crown asks for a declaration of forfeiture of the car. The penalty of forfeiture applies where the car had been or was being used for the purpose of transporting illicit spirits and whether used by Koschuk or anyone else, *The King v. Krakowec et al* (1). The issue now raised is quite a different one from that before the Provincial Courts of Manitoba and therefore there has been no valid and final adjudication upon the issue now raised. Under the charge as laid, neither the Winnipeg Police Court nor the Court of Appeal, sitting in appeal from that Court, had any jurisdiction to grant the relief now claimed; it could not have been determined in those proceedings. These facts are sufficient in my opinion to dispose of the plea of *res judicata*. I hold that the claimant is not entitled to rely thereon.

Reference may be made to *Bureau v. The King* (2), where the President of this Court in considering a claim for forfeiture of a motor car used in bringing cigarettes into Canada, held:—

That the acquittal of the claimant by the jury on the charge that he had been in possession of unlawfully imported goods was not *res judicata* in his favour of the fact that the goods had not been illegally imported and can have no effect in this action.

(1) (1932) S.C.R. 134.

(2) (1948) Ex. C.R. 257.

An appeal being taken on that case (1), Rinfret C.J., said at p. 374:—

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It was correctly decided in the Exchequer Court, (1948) Ex C.R. 257, that the acquittal of the respondent in the Criminal Court could not be invoked by him in the present case. That is in accordance with the judgment of this Court in *La Foncière Compagnie d'Assurance de France v. Perras et al and Daoust*, (1943) S.C.R. 165.

In *Kantyluk v. Graham and Kostick* (2), Williams, C.J.K.B., in a civil proceeding, declined to admit a certificate of conviction of the plaintiff under the *Highway Traffic Act*, following *Caine v. Palace Steam Shipping Co.* (3); *La Foncière Compagnie d'Ass'ce de France v. Perras* (4); *McLean v. Pettigrew* (5).

As I have said, the claim for a declaration of forfeiture of the motor car is founded on section 169 (2) of the Excise Act. It is as follows:—

169. (2) All spirits unlawfully manufactured or imported, or unlawfully or fraudulently removed from any distillery, bonded manufactory or from any bonded warehouse, wheresoever they are found, and all horses and vehicles, vessels and other appliances which have been or are being used for the purpose of transporting the spirits so manufactured, imported or removed or in or upon which the same are found, shall be forfeited to the Crown, and may be seized and detained by any officer and be dealt with accordingly. 1948, c. 49, s. 21, Am.

It is not disputed that on the 11th of December, 1948, a quantity of spirits unlawfully manufactured was found by police officers in a yard adjacent to (but separated by a fence from) the laneway of the property where Koschuk resided and in which laneway the car in question (and admittedly owned by Koschuk) was stationed. It is not suggested that the car had been used for the purpose of transporting any spirits other than those so found in the adjacent yard.

The evidence will be more readily understood if a description of the property is first given. Koschuk is the owner of the property and building shown on the photograph, Exhibit 2. It is on the east side of Gomez Street and consists of four apartments, in one of which Koschuk resides. On the north side of the property is a driveway leading from Gomez Street to a garage at the rear, as shown on Exhibit 3. At the north side of the driveway

(1) (1949) S.C.R. 367.

(2) (1948) 3 D.L.R. 464.

(3) (1907) 1 K.B. 670.

(4) (1943) S.C.R. 165.

(5) (1945) 2 D.L.R. 65;

(1945) S.C.R. 62.

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is a board fence about 5 ft. high extending from the road to and beyond the garage and separating Koschuk's property from the store at 167 Gomez Street. In the rear of the store is a yard shown on Exhibit 7.

Koschuk's evidence is that his car had not been used at any time for the transportation of illicit spirits. He says that he was in his apartment on the afternoon of December 11 with a pensioner, Mike Horodinak, who shared the accommodation; that Nicholas Shinkarik called on Horodinak and, after spending some time with them stated that he felt ill and asked Koschuk to drive him home. Shinkarik got in the rear seat of the car and before his home was reached became ill and vomited on the rear seat. Koschuk says that he returned home directly, parked his car in the driveway at the place where it is shown on Exhibit 3, removed the rear seat from the car, dragged it to his apartment and proceeded there to clean it. He left the keys in the car as he was accustomed to do. At about 8:30 p.m., he went to the store at 167 Gomez Street to purchase cigarettes, remained there for some time, and upon returning home was advised by Horodinak that the car had been seized and removed by the police. He says that there were no spirits of any sort in the car when he left it in the driveway and that the car had not been used by anyone after that time, nor had it been moved until taken by the police. Upon being told that his car had been removed by the police Koschuk says, that without communicating with anyone, he immediately walked to the police station to find out what had happened. He was questioned there about the missing rear seat of the car and explained its removal as I have set out above. He suggested that Shinkarik could corroborate that part of his statement, and, as a result, he was driven by the police to the latter's home. Koschuk did not enter, but Shinkarik did tell the officer that, while being driven home by Koschuk, he had been sick and had vomited on the rear seat.

Horodinak confirmed Koschuk's statement that when the police took the car Koschuk had gone to the store; that previously he had helped Koschuk clean the rear seat of the car in the apartment and that it was there when the

police entered the home. He also states that Koschuk drove Shinkarik home about 7:00 p.m. but that he does not know when Koschuk returned as he was asleep.

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C. H. Clark and S. Fraser—both detectives in the Winnipeg Police Force—were in the vicinity of Koschuk's home about 8:45 p.m. on that day. Seeing Koschuk's car standing in the driveway they made an investigation. The rear right door was wide open, the rear seat of the car was missing and the keys were in the ignition lock. There had been a heavy fall of snow earlier in the day but it had stopped. The snow had been shovelled from the driveway but a light fall of snow had started about 8:30 p.m.; there was a light sprinkling of snow over the whole driveway and part of the exterior of the car, and snow had drifted into the car. They saw that the light snow on the floor and on the place from which the seat had been removed, had been "mussed" up as though something had been dragged along it. On the driveway, at the entrance to the rear right door, they found that the fresh snow had been scuffed as though by someone walking. Leading from there to the junction of the fence and the garage, they found marks in the snow which indicated to them that someone had walked with a heavy load, although there were no clear footprints. The light snow on the top of the fence post had been recently brushed; and looking over the fence they saw about 20 feet away what appeared to be two dark bags, and, leading from the fence to the bags, marks in the snow similar to what had been observed between the car and the fence. Adjacent and parallel to these marks were other marks in the snow which suggested that a heavy burden had been carried and had touched the snow at intervals. They returned to Gomez Street by way of the driveway, entered on the store property at 167 Gomez Street and proceeded to the rear yard where they found two bags in the snow, each containing 7 gallon tins of spirits, which, on later analysis, proved to be of illicit manufacture. From the point where the bags were found in the snow they observed footprints leading to Gomez Street where they could not be traced further.

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The sacks were examined at the police station. In each was found a very small quantity of oats, now contained in the envelopes, Exhibits D and E. Exhibit F is another envelope containing a further small quantity of oats found on the floor of the car between the front and rear seats and on the running-board at the rear right door. Exhibit G contains five pieces of ordinary binder twine found on the floor of the car between the front and rear seats, and Exhibit H contains twelve pieces of binder twine found on the front floor. Exhibit I contains four used screw caps and three used corks found in the glove compartment. Exhibit J consists of eighty-seven paper bags (found at the ledge at the rear window) such as are used ordinarily by grocers. Exhibit B is one of the fourteen tins found in the bags.

Detective Clark also says that when he saw Koschuk at the police station that evening, he observed a quantity of "list" from bagging, and oat beards on his shoe. Asked to explain the presence of these things, Koschuk merely stated that he had not seen anything like that before.

Koschuk was formerly a painter. He had sustained injuries to his back in a fall and underwent an operation in May, 1948, for the removal of a disc from his spine. He says that for some time thereafter he could walk only with the aid of two canes and at the time of the seizure still had to use one cane and went daily to hospital for treatment. He says that it would have been impossible for him to lift or carry bags containing seven gallon tins of spirits or lift them over a fence five feet high. Dr. V. Rosenfield, his physician, confirmed the nature of his injuries and his condition on December 11, 1948, and said he was then incapacitated from lifting weights over 10 to 15 lbs., that he had cautioned him to be careful and to avoid any strain on his back.

Because of his injuries Koschuk said that he was unable to work as a painter; that he therefore purchased chickens and eggs from farmers and resold them in order to gain a living. It was for that purpose, he said, that he had the paper bags and twine. He says also that the oats in his car may well have come from the boxes or bags of produce which he purchased from farmers. As to the bottle caps

and screws found in the clothing compartment, he says he had no knowledge, that he had never seen them before and that they may have been there when he purchased the second-hand car in 1948. He also says that Horodinak collected old bottles and that on occasions he had used the car to drive him and his bottles to the scrap yard. He suggests also that possibly the bottle tops and corks may have been put in the glove compartment by Horodinak.

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None of the witnesses saw any illicit spirits in the car or being removed therefrom, or saw the car being used for the purpose of transporting illicit spirits. The case for the Crown rests on the marks made in the snow, as described above, and on the statement of the police officers that in the driveway in rear of the car they were still able to see in the snow the tracks of the tires leading from Gomez Street to the car itself, partly obscured by the recent fall of snow. They said, also, that there were no other marks in the snow except the ones I have referred to, and specifically that there were none between the car and the building where Koschuk resided, and none at the left side of the car. The engine was still warm and there was every indication that it had been recently used.

The evidence of the police officers is that there was but a light fall of snow on the bags of about the same depth as that covering the tire tracks in rear of the car and on the driveway. They infer from this fact that the bags had not been there during the heavy snowfall earlier in the day, but had been there but a short time.

As I have said, section 112 (1) places the burden of proof on the claimant in proceedings instituted by the Crown for forfeiture; subsection (2) thereof places the same burden on a claimant when he institutes similar proceedings against the Crown. It is of first importance, therefore, to give careful consideration to the words used in the statute and to endeavour to ascertain therefrom the nature and extent of that burden. Section 112 (1) is as follows:—

112. (1) In any proceedings instituted for any penalty, imprisonment or forfeiture or for the recovery of any duty under this Act, in case any question arises as to the identity, origin, manufacture, importation, exportation or entry for duty of any goods or the payment of duties on any goods or the compliance with the requirements of this Act or the doing

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or omission of anything by which such penalty, imprisonment, forfeiture or liability for duty would be incurred or avoided, the burden of proof shall lie upon the owner or claimant of the goods or the person whose duty it was to comply with this Act, or in whose possession the goods were found, and not upon His Majesty or upon any person representing His Majesty.

Now this is a case where proceedings have been instituted for forfeiture of the vehicle and the question that arises is whether "it is a vehicle that had been used for the purpose of transporting spirits unlawfully manufactured" (s. 169 (2)). It is the doing of that act by which such forfeiture would be incurred. There can be no doubt, I think, that the burden of proof cast on the claimant is in respect to the question that so arises and he must therefore, in this case, establish to the satisfaction of the Court that the vehicle he now claims had not been used in the transporting of spirits unlawfully manufactured.

Reference may be made to *Sandness v. The King* (1), in which Angers J., was considering s. 262 of the Customs Act, R.S.C. 1927, c. 42, which contains a somewhat similar provision. At p. 81 he said:—

I may add that in virtue of section 262 of the Customs Act (R.S.C., 1927, chap. 42) the burden of proof lay on the plaintiff, and that the latter has failed to show that his boat had been illegally seized and forfeited. In this respect, see: *Weiss v. The King* (1928) Ex. C.R., 106; *The King v. Doull* (1931) Ex. C.R. 159.

In my opinion, the claimant here is not bound to prove his case beyond a reasonable doubt. I think that he is entitled to succeed if on the whole of the evidence there is a preponderance of probability in his favour. The most recent case which I have been able to find is *Rex. v. Carr-Briant* (2). That was an appeal from conviction under s. 2 of the Prevention of Corruption Act, 1916, when, under certain circumstances, money received "should be deemed to have been paid or given and received corruptly *unless the contrary is proved.*" The trial Judge had directed the jury that the burden of proof resting on the accused to negative corruption was as heavy as that resting in a normal case on the prosecution. In allowing the appeal on the ground of misdirection, Humphreys, J., speaking

(1) (1933) Ex. C.R. 78.

(2) (1943) 1 K.B. 607.

for the full Court, referred to *Sodeman v. Regem* (1), where Lord Hailsham, L.C., in the Privy Council, said:—

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‘The suggestion made by the petitioner was that the jury may have been misled by the judge’s language into the impression that the burden of proof resting upon the accused to prove the insanity was as heavy as the burden of proof resting upon the prosecution to prove the facts which they had to establish. In fact there was no doubt that the burden of proof for the defence was not so onerous . . . It was certainly plain that the burden in cases in which an accused had to prove insanity might fairly be stated as not being higher than the burden which rested upon a plaintiff or defendant in civil proceedings. That that was the law was not challenged.’ In so holding the Lord Chancellor was in agreement with the decision of the majority of the Supreme Court of Canada in *Clark v. The King* (1921) 61 S.C.R. (Can.) 608, 617, where Duff J., in the course of his judgment, expressed the view that the necessity for excluding doubt contained in the rule as to the onus on the prosecution in criminal cases might be regarded as an exception founded on considerations of public policy. There can be no consideration of public policy calling for similar stringency in the case of an accused person endeavouring to displace a rebuttable presumption.

At p. 611 Humphreys, J. said:—

What is the burden resting on a plaintiff or defendant in civil proceedings can, we think, best be stated in the words of the classic pronouncement on the subject by Willes J. in *Cooper v. Slade*, 6 H.L. Cas. 772. That learned judge referred to an ancient authority in support of what he termed ‘the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict.’ The authority in question was the judgment of Dyer C.J. and a majority of the justices of the Common Pleas in *Newis v. Lark* (1571) Plowd. 403, decided in the reign of Queen Elizabeth. The report contains this passage, *Ibid* 412: ‘Where the matter is so far gone that the parties are at issue . . . so that the jury is to give a verdict one way or other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable and by the same reason that which is most probable shall be good evidence’

In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person ‘unless the contrary is proved,’ the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish

In *Clark v. The King* (2), Duff, J. (as he then was) said at p. 616:—

Broadly speaking, in civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigorous as to leave no room for doubt in the mind of the tribunal with whom the decision rests. It is, generally speaking, sufficient if he has

(1) (1936) W.N. 190, 191.

(2) (1921) 61 S.C.R. 608.

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produced such a preponderance of evidence as to shew that the conclusion he seeks to establish is substantially the most probable of the possible views of the facts.

Keeping in mind, therefore, that the onus is on the claimant and that he is entitled to succeed if, upon all the evidence, he has satisfied the Court that there is a preponderance of probability in that which he is called upon to establish, I now turn to consider the evidence.

It may be noted first that even if I were to accept all of the claimant's own statement, it contains no evidence as to the manner in which the car was used between 7:30 p.m. when he says he returned home and 8:45 p.m. when he says he went to the neighbouring store; or between that time (when he says it was still in the driveway) and the time of seizure. During those periods the keys were in the ignition lock and the car was available to anyone wishing to use it. To that extent the claimant has failed to establish his case.

The observations made by the police officers as to the condition of the car, the articles found therein, the marks in the snow from the street to the car, from the car to the fence, from the fence to the place where the bags were found, and from there to Gomez Street; and their evidence as to the "list" found on Koschuk's shoe, have not been seriously challenged in any way. I accept their statements as being accurate throughout. Now, while none of the Crown witnesses saw the illicit spirits in the car or saw the car used in the transportation of illicit spirits, the inference from what they observed is sufficiently clear and strong as to indicate that the car had been so used. The tire marks leading from Gomez Street to the car were clearly visible and no one denies that they were made by the car in question. Had Koschuk last returned home at about 7:30 p.m., as he alleges, there would have been no such tire marks in the snow for the driveway had been cleaned and the new fall of snow had not yet commenced; moreover, there were no marks in the snow leading from the car to the claimant's home. The only foot marks led from the car to the fence and from there directly to the

place where the bags were found, and, on the evidence, had been recently placed. From this evidence, I infer that the spirits found had been in the car in the driveway, and that they had been brought there in the car.

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How, then, does Koschuk endeavour to discharge the onus put upon him? He says, of course, that the spirits were never in his car. He states that it was his custom to leave the keys in the car and that he had given no one permission to use it. But he made no investigation of any sort to ascertain whether, in fact, it had been used or to explain the marks in the snow leading from his own car to the place in the neighbouring yard but a short distance away where the spirits were found. The only matter on which it might be said that his evidence was corroborated on any point was in regard to the missing rear seat. That evidence was no doubt tendered in order to explain its absence and to meet the inference that it had been removed in order to make room for the bags. But that matter, in my opinion, is not material—the spirits could have been in the car whether the seat was there or not. One of the most significant facts in evidence is the finding of oats and oat beards in the car and on the bags as indicating a common origin. In explanation of this fact Koschuk states that he purchased eggs and chickens from farmers and the oats and beards may have been on those boxes or bags. This suggestion is not corroborated by any one, Horodinak merely stating that he knew Koschuk had purchased eggs. The bottle tops and caps are not satisfactorily accounted for. Koschuk suggested that Horodinak might have placed them there but the latter gave no evidence on that point.

Weighing the evidence as a whole, I am of the opinion that the claimant has not produced such a preponderance of evidence as to show that the conclusion he seeks to establish (namely, that the vehicle was not used in the transportation of illicit spirits) is substantially the most probable of the possible views that may be taken of the established facts. He has failed to relieve himself of the onus cast on him and his claim must therefore fail.

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In the result Koschuk's claim will be dismissed with costs. There will be an order declaring that the vehicle in question be condemned as forfeited to the Crown. The Informant is entitled to be paid his costs after taxation.

*Judgment accordingly.*

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Oct. 29-31  
1948  
Mar. 10-12  
May 17-21  
1950  
Aug. 2

BETWEEN:

HIS MAJESTY THE KING, on the  
the information of the Attorney-  
General of Canada, .....

PLAINTIFF,

AND

AMERICAN OPTICAL COMPANY,  
CECIL E. McLEOD, GEORGE B.  
WELLS, IRA MOSHER,  
CHARLES O. COZZENS, IRVING  
W. WILSON, HARRY H. STYLL,  
R. GILMAN WALLACE, HER-  
BERT G. KIMBALL, E. E. WIL-  
LIAMS, A. TURNER WELLS,  
J. M. WELLS, G. McGREGORY  
WELLS Jr., CHARLES N. SHEL-  
DEN, .....

DEFENDANTS.

*Patents—Action by Crown for declaration that patent invalid—The Patent Act, 1935, S. of C. 1935, c. 32, s. 60 (1)—Ophthalmic mountings—Ful-vue construction—Combination of temples connected above horizontal centre line of lenses and nose pads connected below it—Anticipation of invention by prior publication—Anticipation of invention by prior user—Essentials of combination invention—Advantages of invention need not be disclosed—Evidence of commercial success coupled with evidence of a problem and its solution strong evidence of invention.*

The Crown brought action under section 60 (1) of The Patent Act, 1935, for a declaration that the defendants' patent covering improvements in ophthalmic mountings was invalid for lack of novelty and lack of subject matter.

*Held:* That there was no anticipation of the invention either by a prior publication or by prior user.

2. That it is not necessary to the validity of a combination invention that its elements should be new. If the combination is the invention, then it is immaterial that the elements are old.

3. That it is essential to the validity of a patent for a combination invention, apart from considerations of novelty and inventive ingenuity, that the combination should lead to a unitary result rather than a succession of results, that such result should be different from the sum of the results of the elements and that it should be simple and not complex. The elements may interact with one another provided they combine for a unitary and simple result that is not attributable to any of the elements but flows from the combination itself and would not be possible without it.
4. That an inventor need not state the effect or advantages of his invention if he describes his invention so as to produce it. If he has adequately defined his invention he is entitled to its benefit even if he does not fully appreciate or realize the advantages that flow from it or cannot give the specific reasons for them.
5. That the practical utility and commercial success of a new device may be material in determining whether the new result produced by it was an obvious workshop improvement or involved the exercise of inventive ingenuity. Commercial success by itself, without the solution of a difficulty, is not sufficient to establish subject matter. But when it is found that there has been a problem calling for solution and that the new device has solved it then its practical utility and commercial success in displacing alternative devices should be considered strong evidence that its production required the taking of an inventive step and that the applicant for the patent was the first to take it. *Samuel Parkes & Co. Ltd. v. Cocker Brothers Ltd.* (1929) 46 R.P.C. 241 at 248 and *Non-Drip Measure Coy., Ltd. v. Stranger's Ltd. et al.* (1943) 60 R.P.C. 135 at 142 followed.

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THE ACTION was tried before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

*E. G. Gowling, K.C.*, and *G. F. Henderson* for plaintiff.

*Christopher Robinson, K.C.*, for defendant.

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

THE PRESIDENT now (August 2, 1950) delivered the following judgment:

This action was taken on the information of the Attorney-General of Canada under section 60 (1) of *The Patent Act, 1935*, Statutes of Canada, 1935, chap. 32, for a declaration that Canadian letters patent 331,430 is invalid. It was alleged in the particulars of objection filed with the information that the defendant American Optical Company, being a voluntary association, was not competent to hold patent rights in Canada and that the defendant Cecil E.

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McLeod, being the inventor alleged in the patent, was the owner thereof but this contention was abandoned at the trial. It is established that the defendant American Optical Company is the owner of the patent by reason of its issue to it pursuant to an assignment by the defendant Cecil E. McLeod of his rights and that the individual defendants George B. Wells, Charles O. Cozzens, Edward E. Williams, C. Gregory Wells, Charles N. Sheldon and John M. Wells are, with others, members of the defendant American Optical Company. The other individual defendants, although duly served, did not file defences and were not represented at the trial.

The patent in suit relates to alleged new and useful improvements in ophthalmic mountings. It was issued on April 4, 1933, the application having been filed on February 13, 1931. The date relied upon as the date of the invention is October 22, 1928.

The specification states, *inter alia*:

This invention is for improvements in spectacles and the like, and has for one of its objects to improve their general appearance and given unobstructed side vision. Another object of the invention is to ensure that the spectacles shall be securely anchored in their proper setting on the wearer's face.

Hitherto, it has been the custom to attach the side-pieces to the other parts of the spectacles at point on the outside edges of the lenses about midway between the top and bottom vertical extremes of the lenses, so that when in use, the side-pieces are approximately on a level with the pupils of the eyes. According to the invention, the side-pieces are each attached to the associated lens or like holding rim, or directly to the associated lens or the like, at a position to bring the side-piece above the line of useful side view. It will usually be preferred to arrange that the side-piece is approximately at or above the level of the top of the iris, when the face and eye of the wearer are directed horizontally. In addition to the side-pieces not being immediately opposite to the pupils of the eyes, and not being constantly seen by them, the general appearance of the spectacles according to the present invention, when upon the wearer, will be found to be more elegant than that of spectacles of ordinary construction.

It is an important feature of the present invention to provide spectacles or the like in which the side-pieces are each attached to the associated lens or like holding rim, or directly to the associated lens or the like, at a position to bring the side-piece above the line of useful side view, and in which nose-rests are provided to bear one on each side of the nose. The presence of the nose-rests is advantageous because they will prevent such displacement of the spectacles as would otherwise be rather liable to occur, due to the location of the points of attachment of the side-pieces to the remainder of the spectacles.

It is another important feature of the invention to provide spectacles or the like in which the side-pieces are each attached to the associated



lens or like holding rim, or directly to the associated lens or the like, at a position to bring the side-piece above the line of useful side view, and in which rests are provided to bear against the face at positions separated from each other in the vertical direction (for example against the lower forehead and each side of the nose). This high setting of the front ends of the side-pieces co-operates with the vertically separated face-rests to anchor the lenses in their proper position before the eyes and to prevent the frame from sliding down the wearer's nose, thus ensuring comfortable and secure balancing of the spectacles in place on the wearer without obstructing the useful side view.

It is well known to have spectacle side-pieces inclined out of the rectangular setting with respect to the general plane of the lenses when open, and in carrying out the present invention it is preferred to have the side-pieces inclined relatively to the general plane of the lenses or the like when open in order to reach from the lenses or the like to positions adjacent to the wearer's ears.

The invention is also concerned with other features in connection with the face-rests, with the shape of the lenses or the like and of their rims and also with the locations and nature of attachment of the side-pieces to the other parts of the spectacles.

For a more complete understanding of the invention, there will now be described, by way of example only, and with reference to the accompanying drawings, various constructional forms of spectacles according to the invention. It is to be understood, however, that the invention is not restricted to the precise constructional details set forth.

The inventor then describes generally the drawings accompanying his specification and refers to the constructions of the various figures in them. It will, I think, be sufficient to set out only the following references:

Referring firstly to Figures 1 and 2, the eye-rims 10 shown therein are connected by a bridge 11 which is not intended to rest upon the nose of the wearer, but which may be constructed to rest against the lower part of the forehead if desired. The rims 10 are also provided with placquets 12 to bear one on each side of the wearer's nose. The joints 13 for the rims 10 are located above the line of useful side view, and these joints include hinges for the side-pieces 14. In order to enable the latter to fit comfortably around the wearer's ears, the hinges of the side-pieces are angularly set, as is apparent from Figure 2. That is to say, the side-pieces 14 do not extend, when open, at right angles to the general plane of the rims 10.

As is clearly shown in both Figures 2 and 4, the placquets or nose engaging members 12 are pivoted at 25 to the arm 16 at a point to the rear of the plane of the lenses and below the horizontal center line of the lenses. This allows the members 12 to adjust themselves to the wearer's nose, and to rest snugly and firmly on the lower or bony portion of the bridge of the nose so that they will more accurately and firmly support the lenses in their proper position before the eye. However, this leaves the lenses free to pivot or swing about the points where the members 12 are pivoted on the arms 16. In the present instance this pivotal or swinging movement is prevented by the side pieces 14 acting as struts. The high position of the points of attachment of the side-pieces with respect to the pivots enables them to very positively and easily perform this function.

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It is to be understood that the invention is not restricted to the precise constructional details set forth.

The specifications ends with seven claims but only one, namely, claim 5, need be considered. Counsel for the defendant stated that it was the basic claim in the patent, being directed to the combination that had gone into use. He relied upon it as covering everything that had gone into use and agreed that if it fell everything fell. The claim reads as follows:

5. In combination, in a device for holding a pair of lenses before the eyes, nose-rest means extending rearwardly of the plane of said lenses, a nose engaging portion on each of said nose-rest means rearwardly of the plane of said lenses and said connection being below the horizontal center line of the lenses, side-pieces, and means for mounting said side-pieces on said lenses at points spaced above the level of the points of connection of said nose engaging portions and above the field of useful side vision when the lenses are in place before the eyes, whereby said side-pieces will serve as struts and prevent the lens holding device from being tilted about the supports on the nose.

In the specification the inventor uses the term side-pieces to designate the members that are usually called temples. In these reasons for judgment I shall use the latter term. Similarly, I shall use the commoner term nose pad to designate what the inventor has called a placquet or nose engaging portion or member. And nose-rest means are usually called guard arms.

Ophthalmic mountings are mainly of two kinds, namely, eye glasses and spectacles. Eye glasses are rimless and held in position on the nose by a spring. Spectacles are rimless or framed, the frames being of metal or plastic. They usually ride or rest on the nose by a bridge and are held in position by temples extending over the ears. In addition to eye glasses and spectacles there are spectactettes, a combination of eye glasses and spectacles, being fastened on the nose by a spring and held in position by temples over the ears. In this case we are concerned only with spectacles.

The principal objects sought to be achieved by the use of mountings are to hold the lenses in the proper position before the eyes, enable as wide a range of vision as possible, and make them comfortable to wear and inconspicuous in appearance.

The specification of the patent in suit discloses that it was an important feature of the invention to provide spectacles in which the temples are each attached to the associ-

ated lens or like holding rim, or directly to the associated lens or the like, at a position to bring the temples above the line of useful side view. This was above the horizontal centre line of the lenses, frequently called the 180 line, on which the optical centre is usually located, that being immediately in front of the centre of the wearer's eye. The construction with the temple connection above the horizontal centre line of the lenses was known in the trade as Ful-vue, as contrasted with the former construction, which may be called the on-centre construction, where the temples were attached to the lenses or rims at the horizontal centre line of the lenses. It was also stated by the inventor that it would usually be preferred to arrange that the temples should be approximately at or above the level of the top of the iris. Another feature of the invention was the use of nose pads to bear on each side of the nose in order to anchor the spectacles in their proper setting. It was said that the presence of these was advantageous because they would prevent such displacement of the spectacles as would otherwise be liable to occur, due to the location of the points of attachment of the temples to the remainder of the spectacles. The nose pads were connected with the guard arms, which in turn were connected with the rims or lenses by studs. It was essential that the connection of the nose pads with the nose guards should be below the horizontal centre line of the lenses.

It should be noticed that there was some variation in the use of the term Ful-vue construction. To some of the witnesses it meant generally every construction where the temples were connected above the horizontal centre line of the lenses. To others, such as Mr. E. M. Splaine, it meant a construction according to claim 5 of the patent, with temples connected above the horizontal centre line of the lenses and nose pads connected below it.

It was contended for the plaintiff that the patent in suit is invalid for two reasons, namely, lack of novelty and lack of inventive ingenuity.

Counsel for the plaintiff filed a number of patents as part of the evidence of the prior art. I enumerate them as follows, giving in each case the name of the inventor and the number and date of the patent, namely, Exhibit 4, E. E. Emons, Canadian patent 274,841, dated October 25, 1927;

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Exhibit 5, C. H. L. Jachan, U.S. patent 1130, dated April 20, 1839; Exhibit 6, F. K. Roberts, U.S. patent 291,778, dated January 8, 1884; Exhibit 7, J. E. Briggs, U.S. patent 443,160, dated December 23, 1890; Exhibit 8, G. A. Squier, U.S. patent 631,533, dated August 22, 1899; Exhibit 9, L. F. Adt, U.S. patent 766,573, dated August 2, 1904; Exhibit 10, O. B. Carson, U.S. patent 1,113,194, dated October 13, 1914; Exhibit 11, F. W. Haviland, U.S. patent 1,380,957, dated June 7, 1921; Exhibit 12, J. Gaspari, U.S. patent 1,522,620, dated January 13, 1925; Exhibit 13, J. A. Smith, U.S. patent 1,739,049, dated December 10, 1929; Exhibit 14, J. Gaspari, U.S. patent Des. 63,363, dated November 27, 1923; Exhibit 15, E. E. Emons, U.S. patent Des. 73,074, dated July 19, 1927; Exhibit 16, Ed. Messter, German patent 2,888, dated March 16, 1878; Exhibit 17, G. Hoppe, German patent 112,128, dated August 8, 1899; Exhibit 18, R. Pestel, German patent 312,256 dated December 21, 1916.

Oral evidence of the prior art was also given by Mr. H. Barlow, an optician in Montreal, and Mr. W. Kemp, an employee of the R. N. Taylor Company, a large optical firm in Montreal.

The evidence establishes that there was no novelty in the high temple connection feature of the McLeod invention. Mr. Kemp made spectacles in 1919 for a professional golfer with the temples connected to end pieces attached to the lenses at their upper outer edges at the 135° angle, which is 45° above the 180 line, in order to give him unobstructed side vision while putting, and spectacles of a similar type were then made for the R. N. Taylor Company by Mr. George Du Paul. And Mr. Barlow made spectacles of a similar type as early as 1920. Then there were the inventions of E. E. Emons, covered by U.S. patent Des. 73,074, dated July 19, 1927, Exhibit 15, and Canadian patent 274,841, dated October 25, 1927, Exhibit 4, both of which involve the use of the high temple connection. Nor was there anything novel about the use of nose pads. That is clear from the evidence of Mr. Barlow and several exhibits in the American Optical Company's catalogue. And there was no novelty in having the nose pads below the horizontal centre line of the lenses.

Counsel for the defendant admitted that there was nothing new about any of the elements in the McLeod invention. All of them were old. He agreed that the two features to which reference has been made were known in the optical art. The high connection of the temples above the line of useful side view, even at or above the level of the top of the iris, had already been proposed and the use of low nose pads below the horizontal centre line of the lenses was fairly common. His contention was that the McLeod invention resided in bringing these two elements together. No claim is made in respect of any of the features of the invention separately. All claims in the specification to individual elements, such as forehead rests, shapes of lenses and the like, are abandoned. What is said to be the essence of the McLeod invention is the combination of the high connection of the temples above the horizontal centre line of the lenses with the low connection of the nose pads below it, these elements co-operating with one another to effect a vertical separation between the point of connection of the temples above the horizontal centre line and that of the nose pads below it so that the temples will serve as struts and prevent the lenses from tilting about the supports on the nose. That is the combination embodied in the spectacles put out by the defendants under their patent and referred to in claim 5. The validity of the patent depends on whether this combination was novel and, if so, whether it involved the exercise of inventive ingenuity over the prior art.

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There was no serious attack on the patent on the ground that the invention covered by it had been anticipated by a prior publication. In the recent case of *The King v. Uhlemann Optical Company* (1) I had occasion to consider the requirements that must be met before it should be held that an invention has been anticipated by a prior publication and I need not repeat the summary I made there of the views expressed in the leading cases. There is no publication in the evidence of the prior art put in for the plaintiff that meets these requirements. Even the Emons patent, Exhibit 4, on which counsel for the plaintiff particularly relied, could not be regarded as an anticipatory prior publication. For while it did propose a construction

(1) (1950) Ex. C.R. 142.

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that had the temples so connected as to be "removed from the direct useful field of vision", there was no reference to the use of nose pads connected below the horizontal centre line of the lenses or to a combination of high connected temples and low connected nose pads. Indeed, there was no use of nose pads at all. There was nothing to suggest the desirability of a vertical separation between the two points of connection referred to or a construction that would create it. There was no anticipation of the McLeod invention in the Emons patent.

One attempt to prove anticipation of the McLeod invention by prior user failed completely. It had been agreed between the solicitors for the parties that if no further demand for particulars of alleged prior users was made the plaintiff's solicitors would, within a specified time, either allow the defendants' solicitors to inspect and make sketches or photographs of any sample which they had available or if no such sample was available furnish them with such sketches and descriptions as were necessary clearly to define the device of which they proposed to prove prior user, and that they would not be entitled to give evidence of any other device alleged to have been used by any prior user mentioned in the particulars except on such terms as would be imposed if an amendment to the particulars were allowed at the time when they were first given inspection or a sketch and description of such device. In the course of the trial, counsel for the plaintiff indicated to counsel for the defendant that he proposed to prove a particular prior user through Mr. H. Barlow, the plaintiff's first witness, and, in view of the agreement referred to, sought leave to adduce evidence of it. I gave the necessary leave deferring any decision on terms. Mr. Barlow then produced a plastic frame with one temple, the other being missing, which was marked as Exhibit 48. He said that he believed they got it from an old Englishman who came out from Australia in 1930. The mounting was then anywhere from 5 to 10 years old. He could tell this by the dryness of the plastic and the verdigris that had got into it. Exhibit 48 had been in his shop ever since it was obtained in 1930. It was thrown out in the old scrap. He believed it was a European mounting. After this evidence had been given counsel for the defendant informed the Court that he was

caught by surprise and that it was impossible to proceed with Mr. Barlow's cross-examination without further instructions, and applied for an adjournment. I granted his application, reserving the decision on costs.

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On the resumption of the trial Mr. Barlow, on his cross-examination, said that in 1930 the frame could not have been less than 3 years old and finally put its age at 4 years. Exhibit 48 was a mounting similar in its essentials to mountings covered by the patent in suit, and if Mr. Barlow's statement had been accepted that would have been the end of the patent for there could be no doubt that the invention covered by it had been anticipated. But Mr. Barlow's evidence could not stand. His reasons for estimating the age of the mounting were unsatisfactory, and the supporting opinion of Mr. W. Kemp was valueless. Moreover, the evidence of Mr. A. W. Oliver and Mr. J. F. M. Douglas for the defendants was conclusive that Mr. Barlow's statement that he saw the mounting in 1930 could not be true. Mr. Oliver who was in general charge of the production of plastic frames for J. & R. Fleming Limited of London, England, and had been in charge since 1935, recognized the frame of Exhibit 48 as one of J. & R. Fleming's manufacture and the joint as manufactured at their plant in London. The temple was a moulded pinless side produced for Fleming's by the B.A.O. Company of Watford late in 1936 according to a sample which he made himself. Exhibit 48 was Fleming's model 607 P.R.O. which came on the market early in 1937. Mr. Douglas was the warehouse and export man for J. & R. Fleming Limited and was with the B.A.O. Company at Watford from 1935 to 1937. He also recognized Exhibit 48 as of Fleming's manufacture. The temple was of the type first made in 1936. He made the necessary drawing for the moulds in which temples of that model were pressed. The moulds were made in the summer of 1936. Mr. Douglas stated that Exhibit 48 could not have been in Canada in 1930 and that the very earliest date it could have been there was either late in 1936 or early in 1937. It having been suggested that the frame, apart from the temple, might have been in Canada earlier, Mr. Douglas stated that Fleming's started to use the particular kind of cellulose acetate of which it was made in 1933, and that

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its production had not started before he left Fleming's to go to Watford in 1935 but that it was being made when he came back in 1937. This fixes the date of manufacture of the frame very near that of the manufacture of the temple. When Mr. Barlow was recalled he declined to change his estimate of the date when he saw Exhibit 48 but admitted that he might be wrong. The evidence of Mr. Oliver and Mr. Douglas is conclusive that he was wrong. He could not have seen Exhibit 48 before 1936 and counsel for the plaintiff was right in not relying upon his evidence. It was without foundation and the defendants should have the costs of meeting it including all their expenses in connection with the evidence of Mr. Oliver and Mr. Douglas.

The evidence of Mr. Kemp and Mr. Barlow that they had made spectacles with the Ful-vue feature of high temple connection prior to the date of the McLeod invention was not submitted as evidence of anticipation of it by prior user. It was admitted by counsel for the plaintiff that there is a difference between what Mr. Kemp and Mr. Barlow used and the invention. The evidence was given merely to show that the high temple connection feature of the invention was part of the prior art. This is not in dispute. It was freely conceded by counsel for the defendant that the connection of the temples above the line of useful side vision was not new.

In my view, no question of anticipation seriously arises in this case. The real issue is whether the combination in claim 5 was a patentable advance over the prior art, particularly as embodied in the Emons patent, Exhibit 4. Counsel for the plaintiff contended that there was nothing in the patent in suit that amounted to a patentable advance over the Emons invention. It is, therefore, desirable to set out sufficient of the specification in the Emons patent to disclose its objects. The first two paragraphs read as follows:

This invention relates to spectacles, and has for its object the placement of the temple bars of a spectacle frame out of the useful field of vision of the wearer also to prevent the nose bridge from riding downwards, thereby maintaining the lenses in the position to which they have been initially set.

In spectacles now in general use, the temple bar is connected 180° meridian of the lenses with these latter at right angles with respect to the attachment. Such position of the bars and lenses relative to each other



not only have been an obstruction to lateral vision, but further cause the nose bridge to ride downwardly to change the positions of the lenses after initially set. To overcome such defects is the primary object of the invention, and to this end the invention consists in the elevating of the point of connection of the member for attaching the temple bars to the lens frame or lenses, so that the temple bars are removed from the direct useful field of vision. The invention further consists in positioning the lens frame or lenses at an acute angle with respect to the forward ends of the temple bars, whereby the said bars will exert a rearward pull thus preventing the nose bridge from riding downwardly on the nose.

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Emons thus had two objects, namely, the placement of the temples out of the useful vision of the wearer, and the prevention of the nose bridge from riding downwardly. He achieved the first object by raising the temples above the horizontal centre line of the lenses so that they were removed from the direct useful field of vision and sought to accomplish the second by positioning the lenses at an acute angle with the temples.

The first question is whether the combination in claim 5 can be an invention. It is not necessary to the validity of a combination invention that its elements should be new. Indeed, all of them may be old. If the combination is the *vide British United Shoe Machinery Company Ltd. v. A. Fussell & Sons Ltd.* (1); *Baldwin International Radio Co. of Canada Ltd. v. Western Electric Co. Inc. et al.* (2); invention, then it is immaterial that the elements are old: Terrell on Patents, 8th Edition, pp. 78-81. It is essential to the validity of a patent for a combination invention, apart from considerations of novelty and inventive ingenuity that the combination should lead to a unitary result rather than a succession of results, that such result should be different from the sum of the results of the elements and that it should be simple and not complex. The elements may interact with one another provided they combine for a unitary and simple result that is not attributable to any of the elements but flows from the combination itself and would not be possible without it.

Counsel for the plaintiff argued that the combination claimed as the invention did not answer this test. His submission was that each of the elements continued to perform the function that it had done before they were brought together, that the temples continued to be so connected as to give full side vision and the nose pads to

(1) (1908) 25 R.P.C. 631 at 656, 657. (2) (1934) S.C.R. 94 at 104.

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hold the spectacles in place on the nose, that there was no co-operation between them towards any new unitary result, that all the advantages and benefits of the combination flowed from the use of the high connected temples, that the benefit from the nose pads was merely the usual one that followed from their use, that high connected temples and nose pads were both well known, that all that McLeod had done was to give to an already well known article, namely, spectacles with high connected temples, the additional benefit of another well known article, namely, nose pads, and that there was thus merely the sum of the several results of the elements and no new unitary result from the combination different from that attributable to the several elements.

I have come to the conclusion that this submission should not be accepted. I am satisfied, mainly from the evidence of Professor Price, that the construction embodying the combination in claim 5, which is the one that has gone into use by the defendants and which I shall refer to as the Ful-vue construction, did, because of the vertical separation that followed from the combination of having the temples connected above the horizontal centre line of the lenses and the nose pads connected below it, produce a new unitary result that was not attributable to either the high connected temples or the low connected nose pads and was not the sum or succession of the several results of these two elements. That being so, there was novelty in the combination and the only question is whether it involved the exercise of inventive ingenuity.

The essence of Professor Price's evidence, as I understand it, was that the vertical separation between the point of connection of the temples to the end pieces of the lenses and the point of attachment of the nose pads to the nose of the wearer that followed from having the temples connected above the horizontal centre line of the lenses and the nose pads below it enabled the temples to act as struts in such a way as to give benefits and advantages that were not possible where there was no such vertical separation. The over-all purpose of the Ful-vue construction was to keep the lenses in their proper position relative to the eyes. Two parts essential to this purpose were the temples and the nose pads. The nose pads provided a point of support

or means for holding the lenses in their proper elevation and preventing their vertical displacement by a downward movement. The temples held them in against the face and prevented their outward or forward movement or tilting or rotation about the support afforded by the nose pads. The temples acted as struts and were enabled to perform this function by reason of the vertical separation resulting from the high position of the connection of the temples relatively to that of the pivots formed by the nose pads, the point of pivot being the bearing point of the nose pad on the nose. Professor Price explained that in engineering a strut might carry either a compressing force to keep two things apart or a tensile one to hold them together and that frequently it served both purposes. He defined it as a spacing member or a member that keeps two points at the proper distance apart. In the Ful-vue construction the straight portions of the temples acted as struts between the ear loop portions and the lenses and kept them at the proper position apart, preventing any tilting of the lenses either forward or downward, by exerting a tensile force.

Professor Price illustrated how the temples performed this tension function with the aid of Exhibit Z1 showing drawings of two constructions of spectacles, Figure 1 exemplifying the Ful-vue construction with the vertical separation between the point of high connection of the temples to the lenses, C, and the point of attachment of the nose pads to the nose of the wearer, X, and Figure 2 showing the on-centre construction with the temples connected at the 180 line, which was in ordinary commercial use prior to the date of the Emons patent or the patent in suit, without the vertical separation of the Ful-vue construction. Figure 1 of Exhibit Z1 indicates how the strut portion of the temple prevents the forward tilting of the lens by tension and in so doing induces a bending action in it. In the on-centre construction of Figure 2 there is no way of introducing any tensile force into the straight portion of the temple and the only way in which tilting can be prevented is by pulling the temple down at the ear loop behind the ear by a downward force. As a result there is greater resistance to rotation or forward tilting of the lenses in the case of the Ful-vue construction than in

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that of the on-centre one. In the latter the restraint against the forward tilting is, apart from frictional resistance, dependent on the pressure of the ear loop portion of the temple behind and under the ear, whereas in the former it flows from the tensile pull of the strut portion of the temple.

To overcome the forward tilting of the lenses or their downward tilting sliding on the nose it is necessary to have a force to pull them back against the face and against the nose. There must be pressure not only against the forward tilting but also on the nose pads to take care of gravitational pull or tendency of the lenses to slide down the nose. The temples must, therefore, always be under tension. To keep the lenses in their proper position the resisting force must be sufficient to overcome the displacing force that would otherwise cause them to tilt forward or slide down the nose. Professor Price illustrated by Exhibit Z3 how this resisting force is brought into play in the case of the two constructions. In the on-centre one shown by Figure 3 of Exhibit Z3 the resisting force is set up by bending the ear loops of the temples and slipping them over the ears whereby there is essentially a straight tensile force or pull in the straight portions of the temples with some bending in them back near the ear loops. The line of action of the force coincides with and passes through the temples at the point of their on-centre connection with the lenses. In the Ful-vue construction shown in Figure 4, while the ear loops are bent and slipped over the ears in the same way as in Figure 3, there is not a straight pull in the straight portions of the temples but a bending action throughout their length because the line of action of the force is below and parallel to them and the space between the ear loops and the pivot of the nose pads is too short. This greater bending in the straight portions of the temples in the Ful-vue construction is due to the fact that over their whole length they are at a greater distance from the line of action of the resisting force. This greater distance is due to the vertical separation of the point of connection of the temples from the point of attachment of the nose pads. The bending of the straight portions of the temples makes them act like springs over their whole length instead of only in the part near the ear loops, as in the case of the on-centre construc-

tion temples. The result of the longer springs thus created is that the straight portions of the temples in the Ful-vue construction have greater resilience or stored up energy than the on-centre construction ones. This fact has important consequences. For while the amount of resisting force required to overcome displacing forces must be the same in the case of both constructions it can be maintained with a lighter pressure behind the ears in the Ful-vue construction than in the on-centre one, because of the greater resilience. It follows as a practical result from this greater resilience that the adjustment of Ful-vue construction mountings is less critical. It is not as necessary to be exact in getting the right amount of bending of the ear loops to produce the required amount of resisting force. It is consequently easier to adjust Ful-vue construction spectacles in such a way as to give them the necessary resisting force against displacement and at the same time prevent uncomfortable pressure behind the ears.

Professor Price also explained that because of the low connected nose pads and the high connected temples it is easier for the Ful-vue construction to meet and overcome the displacing force of a sudden jar. As explained by Mr. Splaine, the nose pads have less tendency to slide down on the nose than saddle bridges. Consequently, less force is required to keep them in position. In the Ful-vue construction, because of the bending in the straight portions of the temples, there is a resilient active force capable of meeting a displacing force, which gives them a resilient restoring condition, so that if there were a tendency of the lenses to move slightly away from the face in the case of a jar the stored up resilient energy in the temples would pull them back into position. But in the on-centre construction there is no such restoring force, so that when a jar moves the lenses away from the face there is nothing to pull them back and they take the alternative of dropping down slightly on the nose. If the same action occurs again, followed by a slight outward displacement, there is an additional downward one which finally results in the bridge having moved down the nose. This action means that there is a pull forward and up around the back of the ear, and the situation can be corrected only by pushing the bridge back in position. Moreover, the fact that less pres-

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sure is needed to hold nose pads in position than saddle bridges makes it easier, because of the springing action of the Ful-vue temples, to arrive at a soft resilient pressure that is both comfortable and adequate.

There is thus no doubt that the Ful-vue construction claimed by the defendants gave important advantages that were not possible with the former on-centre construction. It is also clear that these all came from the bending action of the straight, or strut, portions of the temples, that made them act like springs, as Professor Price said struts could act, with their resultant resilience, and that the temples could perform this tension function of a strut because of their distance from the line of action of the resisting force that followed from the vertical separation referred to. The combination thus clearly met the test required for a combination invention as compared with the former on-centre construction, namely, that it led to a simple unitary result different from the succession or sum of the results of the elements and not attributable to any of them.

Counsel for the plaintiff called Professor Price's attention, on his cross-examination, to Figure 4 of the Emons patent and Professor Price agreed that the same principles would apply to a spectacle construction according to it as are applicable to the Ful-vue construction according to claim 5 of the patent in suit, as shown by Figure 1 of Exhibit Z1 and Figure 4 of Exhibit Z3; the conditions were the same in the two constructions, from which it would follow that the advantages flowing from the use of the Ful-vue construction as compared with the on-centre one would also flow from a construction according to Figure 4 of the Emons patent. While this was an important statement its effect must not be exaggerated or its scope unduly enlarged. On the contrary, it should be considered as subject to the qualifications inherent in the conditions to which it was applied. But counsel for the plaintiff admitted no such qualifications. He assumed that all the advantages of the Ful-vue construction flowed from the high connected temples, even with saddle bridges, as described in the Emons patent and that Professor Price had so admitted, and based his whole attack on the patent on the ground of lack of inventive advance over the Emons patent on this assumption. In my opinion, there is nothing in Professor

Price's statement to justify such an assumption. A review of his evidence shows that he could not have intended to admit that the advantages resulting from the use of the Ful-vue construction flowed from the high connection of the temples. Indeed, they could not come from that alone. The fact that a construction according to Figure 4 of the Emons patent would give the same advantages as those that flowed from the use of the Ful-vue construction was not because of the high connection of the temples at all, but because in the construction referred to there happened to be an adequate vertical separation between the point of connection of the temples and the point where the saddle bridge found support on the nose of the wearer. The reason for this is easily explained. Emons put his temples above the 180 line and out of the useful field of vision. McLeod suggested that in order to get out of the useful field of side vision the temples should clear the top of the iris. This would put them at 9 millimetres above the horizontal centre line of the lenses. In the Ful-vue construction that has gone into use the temples are connected at  $10\frac{1}{4}$  millimetres above the horizontal centre line. Emons used saddle bridges which varied greatly in height and to a lesser extent in width to suit various types of noses. This variation ran from a low of zero to a high of  $12\frac{1}{2}$  millimetres above the horizontal centre line of the lenses which made the point of support on the nose of the wearer approximately 1 millimetre higher. The bridge shown in Figure 4 of the Emons patent, according to Mr. Splaine's evidence, as to which there is no dispute, was "about the zero height . . . or very close to it, to the centre line". This would make the point of support on the nose approximately 1 millimetre above the horizontal centre line of the lenses so that if the temples were put high enough to clear the top of the iris there would be a vertical separation of approximately 8 millimetres. This would be adequate to separate the straight portions of the temples from the line of force referred to by Professor Price and enable them to act as struts with their resulting bending action and resiliency and the advantages flowing therefrom. But the bridge shown in Figure 4 of the Emons patent, being of about zero height, could be used only by a person with a broad flat nose such as is usual in the case of a Chinaman. It could

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not be used by any one else. In the case of persons with higher noses higher bridges would be required and the higher the bridge the less the vertical separation between the point of connection of the temples and the point of support of the bridge on the nose until it disappeared altogether. For example, if a bridge of the normal height of 5 millimetres was used the point of support on the nose would be approximately 6 millimetres above the horizontal centre line of the lenses and there would be only a small vertical separation of 3 millimetres which would not be adequate. If the bridge was 3 millimetres higher there would be no vertical separation. And if it was higher than that there would not only be no vertical separation of the kind mentioned but the very opposite would result. There would thus be an adequate vertical separation in the Emons construction only in a very limited number of cases. In the Ful-vue construction, on the other hand, there would always be an adequate vertical separation for the nose pads were always connected below the horizontal centre line of the lenses. This would give a vertical separation of at least 9 millimetres even if the temples only cleared the top of the iris. And in the Ful-vue construction that has gone into use the vertical separation is even greater for the temples are connected at  $10\frac{1}{4}$  millimetres above the horizontal centre. It is, I think, impossible to read Professor Price's evidence without coming to the conclusion that it was the vertical separation between the points referred to that was the source of the advantages flowing from the use of the Ful-vue construction for it was this separation that removed the straight portions of the temples from the line of force Professor Price described and enabled them to act as struts with their bending action and resiliency. Where there was no vertical separation there would be no advantages of the kind mentioned. And it should be remembered that Professor Price did not make a general statement that the advantages flowing from the use of the Ful-vue construction would flow from the use of any construction according to the Emons patent. His statement was in reply to a question specifically relating to Figure 4 of the Emons Patent, in which a zero height bridge was used, and should be confined accordingly. Its scope must not be extended to conditions different from those to which it was



applied. Consequently, it is fair to say that the statement could be applicable only in cases where the saddle bridge was of the zero height used in Figure 4 of the Emons patent or low enough to create a sufficient vertical separation such as that resulting from the Ful-vue construction, for it would be only in such limited cases that the advantages could come from a construction according to the Emons patent. The statement could have no application in cases where the conditions were different, as, for example, where the bridge required by the wearer would be too high to create the necessary vertical separation for in such cases the advantages of the Ful-vue construction could not follow from the use of the Emons construction.

The difference between the patent in suit and the Emons patent may, therefore, be stated briefly. In a construction according to the latter the advantages of which Professor Price spoke would follow only in cases where there happened to be an adequate vertical separation by reason of the fact that the nose of the wearer was flat enough to permit the use of a bridge low enough to create such a separation, whereas in the Full-vue construction the advantages would follow in all cases. Under the Emons patent the advantages might or might not happen depending on whether the nose of the wearer was sufficiently flat or not, whereas under the patent in suit they would always happen regardless of the height of the nose of the wearer. The reason for the difference is a simple one. In the Emons patent there was nothing to ensure the existence of the vertical separation that was the essential cause of the advantages and they occurred only in the exceptional cases where there happened to be a sufficient vertical separation because of the flatness of the nose of the wearer. But in the Ful-vue construction the presence of the necessary vertical separation was ensured in all cases with the result that the advantages followed in all cases whether the nose of the wearer was flat or high. This difference made the patent in suit an important advance over the Emons patent. In my judgment, there was both novelty and inventive ingenuity in this advance.

It was suggested that a vertical separation was not claimed in the patent. While it is true that there is no specific claim to the kind of vertical separation of which

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Professor Price spoke, there is a claim to a construction that must of necessity create it with its resulting advantages. An analysis of claim 5 shows this. The combination there claimed is "in a device for holding a pair of lenses before the eyes", namely, a spectacle mounting. The first element mentioned is "nose-rest means extending rearwardly of the plane of the said lenses". These are the guard arms which are connected to the lenses or rims and to which the nose pads are connected. The next element is described as "a nose-engaging portion on each of the said nose-rest means rearwardly of the plane of said lenses and said connection being below the horizontal centre line of the lenses". This has reference to the nose pad. The words "said connection being below the horizontal centre line of the lenses" are not as precise as they might be for no "connection" has previously been mentioned but I see no ambiguity in them. Counsel for the plaintiff suggested that the "connection" referred to was that of the guard arms to the lenses or rims. I do not think that this interpretation is tenable. The connection is said to be below the horizontal centre line of the lenses. That being so, the reference cannot be to the connection of the guard arms to the rims or lenses for the figures show this connection to be at the horizontal centre line of the lenses, not below it. I agree with the submission of counsel for the defendants that the "connection" referred to must mean the connection of the "nose-engaging portion", meaning the nose pad, with "the nose-rest means", meaning the guard arms, and that the words should read "and the connection of the nose-engaging portion with the nose rest means being below the horizontal centre line of the lenses". This is so because the nose pads are connected only to the guard arms and nowhere else and this connection is the only one that is below the horizontal centre line. The guard arm connects with the rim or lens at the horizontal centre line and the point of connection of the nose pad to the arm is below it. There is no difficulty with the remaining part of the claim relating to the temples and their connection "above the field of useful side vision when the lenses are in place before the eyes, whereby the said side pieces will serve as struts and prevent the lens holding device from being tilted about the supports on the nose". Claim 5 is

thus directed to a combination in which there are off-set nose pads connected below the horizontal centre line of the lenses and temples connected above it at a height above the field of useful side vision. This combination will in all cases give the vertical separation of which Professor Price spoke. All the Ful-vue construction used by the defendant American Optical Company since the issue of the patent has been according to claim 5. Without saying so in specific terms the claim is for a construction that must create the vertical separation which Professor Price considered the source of the advantages flowing from the use of the Ful-vue construction.

There is certainly nothing in the Emons patent or in the prior art to indicate or suggest the desirability of the vertical separation we have been discussing or a construction that would create it, and we have seen that where the advantages flowing from its use have also followed from the use of the Emons construction in certain cases such results have been accomplished only accidentally because in such cases there happened to be an adequate vertical separation. But counsel for the plaintiff raised the objection that neither was there any disclosure in the patent in suit of the desirability of having the nose pads connected below the horizontal centre line of the lenses or of the vertical separation referred to. There are, I think, two answers to this objection, namely, that the inventor did disclose the desirability of the vertical separation and that the construction which he described was one that necessarily creates it. It is clearly disclosed that the temples are connected to the lenses or rims high enough to bring them "above the line of useful side view" and it is also stated: "It will usually be preferred to arrange that the side-piece is approximately at or above the level of the top of the iris, when the face and eye of the wearer are directed horizontally." This high connection of the temples is also shown in Figures 1 and 2 and their description. The low position of the off-set nose pads is also disclosed. It appears from Figures 2 and 4 and their description. There it is stated that "the placquets or nose engaging members", meaning the nose pads, are pivoted to the guard arm "at a point to the rear of the plane of the lenses and below the horizontal centre line of the lenses". Incidentally, this

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gives further support to the interpretation of the word "connection" in claim 5 that counsel for the defendants submitted. Figures 2 and 4 show the vertical separation between the two points of connection just as clearly as it appears in Figure 1 of Exhibit Z1 and Figure 4 of Exhibit Z3. Then the inventor states that this leaves the lenses free to pivot or swing about the points where the nose pads are pivoted on the arms but that this pivotal or swinging action is prevented by the side-pieces acting as struts. And then there is this important statement in the specifications describing Figures 2 and 4, namely, "the high position of the points of attachment of the side pieces *with respect to the pivots* enables them to very positively and easily perform this function". That means, of course, the function of acting as struts. The words in the italics, which are mine, emphasize the relativity in height between the point of connection of the temples and that of the nose pads and is indicative of the desirability of an adequate vertical separation between them. But even if that were not so, this would not defeat the patent for the specification did disclose and describe a construction of high connected temples and low connected nose pads that necessarily created an adequate vertical separation with its resulting advantages.

Nor is it any objection to the sufficiency of the disclosures that the advantages of the invention as enumerated by Professor Price were not set out in the specification. As Fletcher Moulton L.J. said in *Clay v. Alcock & Co. Ltd.* (1) it is a "well-known principle in Patent law that a man need not state the effect or the advantage of his invention, if he describes his invention so as to produce it". That is not so where the inventor has to rely on the presence or absence of such effect or advantage as a part of the necessary delimitation, but we are not concerned with that here. If an inventor has adequately defined his invention he is entitled to its benefit even if he does not fully appreciate or realize the advantages that flow from it or cannot give the scientific reasons for them. It is sufficient if the specification correctly and fully describes the invention and its operation or use as contemplated by the inventor, so that

(1) (1906) 23 R.P.C. 745 at 750.

the public, meaning thereby persons skilled in the art, may be able, with only the specification, to use the invention as successfully as the inventor could himself.

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There was some discussion as to the meaning of the word "struts". It is not a term in the optical art and has not, therefore, any special or particular meaning in it. Nor has the inventor used it with any meaning that he has defined. It is a word commonly used in connection with structures of various kinds and ought, in my view, to be considered in its ordinary meaning as a construction term. That was the sense in which Professor Price used it and I adopt his definition of it as a spacing member or a member that keeps two points at the proper distance apart, and his view that it might carry either a compressing force to keep two things apart or a tensile one to hold them together and might do both. I also accept his statement that struts can, and frequently do, act like springs.

Under the circumstances, I am of the view that the disclosures in the specification are sufficient and that the inventor has adequately described his invention. I am satisfied that any person skilled in the art could, with only the specification, put the invention to as successful a use as the inventor could himself. If he constructed a spectacle mounting according to the directions in the specification and claim 5 there would in all cases be an adequate vertical separation between the point of connection of the temples and that of the nose pads with the advantages therefrom that Professor Price described. In my opinion, the Ful-vue spectacle construction according to claim 5 of the patent in suit was an inventive advance over the prior art and I hold claim 5 valid.

I am strengthened in my opinion that the Ful-vue construction was an inventive advance over the prior art by the evidence of its commercial success. In *The King v. Uhlemann Optical Company (Supra)* the circumstances under which the commercial success of a new device may be regarded as evidence of subject matter were discussed at some length. There I applied the principles laid down by Tomlin J. in *Samuel Parkes & Co. Ltd. v. Cocker Brothers Ltd.* (1) and approved in the House of Lords by Lord

(1) (1929) 46 R.P.C. 241 at 248.

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Russell of Killowen in *Non-Drip Measure Coy., Ltd. v. Stranger's Ltd. et al.* (1). The cases indicated that the practical utility and commercial success of a new device may be material in determining whether the new result produced by it was an obvious workshop improvement or involved the exercise of inventive ingenuity. Commercial success by itself, without the solution of a difficulty, is not sufficient to establish subject matter: *Longbottom v. Shaw* (2) and *Heginbotham Brothers, Ltd., et al. v. Burne* (3). But when it is found that there has been a problem calling for solution and that the new device has solved it then its practical utility and commercial success in displacing alternative devices should be considered strong evidence that its production required the taking of an inventive step and that the applicant for the patent was the first to take it.

All the necessary elements are present in this case. That there was a problem to be solved and a long felt want cannot be disputed. The evidence of Mr. E. M. Splaine, the development engineer of the defendant American Optical Company, who worked on the development of the Ful-vue construction makes that plain. His evidence regarding the problem may be summarized. Saddle bridges were unsatisfactory. They had too small a bearing area to carry the weight of the spectacles and tended to slide down the nose and irritate the skin. From the Manufacturers' point of view their use was uneconomic for too many types had to be kept to fit the various shapes and sizes of noses. And fitters found them difficult to adjust without loss of pupillary value. Nose pads came into use after 1920 and up to 1929 were in most cases connected on the horizontal centre line of the lenses. They had an increased bearing area that enabled them to carry the weight of the mounting with less discomfort to the wearer and prevented some of the sliding down. Until about 1929 the temples were connected at the horizontal centre line of the lenses and although the use of the nose pads was a big step in advance over that of the saddle bridges in holding the spectacles on the nose there was still quite a pull on the ears. The fitting of the spectacles was difficult for it was not possible to maintain the right amount of pressure to keep them in place without discomfort to the wearer. If there was

(1) (1943) 60 R.P.C. 135 at 142.

(3) (1939) 56 R.P.C. 399 at 413.

(2) (1891) 8 R.P.C. 333 at 336.

enough tension to hold them in a tight fit there was uncomfortable pressure on the nose or ears causing soreness. This pressure could be relieved by bending the temples at the ear loops so that they did not press behind the ears, but if this was done the wearer lost the good fit he might have had and the spectacles tended to tilt forward or downward. Mr. Splaine said that when he wore spectacles of the kind described he had "the usual experience that most people had, with a sore nose and sore ears." Professor Price had the same personal experience as Mr. Splaine. When he wore spectacles with on-centre connected temples and saddle bridges he suffered discomfort and abrasion of the skin through excessive pressure on the nose or in back of the ears which could be relieved only by deforming the earloops.

The problem of not being able to maintain the fit of spectacles without discomfort to the wearer was an old one and many efforts were made to solve it, including such constructions as the compensating temples or butts or spiral butts, but none succeeded prior to the Ful-vue construction coming on the market. Spectacles according to the Emons patent were first put on the market about 1929 but did not continue to be sold and went off the market after a very short time. Only a few of them were ever made.

The Ful-vue construction first went on the market in the fall of 1930. It made a substantial solution of the problem. It gave the wearer all the advantages that Professor Price described. For the manufacturer it meant a reduction in the amount of stock to be carried and the fitter's task of adjustment was made easier. The advantages outlined by Professor Price were, of course, most apparent in the metal frame spectacles but they were also found in the plastic frame ones. Mr. Splaine said that when he changed to spectacles of the Ful-vue construction about 1931 or 1932 he found a change in comfort. The pad support was better and there was a flexibility between the bearing point on the nose and the bearing point at the back of the ear. The spectacles had a cushioned feel. He had very little sore ear trouble and no sore nose. Moreover, the spectacles did not slip down but stayed in place better. The evidence of Professor Price as to his personal experience was similar.

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When he changed to spectacles of the Ful-vue construction he found no difficulty in keeping them in their correct position on the nose and had no sense of discomfort from them and felt no undue pressure on the nose or in back of the ear. I am satisfied that the McLeod invention succeeded substantially in solving the problem which had baffled the efforts of others in the art for many years.

The commercial success of the Ful-vue construction has been tremendous. Exhibit Z5 shows the number of Ful-vue ophthalmic frames and mountings sold by the American Optical Company and all its licensed manufacturers. They grew from 488,971 units in 1931 to a maximum of 14,984,215 in 1945 and by the end of 1946 the total volume of sales had mounted to 107,173,898 units. Exhibit Z6 is also an illuminating document. It shows the sales of Ful-vue ophthalmic frames and mountings by the American Optical Company, which is the largest manufacturer of optical products in the world, as a percentage of all its sales of ophthalmic frames and mountings. The percentage increased from an estimated 16 per cent in 1931 to 94 per cent in 1944. Spectacles of the Ful-vue construction have thus greatly displaced other spectacles. Counsel for the plaintiff submitted that Exhibits Z5 and Z6 cannot be related solely to the patent in suit. There was, for example, the Emons patent. And the figures in the two exhibits included the Nu-Mont construction. And counsel also sought to minimize the effect of the evidence as to commercial success by pointing to the large amount of advertising and the control exercised by the patentee in the licensing agreement. But even after due allowance is made for these matters the fact remains that the commercial success of the invention was tremendous. Admittedly, the amount of advertising is large but it is interesting to note that a substantial portion of the advertising expense was incurred during the earlier years. It could not, in my judgment, fairly be said that the success of the Ful-vue construction was due to the volume of advertising. I agree rather with the submission of counsel for the defendants that the main reason for its success was that it was superior to the older constructions, that it solved the problem that they had given rise to and that it supplanted them in the market because of its superiority.



Under all the circumstances, I am of the view that the commercial success of the Ful-vue construction is strong evidence that its production was the result of an inventive step and that McLeod was the first to take it.

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I also repeat the observations I made in the *Uhlemann* case (*supra*) as to the applicability of the principle laid down by the Supreme Court of the United States in *Smith v. Goodyear Dental Vulcanite Company et al.* (1).

For the reasons given I hold that claim 5 in the patent is valid. The plaintiff's action for a declaration of invalidity of the patent must, therefore, be dismissed with costs.

*Judgment accordingly.*

BETWEEN:

TORONTO ELEVATORS LIMITED.....APPELLANT;

AND

COLONIAL STEAMSHIPS LIMITED....RESPONDENT.

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Apr. 25,  
26 and 27  
1950  
May 26

*Shipping—Damage to cargo—Bill of lading—Contractual voyage—The Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49, s. 3, articles III and IV—Peril of the sea—Ship damaged in process of docking—Appeal from District Judge in Admiralty dismissed.*

Appellant's claim is for damage to a cargo of grain consigned by appellant from Fort William, Ontario, to the Sarnia Elevators at Sarnia, Ontario, for carriage on the S.S. *Laketon* owned and operated by respondent. Appellant contends that respondent did not use due diligence to make the *Laketon* seaworthy prior to and at the time when the voyage was commenced and that there was a deviation from the contractual voyage in that the *Laketon* passed the dock of the consignee and proceeded down stream for two miles. Upon her return upstream she stopped at the Imperial Oil dock to refuel and when docking struck the dock with considerable force. Later it was discovered that a quantity of the grain was wet and that the *Laketon* had a jagged hole on the starboard side which was responsible for the wet grain. The hole was below the water line as long as the ship was loaded.

The District Judge in Admiralty for the Ontario Admiralty District dismissed an action brought by appellant against respondent company.

On appeal the Court found that the *Laketon* was in a seaworthy condition when she left Fort William and that the hole made in one of her plates was caused by her striking the Imperial Oil dock and that this occurrence was due to a peril of the sea.

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*Held:* That the *Laketon* in fueling at the Imperial Oil dock did not depart from her contractual voyage and that in any event it was fair and reasonable for her to take on fuel as she did and no liability was created.

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

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

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

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

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

ANGERS J. now (May 26, 1950) delivered the following judgment:—

This is an appeal by the plaintiff from the judgment rendered by the Honourable Mr. Justice Fred H. Barlow, District Judge in Admiralty for the Ontario Admiralty District, on February 17, 1949, dismissing the plaintiff's action with costs.

The plaintiff claims the sum of \$16,994.57 from the defendant for damages allegedly arising from the breach of an agreement relating to the carriage of plaintiff's goods on the S.S. *Laketon* and in tort in respect of the said goods received by the defendant on board the said S.S. *Laketon* in good condition at the ports of Fort William and Port Arthur, Ontario, on or about December 3, 1946, for carriage and delivery by the defendant at Sarnia, Ontario, with interest.

(The learned Judge here refers to the pleadings and continues):—

The claim is for damage to a cargo of grain (wheat and barley), consigned by plaintiff from Fort William, Ontario, to the Sarnia Elevators at Sarnia for carriage on the S.S. *Laketon*, owned and operated by defendant.

The bill of lading filed as exhibit 1, dated at Fort William, Ont., December 3, 1946, starts with the following preamble:—

Shipped in apparent good order and condition at and from the port of Fort William, Ont., by Reliance Grain Company Limited as agents

and forwarders for account and at the risk of whom it may concern, on board the vessel S.S. *Laketon* whereof Hawman is Master, now in the port of Fort William, Ont., and bound for Sarnia, Ont., the property herein described, to be delivered as agreed herein in like order and condition, to the order of The Bank of Nova Scotia, or his or their assigns at Sarnia, Ont., upon payment of freight and charges as noted below.

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The bill of lading contains, among others, these clauses, which seem to me material and relevant:—

4. The vessel shall have liberty to tow and to be towed and to assist vessels under all conditions; to deviate for the purpose of making necessary repairs, taking on fuel, ship's supplies or equipment, loading or discharging cargo, crew, passengers or other persons having business with the vessel and any such deviation shall conclusively be deemed reasonable and within the contemplation of the parties hereto and a part of the contract voyage; save that in connection with a deviation for the purpose of loading or discharging cargo, there shall be no unreasonable delay.

6. All the terms, provisions and conditions of The Canadian Water Carriage of Goods Act, 1936, and of the rules comprising the Schedule thereto are, so far as applicable, to govern the contract contained in this Bill of Lading, and this Bill of Lading is to have effect subject to the provisions of the Rules as applied by the said Act. If anything herein contained be inconsistent with the said provisions, it shall to the extent of such inconsistency and no further be null and void.

The bill of lading describes the goods and rate of freight thus:—

Nineteen Thousand Three Hundred Sixty 20/48 (16,360-20) bushels Sample Barley.

Hold 1.

Rate of Freight from Fort William, Ont., to Sarnia, Ont. — As per agreement.

(The learned Judge here considers the evidence and continues):—

The rights of the parties are governed, apart from the evidence verbal and written, particularly the bill of lading, by The Water Carriage of Goods Act, 1936 (1 Edward VIII, chapter 49), and the schedule thereto containing the rules relating to bills of lading.

Section 3 of the Act contains the following provision:—

There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

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Paragraph 1 of article 3 of the rules enacts:—

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

- a) make the ship seaworthy;
- b) properly man, equip, and supply the ship;

Paragraph 6 reads in part thus:—

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the persons entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

The notice in writing in the present case was unnecessary since the state of the goods, at the time of their receipt at the point of destination, was the subject of joint inspection.

I believe that the *Laketon* was seaworthy from the time she left Fort William until she hit the Imperial Oil dock at Sarnia. This is purely a question of fact.

Counsel for plaintiff-appellant relied on *Parkyn & Peters et al. v. Coppack Bros. & Company* (1). This case was decided on its particular circumstances and it was found that the ship was unseaworthy, that there had been earlier leakage and that no proper inspections had been made. This decision is irrelevant.

The collision is attributable, in my opinion, to a peril of the sea and not to neglect or default of the master or pilot of the defendant-respondent in the navigation of the vessel.

Section 3 of the Act and paragraphs 1 and 2 and subparagraphs (a) and (c) of the latter of article IV of the rules are rather favourable to the carrier.

Paragraph 1 of article IV enacts (*inter alia*):—

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied . . .

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

The material part of paragraph 2 of article IV contains, among others, the following provisions:—

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

- (a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;
- . . . . .
- (c) perils, danger, and accidents of the sea or other navigable waters;

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I think that it may be inferred from the evidence that the accident occurred as the result of a peril of the sea or navigable waters.

The obligation of the carrier has been defined in *Northern Fruit Brokers, Limited v. Aberdeen & Commonwealth Line, Limited* (1), where Wrottesley, J. expressed the following opinion (p. 192):—

Now, the law on this matter is laid down in terms by Lord Justice Scrutton in the case of *Silver v. Ocean Steam Ship Company*, (1930) 1 K.B. 416, at p. 424; 35 Ll. L. Rep. 49, at p. 51, and as applied to this case it is as follows. The defendants here, after examination, signed for the apples as in apparent good order and condition. That must mean that so far as inspection and handling and cutting open of a reasonable number of apples which should have disclosed defects, these apples were not suffering from such defects; and it is not therefore open to the defendants, in the absence of fraud—and here no fraud is suggested—to allege that these apples suffered from such defects, or that the damage which admittedly happened in this case was the result of any such defects.

Now, pausing there for a moment, if therefore the plaintiffs were to prove merely the delivery of these apples to the defendants on this bill of lading and that when the apples arrived at Hull they were in bad order, the defendants must either consent to judgment or prove, firstly, that they had exercised the due diligence laid down in Art. III, to which I have already referred, in the matter of the ship, and, secondly, one of the exceptions contained in Art. IV, r. 2.

The primary obligation placed upon the carrier before he can take advantage of one of the exceptions provided by article IV, rule 2, is the exercise of due diligence. In *Smith, Hogg & Co. Ltd. v. Black Sea & Baltic General Insurance Co. Ltd.* (2), Lord Wright made the following observations (p. 260):—

I think this was also the view of Lord Atkinson in the curious case of *Standard Oil Company of New York v. Clan Line Steamers*, (1924) A.C. 100; 17 Ll. L. Rep. 120, where the vessel was held to be unseaworthy because the master had not been furnished with instructions as to special dangers which her design involved. The ship was lost because

(1) (1940) 66 Ll. L. Rep. 184. (2) (1940) 67 Ll. L. Rep. 253.

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the master, being uninstructed, made a manœuvre which caused her to capsizе. He would not have done so if he had been instructed as he ought to have been.

The loss resulted from the unseaworthiness. In that as in other cases, including the present case, the right to rely on the exception of negligence was conditional on due diligence on the part of the owners to make the ship seaworthy, which the owners had failed to exercise.

What constitutes "due diligence" was set forth in *Grain Growers Export Co. v. Canada Steamship Lines Limited* (1). This was an action by the owners of a cargo of grain against the owners of a barge carrying the grain to recover damages for injury to it during carriage. The *Moravia* was a barge having no motive power of her own, which was towed from port to port by tugs. She was taken to the Government elevator at Port Colborne and there loaded with the view of being towed through the Welland canal to Montreal. The report shows that, after leaving the elevator dock, she was found to be leaking and was taken back to the elevator, where the dry grain was removed, and was then directed to another dock, where the wet grain was taken out of her hold. The decision of the Appellate Division of the Supreme Court of Ontario reversed the judgment of Middleton, J., who had dismissed the action with costs. In the reasons of Hodgins, J.A., who delivered the judgment of the Appellate Division, we find the following remarks (p. 344):—

Upon the result of all this evidence, I cannot find due diligence in regard to seaworthiness, nor seaworthiness itself. To my idea, the words "exercises due diligence" must be taken in a reasonable sense, and mean something substantial. The ship-owner warrants the seaworthiness, and the seaworthiness is a necessary condition of the carriage. Its absence, as has already been pointed out, increases the danger from the perils mentioned in sec. 6, and I read "exercises due diligence to make the ship in all respects seaworthy" as meaning not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so, as far as diligence can secure it.

The decision of the Appellate Division was unanimously confirmed by the Supreme Court of Canada.

In view of the defendant-respondent's reliance on the perils of the sea or other navigable waters, it becomes necessary to define what constitutes such perils. In the

(1) (1918) 43 O.L.R. 330; (1919) 59 S.C.R. 643.

case of *Canadian National Steamships v. William Bayliss* (1) Duff, C.J., expressed the following opinion (p. 263):—

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Counsel for the appellant accepted the definition of "perils of the sea" given in the last edition of Scrutton on Charter Parties (p. 261) as follows:—

"Any damage to the goods carried, by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure."

His main contention was that the appellants having established at the trial a *prima facie* case of loss by a peril of the sea within this definition, the burden of proving negligence consequently rested on the respondent on the authority of *The Glendarroch*, (1894) Prob. 226. At the trial the defence raised under this head was that the heavy seas that were encountered after leaving Hamilton and before the discovery of the loss and damage on the following morning were of such a character as to bring the damage within the words quoted above.

In the case of *Grain Growers Export Co. v. Canada Steamship Lines Limited* (*ubi supra*) Hodgins, J.A., said (p. 347):—

There is no doubt that, if the hole was made by striking the dock, owing to bad steering, then it was not caused by a peril of the sea. Striking a rock or being struck by another vessel without fault is a peril of the sea. See *Chuxton v. Dickson*, (1876) 27 UCCP. 170. But there is in such a case always the proviso that the vessel itself must not have been at fault: *Wilson Sons & Co. v. Owners of Cargo per The "Xantho"*, (1887) 12 App. Cas. 503; *British and Burmese Steam Navigation Co. v. Liverpool and London War Risks Insurance Association*, (1917) 34 Times L.R. 140.

It was submitted on behalf of plaintiff-appellant that the burden rests upon the carrier to bring itself within some exception from liability. In support of this contention counsel for plaintiff-appellant cited the decision of Mr. Justice Morris of the King's Bench Division in *re Herald & Weekly Times, Ltd. v. New Zealand Shipping Company, Ltd.* (2). In this case the Court dealt with the exception under the Canadian Water Carriage of Goods Act, 1936, and specifically with rule 2 (a) of article IV, which is the same exception put forward by the defendant-respondent herein. At page 606 we find the following statements by the Court:—

. . . I do not think on this evidence that I ought to come to the conclusion that it is reasonably shown that there was some act or default on the part of the servant of the ship so as to bring the carriers within the exemption of Art. IV, Rule 2 (a). Unless it can be shown to

(1) (1937) S.C.R. 261.

(2) (1947) 80 Ll. L. Rep. 596.

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me with reasonable clearness what was the act or default, I think it is very difficult to say whether that act or default was done in the navigation or management of the ship.

Further on (p. 607) the learned Judge added:—

Apart from the other difficulties to which I have referred, I am not in a position to know whether the alleged act or default was an act or default while doing something in reference to the cargo or not, nor am I in a position to say whether any act or default was of a nature necessary in the proper handling of the ship.

For these reasons it seems to me that it would be quite impossible for me on the evidence before the Court to say that there was an act, neglect or default of the master, mariner, pilot or servants of the carrier in the navigation or in the management of the ship. Equally it follows that the defendants have not shown that they bring themselves within Rule 2 (g). It follows from what I have said that the plaintiffs are entitled to succeed in this action and it is not really necessary that I should deal with the question of unseaworthiness.

Regarding the question of failure to exercise diligence to make the *Laketon* seaworthy counsel for plaintiff-appellant also relied on the case of *Parkyn and Peters et al v. Coppack Bros. & Company (ubi supra)*. He argued that this case is very similar to the one at bar and referred particularly to the statement by the Court (p. 18) in dealing with the facts and the application of the rules under the English Carriage of Goods by Sea Act, which reads in part as follows:—

Therefore, the question for me is whether the defendants, the ship-owners, have proved that they had exercised all due diligence to make the steamer seaworthy. They say that they had at all times kept this ship up to the requirements of Lloyd's Register classification surveyors; that so far as human care can go, they had kept her in a seaworthy condition; that she was well kept up; and that this disaster was due to some unforeseen accident.

The Court then relates in detail the story of the ship, which I do not consider useful to reproduce, and continues:—

As I have said, it is asserted by the defendants that they did by this means satisfy Lloyd's Register's requirements in everything to keep this vessel in perfect and good condition; that she was in good condition; and that this disaster must have been due to the fact that she sat on some hard substance in taking the ground in Par Harbour which fractured the bottom in some way, which otherwise was sound and seaworthy, and hence this disaster.

There is no evidence whatever that there was any such obstruction.

I must say that I fail to see a thorough similarity between the two cases which counsel for plaintiff-appellant sets forth.

It was urged on behalf of defendant-respondent that the accident was caused by a peril of the sea and in no way by the act, neglect or default of the master, pilot or servants of the *Laketon* in the navigation or management of the vessel. Counsel submitted that the definition of the expression "peril of the sea" is the same whether it be used in a marine insurance policy or in a bill of lading. In support of his pretension counsel referred to various text-books and precedents, the most relevant thereof I think apposite to summarize briefly.

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In the case of *Wilson, Sons & Co. v. Owners of Cargo per The Xantho* (1), Lord Herschell made the following comments (p. 509):—

But it is said that the words "perils of the sea" occurring in a bill of lading, or other contract of carriage, must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the *causa proxima* alone is regarded; whilst, in the former, you may go behind the *causa proxima*, and look at what was the real or efficient cause.

It is on this view that the Court of Appeal acted in *Woodley v. Mitchell*, 11 Q.B.D. 47.

Now, I quite agree that in the case of a marine policy the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils. But I do not think this difference arises from the words "perils of the sea" having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception. It would, in my opinion, be very objectionable, unless well settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments.

In the matter of *The Stranna* (2), Scott, L.J., expressed the following opinion (p. 82)—

In my view what happened was a loss by a peril of the sea, and none the less so because it was the negligence of those who were concerned with the work of loading the ship that brought the peril into operation. It was argued by Sir Robert Aske that if the listing of the ship was caused by bad loading, that very fact excluded the idea of a peril of the sea, his contention being that the meaning of that phrase in the English language, or at any rate as judicially defined, restricts it to cases where the damage to ship or cargo by the sea, or sea water, arises through external causes such as wind and weather, or striking a rock, or where sea water actually gets into the ship. I do not agree.

(1) (1887) 12 A.C. 503.

(2) (1938) P.D. 69.

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Even apart from the wider expressions in the clause which come after "perils of the sea", it is, in my opinion, an appropriate use of the English language to say that on the facts of the present case the timber was lost by a peril of the sea. The fortuitous aspect of the meaning of the word "peril" in a contract either of carriage or of insurance is plainly satisfied by the evidence. As the learned judge points out, so far as the defendants' servants were concerned, the event was wholly unexpected, it was just an unfortunate accident. But it was also a peril of the sea and not merely a peril on the sea.

The liability of a ship floating in the sea, and free to respond to the changing interaction of the forces of gravity and buoyancy as the cargo is loaded, and thereunder to list sideways and so to cause a sudden loss of deck cargo is in my opinion essentially one of the sea risks to which maritime commerce is exposed. It falls within the passage in Lord Herschell's speech in *Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.*, 12 App. Cas. 484, 498, which the learned judge cites—it is "damage of a character to which a marine adventure is subject"; and therefore a loss by such an event is a loss by a peril of the sea.

Another decision which offers some interest is that rendered by The Judicial Committee of the Privy Council in *Canada Rice Mills, Ltd. v. Union Marine and General Insurance Co.* (1). Lord Wright, who delivered the judgment of the Court, set forth these remarks (p. 68):—

Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is *prima facie* a loss by perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that seawater is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the seawater which is the peril of the sea in such cases.

Further on Lord Wright added (p. 69):—

On any voyage a ship may, though she need not necessarily, encounter a storm, and a storm is a normal incident on such a passage as the *Segundo* was making, but if in consequence of the storm cargo is damaged by the incursion of the sea, it would be for the jury to say whether the damage was or was not due to a peril of the sea. They are entitled to take a broad commonsense view of the whole position.

Reference may also be had with advantage to *The Thames and Mersey Marine Insurance Company, Limited and Hamilton, Fraser & Co.* (2); *Hamilton, Fraser & Co. and Pandorf & Co.* (3); *Davidson v. Burnand* (4).

(1) (1941) A.C. 55.

(3) (1887) 12 A.C. 518, 527, 529.

(2) (1887) 12 A.C. 484, 492, 498

(4) (1868) L.R. 4 C.P. 117.

The question of deviation must now be considered.

Paragraph 4 of article IV of the rules is thus worded:—

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

As already noted, the bill of lading contains a clause concerning deviation, which is hereinabove reproduced; this clause is clear and unequivocal.

The evidence discloses, as I think, that the deviation in the present case, which consisted in the berthing at the Imperial Oil dock to take on fuel, was reasonable. It shows that the master of the *Laketon* took her down the river, past the Imperial Oil dock, with a view to turning and making his way into the elevator, and that, upon the return up-stream, the Imperial Oil dock being along the trip of the vessel, the latter stopped there for fuelling. I do not believe that the plaintiff-appellant's claim that the *Laketon* had sufficient fuel to dock at the elevator is founded. The learned trial judge rightly said, to my mind, that, if there were delay in unloading, the fuel supply might be insufficient.

The decision in the case of *Glynn et al. v. Margetson & Co. et al.* (1) cited by counsel for plaintiff-appellant is not pertinent; it cannot be contended that the deviation therein was reasonable.

The case of *Stag Line Limited v. Foscolo, Mango & Co. Ltd. et al.* (2) is not, on the whole, applicable, because the vessel therein involved departed from her contractual route for a purpose entirely outside of her contract. Nevertheless, the remarks by Lord Atkin, dealing with rule 4 of article IV of the schedule to The Carriage of Goods by Sea Act, which, by the way, is literally the same as paragraph 4 of article IV of The Water Carriage of Goods Act, 1936, are material and relevant (p. 341 in fine et seq.).

The decision in *Reardon Smith Line Ltd. and Black Sea and Baltic General Insurance Co. Ltd.* (3) is fairly in point, particularly the reasons of Lord Wright on page 577.

(1) (1893) A.C. 351.  
 (2) (1932) A.C. 328.

(3) (1939) A.C. 562.

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In *Phelps, James & Co. v. Hill* (1) the notes of Lopes, L.J., at p. 613, are apposite and informative.

See also *Leduc & Company v. Ward et al.* (2); *Frenkel v. MacAndrews & Co. Ltd.* (3); *Tate and Lyle Ltd. v. Hain Steamship Company* (4); *Rendell v. Black Diamond Steamship Company* (5).

In Scrutton, on Charterparties and Bills of Lading, 15th edition, on pp. 469 and 470 there are relevant and clear commentaries relating to deviation.

Maclachlan, on Merchant Shipping, 7th edition, and Carver's Carriage by Sea, 8th edition, may also be consulted beneficially on this subject.

About the weight to be attached to the testimony of Loeser, rejected by the learned trial judge, as I have not seen nor heard him, I am not in as good a position as Mr. Justice Barlow to determine the credibility of this witness; in the circumstances I am disposed to adopt his view.

In *Dominion Tankers Ltd. and Shell Petroleum Company of Canada Ltd.* (6) the late President of the Court, Mr. Justice Maclean, had to deal with the evidence of a witness who testified in a capacity rather similar to that of Loeser. The learned judge declined to accept this evidence; his decision on this particular point will be found at p. 202 of the report.

After carefully perusing the evidence and the able and exhaustive argument of counsel I have reached the conclusion that the *Laketon*, when she left Fort William, was in a seaworthy condition and that a hole made in one of her plates on the straight of the vessel aft the bluff of the bow, on the starboard side, was caused by her violently striking the Imperial Oil dock and that the accident must be attributed to a peril of the sea.

I am satisfied that the deviation to take fuel at the Imperial Oil dock was reasonable and a part of the contractual voyage.

For the reasons aforesaid the appeal is dismissed, with costs against plaintiff-appellant.

*Judgment accordingly.*

(1) (1891) 1 Q.B. 605.

(2) (1888) 20 Q.B.D. 475.

(3) (1929) A.C. 545.

(4) (1936) 55 Ll. L.R. 159, 173.

(5) (1895) 8 S.C. 442;

(1896) 10 S.C. 257.

(6) (1939) Ex. C.R. 192.

Reasons for judgment of Barlow, D.J.A.:—

The plaintiff's claim is for damage to a cargo of grain consigned by the plaintiff from Fort William to the Sarnia Elevators at Sarnia, for carriage on the SS. *Laketon*, owned by the defendant company.

It is admitted that certain of the grain cargo was damaged by water on the said voyage, and it is agreed by counsel that the damages will be the subject of a reference if it is found that the plaintiff is entitled to recover.

The rights of the parties fall to be decided, apart from the evidence, upon the bill of lading, Exhibit 1, and The Water Carriage of Goods Act, 1936, Statutes of Canada, 1 Edward VIII, Cap. 49.

The plaintiff contends that the defendant did not use due diligence to make the SS. *Laketon* seaworthy prior to and at the time when the voyage was commenced, and that there was a deviation from the contractual voyage, which fixes the defendant with liability. The defendant contends that the *Laketon* was seaworthy, and in any event that it used due diligence to make her seaworthy. The defendant further contends that there was no departure from the contractual voyage and that if there was, it was a reasonable departure and does not create liability.

Pursuant to the bill of lading, Exhibit 1, the plaintiff shipped from Fort William a cargo of grain on the SS. *Laketon* owned by the defendant, consigned to the Sarnia Elevators Limited. The *Laketon* duly arrived at Sarnia, and I am satisfied on the evidence quite properly by reason of the strength of the current, passed the elevator and proceeded downstream for about two miles, in order to make the turn and proceed to the elevator. Upon her return up-stream, she would pass the Imperial Oil dock, being the only dock on the

Canadian side where she could replenish her fuel oil, she being a fuel oil burner. The evidence which I accept shows that she had in her tanks before refueling at the Imperial Oil dock, at least twenty tons of fuel oil, which was sufficient to enable her to complete her voyage to the elevator. The evidence further shows, that her then supply of fuel oil might not have been sufficient to enable her to move about the elevator harbour in the event of not being able to unload at once by reason of other vessels being ahead of her. Her Master and the Chief Engineer decided to take on a further supply of fuel oil at the Imperial Oil dock. When docking, the starboard side of the *Laketon* struck the dock with "considerable force".

After having taken on fuel, she then proceeded to the elevator where she docked, for the purpose of unloading, with her port side to the elevator. During the unloading a considerable quantity of wet grain was found. After she was unloaded it was then discovered that she had a jagged hole three inches by three-eighths of an inch on the starboard side, which undoubtedly was responsible for the wet grain. So long as the ship was loaded this hole was below the water line.

The evidence shows no water was made on the down voyage, and that the ship had no damp grain on other voyages.

Upon this evidence and other evidence which I accept, I find as a fact that the hole was made by the force with which the ship struck the Imperial Oil dock.

Article III, section 1 of The Water Carriage of Goods Act is as follows:—

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(a) make the ship seaworthy;

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(b) properly man, equip, and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation.

and Article IV, sub-section 1 is as follows:—

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section

The above articles place the onus upon the defendant of proving that due diligence was exercised to make the *Laketon* seaworthy prior to and at the commencement of the voyage.

The evidence shows that the vessel was properly inspected, certified and classified.

I accept the evidence that the hole was on the straight of the ship, just aft the buff of the bow on the starboard side. The witness Loeser would place it slightly forward of this. His demeanour in the witness box and the fact that he was willing to swear that the plate in which the hole was, was paper thin which I cannot accept, makes me suspicious of his evidence. The manner in which he made his examination, the fact that no rivets were disturbed or loose which he admits, the further fact that it was only by reason of the edges of the hole being sharp and jagged which leads him to the conclusion

that the plate was paper thin, is not in the least convincing. I cannot accept his evidence.

The evidence which I do accept satisfies me that the hole was the result of a fracture of the plate caused when the ship sharply struck the Imperial Oil dock. The evidence shows that there is always danger in docking. Undoubtedly, she was not as carefully docked as she should have been

After a careful consideration of all of the evidence, including the evidence of Captain Misener on discovery read into the record by the plaintiff's counsel, I am satisfied that the defendant has satisfied the onus placed upon it, and that all due diligence was taken by it to make the vessel seaworthy. *Dominion Glass Company Limited v. The Ship Anglo Indian and her owner* (1).

It would appear to me that what happened at the Imperial Oil dock might very well be termed a peril of the sea. There is always danger in docking, and it requires very skilful handling. If what happened was not a peril of the sea then it was caused by the act, neglect or default of the master or the servants of the defendant in the navigation or in the management of the ship, for which the defendant cannot be held liable. See Article IV, ss 2 of The Water Carriage of Goods Act, as follows:—

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

(c) perils, danger, and accidents of the sea or other navigable waters;

I must therefore find that there is no liability on the part of the defendant unless it can be found

(1) (1944) S.C.R. 409.

that it arose by reason of a deviation from the contractual voyage.

The question now to be determined is: Was the deviation to take on fuel oil at the Imperial Oil dock a departure from the contractual voyage, or if it was a departure, was it an unreasonable departure?

The bill of lading, exhibit 1, contracted for a voyage from Fort William to the Sarnia Elevators at Sarnia. Paragraph 4 of Exhibit 1 is as follows:—

4. The vessel shall have liberty to tow and to be towed and to assist vessels under all conditions, to deviate for the purpose of making necessary repairs, taking on fuel, ship's supplies or equipment, loading or discharging cargo, crew, passengers or other persons having business with the vessel and any such deviation shall conclusively be deemed reasonable and within the contemplation of the parties hereto and a part of the contract voyage; save that in connection with a deviation for the purpose of loading or discharging cargo, there shall be no unreasonable delay.

This provides for a deviation for the purpose of taking on fuel and that "any such deviation shall conclusively be deemed reasonable and within the contemplation of the parties hereto and a part of the contract voyage." The alleged deviation is the docking to take on fuel oil at the Imperial Oil dock. This is the only Canadian dock at which fuel oil can be taken. The evidence satisfies me that the Master quite properly took his vessel down the river past the Imperial Oil dock in order to turn and make his way into the elevator. Upon the return upstream, the Imperial Oil dock was along the way of the voyage, and the vessel stopped for fueling in terms of Exhibit 1 quoted above.

It is contended that this was an unnecessary part of the voyage in view of the fact that the vessel had sufficient fuel to dock at the

elevator. It is further shown, however, that if there were delay in unloading necessitating the moving of the vessel around the elevator harbour, the fuel supply would be insufficient. This is not the case of a vessel travelling for a considerable distance outside of her line of voyage, and by reason thereof encountering perilous seas and other difficulties. It would appear to me that this was a usual and reasonable deviation and that it comes quite properly within the terms of the contract.

The case of *Glynn and Others v. Margetson & Co. and Others* (1), cited by the plaintiff's counsel, is not applicable. In that case it clearly could not be said that the deviation was either usual or reasonable.

In the case at bar, the vessel in the necessary course of her voyage was passing very near the Imperial Oil dock.

Counsel for the plaintiff also cites *Stag Line, Limited v. Foscolo, Mango and Company Limited and Others* (2). This case also is not applicable in my opinion because the vessel departed from her contractual voyage for a purpose entirely outside of her contract.

The case of *Reardon Smith Line, Limited v. Black Sea and Baltic General Insurance Company, Limited* (3), would appear to be in point, and more particularly at page 577, where Lord Wright after having found that a deviation must be usual and reasonable, says:—

The test of what is usual and reasonable in a commercial sense may arise in very different circumstances and must be decided whenever it arises by the application of sound business considerations and by determining what is fair and reasonable in the interests of all concerned.

- (1) (1893) A.C. 351.
- (2) (1932) A.C. 328 at 340.
- (3) (1939) A.C. 562 at 575.

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It appears to me that in the light of all the evidence, it was fair and reasonable for the *Laketon* to take on fuel oil at the Imperial Oil dock.

The Master must act reasonable under all the circumstances, *Phelps, James & Co. v. Hill* (1). See also Article IV, s. 4 of The Water Carriage of Goods Act, which is as follows:—

4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

For further reference as to deviation see: *Frankel v. MacAndrews and Company, Limited* (2); *Tate and Lyle Limited v. Hain S.S. Co.* (3), and *Scrutton Charter Parties*, 15th Ed. 469 and 470.

I find that the SS. *Laketon* in fueling at the Imperial Oil dock did not depart from her contractual voyage. Furthermore, that in any event it was fair and reasonable for her to take fuel as she did and that no liability was created.

The action will be dismissed with costs.

- (1) (1891) 1 Q.B. 605 at 611.
- (2) (1929) A.C. 545 at 564.
- (3) (1936) 55 Ll. L. Rep. 159 at 173.

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April 17, 18,  
19, 20 & 21  
May 4 & 5  
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BETWEEN:

BARTON INC. and BARTON'S  
BONBONNIERE INC. ....

APPLICANTS;

AND

MARY LEE CANDY SHOPPES  
LTD. and BARTON'S BONBONS  
LTD., .....

RESPONDENTS.

*Trade mark—Word mark—Petition to expunge—The Unfair Competition Act, 1932, 22-23 Geo. V. c. 38, ss. 2(h), 2(m), 3(b), 10(d), 44(2), 52(1)—“Bartons”—“Barton’s Bonbonniere”—Trade marks registered in the United States and widely used and advertised there and also known in Canada—It is not necessary to be the owner of a registered trade mark in Canada to be a “person interested” within s. 2(1) of the Act—Symbol becomes a trade mark upon becoming adapted to distinguish particular wares, by use—Prior use of mark before application for registration essential to its registrability—Registration of a trade mark adopted in contravention of s. 3(b) of the Act invalid—Defendants’ word mark ordered expunged from the Register.*

Bartons Inc., manufacturers of candy and chocolates in New York City since 1940, were the owners of the trade mark “Barton’s Bonbonniere” registered in the United States, their principal trade mark, however, being the single word “Bartons”. Both trade marks were widely used and advertised there and were also “known” in Canada by reason of mail order sales, retail sales to residents of Canada visiting in New York and others who either sent or bought the chocolates in Canada by reason of advertisements having circulation there. Mary Lee Candy Shoppes Ltd., manufacturers of chocolates in Montreal,



P.Q. applied for registration of the word "Bartons" as a trade mark for their chocolates, giving as date of first user, September 2, 1947. The application was granted. The plaintiffs now bring this action, asking that the word mark "Bartons" be expunged. On the evidence the Court found that the word "Bartons" was not used by Mary Lee Candy Shoppes Ltd. as a trade mark at any time prior to the date of its application for registration and that the word had never been used by them as their trade mark within the meaning of "trade mark" as defined in s. 2(m) of the Unfair Competition Act, 1932, since it was never used on wares for the purpose of indicating to dealers or users that such wares were made or sold by them.

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*Held:* That the plaintiffs fall within the definition of a "person interested" as defined in s. 2(h) of the Unfair Competition Act, 1932. By the registration of "Bartons" as its trade mark, Mary Lee Candy Shoppes Ltd. has narrowed the area of business open to its rivals, such as the plaintiffs. The possession of that registered trade mark excludes, or with reasonable probability would exclude, the plaintiffs from a portion of that trade into which they desire to enter. By reason of the registration and the existence of the mark, the applicants cannot lawfully do that which, but for the existence of the trade mark, they would otherwise lawfully do; and therefore they have a *locus standi* to be heard as "persons interested".

2. That the definition of a "person interested" as contained in s. 2(h) of the Act does not require that he must have a registered mark in Canada and must have used his mark there by making sales of his wares there or be in business there.
3. That a symbol cannot in Canada become a trade mark as defined in s. 2(m) of the Act until it has become adapted to distinguish particular wares from other wares, by use. Until it has become so adapted to distinguish it is not a trade mark entitled to registration. *Standard Brands Ltd. v. Staley* (1946) Ex. C.R. 615; *J. H. Munro Ltd. v. Neaman Fur Co. Ltd.* (1947) Ex. C.R. 1; *William Candy Co. v. Crothers* (1924) Ex. C.R. 183, referred to.
4. That there being no use of the mark "Bartons" prior to the application for registration, the mark lacked registrability, should not have been registered and the same must be expunged from the Register of Trade Marks;
5. That the trade mark also lacked registrability since it was adopted in direct contravention of s. 3(b) of the Act.

ACTION by plaintiffs herein to have defendants' trade mark expunged from the Register.

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

*H. Gerin-Lajoie, K.C.* and *Edouard D. Angers* for applicants.

*Isidore Popliger, K.C.* and *A. H. Tanner, K.C.* for respondents.

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

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 CAMERON J. on the conclusion of the trial (May 6, 1950)  
 BARTON INC. delivered the following judgment:

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In this matter the applicants asked for an order expunging from the register of trade marks the word "Bartons", which registration was applied for by Mary Lee Candy Shoppes Ltd., one of the respondents, in an application dated September 10, 1947, filed on September 26, 1947, and granted on December 18, 1947, as of the date of filing, for use of wares described as "candy (confections)" as a human food product.

The application to expunge is made under the provisions of sec. 52, subsection (1) of The Unfair Competition Act, 1932, which is as follows:

The Exchequer Court of Canada shall have jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

It follows from that section that unless the applicant be the Registrar he must be a "person interested". The status of the applicants herein is challenged by the respondents, who allege that neither of the applicant corporations comes within the definition of a "person interested" as found in section 2, subsection (h) of the Act; the part of that section which here has any relevancy being as follows:

"Person interested" includes any person directly affected by any breach of any provision of this Act; any person who, by reason of the nature of the business carried on by him and the ordinary mode of carrying on such business, may reasonably apprehend that the goodwill of such business may be adversely affected by any entry in the Register of trade marks, or by any act or omission or contemplated act or omission contrary to the provisions of this Act.

To determine the question thus raised it becomes necessary at once to record my impressions of the evidence adduced as to the nature of the businesses carried on by both applicants and respondents.

As to the applicants, certain facts are either admitted in the pleadings or completely unchallenged by the respondents. Both applicants are bodies incorporated under the laws of the State of New York, having their head offices in New York City. Bartons Inc. was incorporated on July 1, 1940, and Barton's Bonbonniere Inc. on September 30,

1940. The stock of both companies is owned by the same individuals and the officers, directors and shareholders are identical. Since its incorporation in 1940 Bartons Inc. has manufactured candy and chocolates which it sells to Barton's Bonbonniere Inc. and other affiliates which, in turn, retail them to the public. Following its incorporation in 1940 Barton's Bonbonniere Incorporated opened a number of retail stores in New York City, the number being gradually increased until in 1947 there were approximately seventeen, and at the present time, about thirty. They sell only chocolates manufactured by Bartons Inc., and that name appears on every box or package of merchandise to indicate that that firm is the manufacturer of the goods.

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Shortly after its incorporation, Bartons Inc. adopted certain trade marks for use on its products. Exhibit A is a certified copy of its registration of the trade mark "Barton's Bonbonniere" in New York State and dated August 22, 1940. Similar registrations were obtained in every State of the United States except one. The principal trade mark of Bartons Inc., however, was the single word "Bartons" as stated by the witness Tenzer, chairman of the board of both applicant corporations, and unchallenged by any other evidence. These two trade marks were very widely used by the applicants from 1940. On each moulded chocolate made by the first named applicant and sold by the second-named applicant the word "Bartons" appeared whenever it could be impressed thereon, or alternatively on the foil wrapping. On every box or package appeared the trade mark "Bartons" or "Barton's Bonbonniere". The same marks were used on the voluminous literature circulated by the applicants and in their advertisements and on their stationery and display cards. The retail shops of Barton's Bonbonniere were of a distinctive type and were called either "Bartons" or "Barton's Bonbonniere", the name being prominently displayed over the shop or, on occasions, by an electrical sign.

The applicants' sales of such chocolates became very substantial, reaching a figure of \$3,000,000 in 1945 and over \$5,000,000 in 1949. Sales were mainly in New York City, but there was a substantial mail order business operated by Barton's Bonbonniere Inc. for all its shops, and from

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that department about eleven per cent of the total sales were made, the wares being so sold throughout the United States and many foreign countries and Canada. It is established that for the year 1947, the only year for which reasonably accurate figures are available, the mail order sales to points in Canada totalled about ten per cent of the total mail order sales in that year of the value of about \$33,000. As will be seen later, sales were also made since 1940 in the retail shops to residents of Canada visiting in New York and others who either sent or brought the boxes to Canada for consumption and distribution to friends and relatives in this country. Neither of the applicants has any place of business, agencies, branches or employees in Canada.

On March 21, 1949, prior to the commencement of these proceedings, Bartons Inc. applied to the Registrar of Trade Marks in Canada for registration of the trade mark "Bartons" as applied to confectioneries, candies and chocolates (Exhibit 46). In reply to that application the Registrar cited the prior registration of the respondents' mark now sought to be expunged, and the application is still pending.

Both respondent corporations are Canadian corporations having head offices in Montreal and carrying on business solely in Canada. Mary Lee Candy Shoppes Ltd. was incorporated in 1941, the business having been formerly carried on as a partnership. Since that date it has manufactured chocolates which it sold through its own chain of retail shops in Montreal called Mary Lee Shoppes and to other affiliates and agencies. The witness Berman, the president and director of both respondent companies and one of two individuals controlling Mary Lee Candy Shoppes Ltd., and who has been for forty years in the candy business in Canada, was in New York City about May 1947. There he saw the Bartons shops of the applicants, was impressed by their lay-out and design, purchased one of their boxes of chocolates, and took it with him to Montreal. That box, Exhibit D, was of a type widely used by the applicants, with its distinctive label bearing the word "Bartons" in large letters in a square, as well as the word "Bonbonniere" in an adjacent and overlapping square, and also the word "Monte Carlo", indicative of the special

assortment, as well as the words "Bartons Inc.", the name of the manufacturer. He liked the idea of the use of the word "Bartons" as a trade mark for chocolates, although he volunteered no reason for so liking it, and he conceived the idea of manufacturing chocolates under that trade mark. As I have stated, his company Mary Lee Candy Shoppes Ltd. applied for registration of the word as its trade mark by application dated September 10, 1947 and filed on September 26, 1947, giving the date of first user as September 2, 1947.

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It was also decided that a new company should be formed to be the principal retail outlet for the new Barton brand of chocolates. Accordingly, in November 1947 Mary Lee Candy Shoppes Ltd. caused an application to be made for the incorporation of a new company to bear the name "Bartons Inc.", the identical name of the first applicant herein. Upon some objection being taken, the name of the proposed company was changed to "Bartons Bonbons Limited"; and incorporation was granted under that name on January 10, 1948 (Exhibit B). Ninety-six shares of the stock were issued to Mary Lee Candy Shoppes Ltd. and the remaining four shares to individuals controlling that company. The first-named respondent therefore controls the second-named respondent. By resolution of Mary Lee Candy Shoppes Ltd., permission was given to Bartons Bonbons Limited to use the word "Bartons" as part of its corporate name. In March 1947 the second respondent opened two retail stores in Montreal, and since then has opened two additional ones, all using the word "Bartons" prominently displayed on the shop front and in a display card. It is admitted that since these shops were opened they have, with full knowledge and consent of Mary Lee Candy Shoppes Ltd., sold chocolates actually made by Mary Lee Candy Shoppes Ltd.—they sell no others—in boxes bearing the trade mark "Bartons" on the label of the box. Such boxes are all marked "Manufactured by Bartons Bonbons Limited," the first ones sold, however, being marked "Manufactured by Bartons Inc." On none of the boxes has it been stated that the manufacturer is Mary Lee Candy Shoppes Ltd.

In Kerly on Trade Marks, 6th edition, pages 324 to 331, the author reviews the decisions in the English courts as

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to who are persons aggrieved or interested. He refers to the case of *Apollinaris Co.'s Trade Marks*, (1), where Fry J., in delivering judgment in the Court of Appeal, said:

Further, we are of opinion that, wherever one trader, by means of his wrongly-registered trade mark, narrows the area of business open to his rivals, and thereby either immediately excludes, or with reasonable probability will in the future exclude, a rival from a portion of that trade into which he desires to enter, that rival is an "aggrieved person".

Reference is also made in Kerly to the case of *Powell's Trade Mark* (2). In that case, Lord Herschell, in giving judgment, said:

Wherever it can be shown, as here, that the applicant is in the same trade as the person who has registered the trade mark, and wherever the trade mark, if remaining on the Register, would or might limit the legal rights of the applicant, so that by reason of the existence of the entry on the Register he could not lawfully do that which, but for the existence of the mark upon the Register he could lawfully do, it appears to me he has a *locus standi* to be heard as a person aggrieved.

Reference may also be made to *Crothers v. Williamson Candy Company* (3), which affirmed the judgment of this Court. The facts in many ways are similar to the instant case; and while that judgment was under the Trade Mark and Design Act, I do not think there is any material difference between the expression "any person aggrieved" as used in that act and "any person interested" as defined in the present Act so far as this case is concerned. In that case the headnote is as follows:

The Williamson Candy Company, manufacturers of confectionery in the United States, had the words "Oh, Henry" registered in the Patent Office at Washington as a trade mark for chocolate bars and advertised it extensively in American papers and magazines having a substantial circulation in Canada, but made no use of it there. The Crothers Company in the same business in Kingston, Ontario, registered these words in Canada as its own trade mark for the same goods.

Held, affirming the judgment of the Exchequer Court, (1924) Ex. C.R. 183, Idington J. dissenting, that the Williamson Candy Company, while the Canadian registration stands, is prevented from making any use of said words in Canada in connection with the sale of their product, and is deprived of the benefit here of their extensive advertising; it is, therefore, "a person aggrieved" within the meaning of section 42 of The Trade Mark and Design Act and entitled to bring an action to have them expunged from the Canadian registry.

Held also, that the trade mark of the Crothers Company was "calculated to deceive and mislead the public" and should be expunged from the Canadian registry.

(1) (1891) 2 Ch. D. 186.

(2) (1893) 2 Ch. 388;

(1894) A.C. 8.

(3) (1925) S.C.R. 377.

Chief Justice Anglin, in that case, said in part (p. 379):

In May, 1922, an officer of the defendant, a manufacturing confectioner at Kingston, in Canada, attended a confectioners' convention in Chicago. He then learned of the plaintiff's trade mark and of its great vogue and success. The defendant promptly applied for registration of the words "Oh, Henry" as a specific trade mark in Canada for chocolate bars and biscuits made by it, and its application was granted on the 15th of June, 1922. In making the application there was filed a declaration of one of the defendant company's officers, in the form prescribed by sec. 31 of the statute, that the trade mark, registration of which was applied for, "was not in use to his knowledge by any person other than himself at the time of his adoption thereof." The existence of the plaintiff's United States trade mark and its user by them appears not to have been disclosed. A subsequent application by the plaintiffs for registration in Canada was refused.

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And later on he said:

Although it may be that the failure of the plaintiffs to apply for registration in Canada within the time provided for by section 49 of the statute and the defendant's adoption and user of the words "Oh, Henry" as its trade mark will prove an obstacle to the plaintiffs' obtaining registration for themselves of these words as a trade mark even if the defendant's registration should be expunged, that registration, while it stands, prevents the plaintiffs making any use of these words in Canada in connection with the sale of their product and deprives them of the benefit in this country of their extensive advertising. In our opinion it is obvious that they are persons whose legal rights would or might be limited by the appellant's trade mark remaining on the register, and they are, accordingly, "persons aggrieved" within section 42 of the Trade Mark and Design Act and have a status to maintain this action. The learned President of the Exchequer Court regards the exercise of the discretion given the Minister by section 11 of the Act as subject to review by the Exchequer Court for the purpose of the jurisdiction conferred by section 42 of The Trade Mark and Design Act. In this view we agree. In re Vulcan Trade Mark (1915) 51 Can S.C.R., 411, at 413 and 414.

The learned President has held that the defendant's trade mark as registered is "calculated to deceive and mislead the public." That finding has not been successfully impeached. The evidence warrants it. It in turn fully supports the order made by the Exchequer Court that the defendant's trade mark should be expunged as a trade mark which the Minister in the exercise of his discretion could properly have refused to register.

In the instant case the applicants are in the same trade as Mary Lee Candy Shoppes Ltd., the registrant in Canada of the trade mark "Bartons", namely the manufacture and sale of chocolates and candy. The trade mark was adopted by Bartons Inc. and used in the United States, a country of the Union, by both applicants for some seven years or more prior to its adoption or use by either of the respondents, and was for about the same length of time "known"

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in Canada by reason not only of the distribution of wares but also by reason of the advertisements thereof having a circulation in Canada. A certain amount of goodwill in Canada had therefore been established. It is in evidence that the applicants intended to establish agencies or branches in Canada for their goods when satisfactory conditions of supply existed.

Applying these facts to the principles laid down in the cases which I have cited, it seems clear to me that the applicants fall within the definition of a "person interested". By the registration of "Bartons" as its trade mark, Mary Lee Candy Shoppes Ltd. has narrowed the area of business open to its rivals, such as the applicants. The possession of that registered trade mark excludes, or with reasonable probability would exclude, the applicants from a portion of that trade into which they desire to enter. By reason of the registration and the existence of that mark, the applicants cannot lawfully do that which, but for the existence of the trade mark upon the register, they could lawfully do; and therefore, in my opinion, they have a *locus standi* to be heard as "persons interested".

I am unable to agree with the submissions by counsel for the respondents that a "person interested" must have a registered trade mark in Canada and must have used his mark in Canada by making sales of his wares in Canada or be in business in Canada. I find no such requirements in the definition of "a person interested" as contained in sec. 2(h) *supra* or in any other part of the Act.

I now turn to the merits of the case. The main attack on the registration is based on the allegation that the application for registration contained a false and material representation, in that it stated that the word had been first used by the applicant as a trade mark on September 2, 1947. It is submitted that in fact the applicant therefor had never used the word as a trade mark prior to the application for registration. If it be established that such is the case, the applicants are entitled to succeed.

Reference may be made to *Standard Brands Ltd. v. Staley* (1), where O'Connor J. made an order expunging a registered mark which the applicant therefor had stated had been used prior to the application for registration but



which in fact had not been so used. I concur with his opinion on that point, but need not here repeat the reasons given by him in reaching that conclusion. It is sufficient to say that in my opinion a symbol cannot in Canada become a trade mark as defined in section 2 (m) of the Unfair Competition Act until it has become adapted to distinguish particular wares from other wares, by use. Unless it has become so adapted to distinguish, it is not a trade mark entitled to registration.

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Reference may also be made to *J. H. Munro Ltd. v. Neaman Fur Co. Ltd.* (1), where, at page 7, the President of this Court said:

If use of a trade mark was a prerequisite to its valid registration under The Trade Mark and Design Act, as, in my opinion, the weight of authority indicates, although there is some conflict of opinion on the subject, the plaintiff's registration of the words "Gold Medal Furs" as a trade mark was invalid on the ground that they had never been used as such.

Further reference may also be made to the opinion of the late President of this Court, Maclean J., in *Williamson Candy Co. v. Crothers* (2).

The evidence as to the first user of the trade mark by Mary Lee Candy Shoppes Ltd. is somewhat conflicting, but I find no great difficulty in deciding the point. Mr. Saul Berman above referred to was examined in another action between the parties hereto, now pending in the Superior Court of the Province of Quebec. At the trial of the case in which I am now concerned, certain questions put to him on that examination and his answers thereto were read to him, and he admitted that they were accurately reported. Upon that examination, which it may be noted was held prior to the commencement of these proceedings, he stated with no reservations whatever that neither of the respondent corporations had made any use whatever of the trade mark "Bartons" until the time of the application for incorporation of "Bartons Inc.", that is November, 1947, and he added that until that time no one in Canada, so far as he knew, had ever used that trade mark in Canada as applied to candies and confectionery. On his examination for discovery in these expungement proceedings he was asked to produce all boxes bearing the word "Bartons" as used at any time by either of the

(1) (1947) Ex. C.R. 1.

(2) (1924) Ex. C.R. 183.

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respondent corporations. He did so, and stated that Exhibit 14 then produced (now Exhibit 32) was the earliest of the boxes so used. It was definitely pointed out to him that the date of the application for registration was September 26, 1947, but he stated, "We did not use it previous." These statements, made as they were by a person most likely to know all the facts, would seem to conclude the matter; but at the trial, Mr. Berman, notwithstanding his previous sworn statements, endeavoured to support the date given in his application, that is September 2, 1947, and in fact to carry the date of first user back to August, 1947. He says that at the two previous examinations he was confused and mistaken. He now for the first time recalls the fact that in August, 1947, he had prepared about twenty-five to fifty boxes bearing the word "Bartons" in plain print, filled them with chocolates, and sold them over the counter in small lots as cash sales to friends and relatives, to get their reaction. He now says that, because of the small amount involved in these sales, he did not consider them to be in the category of sales, and that for that reason he made no mention of these sales at the examinations for discovery to which I have previously referred.

There is not the slightest credible corroboration of these statements. Mr. Berman was unable to produce any such boxes, alleging that they were all disposed of. No other witnesses saw them; and none of the alleged purchasers, said to have been relatives or friends, whose reaction was sought, and whose identity therefore would presumably be known, was called as a witness. In view of Mr. Berman's previous positive and unqualified statements, I must entirely reject his evidence in this regard. But, even if believed, the evidence would not be helpful to his case, as he stated, as I recall it, that the only word used thereon was "Bartons", and in the absence of any reference thereon to the name of the manufacturer it would not appear that the word had been used to indicate to purchasers that they were made or sold by Mary Lee Candy Shoppes Ltd.

Nor, in my opinion, does the evidence of Mr. Landan assist the respondents at all. In 1947 he was the manager of the Ideal Paper Box Company, which supplied boxes to Mary Lee Candy Shoppes Ltd. He is not now in its

employ. He stated that in August, 1947, he received the first order from Mary Lee Candy Shoppes Ltd. for Bartons boxes, and actually delivered some in that month. He identified Exhibit D as one of those boxes. That box has a label undoubtedly printed or reproduced from the cut produced by Standard Engraving Company at the request of Ideal Paper Box Company, and which, it is fully established, was first delivered to Ideal Paper Box Company on or about the 23rd of October, 1947. I refer to the evidence of Mr. W. B. Sharpe, the manager of Standard Engraving Company, and that of Mr. Lacouture, the employee of that company who secured the order for the cut from Ideal Paper Box Company, the latter having it approved by the paper box company and also by a representative of Mary Lee Candy Shoppes Ltd. These witnesses established that the order for the cut was not given until mid-October, 1947. Mr. Landan's evidence was given without reference to the books and records of Ideal Paper Box Company, was entirely dependent on his memory, and I am satisfied that his evidence was given with the sole purpose of endeavouring to assist Mr. Berman in establishing the first user as of August 1947,—a purpose in which he has completely failed. I reject his evidence entirely.

Moreover, such documentary evidence as exists would indicate that the first sale of Bartons was on December 4, 1947. Mr. Katz, the accountant for both respondents, produced Exhibit 111, an invoice for 5 lbs. of Bartons candies sold to Berkley Neckwear Company, and stated it was the first sale of Bartons chocolates of which there was any record. He also produced Exhibit 110, an invoice of Ideal Paper Box Company for 501 Bartons boxes, that being the earliest shipment of such boxes of which he could locate any record. It is dated November 7, 1947. From this evidence, and other parts of the evidence to which I need not specifically refer, but one conclusion can be reached, namely, that "Bartons" was not used by Mary Lee Candy Shoppes Ltd. as a trade mark at any time prior to the date of its application for registration, namely on September 26, 1947. The application, therefore, contained a false and material representation. There being no use of the mark prior to the application for registration, the

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mark lacked registrability and should not have been registered, and an order will go expunging it from the Register.

On this evidence it is possible to go even further, and to find, as I do, that "Bartons" has never been used by Mary Lee Candy Shoppes Ltd. as its trade mark within the meaning of "trade mark" as defined in section 2, subsection (m). Between October, 1947, and March 1948, it was used on boxes marked "Manufactured by Bartons Inc." From that date to the present it has been used on boxes marked "Manufactured by Bartons Bonbons Limited." It has never, therefore, been used on wares for the purpose of indicating to dealers or users that such wares were made or sold by Mary Lee Candy Shoppes Limited.

The finding which I have made is sufficient to dispose of the matter. But of the various other reasons advanced by the applicants as grounds for expungement I think it necessary to consider but one. It is submitted that on the facts disclosed the registration was invalid, as being in contravention of section 3(b) of the Act, which is as follows:

No person shall knowingly adopt for use in Canada in connection with any wares any trade mark or any distinguishing guise which . . .

(b) is already in use by any other person in any country of the Union other than Canada as a trade mark or distinguishing guise for the same or similar wares, and is known in Canada in association with such wares by reason either of the distribution of the wares in Canada or of their advertisement therein in any printed publication circulated in the ordinary course among potential dealers in and/or users of such wares in Canada.

It is alleged that the applicants' mark was already in use by the applicants in the United States, a country of the Union, as a trade mark for the same wares as the respondents' wares, and was known in Canada in association with such wares, both by reason of the distribution of the wares in Canada and also by reason of their advertisement therein in printed publications circulated in the ordinary course among dealers and users thereof in Canada prior to the adoption or any use of the mark "Bartons" by either respondent in Canada.

<sup>1</sup> I am of the opinion that the applicants have affirmatively established that such is the case. The user of "Bartons" by the applicants in the United States is not challenged in any way. It was both substantial and con-

tinuous since 1940. Counsel for the respondents points out that the applicants' registered mark in the United States was "Barton's Bonbonniere"; and that is so; but the applicants do not rely on the registered mark alone. They have established the fact that they also use "Bartons" most extensively and as their principal mark. It is also established that since 1940 individual purchasers from Canada have brought or had sent into Canada boxes of chocolates manufactured by the first-named applicant and bearing the Bartons trade mark. Moreover, through its mail order department Barton's Bonbonniere, incorporated in 1947, alone sent to Canada the boxes using the word "Barton's" as the trade mark, or the double word "Barton's Bonbonniere" as the trade mark, to the value of \$33,000. On its mail order list it had over sixteen hundred Canadian customers. It is shown also that with each box of chocolates so shipped to Canada, literature and advertisements were enclosed, all stressing the applicants' trade mark "Bartons". Advertisements appeared in the New York Times Magazine and the Herald-Tribune and other papers and journals, all of which, it is agreed, had a circulation in Canada. Many other articles also appeared in trade journals having possibly only a limited circulation in Canada to some of which at least, the respondents were apparently subscribers, some of them having been seen in Mr. Berman's office.

Nor can there be any doubt that Mary Lee Candy Shoppes Ltd. through its officers knowingly adopted the mark. Mr. Berman admits that he knew of its use in the United States, and that a few other friends whom he approached upon his return from New York in May, 1947, also knew of its use there. But he says that neither he nor such friends in Montreal had any knowledge of its use in Canada or that it was "known" in Canada: but that, in my opinion, is unimportant. He did know of its use in the United States; and it was "known", as I have said above, in Canada. The adoption of it therefore by Mary Lee Candy Shoppes Limited was knowingly made, and the respondents therefore cannot take advantage of the provisions of section 10, subsection (d). They were not in ignorance of the use of the trade mark in the United States, —the trade mark which was also known in Canada.

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Nor was the name adopted by the registrant in good faith. With some knowledge of the extent of the applicants' user of the mark in the United States at least, Mr. Berman quite deliberately decided to adopt for his company's use a mark which, apart from the significance attached to it by the extensive user in the United States and elsewhere by the applicants, would confer no conceivable benefit on his company. He gave the label of the applicants to the Ideal Paper Box Company with instructions to copy it in every detail, including colour. He also marked his chocolates as made by "Bartons Inc.", and attempted to incorporate his new company under that name. In his advertisements in the Montreal papers in March, 1947, no mention was made of the name of the manufacturer of the wares, but in addition to stressing the trade mark as "Bartons" some of these advertisements stated that "Now for the first time the famous Bartons chocolates can be bought in Canada",—all at the time when his first Bartons shops were about to open. He denies responsibility for that part of his advertisements, attributing it to his advertising man, Walsh, who at the trial assumed responsibility in the main therefore. In that respect the advertisement was changed upon the instructions of Mr. Berman. The reason for the change may have been the warning letter sent to the respondents by the applicants' attorneys, and which was no doubt received about that time, although Mr. Berman alleges that that was not so. Walsh's evidence was so confusing and inconsistent that I formed the opinion that he was more concerned with assisting Mr. Berman than with relating facts of which he had any actual recollection.

In *Feingold v. Demoiselle Juniors Limited* (1), I had occasion to consider the case of a registrant who was not the first to use or make known his mark in Canada. I repeat in part what I then said, at page 125:

In my view, the problem is simplified if it is kept clearly in mind that in proceedings under section 52 of The Unfair Competition Act, consideration must be directed primarily to the rights of the registered owner, not to those of the applicants. It is the existing rights of the registered owner as they are defined or expressed in the Register that may be challenged, and not the merits or demerits of the party moving under section 52. The Registrar may move to challenge the validity of the registered mark, and so also may any person interested as defined in section 2, subsection (h). The person interested does not need to

have been himself the user of any mark similar to that of the registered owner: He has the necessary status if, by reason of the nature of the business carried on by him, and the ordinary mode of carrying on such business, he may reasonably apprehend that the goodwill of his business may be adversely affected by any entry in the register of trade marks. The authority of any "person interested" to institute proceedings under section 52, subsection 1, is not, I think, to be cut down by the somewhat obscurely expressed provisions of section 4, subsections 2 and 3. It is to be kept in mind that the tenor of the whole Act is to prevent unfair competition. Section 3 forbids the deliberate adoption of a mark similar to any trade mark in use, or in use and known as therein described. Section 4, subsection 1 gives exclusive use to one who first uses or makes known his mark in Canada, if registered. I can find no section of the Act which in clear terms gives any rights to one who was not the person to use or make known his mark in Canada. Section 4, subsection 3 does not, in my view, confer any rights on a later user who has registered his mark, but is a mere direction to the Registrar to take into account the condition of the register at the time an application is made under section 4, subsection 3, and to act accordingly.

Finding, as I have done, that the word "Bartons" registered by the Mary Lee Candy Shoppes Ltd. was adopted by it in direct contravention of the provisions of section 3, subsection (b) of the Act, it follows that it lacked registrability and should not have been registered. On this ground also the applicants are entitled to succeed.

Other grounds advanced by the applicants as establishing invalidity of the mark are: (a) that even if it had been used at any time by Mary Lee Candy Shoppes Limited, it has not been used since at least March, 1948, by that Company, and has in fact been used only by Bartons Bonbons Limited, stated on the boxes to be the manufacturer thereof, and that therefore it has lost its distinctive character as indicating the goods of the registered owner; (b) that, assuming the registration to have been valid originally, the mark has been transferred by the owner to Bartons Bonbons Limited which has used it without a concurrent assignment of the goodwill of the business of Mary Lee Candy Shoppes Limited in connection therewith, contrary to section 44, subsection 2 of the Act. However, in view of my finding declaring invalidity of the registration on the two main points advanced, I do not consider it necessary to reach any definite conclusion on these submissions, although much might be said in support thereof.

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The applicants are therefore entitled to an order expunging from the Register the registration of the trade mark "Bartons", such registration having been made on September 26, 1947, number NS-26364, register 102.

The applicants are entitled to be paid their costs after taxation.

*Judgment accordingly.*

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June 12  
July 8

BETWEEN :

HERBERT FREDERICK MAYBERRY, .. CLAIMANT;

AND

HIS MAJESTY THE KING, ..... RESPONDENT.

*Crown—Information—The Excise Act, S. of C. 1934, c. 52, ss. 112(1), 124, 169(2), 169(A)—Seizure—Forfeiture—Vehicle which "had been or was being used for the purpose of transporting spirits unlawfully manufactured"—Court vested with no discretion when offence proved even when owner of vehicle had no knowledge it carried such spirits—Partial relief under s. 169(A) of the Act not available to claimant in whose possession vehicle was seized—Intention or purpose of owner or driver of vehicle in transporting illicit spirits need not be established by Crown officers—Powers to relieve from forfeiture reserved to Governor in Council under the Consolidated Revenue and Audit Act, S. of C. 1931, c. 27, s. 33—Claim dismissed.*

One M. and one S. while motoring towards Charlottetown observed a man standing on the side of the road and signalling for a lift. M. stopped his car. He had never seen the man before but S. recognized him as one L. Upon being invited into the car, L. took a parcel from the ground, placed it in the rear seat and got into the front seat with M. and S. who paid no attention to the parcel. After proceeding but a very short distance they were ordered by R.C.M.P. constables to stop. The car was searched and the officers upon examining the parcel found it to be a potato sack in which there were two one-quart tins which contained spirits commonly called "moonshine". The spirits and car were then seized as forfeited. Subsequently both M. and S. were charged under s 169 of the Excise Tax Act with having in their possession spirits unlawfully manufactured or imported and were acquitted by the magistrate. L., also charged, pleaded guilty.

M.'s and S.'s evidence was accepted by the Court as true statements of what occurred: that until his car was searched and the spirits discovered M had no knowledge that it was carrying spirits illicitly manufactured.

*Held:* That the matter is in the nature of a proceeding *in rem* and, if it be established—as it has been done in this case—that the vehicle "had been or was being used for the purpose of transporting spirits unlawfully manufactured" the Court is vested with no discretion in the matter, but must declare the vehicle condemned as forfeited, and that is so even when the owner had no knowledge that such spirits were carried in his vehicle.



2. That the partial relief afforded under the provisions of s. 169(A) of the Excise Tax Act is not available to the claimant since the vehicle was seized in his possession.
3. That if in such proceedings the Crown officers had to prove the intention or purpose of the owner or driver of a vehicle in transporting illicit spirits they would have a very difficult task and the whole intention of s. 169(A) of the Excise Act might readily be evaded.

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INFORMATION exhibited by the Deputy Attorney General of Canada to have declared forfeited to the Crown a motor vehicle seized and detained under the provisions of section 169 of the Excise Tax Act.

The action was tried before the Honourable Mr. Justice Cameron at Charlottetown.

*R. R. Bell, K.C.* and *L. P. O'Donnell* for claimant.

*K. M. Martin, K.C.* and *K. E. Eaton* for respondent.

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

CAMERON J. now (July 8, 1950) delivered the following judgment:

This is an Information exhibited by the Deputy Attorney General of Canada on behalf of His Majesty claiming to have the automobile above mentioned condemned as forfeited to the Crown. On December 26, 1949, on the highway leading from Charlottetown to Montague in Prince Edward Island, it was seized as forfeited by Corporal W. H. Warner of the Royal Canadian Mounted Police under the provisions of section 169 of the Excise Act (Statutes of Canada, 1934, c. 52 and amendments) and it is alleged that at the time of such seizure it had been or was being used for the purpose of transporting a quantity of spirits unlawfully manufactured, in violation of the said act.

The claimant Mayberry is a baker residing and carrying on his business at Charlottetown. In 1945 he purchased the car in Connecticut (where he formerly resided) for \$800 and brought it to Canada in 1949 when he moved here. It is used for pleasure trips, but mainly in making deliveries from his shop.

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December 26, 1949, was a holiday. On that afternoon after an early supper Mayberry's son-in-law Douglas H. Sherren, had occasion to attend to his duties as janitor at the office of the Unemployment Commission in Charlottetown and Mayberry went there with him to assist with the work. That task being completed earlier than usual, they decided to motor out to Cherry Valley to call on Sherren's sister. They proceeded by the main road leading from Charlottetown to Montague, but after going some distance they decided to postpone that visit to the following day (also a holiday) so that they could take their wives with them. The car was turned about and they proceeded towards Charlottetown. They had with them in the car one half dozen bottles of beer, legally purchased, and decided to stop at a convenient point off the road and consume one bottle each. The stop was made at a point a short distance east of Key Hill and lasted about 5 minutes, the lights of the car being left on. They then proceeded towards Charlottetown and after going about 150 yards observed a man on the right side of the road. He was standing erect and so far as they could then see he carried no parcels of any sort. He signalled by his hand that he wanted a lift, and without any hesitation, and following the custom in that area, Mayberry decided to take him along and stopped the car. Mayberry had never seen or heard of the man before; but upon the car being stopped Sherren recognized him as one LeBlanc, who some years previously had played in the Charlottetown band. Upon being invited into the car, LeBlanc took a parcel from the ground and placed it in the rear seat and at the suggestion of Sherren, who did not want anyone to see the remaining bottles of beer in the rear, LeBlanc got into the front seat with Mayberry and Sherren. Neither of the latter paid any attention to the parcel. They then drove towards Charlottetown and after proceeding but a very short distance they were ordered by constables of the Royal Canadian Mounted Police to stop. The car was searched and the officers upon examining the parcel which LeBlanc had placed in the car found it to be a potato sack in which there were 2 one-quart tins which contained spirits illicitly manufactured, commonly called "moonshine." There is no dispute as to the contents of the tins.

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To the constables, Mayberry and Sherren each denied any knowledge of the contents of the bag, but LeBlanc immediately admitted ownership thereof and full responsibility for its presence in the car. LeBlanc told the officers that he had been on the roadside and had been "hitchhiking a ride" and had just been picked up by Mayberry and Sherren. The spirits and car were then seized as forfeited.

Subsequently both Mayberry and Sherren were charged under s. 169 of the Excise Act with having in their possession spirits unlawfully manufactured or imported and were acquitted by the magistrate. LeBlanc was also charged under the Provincial Liquor Act, and the Excise Act, and pleaded guilty.

The claim for a declaration of forfeiture is founded on section 169(2) of the Excise Act. It is as follows:

169. (2) All spirits unlawfully manufactured or imported, or unlawfully or fraudulently removed from any distillery, bonded manufactory or from any bonded warehouse, wheresoever they are found, and all horses and vehicles, vessels and other appliances which have been or are being used for the purpose of transporting the spirits so manufactured, imported or removed or in or upon which the same are found, shall be forfeited to the Crown, and may be seized and detained by any officer and be dealt with accordingly.

The claimant has complied with all of the requirements of sections 115 and 116 of the Excise Act, but the car has remained in the custody of the seizing officers.

Section 112(1) places the burden of proof on the claimant. Without the slightest doubt I accept his evidence as a true statement of what occurred; that until his car was searched by the constables and the spirits discovered he had no knowledge whatever that his car was carrying spirits illicitly manufactured. His statement is fully corroborated by that of Sherren whose evidence I also accept at full value. Both are reputable citizens of Charlottetown and so far as the evidence shows, have never had any difficulties with the police or been connected in any way with LeBlanc or any bootlegger. LeBlanc was not available at the hearing of this matter, but by consent, the magistrate's notes of his evidence given in the police court were admitted. For what that evidence is worth, it corroborates the statements of Mayberry and Sherren. LeBlanc said that after purchasing the spirits at the roadside from an

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unknown person, who later vanished, he decided to hitch-hike into Charlottetown. Several cars refused his request for a lift but finally Mayberry's car did stop in response to his signal. I am completely satisfied that the picking up of LeBlanc was not by pre-arrangement, but merely the courteous act of the driver of a car in giving assistance to a hitch-hiker. Neither Mayberry nor Sherren paid any attention to the bag placed in the rear seat. It was a potato bag, and apparently that type of bag is commonly used throughout the province as a convenient method of carrying all sorts of articles.

On behalf of the Crown it is contended that the mere fact that the car transported spirits illicitly manufactured is sufficient to warrant the declaration of condemnation, that the provisions of section 169(2) are absolute and that the court has no discretion under these circumstances, but must declare condemnation upon the facts here proven. Counsel for the Crown also submits that under the circumstances established, section 169(A) provides the only form of relief from forfeiture and that as the vehicle was in possession of the claimant when seized that section does not apply to him. I am satisfied that the claimant here cannot avail himself of the provisions of section 169(A).

It is established, on behalf of the Crown, that close to the place where Mayberry and Sherren stopped to consume the beer, there is a cottage or shack occupied by a man who has been convicted as a bootlegger on several occasions. Neither Mayberry nor Sherren knew him or anything about him. It is also shown that LeBlanc has been a bootlegger for many years, with numerous convictions under the Provincial Liquor Act and the Excise Act. It is also established that it was possible for LeBlanc to have seen the lights of the parked car from his position at the roadside. I am asked to draw the inference from these facts that picking up LeBlanc was not a mere coincidence but a plan which had been pre-arranged, that those in the car were waiting until LeBlanc appeared at the roadside ahead and that he and his illicit spirits would then be picked up and taken to Charlottetown. In the light of the evidence which I have accepted I must refuse to draw any such inference. Had the Crown established that Mayberry or Sherren were

connected in any way with bootlegging or with LeBlanc there might have been some ground for suspicion, but the evidence is quite to the contrary.

Then it is pointed out that when the car was stopped and searched by the officers they detected a strong odour of "moonshine" in the car, caused by the liquor leaking out of one of the tins and wetting the bag. It is urged that the odour was so noticeable that Mayberry and Sherren must have detected it and therefore must have known that the car was transporting "moonshine." Mayberry had no knowledge of the odour of "moonshine" but Sherren said that he knew what it was like. Both said they did not observe any such odour in the car and LeBlanc's evidence was to the effect that until the time the car was searched by the police there was no noticeable odour of "moonshine" in the car. When it is recalled that both Mayberry and Sherren had just consumed a bottle of beer and that the spirits were in the car only long enough for the car to travel one-quarter of a mile, I think that it is quite impossible to find that they must have known that they were transporting spirits. I accept their statements that they had no knowledge of it whatever. I am quite satisfied that neither Mayberry nor Sherren were in any degree parties to LeBlanc's offence and that they were quite innocent of any complicity therein or of any collusion with LeBlanc in regard thereto.

The facts of the matter in my opinion are those stated by the claimant, but unfortunately that finding does not entitle him to the relief which he now claims. This matter is in the nature of a proceeding *in rem* and, if it be established—as I think has been done in the instant case—that the vehicle "had been or was being used for the purpose of transporting spirits unlawfully manufactured" the court is vested with no discretion in the matter, but must declare the vehicle condemned as forfeited, and that is so even when the owner had no knowledge that such spirits were carried in his vehicle. The only exception to that statement is the partial relief afforded under the provisions of section 169(A), which section is not available to the claimant herein, inasmuch as the vehicle was seized in his possession.

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Reference may be made to *The King v. Krakowec et al* (1). In that case proceedings were taken for a declaration of forfeiture of a vehicle shown to have been used in the transportation of illicit spirits. The facts are stated shortly in the headnote as follows:

A truck in the possession and use of its purchaser under a conditional sale agreement, by which the property in and title to it remained in the vendors until payment in full and on which a balance remained unpaid, was seized under circumstances which, as held on facts admitted, must be taken to have made it liable to forfeiture to the Crown under said s. 181.

It was held, reversing judgment of the Exchequer Court:

1. That the vehicle was liable to forfeiture not only as against the person in whose possession it was seized but also as against the said vendors, although the latter had no notice or knowledge of the illegal use which was being made of it,

2. That the court is not vested under s. 124 of the Act with any discretionary power in the matter. It must decide according to law.

That judgment was of course delivered before s. 169(A) was incorporated in the Act. The seizure and forfeiture of the vehicle had been made under s. 181 of the Excise Act which in substance was much the same as the present s. 169, although the words "for the purpose of removing the same" have been changed to "for the purpose of transporting the spirits so manufactured . . ." In that case Rinfret, J. (as he then was) said at pp. 142-3:

We agree that, when the meaning of a statute is doubtful or ambiguous, the courts should not, unless otherwise compelled to do so, give it that interpretation which might lead to unjust consequences; but even penal statutes must not be construed so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation would comprehend (*Dyke v. Elliott*; *The "Gauntlet"* (1872) L.R. 4 P.C. 184, at 191); and it is surely not for the judge so to mould a statute as to make it agree with his own conception of justice (Craies on Statute Law, 3rd ed., pp. 86, 444). Adverting to the particular case before us, it is not assuming too much to say that it must have been known to the legislature, when it passed the Excise Act, that a great many drivers of motor vehicles are not the owners thereof, but possess and operate them subject to conditional sale agreements, and if sec. 181 was meant to apply only to vehicles driven by the owners thereof, it is obvious with what ease the provision respecting forfeiture could be evaded.

Whether such a thing exists as what is referred to by Lord Cairns (in *Partington v. Attorney-General* (1869) L.R. 4 H.L. 100, at 122.) as the "equitable construction" of a statute, we cannot see that this is a case for its application, and we find no reason why we should not simply adhere to the words of the enactment.

It is not for the court to say if, in some cases,—such as, for example, when the vehicle utilized was stolen from its owner—the forfeiture may

effect a hardship. Such cases are specially provided for in subs. 2 of sec. 133 of the Excise Act. The power to deal with them is thereby expressly vested in the Governor in Council, thus leaving full play to the operation of sec. 91 of the *Consolidated Revenue and Audit Act* (c. 178 of R.S.C., 1927), for the remission of forfeitures. We are unable to agree with the decision in *Le Roi v. Messervier* (1928) Q.R. 34 R.L.N.S. 436, already referred to, that the discretionary power is also vested in the court under sec. 124 of the Act. In our view, that section means nothing more than this:

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After the vehicles, vessels, goods and other things have been seized as forfeited under sec. 181, the person from whom they were seized, or the owner thereof, may prevent the automatic condemnation of the said vehicles, etc., by giving notice as provided for in sec. 125 "that he claims or intends to claim the same"; whereupon, an information for the condemnation of the vehicles, etc., having been filed (as was done in this case), the court may hear and determine the claim made by the person from whom they were seized or from the owner, and the court may release or condemn the vehicles, etc., as the case requires, i.e. according as they come or not under the provisions of the Act. The court thereunder is vested with no discretion, it must decide according to law.

Had I any authority under the Act to exercise any discretion in dealing with the established facts I would unhesitatingly have granted relief to the claimant and directed that his car be returned to him. But no such authority exists and it is my duty to apply the law as found in the statute and in the light of the interpretation placed on it in the case which I have cited. I must therefore find that as the Crown has established the fact that the vehicle was used in the transportation of spirits admittedly of unlawful manufacture, judgment must go declaring the said automobile condemned as forfeited to the Crown by virtue of the provisions of the Excise Act.

Counsel for the claimant submitted that while the vehicle undoubtedly was used "in the transportation" of spirits unlawfully manufactured, it could not be said that it was used "for the purpose" of transporting spirits unlawfully manufactured. He argued that as the driver and owner had no knowledge of the presence of spirits in his car, he therefore lacked the intention or purpose of using his car for such transportation. I am unable to interpret the section in that way. The obvious purpose under the Act is to provide something more drastic in the way of penalties than fines or imprisonment and to provide for the forfeiture of vessels and vehicles illicitly engaged in the liquor traffic. If in such proceedings the Crown officers

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had to prove the intention or purpose of the owner or driver of such vehicle in transporting the illicit spirits they would face a very difficult task and the whole intention of the subsection might readily be evaded.

The finding which I have made will doubtless work a great hardship to the claimant. I realize also that it could create very substantial difficulties for motorists who may "give a lift" to strangers who may be in possession of a very small quantity of illicit spirits, concealed possibly on their persons. Notwithstanding the lack of any discretion in the court under the Excise Act as it now stands, there is power to deal with such cases of hardship under the Consolidated Revenue and Audit Act, 1931, c. 27, s. 33, such powers for the remission of forfeitures being expressly reserved to the Governor in Council under s. 124 of the Excise Act. I cannot leave the matter without suggesting that this is a case where consideration might well be given to any such claim as may be advanced by the claimant herein.

There will therefore be judgment declaring condemnation of the automobile in question as forfeited to the Crown, as claimed in the information. The costs of the Crown proceedings are in the discretion of the Court. The Crown under the law had the right to institute these proceedings and has succeeded in establishing the claim. In the exercise of a judicial discretion, I cannot do otherwise than to find that the costs must follow the event. The claimant must therefore pay the costs of the Crown proceedings and of his claim to the return of the motor car, *if demanded by the Crown*, which I hope will not be the case.

The claimant also asked for compensation for loss of use of his vehicle. That claim will be dismissed without costs.

*Judgment accordingly.*

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BETWEEN :

MAY McDUGALL ROSS, as Execu-  
trix of the last Will of ANNIE Mc-  
DOUGALL, ..... } APPELLANT;

1949  
Sept. 23  
1950  
July 7

AND

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

*Revenue—Income Tax—Income War Tax Act, R S C. 1927, c. 97, ss. 2(h), 3(1) (f), 5(1) (a), 33(1), 36(2), 77(1) (c), 77(2)—“Income”—“Royalty”—“Production”—Receipts either royalties—Words “production or use of any real or personal property” in s. 3(1) (f) of the Act include oil produced from land—Allowance made by Minister for exhaustion “just and fair”—Penalty added by Minister for failure to file estate income tax return within delay—“Person”—Appeal allowed in part.*

Section 3(1) (f) of the Income Tax Act reads as follows: For the purposes of this Act “income” . . . shall include . . .

(f) rents, royalties, annuities or other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property.

As executrix of the will of her late mother, Annie McDougall, who owned certain lands in the province of Alberta, appellant transferred all hydro carbons (oil and gas) except coal in said lands and the right to work the same to a company in consideration of a sum in cash and the execution of an incumbrance to secure to and for her benefit a further sum of \$60,000 payable out of 10 per cent of oil produced from the land with the option, however, to the company to pay her the cash market value of such production. The company made certain payments in the years 1944 and 1945 which appellant did not include in the estate returns for those years.

Respondent, considering these payments to be “income” within s 3(1) (f) of the Act, allowed a deduction of 25 per cent for exhaustion and assessed the balance to tax, adding a penalty of \$500 to the assessment for the taxation year 1945 because the appellant was late in filing the return.

*Held:* That the payments received by appellant were like royalties, if not royalties themselves, and they come within that part of subsection (f) of the Act.

2. That the words “production or use of any real or personal property” in the same subsection, include the bringing forth or yielding up of hydro carbons from an oil well and that the payments so received fall also within that part of the subsection.
3. That appellant has not established that the allowance of 25 per cent for exhaustion made by the Minister is other than a “just and fair” one.

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4. That Parliament in enacting s. 77(2) of the Income War Tax Act intended to provide special and distinct penalties for the classes of persons described in ss. 36 to 38 of the Act and that they should not be liable under any other part of s. 77. The intention is so manifest that it cannot be overridden merely by the broad definition of "person" contained in the Act.

Cameron J. APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Calgary.

S. J. Helman and *L. F. May* for appellant.

H. W. Riley, Jr., T. Z. Boles and *N. D. McDermid* for respondent.

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

CAMERON J. now (July 7, 1950) delivered the following judgment:

The appellant received from Royalite Company, Ltd. (hereinafter called Royalite), the sum of \$183.90 in the year 1944, and \$37,820.82 in the year 1945, under circumstances set out in the agreed statement of facts or admitted in the pleadings. The first question is whether these sums were "income" of the appellant within the meaning of the Income War Tax Act (R.S.C. 1927, ch. 97, as amended).

It appears that the appellant is the executrix of the will of her late mother, Annie McDougall, who on June 30, 1938, was the registered owner in fee simple of all mines and minerals, petroleum and gas and the right to work the same in, on or under certain lands in the province of Alberta as particularly described in para. 3 of the amended statement of claim. On that date Mrs. McDougall entered into an agreement under seal with Royalite (Ex. 2) whereby in consideration of the sum of \$12,000 and the covenants of Royalite therein, she did "lease, grant, demise and let" to Royalite "all hydro carbons except coal which may be found in or upon the leased area", and also the right to explore and operate the same and remove the leased substances therefrom (The phrase "hydro carbons except coal" is apparently used to denote "oil and Gas").

That document is referred to as a lease and it provided that Royalite would be the tenant for six years, subject to the term being extended as therein provided.

By that agreement the lessor (Mrs. McDougall) was entitled monthly to receive at the point of production "as royalty and rental," one-tenth part of the leased substances produced; or, alternatively, Royalite had the option of paying her the value thereof in cash at the end of each month.

By para. 11 thereof the lessor gave Royalite an option to buy her entire estate and interest in "the lands and rights hereby leased, including the term of this lease and the reversion thereof," for:

- (a) the sum of \$40,000, credit being given thereon for the \$12,000 paid as consideration for the lease, and the balance being payable in cash at the time of taking up the option; and
- (b) \$60,000 payable out of 10 per cent of the production of hydro carbons except coal, as therein provided.

By para. 12 it is provided that upon taking up the option and upon payment of \$28,000, the lessor would give to Royalite a registrable transfer and that such transfer:

shall reserve to the Lessor a right to receive at the mouth of the well or wells drilled or to be drilled on the said lands 10 per cent of all hydro carbons other than coal produced, saved and marketed from the said lands until the Lessor shall have received such substances in quantities which valued at the current market price at the time and place of production amount in the aggregate to \$60,000, whereupon the right of the Lessor to receive the said *royalty* shall cease and determine and all interest of the Lessor in the lands, rights and the production shall cease and determine. The Operator shall have the right in lieu of paying the said *royalty* in kind as by this paragraph provided to pay the lessor the value thereof at the current market price prevailing in Turner Valley field on the day of production thereof, such payment to be made not later than the last day of the month following production.

On April 25, 1939, Royalite exercised the option and paid the sum of \$28,000 to Mrs. McDougall but nothing further seems to have been done up to the time of her death on June 13, 1939. The transaction was closed out in a manner somewhat different from that provided for in the original agreement of June 30, 1938. By a "surrender of lease" dated February 3, 1940 (a certified copy of which is attached to Ex. 5), Royalite surrendered to the appellant as executrix of the will of Mrs. McDougall, the lease dated June 30, 1938, and "the terms therein created". By transfer also dated February 3, 1940, the appellant, as executrix in

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consideration of \$40,000, transferred to Royalite all hydro carbons except coal in the lands referred to and the right to work the same. That transfer contained no reservation of any rental or royalty to the transferor; but in the "affidavit of transferor," required for registration and sworn to on January 23, 1941, Mrs. Ross stated that the consideration passing between the parties was as follows:

The sum of Forty Thousand Dollars (\$40,000) paid by the Transferee to the transferor and the granting by the Transferee of an incumbrance of the nominal value of One Dollar (\$1 00) to secure the Transferor the payment of a *royalty* to the extent of Sixty Thousand Dollars (\$60,000) on production of hydro-carbons except coal obtained from the said lands.

Ex. 7 is an incumbrance dated June 4, 1940. In that document there is recited the lease of June 30, 1938, the option therein contained, the exercise of that option, the transfer (Ex. 6) and "Whereas in order to preserve the rights of the said May McDougall Ross, as executrix, in the said lands, the said Royalite Oil Co. Ltd. has agreed to execute this incumbrance.

By that incumbrance Royalite, being desirous of rendering the hydro carbons except coal available for the purpose of securing to and for the benefit of Mrs. Ross the said sum of \$60,000, did thereby incumber the said hydro carbons for her benefit with the sum of \$60,000. The terms of payment thereof appear to have been identical with those contained in the original option, namely, that as, if and when production was obtained to deliver to her 10 per cent of such production until at current market values thereof she should have received an amount of an aggregate value of \$60,000; but with the option to Royalite instead of delivering the same, to pay her therefor in cash at the current market value thereof until she should have received from them the sum of \$60,000.

The surrender of lease, transfer and incumbrance were all registered on September 18, 1941. Royalite drilled wells and upon oil being produced elected to pay Mrs. Ross the cash market value of 10 per cent of such production. She received the payments I have mentioned and the balance of \$21,995.28 in the year 1946, but with the payments in that year I am not here concerned.

The appellant did not include these payments in the estate returns for 1944 or 1945. The respondent, however,

considering them to be "income" within section 3(1) (f) of the Act, allowed a deduction of 25 per cent thereof for exhaustion and assessed the balance to tax. Following an appeal the respondent, both in his decision and later reply, affirmed the assessments as levied.

Section 3(1) (f) is as follows:

For the purposes of this Act, "income" . . . shall include . . .
 (f) rents, royalties, annuities or other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property.

Subsection (f) was enacted in 1934 following the decision in *Spooner v. Minister of National Revenue* (1). The headnote in that case is:

The respondent sold all her right, title and interest in land which she owned in freehold to a company in consideration of a sum in cash, shares in the company, and an agreement to deliver to her 10 per cent (described as a royalty of oil produced from the land, on which the company covenanted to carry out drilling and, if oil was found, pumping operations. The company struck oil and paid to the respondent in 1927 10 per cent of the gross proceeds of the oil produced, which she accepted in discharge of the royalty. The Supreme Court of Canada held that the sum so received was not an annual profit or gain within s. 3 of the Income War Tax Act, but a receipt of a capital nature, and that accordingly the respondent was not chargeable to tax in respect of it:—

Held, that it was for the appellant Minister to displace the view of the Supreme Court as being manifestly wrong, and that he had failed to do so.

The Judgment of the Supreme Court (2) was affirmed. There, Newcombe, J., speaking for all the members of the Court, pointed out that while that which Mrs. Spooner received was described as a "royalty", the statute did not, in terms, charge either royalties or annuities as such. It will be observed that both of these words were incorporated in the new subsection (f).

The appellant, however, submits that her receipts were neither royalties nor like royalties, and further that they did not depend upon the *production* of any real or personal property and that consequently they are not caught by subsection (f). It is not disputed that such receipts were periodical or that they were payable "on account of the sale of any such property". It is of some interest to note that in the documents by which the final settlement was carried out—the transfer and the incumbrance—the word "royalty" was used by the appellant in her "Affidavit of

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(1) (1933) A.C. 684.

(2) (1931) S.C.R. 399.

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Transferor” to describe the payments to which she was entitled, and the word “production” was used in that affidavit and in the incumbrance to describe that which might be yielded up by the well and to a percentage of which the appellant was entitled. It is now sought to establish that these words as so used do not bear the same meaning as they do in subsection (f). I take it to be well settled that the name given to a transaction by the parties concerned does not *necessarily* decide the nature of the transaction (*I.R.C. v. Wesleyan Assurance Society* (1)).

“Royalty” is not defined in the Act. Mr. Helman, counsel for the appellant, submits that “royalty implies a transaction which has some *reddendum*, some retention, such as exists between the relationship of lessor and lessee, where there is a fixed royalty obtained, not for a partial time but for the lifetime of the property.” I find no authority for the suggestion that a royalty must exist for the lifetime of the property out of which it is payable. He stresses the importance of the manner in which the sale was eventually carried out, first by cancellation of the original lease in which there has been a reservation of a royalty, and finally by the execution of an incumbrance given to secure the sum of \$60,000 to the appellant as the balance of the purchase price (but payable, of course, out of production). It may be noted in passing that there is a recital in the incumbrance that it is executed by Royalite “in order to preserve the rights of May McDougall Ross (the appellant) in the said land”. Her only rights in the property were the rights to the royalty provided for and reserved to Mrs. McDougall in the original lease and, as I have noted, the appellant in her “Affidavit of Transferor”, refers to these rights as a royalty.

In the Shorter Oxford English Dictionary, Third Edition, “royalty” is defined in various ways. Excluding those which have reference to the Sovereign, these definitions include the following: “denoting chiefly rights over minerals”; “A payment made to the landowner by the lessee of a mine in return for the privilege of working it”; “A sum paid to the proprietor of a patented invention for

the use of it"; "A payment made to an author, editor, or composer for each copy of a book, piece of music, etc., sold by the publisher, or for the representation of a play."

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Other definitions of the word as used in reference to oil, gas and minerals are found in Words and Phrases, Permanent Edition Vol. 37, at p. 811, including the following:

- (a) As relates to mining, "royalty" is a share of the product or profits reserved by the owner for permitting another to use the property.
- (b) "Royalty" in connection with gas and oil leases is a certain percentage of the oil after it is found or so much per gas well developed.

Again, in Webster's New International Dictionary, Second Edition, it is described as "a share of the product or profit (as of a mine, forest, etc.) reserved by the owner for permitting another to use the property".

Some of these definitions would appear to give some support to appellant's argument that a royalty can only be created where there is something reserved out of a demise or grant and payable to an owner. I have, however, been unable to find any decision which says that such is the case, and in one of the definitions which I have given above the meaning is given as a percentage of the oil or gas after it is found, without any reference to any reservation by an owner.

In *Mercer v. Attorney General for Ontario* (1), Henry J. at p. 66 said: "'Royalties' is of very general import and very comprehensive . . . 'Royalties' as to mines is well understood in England to be the sums paid to the Sovereign for the right to work the Royal mines of gold and silver; and to the owner of private lands for the right to work mines of the inferior metals coal, etc." Assuming, however, (but without deciding) and for the purposes of this case only, that to constitute a royalty there must have been some reservation of that royalty in the grant or demise, and assuming also that in this case there was not *in form* any such reservation (although I am of the opinion that in both form and substance there was such a reservation in the documents read as a whole), that does not conclude the matter. It is sufficient to bring the receipts into tax if they are "like" rents, royalties or annuities, provided of course, they fulfil the other requirements of the subsection.

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Royalties, in reference to mines or wells in all the definitions, are periodical payments either in kind or money which depend upon and vary in amount according to the production or use of the mine or well, and are payable for the right to explore for, bring into production and dispose of the oils or minerals yielded up. All these conditions exist in the present case. Another matter which *may* not exist is the reservation of rights at the time of the grant and the consequent payment to the appellant as owner of such reserved rights. But even assuming that to be the case it is not sufficient, in my opinion, to prevent the "receipts" here being like or similar to royalties, all other essential requirements being fulfilled. It may well be that the concluding words of the subsection "notwithstanding that the same are payable on account of the use *or sale* of such property" are sufficient in themselves to do away with any requirement that the receipts must be paid to an owner. At least the appellant was a former owner.

I find, therefore, that the receipts here were like royalties, if not royalties themselves, and therefore they come within the meaning of that part of the subsection.

Before leaving that matter, I must refer to certain other evidence which was put in following an order reopening the case to permit of its being tendered, counsel for the respondent having reserved his right to object to its admissibility or relevancy, but consenting to its being presented in the form of an affidavit by R. D. Mercer, Secretary-Treasurer of Royalite. After setting out particulars of the payments, Mr. Mercer stated:

3. In making up the income tax returns for Royalite Oil Company Limited the full consideration paid to the late Annie McDougall and her estate, including the said \$60,000, was capitalized and no deductions were made relative to the said \$60,000 from the Company's total taxable income.

It is submitted on behalf of the appellant that if there be any doubt as to the nature of the contract with Royalite, the Court is entitled to see what the parties intended by seeing what they did (*B. & M. Readers' Service Ltd. v. Anglo Canadian Publishers Ltd.* (1)) from the fact that Royalite made these payments to the appellant out of capital and made no claim for any deductions in respect thereof from its taxable income, it is argued that Royalite did not

(1) (1950) O.R. 159 at 164, C.A.

consider the payments in any sense a "royalty" but merely in reduction of the balance due on its purchase price, the same view of the matter as taken by Mrs. Ross in her appeal.

However relevant and useful the conduct of the parties might be in an action between themselves as indicative of what they intended by the terms of the contract, I do not think that the conduct of one of the parties who is not before the Court and on a matter (the payment of income tax by Royalite) which was no concern whatever to the appellant, can be considered relevant to the appellant's case or as helpful in determining the nature of the appellant's receipts. It is entirely a collateral matter with which I am not in any way concerned. The question which I have to determine is whether under the Income War Tax Act the appellant's receipts are taxable, and not the question as to whether Royalite was or was not entitled to any deduction from its income in respect of such payments. The question of Royalite's opinion as to its liability to tax cannot in any way affect the appellant's liability.

In my opinion, the affidavit is inadmissible as being irrelevant. But even if admitted it is not helpful to the appellant. Assuming that Royalite was right in considering that its payments to the appellant were capital expenditures, that fact by itself does not necessarily mean that in the appellant's hands such payments were capital receipts. In *Brodie v. I.R.C.* (1), Finlay, J. stated at p. 439:

If the capital belonged to the person receiving the sums—if he or she was beneficially entitled not only to the income but to the capital—then I should think that, when the payments were made, they ought to be regarded, and would be regarded, as payments out of capital, but where there is a right to the income, but the capital belongs to somebody else, then, if payments out of capital are made and made in such a form that they come into the hands of the beneficiaries as income, because the source from which they came was—in the hands, not of the person receiving them, but in the hands of somebody else—capital.

The next point taken by the appellant is that even if her receipts were royalties or like royalties, they did not "depend upon the *production or use of* any real or personal property" and therefore did not come within subsection (f). It is not disputed that such receipts did depend upon the production of hydro carbons for if none were produced she

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would receive nothing. But it is contended that such hydro carbons being part of the property itself, they were not the production of property, although they may have been production *from* property. Counsel for the appellant takes the view that "production of" means only the renewing produce of property such as might be obtained periodically from the working of a farm.

"Production" is not defined in the Act. It is a word in common use and having a variety of meanings, including "the action of producing" and "that which is produced". In vol. 7 of the New English Dictionary there are the following definitions:

- (a) "The action of producing, bringing forth, making or causing";
- (b) "That which is produced—a thing that results from any action, process or effort—a product."

And in the same volume, "To produce" is defined as:

- (c) "To bring forth, bring into being or existence";
- (d) And with relation to a country, region, mine, process, etc.:
 "To give forth, yield, furnish or supply."

In *Ottawa Electric Light Co. v. City of Ottawa* (1), "To produce" was given several meanings, including "to bring forth, to furnish, generate, yield, etc."

In *Hanfstaengl v. American Tobacco Company* (2), Rigby, L.J. at p. 355 said that "'Produce' is a word which has not got any exact legal meaning but which requires to have an interpretation placed upon it in the statute in which it is used."

Now whatever be the meaning of "royalties" it is a word which is widely used in connection with payments made for the use or operation of mines and oil wells. The presence of that word in the subsection—and also of the word rentals, which is frequently used as an alternative to the word royalties—suggests most strongly that Parliament in enacting this subsection must have had in mind the operation of mines and oil wells, as well as other matters. It cannot be disputed that such phrases as "a gold producing mine" and "an oil producing well" are in everyday use as indicating that the mine or well yields or brings forth gold or oil. It is of some significance that in the original lease of June 30, 1938, in the "Affidavit of Transferor" and in the incumbrance, the parties thereto used the

(1) (1906) 12 O.L.R., 290 (C.A.) (2) (1895) L.Q.B.D. 347.

word "production" throughout in that sense. I am quite unable to uphold the contention of appellant's counsel that it means only that which is made or grown. I hold, therefore, that the words, "production or use of any real or personal property" include the bringing forth or yielding up of hydro carbons from an oil well and that, therefore, the receipts here in question fall within that part of subsection (f).

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One further point is taken by the appellant on this matter. It is submitted that as payments to her were limited to the sum of \$60,000; that by itself establishes that her receipts were part of the purchase price and therefore capital in her hands. That fact might have been of some importance prior to the enactment of subsection (f). But having found that the receipts were either royalties or like royalties, I am unable to find that they ceased to be such merely because they stopped when an agreed maximum amount had been paid.

In my opinion, for the reasons stated the sums so received by the appellant for each of the years in question fall within the ambit of subsection (f).

An appeal is also taken on the amount of exhaustion allowed to the appellant. The allowance was made under the provisions of section 5(1) (a), the relevant parts of which then read as follows:

5(1) "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:

- (a) The Minister in determining the income derived from mining and from oil and gas wells and timber limits may make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair . . .

In the agreed statement of facts it is admitted that when the Minister was making the depletion allowance he had before him evidence of the fact that the appellant had been paid in full the sum of \$60,000 in the course of the years 1944, 1945 and 1946. The assessments for the two years in question are dated March 31, 1947.

Counsel for the appellant put his argument thus:

I submit that here, where the Minister had a duty to find a reasonable amount, that he has not exercised that, because at the minute that he did that, this very source of income was shown to be exhausted in three years. Therefore, he was bound to exercise it on that basis and give us 33½ per cent depletion and not 25 per cent. In a word, he could not say "I am going to ignore every bit of evidence that is before me.

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I am going to do that. It is true the statute says I have to do it fairly and reasonably but I am going to be unfair and unreasonable in this case because I have fixed that amount and done it in other cases . . ."

If the source of the income is income from a well, which terminates in three years, then it terminates as soon as the \$60,000 is paid. We cannot look at this as being income from the well. It is income that is payable from this alleged royalty which was exhausted in three years, and that being exhausted in three years and he knew that at the time he made the assessment, he is bound to have that before him and he says "I am going to assess this at 25 per cent." He cannot say "This is the same as any ordinary well." It is not a well, it is income that comes from a source and it is bound to be exhausted in three years. Because he knew it was exhausted in three years. That was before him, that the \$60,000 has been paid. In a word, Your Lordship is looking at it from the productive end of it, and I am looking at it from the standpoint of the income received by the taxpayer in his hands. It was a source of revenue that exhausted in three years. That is the whole point there is about that.

Counsel cited no case which would support the proposition so advanced and I know of no principles laid down in the cases which would indicate that that is the manner in which the allowance must be awarded. In effect, it would mean that when the Minister at the time of the assessment had knowledge that the depletable asset out of which the taxpayer received his income had been completely exhausted, the allowance he must make would be based solely on the number of years taken up in completing the operation, and without any other consideration whatever. For example, one operator of a timber limit who was able to complete all his logging operations in one taxation year would be entitled to an exemption of all his income and would pay no tax. Another such operator who occupied three years in precisely the same process would be entitled to an allowance of only 33 $\frac{1}{3}$ per cent of his income. If the allowance were to be made in this way, it would fail completely to take into consideration the cost or value of the capital asset being depleted, a factor which must always be taken into consideration in making any such allowance. In fixing the amount to be allowed for exhaustion, the Minister had a statutory discretion. In *Fraser v. M.N.R.* (1), the principles to be followed in exercising that discretion were stated to be as follows:

The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is very well settled that if the discretion has been exercised bona fide, uninfluenced

(1) (1949) A.C. 24.

by irrelevant consideration and not arbitrarily or illegally, no Court is entitled to interfere even if the Court, had the discretion been theirs, might have exercised it otherwise.

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In the instant case the Minister allowed the appellant a deduction of 25 per cent. The only objection taken thereto is that it should have been more, namely, 33 per cent, and for the reason which I have above referred to. There is no evidence before me as to how the allowance of 25 per cent was arrived at, but I think it is common knowledge that under the Income War Tax Act it was the practice of the Minister to deal broadly with allowances for exhaustion and to allow fixed percentages of gross income to those whose income was derived from mining. I think that counsel for both parties assumed that that was the situation here and therefore no evidence was led on that point.

When the *Fraser* case was before the Supreme Court of Canada (1), Rand, J. pointed out the difficulties involved because of the uncertain factors involved in mining operations, and at p. 163 stated:

It calls for judgment of experience; and considering the unknown factors in the complication of actual operations in the mining industry, and the different accounting methods or measures by which the object in view might be attained, any award made by the Minister "as just and fair" on that broad basis of fact would be unchallengeable.

And at p. 165 he stated:

Even conceding an absolute right to an allowance, it is necessarily bound by the limitation of value spread evenly over the asset as a whole; and since the statute does not prescribe the basis, the Minister must be free in any case to adopt one reasonably designed to carry out the purpose intended. On this assumption, I take the word "May" to include a discretion in that choice; and that the basis of actual capital investment may be used by him in any case is, I think, beyond doubt. Ordinarily the increments of return would attach to every unit of asset and value, but here the whole has been recovered by relation to part only of the asset.

I am quite unable to find that in allowing the appellant a deduction of 25 per cent the Minister acted in any arbitrary or illegal manner or contrary to well established practice or on any unsound principle. The appellant has not established that the allowance is other than a "just and fair" one. The appeal on this point must therefore be dismissed.

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The remaining question is that of the penalty of \$500 added by the respondent to the assessment made on March 31, 1947, for the taxation year 1945, on the ground that the appellant was late in filing such return. It is dated June 21, 1946, and while the precise date of filing is not noted, it was on and after the latter date and was therefore beyond the last date fixed for filing, namely, February 28, 1946.

The dispute centers around the question as to which part of section 77 is here applicable. That section was as follows:

77(1). Every person who fails to deliver a return pursuant to section thirty-three or section thirty-five of this Act within the time limited therefor is liable to a penalty of

- (a) five dollars, where the amount of tax that was unpaid when the return was required to be made is one hundred dollars or less;
- (b) an amount equal to five per centum of the tax that was unpaid when the return was required to be made, where the amount of the tax unpaid at that time is more than one hundred dollars and less than ten thousand dollars; and
- (c) five hundred dollars, where the amount of the tax that was unpaid when the return was required to be made is ten thousand dollars or more.

(2) Every person failing to deliver a return pursuant to the provisions of sections thirty-six to thirty-eight inclusive, within the time limited therefor, shall be liable to a penalty of ten dollars for each day of default: Provided, however, that such penalty shall not in any case exceed fifty dollars.

The appellant contends that if she were liable to any penalty it could only be under section 77(2) inasmuch as the return made by her was in the capacity of executrix of her mother's estate and was made under the requirements of section 36(2), which is as follows:

36(2). In the case of the estate of any deceased person, the return shall be made by the executor, administrator or heir of such deceased person.

Counsel for the respondent, while agreeing that the penalty could have been assessed under section 77(2), takes the position that the Minister also had authority to assess the penalty, as has been done, under section 77(1) (c). He points out that the last named subsection provides the penalty for late filing of a return required to be made pursuant to section 33(1), which is as follows:

33(1). *Every person liable to taxation under this Act shall on or before the thirtieth day of April in each year, without notice or demand, deliver to the Minister a return in such form as the Minister may pre-*

scribe of his total income during the last preceding year; provided, however, that the return in respect of the year 1942 shall be filed on or before the thirtieth day of June, 1943.

It is submitted that section 33(1) is general in its scope and applies to "every person liable to taxation under the Act" and that the appellant as executrix is within the definition of "person" contained in section 2(h).

Upon consideration of the Act as a whole I have come to the conclusion that the appellant's contention on this point must be upheld. Section 33(1) is a general section and I have no doubt is sufficiently comprehensive to require returns to be made by all "persons" (as defined in the Act) liable to taxation. Special provision, however, is made as to what persons shall make the returns in the case of (a) legal representatives, as in section 36; (b) trustees in bankruptcy and other fiduciaries, as in section 37; and (c) recipients of income for non-residents, as in section 38. These three subsections have special reference to those who are or may be liable in a representative capacity and not in a personal capacity. Then, under Part XI, separate and specific penalties are provided for various offences and in every case by reference to the particular section which sets out the duty of the taxpayer to make the return. Sub-section 2 of section 77 has been in effect for many years. In 1927 it was applicable to sections 35 to 39, inclusive; in 1934 only to sections 36 to 39, inclusive; and in 1943 applicable to only sections 36 to 38.

I cannot doubt that Parliament in enacting section 77(2) intended to provide special and distinct penalties for the classes of persons described in sections 36 to 38 and that they should not be liable under any other part of section 77. The intention is so manifest—at least in my opinion—that it cannot be overridden merely by the broad definition of "person" contained in the Act.

In Craies on Statute Law, Fourth Edition, at p. 200 it is stated:

ACTS of Parliament sometimes contain general enactments relating to the whole subject-matter of the statute, and also specific and particular enactments relating to certain special matters; and if the general and specific enactments prove to be in any way repugnant to one another, the question will arise, Which is to control the other? In *Pretty v. Solly*, (1859) 26 Beav. 606, at p. 610, Romilly, M.R., stated as follows what he considered to be the rule of construction under such circumstances. "The

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general rules," said he, "which are applicable to particular and general enactments in statutes are very clear; the only difficulty is in their application. The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply". "For instance", said the same Judge in *De Winton v. Brecon*, (1859) 28 L.J. Ch. 604, "if there is an authority in an Act of Parliament to a corporation to sell a particular piece of land, and there is also a general clause in the Act to the effect that nothing in the Act contained shall authorize the corporation to sell any land at all, the general clause could not control the particular enactment, and the particular enactment would take effect, notwithstanding the prior exception was not clearly expressed in the general clause. If the Court finds a positive inconsistency and repugnancy, it may be difficult to deal with it, but, so far as it can, it must give effect to the whole of the Act of Parliament."

The appeal on this point will therefore be allowed. The matter of the penalty will be referred back to the Minister to fix the penalty under the provisions of section 77(2) and subject to the limitation therein provided.

One further matter must be referred to. The respondent had assessed the appellant executrix under section 11(2) of the Act on the basis that she received such payments for the benefit of unascertained persons, or persons with contingent interests, in *one* trust only. It is now admitted that the assessment should have been made on the basis of there being *two* separate trusts. The parties have agreed on the amended assessments to be made on that basis. The appeal on that point will therefore be allowed and the matter referred back to the respondent to adjust the assessment in accordance with the agreement reached.

While the appellant has not been successful on all points, she has had substantial success. She is entitled to be paid her costs after taxation.

Judgment accordingly.

British Columbia Admiralty District

1950
 June 21, 22
 July 11

BETWEEN:

SUZUKI *et al.*..... PLAINTIFFS;

AND

IONIAN LEADER..... DEFENDANT.

Shipping—Liability for dumping injurious substance in navigable waters.

Held: That the dumping of an injurious substance, oil in the particular instance before the Court, in a navigable river, renders the person so doing liable at common law for damage resulting from such action.

ACTION for damages resulting from the dumping of an injurious substance in the Fraser River.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

J. R. Cunningham for plaintiffs.

C. C. I. Merritt for defendant.

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

SIDNEY SMITH, *D.J.A.* now (July 11, 1950) delivered the following judgment:

The two plaintiffs sue for damage to their fishing-nets caused by crude oil floating in the Fraser River. They say that this oil was dumped there by the defendant ship in pumping out its tanks while it was stranded on a mud-bank in the river.

The evidence that the oil came from the ship is circumstantial, except that one of the plaintiffs gave evidence that he saw it coming out of a discharge pipe on the port side of the ship. The defendant relied as an answer on evidence given by its engineer-officers that this was impossible because this particular discharge outlet is below the water-level. However, I am by no means convinced that this plaintiff was wrong. On the contrary, I accept his evidence; as I do the evidence of the other plaintiff and of their three independent witnesses, all of whom testified with impressive candour.

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Apart from this piece of direct testimony, there was so much circumstantial evidence against the ship that I am satisfied the ship was the source of the oil. The defendant, as is usual in cases of circumstantial evidence, argued that the case made out against it was mere conjecture and suspicion. But if there are enough circumstances pointing one way, we pass the line bounding suspicion and reach the field of legitimate inference.

Lord Wright in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (1), puts the matter thus:

. . . Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

Here the evidence, both direct and circumstantial, leaves little room for doubt that the oil that damaged plaintiffs' nets came from the defendant ship. So far I have had little difficulty; what has bothered me is whether on this finding the plaintiffs can recover.

Defendant claims that it is not liable for damage caused by the oil, even if it is found to have dumped this into the river. The plaintiffs rely on sec. 33 of the Fisheries Act, 1932, which forbids the dumping of deleterious substances into fishing waters. This does not specifically mention oil, but I have no doubt that oil would be covered by the section. Plaintiffs also rely on By-law 57 passed by the Harbour Commissioners of New Westminster under their special Act, which by-law specifically forbids the dumping of oil into the harbour. The question how far breach of a by-law gives rise to an action for damages, is troublesome; but I need not decide the point.

Defendant relies chiefly on the case of *Fillion v. New Brunswick International Paper Co.* (2), as showing that the Fisheries Act is for the protection of fish and not fishermen. It is unnecessary for me to consider whether I agree entirely with the reasoning in that case, for it is easily distinguishable. There the defendant was sued for emptying pulp-waste into a river. The case might be in point if the present plaintiffs were complaining that the fish were

(1) (1940) A.C. 152 at 169.

(2) (1934) 3 D.L.R. 22

frightened away by the oil, or that in some way it caused them loss suffered by all of the public alike. That however is not so; the plaintiffs suffered direct injury to their fishing gear through the defendant's release of an injurious substance. The *Fillion* case also turned on remoteness of damage, the element of frost coming in as a supervening factor. Here the injury seems to me very direct and one that could easily have been foreseen. I think the defendant is responsible for the breach of the statutory duty: for its disobedience to the express statutory prohibition. The cases cited to the contrary turn on failure to do acts enjoined by the legislature.

In my view the defendant is liable at common law on another ground. No case has been cited to me dealing with damage from oil, but on principle I do not see how the defendant can escape liability. Even apart from statute the defendant had no right to dump an injurious substance in a navigable river, which is a public highway. It is much as if it left a pool of oil on the road outside its premises, and someone fell into it in the dark. Or, as if it had a spray of oil on its premises, which the wind blew onto someone's clothes or someone's motor car on the street.

It is unnecessary to decide whether defendant would have been excused if it had had to jettison oil in order to avoid serious danger to the ship. No such case was made out. Even without the pumping it seems extremely likely that the ship would have been freed within a few hours, at high water, with or without the assistance of the tug which had been called for, and was standing by. And even if pumping was unavoidable, the oily mixture should not have been dumped into the river, whether wilfully or negligently; a lighter could and should have been used.

In my opinion therefore the defendant is liable for the damage done, with costs. There will be a reference to assess the damages to the learned Deputy Registrar.

Judgment accordingly.

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British Columbia Admiralty District

1950
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BETWEEN :

SHERMAN ET AL, (PLAINTIFF) (RESPONDENT) ;

AND

THE SHIP *GOOD HOPE II*,
DEFENDANT } (APPELLANT).

Shipping—Collision—Appeal from assessment of damages—Claim for salvage disallowed.

Held: That a claim for salvage not supported by evidence that such was a reasonable disbursement must be disallowed.

APPEAL from assessment of damages.

The appeal was heard before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

John I. Bird for plaintiff-respondent.

Roy Ginn for defendant-appellant.

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

SIDNEY SMITH, D.J.A. now (June 24, 1950) delivered the following judgment:

This is an appeal from the learned Deputy Registrar's assessment of damages sustained by the plaintiffs on account of the sinking of their vessel *Paul D* following collision with the *Good Hope II*.

The first point made is that the valuation of *Paul D* was excessive. I am inclined to think the Vancouver witnesses' figures were "out of line", as expressed by one of the defendant's experts, and were too high. But the figures were sworn to, the Registrar accepted them on ample evidence, and I am not prepared to say that he was wrong.

The second point raises different considerations. The plaintiff testified that Dale & Co. (the insurers of the *Paul D*) sent a tug out to try and salvage the vessel.

Nothing came of it. A bill for \$1,000 from the tug-owners was presented for the effort, and this item was allowed by the Registrar. There is no evidence that this was a reasonable disbursement; no foundation was laid for the claim; for all that appears on the record the whole thing may have been a wild-goose chase from the start. Moreover, as defendant's counsel put it, it may have been merely a speculation of the insurers for their own benefit; and so not recoverable. Cf. *The M.S. Tex* (1).

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The appeal will therefore be allowed on this head. The assessment should be reduced by \$1,000; otherwise it will stand. The appellant is entitled to his costs.

Judgment accordingly.

BETWEEN:

FREED & FREED LIMITED,..... APPELLANT,

AND

THE REGISTRAR OF TRADE MARKS, } RESPONDENT,

AND

THE GREAT WESTERN GAR- } OBJECTING PARTY.
MENT COMPANY LIMITED,...

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Trade Marks—"Iron Man"—"The Iron King"—The Unfair Competition Act, 1932, S. of C. 1932, c. 38, ss. 2(k), 23(1), 23(5) (c), 26(1) (f)—Similarity of word marks—Onus on appellant to show no reasonable probability of confusion—Registrar's decision not to be set aside lightly—Evidence of actual confusion not necessary—Tests of similarity of trade marks—Totality of trade marks to be considered—Trade marks not to be carefully analysed—Similarity of word marks a matter of first impression.

The Registrar refused the appellant's application to register "The Iron King" as a word mark for use in association with men's work trousers on the ground that the proposed word mark is confusingly similar to the objecting party's registered trade mark "Iron Man" for use in association with overalls, pants, shirts, mackinaws and leather coats. The appellant appealed from the Registrar's refusal and the objecting party was subsequently added as a party to the proceedings.

Held: That the objecting party is entitled to have the words "Iron Man" in its specific trade mark, registered under the Trade Mark and Design Act, treated as a word mark under The Unfair Competition Act, 1932, as if it had been registered as such thereunder.

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2. That when the Registrar has refused an application for the registration of a word mark on the ground that it is similar, within the meaning of section 26(1) (f) of The Unfair Competition Act, 1932, to some other word mark already registered for use with similar wares and the applicant for registration has appealed from the Registrar's decision the onus is on the appellant to show that there is no reasonable probability of confusion through the contemporaneous use of both marks in the same area in association with wares of the same kind.
3. That the Registrar's decision that the two marks are similar must not be set aside lightly.
4. That where there has been a long contemporaneous use of two marks in the same area in association with wares of the same kind the lack of evidence of confusion through such use would afford support for the conclusion that the two marks are not confusingly similar but where there has been no substantial contemporaneous use of the two marks the fact that there is no evidence of actual confusion is not of much importance.
5. That on an appeal from the Registrar's refusal to register a word mark on the ground that it is confusingly similar to an already registered word mark evidence of actual confusion is not necessary.
6. That it is essential to the valid registration of a word mark that it should be outside the scope of the implied prohibitions of section 23(1) of The Unfair Competition Act, 1932, and the onus of showing that it is so is on the applicant for the registration, whether in the proceedings before the Registrar or on an appeal from his refusal to register.
7. That it is not a proper approach to the determination of whether trade marks are similar to break them up into their elements, concentrate attention upon the elements that are different and conclude that, because there are differences in such elements, the marks as a whole are different. Trade marks may be similar when looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitute the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered.
8. That it is not a correct approach to the solution of the problem whether two marks are similar to lay them side by side and make a careful comparison of them with a view to observing the differences between them. The Court should not subject the two marks to careful analysis but should seek to determine the issue of similarity from the point of view of a person who has only a general and not a precise recollection of the earlier mark and then sees or hears the later one by itself.
9. That the answer to the question whether two word marks are similar must nearly always depend on first impression.
10. That the proposed word mark "The Iron King" is confusingly similar to "Iron Man".

APPEAL from the Registrar's refusal of the appellant's application to register a word mark.

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

C. Scott for appellant.

Alex Cattanach for Registrar.

E. G. Gowling K.C. and *J. C. Osborne* for objecting party.

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

THE PRESIDENT now (August 22, 1950) delivered the following judgment:

This is an appeal from the decision of the Registrar in refusing the appellant's application to register the words "The Iron King" as its word mark for use in association with men's work trousers on the ground that the proposed word mark is similar, within the meaning of section 26(1) (f) of The Unfair Competition Act, 1932, Statutes of Canada, 1932, chap. 38, to the objecting party's registered trade mark "Iron Man" for use in association with the sale of overalls, pants, shirts, mackinaws and leather coats.

The facts, except those relating to the issue whether the marks are similar, are not in dispute. The objecting party adopted its trade mark in 1931 and had it registered as a specific trade mark under the Trade Mark and Design Act, R.S.C. 1927, chap. 201, on February 11, 1932, in the Trade Mark Register No. 250, Folio 53,864, and has used it continuously ever since. The mark consists of the representation of an iron worker pouring molten metal from an iron maker's ladle and the words "Iron Man". The objecting party is a large manufacturer of work clothing for men and boys, such as overalls, pants, shirts, mackinaws, wind-breakers and jackets and also makes some ladies' wear. Its head office is at Edmonton, Alberta, and the most extensive part of its business is in Western Canada, but it does business all over Canada. This has been so particularly since about 1942. At the present time it sells only work pants under its trade mark "Iron Man". It advertises

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these wares under this mark very extensively in newspapers, pamphlets and periodicals and over the radio. The extent of its use of the mark is indicated by the fact that its total sales under it from 1936 to 1947 amounted to \$3,100,000. Its sales are exclusively to retailers. The objecting party's "Iron Man" pants are sold to various classes of workers, many of whom are of foreign origin and have only a slight knowledge of English.

The appellant is a manufacturer of various kinds of work trousers. It has its head office at Winnipeg, Manitoba, and does business in the principal cities and towns of western Canada but mostly in the prairie provinces. Its largest customer is The T. Eaton Company Limited to which it sells wholesale but it also has a number of other wholesale accounts. In addition it does business direct with retailers through commission agents who call on them with samples. The appellant first adopted the words "The Iron King" as a trade mark in 1935 and has used it since then but took no steps to register it until the fall of 1945. The appellant does not sell all its work trousers under its mark, only one type being sold thereunder. And it does not itself advertise its wares under its mark, any use of the mark in advertising being in the catalogues of its wholesale customers. The appellant's work trousers are cheaper than the objecting party's, the retail price of the former being from \$4.00 to \$4.50 per pair and that of the latter \$5.35.

The appellant made its application on October 24, 1945, and opposition to it was taken on behalf of the objecting party on January 4, 1946. This fact was communicated to the appellant's attorneys who made representations to the Registrar on its behalf. On September 23, 1946, the Registrar expressed the opinion that the concurrent use of the appellant's proposed mark and the objecting party's registered mark would be likely to cause confusion in the trade. Further representations having been made by the appellant's attorneys the Registrar, on September 19, 1947, maintained his decision that the proposed mark was confusingly similar to the registered one, and on October 6, 1947, took final action and formally refused the appellant's application under section 26(1) (f) of The Unfair Competi-

tion Act, 1932. It is from this refusal that the present appeal was taken, the objecting party having been subsequently added as a party to the proceedings.

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The objecting party is entitled to have the words "Iron Man" in its specific trade mark treated as a word mark under The Unfair Competition Act, 1932, as if it had been registered as such thereunder, for section 23(1) provides in part:

23. (1) The register now existing under the *Trade Mark and Design Act* shall form part of the register maintained pursuant to this Act, and, subject as hereinafter provided, all entries therein shall hereafter be governed by the provisions of this Act, . . .

And section 23(5) (c) reads:

23. (5) Marks registered before the coming into force of this Act shall be treated as word marks or as design marks according to the following rules:—

(c) Any mark including words and/or numerals in combination with other features shall be deemed to be a design mark having the features described in the application therefor but without any meaning being attributed to the words or numerals, which shall, however, also be deemed to constitute a word mark if and so far as they would at the date of registration have been registrable independently of any defined form or appearance and without being combined with any other feature;

There can be no doubt that the words "Iron Man" would have been registrable independently within the meaning of the subsection.

Counsel for the appellant admitted that the wares to which it applied the trade mark "The Iron Man" were similar, within the meaning of section 2(l) of the Act to those dealt with by the objecting party under its "Iron Man" trade mark and submitted that there were only two points in issue, namely, that the two trade marks were not similar, and that the objecting party had lost its rights to object, if it ever had any, by acquiescence and laches on its part.

There is no substance in the latter submission. While there is evidence that the appellant used its mark since 1935 it did no advertising under that mark itself and there was no advertising of it by others prior to the issue of the Eaton catalogue in the fall of 1945. And Mr. Roscoe's evidence for the objecting party, which I accept, was that prior to 1945 he did not know that the appellant was selling goods under the trade mark "The Iron King", that his first

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knowledge of its use was in the fall of 1945 in connection with the application to register and that the objecting party then immediately instructed its solicitors to object to the registration. I find that there was no acquiescence by the objecting party in the use by the appellant of its mark and that it cannot be charged with laches.

There remains the issue of similarity of the marks. The Registrar, after giving the appellant the fullest opportunity of supporting its application and after consideration of the representations made on its behalf, concluded that the proposed word mark was confusingly similar to the objecting party's registered trade mark and, therefore, not registrable as being within the prohibition implied in section 26(1) (f) which provides:

26. (1) Subject as otherwise provided in this Act, a word mark shall be registrable if it

(f) is not similar to, or to a possible translation into English or French of, some other word mark already registered for use in connection with similar wares;

the word "similar" having the statutory meaning given by section 2(k) as follows:

2. In this Act, unless the context otherwise requires:—

(k) "Similar," in relation to trade marks, trade names or distinguishing guises, described marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin;

Counsel for the appellant submitted that the onus was on the objecting party to show that there was a likelihood of confusion if the proposed word mark was registered. I do not agree. There is no onus on the objecting party. The onus is on the appellant to show that the Registrar was in error in refusing its application. It is, I think, settled that where the Registrar has refused an application for the registration of a word mark on the ground that it is similar, within the meaning of section 26(1) (f) of The Unfair Competition Act, 1932, to some other word mark already registered for use with similar wares and the applicant for registration has appealed from the Registrar's decision the onus is on the appellant to show that there is no reasonable probability that the contemporaneous use of

both marks in the same area in association with wares of the same kind will lead to the kind of confusion referred to in section 2(k) of the Act. The rule in the United Kingdom is well established. In *Eno v. Dunn* (1) it was laid down by Lord Watson in the House of Lords that where an enactment prohibits the registration, with respect to the same goods or descriptions of goods, of a trade mark so nearly resembling a trade mark already on the register with respect to such goods or descriptions of goods as to be calculated to deceive the applicant for registration must satisfy the comptroller, or the Court, that the trade mark which he proposes to register does not come within the scope of the prohibition. He pointed out that the onus is otherwise in the case of an action for infringement. There the onus is on the party alleging infringement to show that the trade mark complained of is calculated to mislead. Lord Watson summed up the position of the applicant for registration in these words:

here he is *in petitorio*, and must justify the registration of his trade-mark by showing affirmatively that it is not calculated to deceive. It appears to me to be a necessary consequence that, *in dubio* his application ought to be disallowed.

It follows, as Lord Watson later indicates, that if the proposed trade mark might have the effect of deceiving the public its registration should be refused. Lord Watson's statement has been fully accepted as the leading authority on the subject: *vide McDowell's Application* (2) and *Aristoc, Ltd. v. Rysta, Ltd.* (3), where Viscount Maugham put the rule thus:

it is well settled that the onus of proving that there is no reasonable probability of deception is cast on an applicant for registration of a mark.

A similar view has been taken in Canada: *vide Peggy Sage Inc. et al. v. Siegel Kahn Company of Canada Ltd.* (4); *Benskin v. Registrar of Trade Marks et al* (5); *Union Oil Company of California v. Registrar of Trade Marks* (6).

It follows from what I have said that the Registrar's decision that the two marks are similar must not be set aside lightly. In the English cases great weight is attached

(1) (1890) 15 A.C. 252 at 257.

(2) (1927) 44 R.P.C. 335 at 341

(3) (1945) A.C. 68 at 85.

(4) (1935) S.C.R. 539 at 544.

(5) (1946-47) 6 Fox Pat

C. 20 at 24.

(6) (1949) Ex. C.R. 397 at 407.

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to the Registrar's decision in such matters. For example in *McDowell's Application (supra)* Viscount Cave L.C., speaking in the House of Lords, after approving Lord Watson's statement in *Eno v. Dunn (supra)* regarding the onus of proof on the application for registration of a trade mark, said:

I would add that registration under the Acts is a matter of discretion, and, although the decision of the *Registrar* in the matter is by no means conclusive and under Section 8, Subsection (2) of the Trade Marks Act, 1919, the question is entirely open for the Courts, yet the fact that the *Registrar*, an experienced official, has decided against an application on the ground that registration might lead to confusion, must still carry considerable weight with any Court or Tribunal which has to review his decision.

A similar view should, I think, be taken in Canada but of course, reliance on the Registrar's decision that two marks are confusingly similar must not go to the extent of relieving the judge hearing an appeal from the Registrar's decision of the responsibility of determining the issue with due regard to the circumstances of the case.

I find no difficulty in reaching the conclusion that the appellant has not discharged the onus that rests on it and that its appeal must, therefore, fail. The evidence does not, in my opinion, support a contrary conclusion. Mr. Freed, the appellant's secretary-treasurer, testified that he did not know of any confusion resulting from the use of the two marks and had received no complaints from customers of any such confusion. And counsel for the appellant filed several affidavits by proprietors of retail stores and others in which the affiant stated that he had been selling men's trousers manufactured by the objecting party and known as "Iron Man" as well as those manufactured by the appellant and known as "The Iron King" and had not experienced any instances of confusion between the two trade marks in selling garments of the respective makes and had never had any complaints from customers that they had purchased one make while intending really to buy the other. For the objecting party Mr. Roscoe, its secretary-treasurer, admitted on cross-examination that he had no personal knowledge of actual confusion through the use of the two marks. But counsel for the objecting party filed a great many affidavits by merchants and sales-

men in British Columbia, Alberta, Saskatchewan and Manitoba, 58 of them being filed together as Exhibit J. in which the affiants made the following depositions:

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2. I have known and been familiar with the trade mark IRON MAN for more than _____ years (the number of years in each case being filled in) and have throughout such period known that when used in wares such as pants and windbreakers the said trade mark IRON MAN indicated that the wares in connection with which it is used are manufactured and sold by The Great Western Garment Company Limited of Edmonton, Alberta.

3. The use of the words THE IRON KING if used in association with men's pants would mislead me into the belief that the wares in connection with which the words THE IRON KING were being used were manufactured or sold by The Great Western Garment Company Limited.

There was also an affidavit by W. C. Cox that he had complaints from customers who had purchased "Iron King" pants from him under the impression that they had purchased the superior quality "Iron Man" pants. And there were other affidavits strongly indicative of the likelihood of confusion if the two marks were used.

Counsel for the appellant argued that there was no evidence of any actual confusion through the use of the two marks and that in view of the long user of the appellant's mark the absence of any evidence of confusion was most significant that there was no likelihood of confusion in the future. There is no doubt that where there has been a long contemporaneous use of two marks in the same area in association with wares of the same kind the lack of evidence of confusion through such use would afford support for a conclusion that the two marks are not similar within the meaning of section 2(k) of the Act. But that is not the situation here. It is true that Mr. Freed stated that the appellant's trade mark was adopted in 1935 and has been used since then. There is also some evidence in affidavits filed on behalf of the appellant of user since 1937. But the extent of such user was not precisely established. The appellant did not advertise its goods under its trade mark at all, and my impression of the evidence as a whole is that there was no substantial use of its trade mark prior to the issue of the Eaton's fall catalogue for 1945. This is borne out by Mr. Roscoe's statement that he had no knowledge of its use prior to the fall of 1945. And there are also the affidavits of T. S. Dixon,

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R. J. McLeod and D. A. Sprung all with knowledge of the clothing trade, in which they state that they had no knowledge of any trade mark with the word "Iron" in it associated with men's work trousers, etc., other than the objecting party's trade mark "Iron Man". If there had been any substantial contemporaneous use of the appellant's mark it is most unlikely that these persons would not have heard of it.

Where there has been no substantial contemporaneous use of the two marks the fact that there is no evidence of actual confusion through such use as there has been is not of much importance. In *The British Drug Houses Ltd. v. Battle Pharmaceuticals* (1) I expressed the opinion that in a motion to expunge a word mark on the ground that it was confusingly similar to a previously registered word mark it was not necessary that there should be any evidence of actual confusion since the issue was not whether there had been confusion but whether confusion was likely to occur. I see no reason why a similar principle should not be applicable here. That being so, and the onus on the appellant being as stated the affidavit evidence adduced by counsel for the objecting party assumes considerable importance. The fact that so many persons have sworn that they would be misled by the use of the words "The Iron King" on men's pants into thinking that the pants were those made by the appellant cannot be lightly dismissed. Indeed, I find no difficulty in accepting their evidence. Such evidence really goes farther than is necessary for the rejection of the appellant's application, for, as Lord Watson suggested in *Eno v. Dunn* (*supra*), the application to register a trade mark should be disallowed if confusion might happen through its use or if there is doubt whether confusion would happen or not; to be registrable the mark must be clearly outside the scope of the prohibitory enactment. And similarly in Canada, it is essential to the valid registration of a word mark that it should be outside the scope of the implied prohibitions of section 23(1) of The Unfair Competition Act, 1932, and the onus of showing that it is so is on the applicant for the registration, whether in the proceedings before the Registrar or on an appeal from his refusal to register. In view of the evidence to

(1) (1944) Ex. C.R. 239 at 244.

which I have referred I am unable to see how the appellant could successfully contend that it has discharged the onus of showing that there is no reasonable probability of confusion through the use of its proposed mark and I find that it has not done so.

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Nor can the appellant successfully meet the tests that ought to be applied in determining whether two word marks are confusingly similar. It cannot be too strongly stressed that it is not the likely effect of the use of the two marks on the mind of the judge that is in issue. The fact that he himself would not be confused is immaterial. What is to be determined is whether there is a likelihood of confusion in the minds of dealers in and/or users of the goods on which the marks are used. This means that the judge must endeavor to free himself as far as he can from a subjective approach to the issue of likelihood of confusion and seek to project himself into the position of dealers in and/or users of the goods with a view to determining the likelihood of confusion in their minds. And even if the circumstances should be such that dealers in the goods, whether wholesalers or retailers, would not be likely to be confused that is not enough to dispose of the issue, for there might be confusion in the minds of users of the goods, in which case the marks would have to be considered as confusingly similar.

There have been many cases in which trade marks have been held similar: *vide* the lists of such similar marks in Kerley on Trade Marks 6th Edition, at pp. 295-304, and Fox on Canadian Law of Trade Marks and Industrial Designs, at pp. 80-88. But such cases are not helpful in determining the similarity or otherwise of particular marks, except so far as they express or illustrate general guiding principle. This warning was sounded by Lord Russell of Killowen in *The Coca-Cola Co. of Canada, Ltd. v. Pepsi Cola Co. of Canada, Ltd.* (1) in these words:

except when some general principle is laid down, little assistance is derived from authorities in which the question of infringement is discussed in relation to other marks and other circumstances.

The reason for this warning is clear, for each case must stand on its own facts. The issue whether the trade marks in any given case are similar is a question of fact and the

(1) (1942) 59 R.P.C. 127 at 133.

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determination of fact in one case can have no bearing in another case where the trade marks in question are different.

Counsel for the appellant submitted that the marks in question on this appeal are not similar in that, although the word "Iron" is the same in both, the words "King" and "Man" are different and, therefore, the two marks are not similar. There are, in my judgment, several reasons for thinking that this analysis of the issue is erroneous. In the first place, breaking up the marks into their elements and concentrating attention on those that are different and concluding that because there are differences in the elements the marks are not similar is contrary to a principle that has been regarded as cardinal ever since the case of *Re Christiansen's Trade Mark* (1), namely, that in determining whether one trade mark is similar to another it is the totality of the mark rather than any element in it that must be considered. In *The British Drug Houses, Ltd. v. Battle Pharmaceuticals (supra)*, after discussing *Christiansen's case (supra)*, I put the rule as follows:

It is, I think, firmly established that, when trade marks consist of a combination of elements, it is not a proper approach to the determination of whether they are similar to break them up into their elements, concentrate attention upon the elements that are different and conclude that, because there are differences in such elements, the marks as a whole are different. Trade Marks may be similar when looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitutes the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered.

Counsel's submission also runs counter to another principle that is closely related to the one just stated, namely, that it is not a correct approach to the solution of the problem whether two marks are similar to lay them side by side and make a careful comparison of them with a view to observing the differences between them. The Court should not subject the two marks to careful analysis but should seek to determine the issue of similarity from the point of view of a person who has only a general and not a precise recollection of the earlier mark and then sees or hears the later one by itself. If such a person would be likely to think that the goods on which the later mark appears are put out by the same person as the goods sold

(1) (1886) 3 R.P.C. 54.

under the former mark of which he has only a general and not a precise recollection the Court may properly conclude that the marks are similar: *vide Sandow Ld's Application* (1). The reason for this rule is clear. Careful analysis of the marks with a view to ascertaining the differences between them merely serves the purpose of pointing out the differences in the marks but does not answer the question whether they are similar. Marks may be similar although there are differences between them. Indeed, they cannot be similar unless there is some difference. Similarity connotes difference for if there were no difference there would be identity, not similarity.

The proper test to be applied has been laid down by high authority. In the *Coca-Cola v. Pepsi Cola* case (*supra*) Lord Russell of Killowen, delivering the judgment of the Judicial Committee of the Privy Council, put the test to be applied in cases where there was no evidence of actual or probable confusion in these words:

In these circumstances the question for determination must be answered by the Court, unaided by outside evidence, after a comparison of the Defendant's mark as used with the Plaintiff's registered mark, not placing them side by side, but by asking itself whether, having due regard to relevant surrounding circumstances, the Defendant's mark as used in similar (as defined in the Act) to the plaintiff's registered mark as it would be remembered by persons possessed of an average memory with its usual imperfections.

It should be noted that in the present case there is some evidence of confusion or its likelihood. And in *Aristoc, Ld. v. Rysta, Ld.* (*supra*) the House of Lords decided that the question whether two marks are similar must be answered by the judge on whom the responsibility lies as a matter of first impression. They adopted as a fair statement of the duty cast upon the Court the following passage from the dissenting judgment of Luxmoore L.J. in the Court of Appeal (2):

The answer to the question whether the sound of one word resembles too nearly the sound of another so as to bring the former within the limits of section 12 of the Trade Marks Act, 1938, must nearly always depend on first impression, for obviously a person who is familiar with both words will neither be deceived nor confused. It is the person who only knows the one word, and has perhaps an imperfect recollection of it, who is likely to be deceived or confused. Little assistance, therefore, is to be obtained from a meticulous comparison of the two words, letter by letter and syllable by syllable, pronounced with the clarity to be expected from a teacher of elocution.

(1) (1914) 31 R.P.C. 196.

(2) (1943) 60 R.P.C. 87 at 108

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The Court must be careful to make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants.

Lord Luxmoore's statement was expressly approved by Kerwin J., giving the judgment of the Supreme Court of Canada, in *Battle Pharmaceuticals v. The British Drug Houses Ltd.* (1) and must be regarded as the leading authority on the subject.

It is perhaps easier to apply the test of first impression to single words, such as those in question in the *Aristoc* case (*supra*), than in the case of word marks consisting of more than one word, but the principle involved is the same.

Applying the tests I have mentioned and seeking to view the issue as free from a subjective approach as possible I am of the opinion that the contemporaneous use of the two marks in the same area in association with work trousers would be likely to cause users of them to infer that the same person assumed responsibility for their character or quality and I find, accordingly, that the appellant's proposed word mark is similar to the objecting party's registered mark, within the meaning of section 2(k) of the Act. The Registrar was, therefore, right in refusing the appellant's application.

Even if there were any doubt as to the similarity of the two marks,—and I have none—the appellant's appeal would fall for failure to discharge the onus upon it.

For the reasons given the appeal will be dismissed with costs to the objecting party as against the appellant. There will be no costs to or against the Registrar.

Judgment accordingly.

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BETWEEN:

ARMANEKIS *et al.*.....PLAINTIFFS;

AND

THE S.S. CNOSAGA.....DEFENDANT.

Shipping—Wages—Foreign ship—Protest by Foreign Consul—Discretion of Court—Motion for dismissal of action allowed.

In an action for wages brought by seamen of Greek nationality who had served on defendant ship, owned by a Panamanian corporation and registered at the Port of Panama City, the defendant moved for a dismissal of the action on the ground that the consul-general for the Republic of Panama in and for the Province of British Columbia protests against its continuance. The articles signed at Mobile in the state of Alabama, one of the United States of America, written in Spanish and English, prohibited seamen from attempting action against the Master or ship, and provided for the submission of any dispute to the competent authorities of the Republic of Panama.

While the vessel was in Vancouver, British Columbia, the men went on strike and caused a delay in loading until the strike was ended by an injunction issued out of the Supreme Court of British Columbia.

Held: That the grounds for the protest were reasonable and the Court declined to exercise its discretion to adjudicate.

MOTION for dismissal of action.

The motion was heard before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

J. R. Cunningham for the motion.

John Stanton contra.

SIDNEY SMITH D.J.A. now (May 23, 1950) delivered the following judgment:

This is a motion by the Panamanian owner of the defendant ship to dismiss the plaintiffs' action for wages upon the ground that the consul-general in and for the Province of British Columbia for the Republic of Panama protests against its continuance. It has long been established that the Court has jurisdiction in these actions, but

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that it may, in its discretion, decline to exercise the jurisdiction where the accredited representative of the state to which the ship belongs objects to the Court proceeding to adjudicate, and where he does so on reasonable grounds. Here there is no doubt about his objection, so the only question before me is as to its reasonableness.

The plaintiffs are, or were, fifteen members of the ship's company, of whom one was the 2nd Mate, the others seamen in various capacities, all of Greek nationality except one, an Ecuadorian. Three of the plaintiffs withdrew from the action, re-joined the vessel and sailed in her. The defendant ship is owned by a Panamanian corporation and registered at the Port of Panama City. The owning company seems to be composed of Greek nationals, and has its head office at New York, in the United States of America.

Articles were signed at Mobile, Alabama, in the United States of America, on the 23rd January, 1950, and the vessel proceeded thence to Vera Cruz, then to Yokohama and from there to Vancouver, B.C., where she remained from 27th April till 13th May, 1950. On the 30th April the crew were paid their wages, overtime pay and certain bonuses. On the 3rd May the plaintiffs went on strike, without notice, on account of the refusal of the Master to make certain further payments. The consul-general visited the ship on the same day and warned the men that the strike was illegal under Panamanian law. The Master paid over to him \$134.27 which may have been part of the sum in dispute. There is no clear evidence as to this.

The strike caused an interruption in the loading of the vessel for a period of seven days. An injunction was obtained from the Supreme Court of British Columbia, which brought it to an end. The vessel in due course sailed but without the twelve plaintiffs concerned. These now await repatriation. The proceedings in the Supreme Court were heard by the learned Chief Justice, who declared the strike illegal; he also found the consul-general, who gave evidence, a competent and qualified authority on the law of Panama.

The present action was commenced on the 13th May, 1950. The claims made, which amount to approximately

\$100 per man, are based (other than a claim of \$62.68 for overtime) on demands for vacation pay, allegedly due under Panamanian law, and for extra pay on account of the absence of other crew members at certain times.

A clause in the ship's articles (written both in Spanish and English) is as follows:

(6) Seamen are prohibited from attempting action of any kind against the Master or ship. Any dispute which may arise between the Master or owner, and the members of the crew of the vessel relative to their contracts, salaries, working conditions or obligations and rights of the parties, shall be submitted to and be resolved by the competent authorities of the Republic of Panama, whose decisions shall be obligatory for all parties. (Art. 1230 of C.C.)

The consul-general filed an affidavit in these proceedings, part of which reads as follows:

(5) The Plaintiffs did not submit or attempt to submit any of the claims contained in the Indorsements on the Writ in this action, nor did they or anyone of them complain to me of the alleged unlawful breach of the said articles by the Captain of the SS. *Cnosaga*.

(9) I respectfully submit that the Plaintiffs do not deserve the right to proceed with their alleged claims in this Honourable Court, and, as the duly appointed representative of the Republic of Panama I consider it to be my duty to respectfully and formally protest against the exercise of the jurisdiction of this Honourable Court in connection with any alleged claims the Plaintiffs have made against the ship SS. *Cnosaga*.

Counsel for the plaintiffs on the hearing before me raised some points on this affidavit, notably as to whether the consul-general had been properly appointed. I accordingly gave the consul-general the opportunity to appear personally before me in the presence of counsel. He did so, produced his credentials, and satisfied me on his appointment, as well as on the other points raised.

In these circumstances I hold there were reasonable grounds for the protest, and I accordingly decline to exercise my discretion to adjudicate. *The Leon XIII* (1). The action is dismissed and the defendant's bail-bond for \$2,000 cancelled. Defendant does not ask for costs.

There will be judgment accordingly.

Judgment accordingly.

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BETWEEN:

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

AND

COWICHAN AGRICULTURAL
SOCIETY, } DEFENDANT.

Crown—Indian Act, R.S.C. 1906, c. 81, s. 51—Lease of surrendered Indian Reserve lands not valid without direction of Governor in Council—No estoppel to defeat express requirements of statute.

The plaintiff sought a declaration that a lease of certain lands, dated October 16, 1912, and made by the Superintendent General of Indian Affairs to the defendant, was null and void on the ground that it had been made without the direction of the Governor in Council. The lands are at Duncan on Vancouver Island in British Columbia and formed part of the Indian Reserve of the Somenos Band of Cowichan Indians. They had been surrendered by the Indians on June 29, 1888, on certain conditions and leased for 21 years by the Superintendent General to the defendant to enable it to erect an agricultural hall and lay out the grounds to hold annual exhibitions. The lease was renewed on November 29, 1905, for a further period of 21 years and subsequently a new lease, dated October 16, 1912, for 99 years was made. The surrender was accepted by the Governor in Council by Order in Council P.C. 1880, dated August 16, 1888, which gave authority for the issue of a lease to the defendant but no Order in Council was ever passed with reference to the lease of October 16, 1912.

Held: That section 51 of the Indian Act requires a direction by the Governor in Council before there can be a valid lease of surrendered Indian lands, that the responsibility for controlling the leasing of such lands thus vested in the Governor in Council cannot be delegated to the Superintendent General of Indian Affairs or any one else and that a lease of such lands without the direction of the Governor in Council is void. *St. Ann's Island Shooting and Fishing Club Ltd. v. The King* (1950) Ex. C.R. 185; (1950) S.C.R. 211 followed

2. That there cannot be an estoppel to defeat the express requirements of a statute, particularly when they are designed, as section 51 of the Indian Act is, for the protection of the interests of special classes of persons.

ACTION for a declaration that a lease of surrendered Indian Reserve lands made without the direction of the Governor in Council is null and void.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Victoria.

F. A. Sheppard K.C. and *A. H. Laidlaw* for plaintiff.

D. M. Gordon for defendant.

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

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THE PRESIDENT now (October 21, 1950) delivered the following judgment:

This is an action for a declaration that a lease of certain surrendered Indian Reserve lands made by the Superintendent General of Indian Affairs to the defendant, dated October 16, 1912, is null and void.

The facts have been agreed upon in a statement with supporting documents. The defendant was incorporated in 1888 under the name of Cowichan and Salt Spring Island Agricultural Society and changed its name to its present form in 1913. The lands in question are on Vancouver Island in British Columbia in what is now the City of Duncan and form part of the Indian Reserve of the Somenos Band of Cowichan Indians. On March 24, 1888, the defendant applied to the Department of Indian Affairs for a lease of the lands, comprising 5 acres more or less, to enable it to erect an agricultural hall and lay out grounds to hold annual exhibition shows. On June 29, 1888, the Chief and principal men of the Somenos Band of Cowichan Indians surrendered the lands to Her Majesty the Queen subject to the following conditions:

TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to lease and surrender the same to the Cowichan and Salt Spring Island Agricultural Society upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

AND upon the further condition that all moneys received from the lease and surrender thereof, shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such investment shall be paid annually or semi-annually to us and our descendants forever.

By Order in Council P.C. 1880, dated August 16, 1888, the said surrender was accepted by the Governor in Council and authority was given for the issue of a lease to the defendant, "at a nominal rental, but on the condition that the Indians of the Somenos Band shall have the right to use the grounds should they at any time wish to hold an Agricultural Exhibition." In November, 1888, the Superintendent General of Indian Affairs executed a lease of the lands to the defendant for a term of 21 years to be computed from September 1, 1888, at a rental of \$1.00 per year,

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with the condition that the defendant "will allow the Somenos Band of Cowichan Indians to have the use of the property hereby demised should they at any future time or times wish to hold a separate exhibition." On July 9, 1894, the defendant applied to the Superintendent General for a Crown grant of the lands on the grounds that the defendant had put up buildings and made improvements worth \$3,000 or \$4,000 and that "greater encouragement would be given to the Society to improve the said property were it their own." On October 29, 1894, the Chief and principal men of the Somenos Band of Cowichan Indians surrendered the lands to Her Majesty the Queen "in trust to sell the same to the Cowichan & Salt Spring Agricultural Society". This surrender was never accepted. On January 15, 1895, the Superintendent General informed the defendant by letter that the Department of Indian Affairs could not give the defendant title in fee simple because of the unsettled question between the Government of British Columbia and the Federal Government as to the reversionary right of the former in Indian Reserves but that it would be prepared to renew the lease for as long a period as desired and follow the same up with a patent when the general question affecting the title to Indian Reserves was disposed of. On March 8, 1904, the defendant wrote to the Indian Agent at Duncan asking, if it was still impossible to grant a patent, to have the existing lease cancelled and a new lease granted for 50 years, the reason for the request being that the defendant contemplated making extensive improvements to its Agricultural Hall and that before starting on this work it would like to have a renewal of the lease for a longer period. On June 29, 1904, the Secretary of the Department of Indian Affairs informed the defendant that "in view of representations made that an extension of the lease is desired in view of contemplated extensive improvements to Agricultural Hall, the Department will renew the present lease at its expiration on the 1st September 1909, for a further term of twenty-one years, upon the same terms." On November 29, 1905, the Deputy Superintendent General without waiting for the expiry of the lease, extended it for a further period of twenty-one years from

December 1, 1909, "upon the same terms and conditions" by an endorsement thereon. On a further request for a longer lease the Assistant Deputy Superintendent General, on July 13, 1912, informed the Indian Agent at Duncan that it had been decided to issue a new lease to the defendant for a term of 99 years. On September 5, 1912, the defendant in consideration of a new lease surrendered its lease of September 1, 1888, and the renewal thereof. On September 9, 1912, the Cowichan Indians through their solicitors protested against a further lease of their reserve, to which the Assistant Deputy Superintendent General replied on October 11, 1912, that the surrender of the Indians was absolute and the Department was satisfied that the proposed lease was not detrimental to the interest of the Indians. On October 7, 1913, the Superintendent General wrote to the defendant asking whether it would agree to pay \$450 yearly as rental for the leased lands, being on the basis of 3 per cent of their alleged value of \$15,000. On October 28, 1913, the defendant replied that the suggested terms were not satisfactory. On November 28, 1913, the Deputy Superintendent General informed the defendant that "it is considered that the Company (meaning the defendant) have a vested interest in the property in question, entitling them to favourable consideration as to extension of lease, and it has, therefore, been decided to extend the lease for a term of ninety-nine years, at a nominal rental." The clause permitting use of the property by the Somenos Band of Indians in case they desired at any future time to have a separate exhibition was retained. The new lease, dated October 16, 1912, was sent to the defendant for signature and was returned signed on December 9, 1913. Shortly thereafter the lease was executed by the Deputy Superintendent General and on December 15, 1913, an executed copy was sent to the defendant. No Order in Council was ever passed with reference to the extension of the lease of September 1, 1888, on November 29, 1905, or to the lease of October 16, 1912. By provincial Order in Council No. 1036 (B.C.), dated July 29, 1938, the title to all Indian Reserve lands in the Province of British Columbia was settled in the Dominion of Canada subject to the terms and conditions thereof.

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On April 11, 1944, the defendant wrote to the Indian Commissioner for B.C. referring to the letter from the Deputy Superintendent General, dated January 15, 1895, and requesting that, since the general question affecting Indian Reserves had been disposed of and the Department was now in a position to issue patents, means should be taken to grant the defendant a patent. On May 30, 1944, the Indian Commissioner for B.C. informed the defendant that the only valid surrender was that executed by the Indians in 1888, that such surrender was in trust to lease the lands, and that the Crown could not under the circumstances give title to the defendant without a further surrender from the Indians giving consent to such a transfer.

It was further agreed in the statement of facts that the defendant built a hall and other improvements on the leased lands in 1889, and built a new and larger hall in 1914 at a substantial cost, the funds being largely raised by the sale of debentures, that the Indian Agent at Duncan knew of these improvements, that the defendant had no notice until 1944 that the plaintiff or any one on his behalf questioned the validity of any of the leases to the defendant, and that the rents due under the respective leases had at all times been kept up by the defendant and accepted by the Indian Department.

Counsel for the plaintiff submitted that there were two reasons for finding that the lease of October 16, 1912, was void, the first being that it was not directed by the Governor in Council and consequently not authorized as required by section 51 of the Indian Act, R.S.C. 1906, chap. 81, and the second that it was a condition of the surrender of June 29, 1888, that the proceeds from any lease should be invested for the Indians, which connoted a lease at a substantial rent, and that since the lease was only for a nominal rental there had been a breach of this condition.

Whether effect should be given to the first reason depends on the construction to be placed on section 51 of the Indian Act of 1906, which read as follows:

51 All Indian lands which are reserves or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part.

The section was in substantially the same form in the 1886 Revision, R.S.C. 1886, chap. 43, section 41, and remained unchanged in the 1927 Revision, R.S.C. 1927, chap. 98, section 51.

Counsel for the defendant argued that no specific Order in Council was required for the 1912 lease, that section 51 contemplated merely a control by the Government of general matters of policy affecting surrendered Indian Reserve lands and that this did not extend to administrative details such as the issue of a particular lease, that the Order in Council of August 16, 1888, accepting the surrender, gave authority for the issue of a lease to the defendant and that this gave the Superintendent General of Indian Affairs authority to issue not only the lease of September 1, 1888, but also successive leases, such as the extension of November 29, 1905, and the 99 year lease of October 16, 1912, and that consequently this lease was valid although there was no specific direction for its issue by the Governor in Council.

I am unable to agree that the statutory requirements imposed by section 51 of the Indian Act are subject to the limitation implied in this argument. In my judgment, the decision in *St. Ann's Island Shooting and Fishing Club Ltd. v. The King* (1) is conclusively against such a narrow view of the section. There the claimant sought a renewal of a lease of certain surrendered Indian lands in the County of Kent in Ontario, dated May 19, 1925, made by the Superintendent General of Indian Affairs to trustees for the claimant, pursuant to a provision in the lease for such renewal, but the validity of the lease was called in question on the ground that there had been no Order in Council directing it, although an earlier lease, dated May 30, 1881, had been confirmed by an Order in Council. The issue before the Court was thus the same in principle as that now under discussion. And the claimant's arguments in support of the validity of the lease were similar to those advanced in this case. These were carefully considered by Cameron J and rejected. He was of the opinion that section 51 of the Indian Act was imperative in its requirements that only by a direction of the Governor in Council could surrendered Indian lands be validly managed, leased

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or sold, and that the disposition of such lands was thereby placed directly under the control of the Government. His conclusion was that the section required an Order in Council as the necessary preliminary to the validity of the 1925 lease and that since there was no Order in Council referable to it there had been non-compliance with the imperative provisions of the section and the lease and the provisions for renewal therein were void. In the Supreme Court of Canada the judgment of this Court was unanimously affirmed. Kerwin J. agreed with the opinion of Cameron J., and Taschereau J., speaking also for Locke J., took the same wide view of section 51 of the Indian Act and held that although the original lease of 1881 had been approved by an Order in Council this did not authorize the Superintendent General of Indian Affairs to make the lease of 1925 and the imperative terms of section 51 required a new Order in Council for its validity. And Rand J., speaking also for Estey J., agreed that section 51 required a direction by the Governor in Council for a valid lease of Indian lands. At page 219 he gave a convincing reason for the wide view that ought to be taken of the section:

The language of the statute embodies the accepted view that these aborigines are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.

It was his opinion that the efficacy of the Order in Council confirming the original lease was exhausted by it and that before a new lease could be considered valid it must appear that it was made under the direction of the Governor in Council.

The principles thus laid down in the *St. Ann's* case (*supra*) ought to be applied in this one. It must, I think, be considered settled law that section 51 of the Indian Act requires a direction by the Governor in Council before there can be a valid lease of surrendered Indian Reserve lands, that the responsibility for controlling the leasing of such lands thus vested in the Governor in Council cannot be delegated to the Superintendent General of Indian Affairs or any one else and that a lease of such lands with-

out the direction of the Governor in Council is void. It follows that since the lease of October 16, 1912, was made without a direction by the Governor in Council it is void and the Court so declares.

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This finding makes it unnecessary to deal with the second reason advanced for submitting that the lease was invalid. Moreover, the question whether a lease at a nominal rental was inconsistent with the conditions of the surrender of 1888 and, therefore, void could properly be the subject of judicial determination only if there were a lease at a nominal rental that had been made under the direction of the Governor in Council and such is not the case here.

There remains only the submission by counsel for the defendant, which he made one of his main arguments, that by reason of standing by and allowing the defendant to proceed with substantial improvements on the lands in question the Crown is estopped from contending that the lease is invalid for non-compliance with the requirements of section 51 of the Indian Act. I have considered the authorities submitted to me, including *Ramsden v. Dyson* (1), and the doctrine of equitable estoppel of which it was said to be the source, but have come to the conclusion that the authorities upon which the defendant relied do not apply to the facts of this case and that the defendant cannot set up any estoppel. In my judgment, there cannot be an estoppel to defeat the express requirements of a statute, particularly when they are designed, as section 51 of the Indian Act is, for the protection of the interests of special classes of persons. I follow the opinion on this subject expressed by Rand J. in the *St. Ann's* case (*supra*), although there was no argument on the subject of estoppel in that case when it came before the Supreme Court of Canada, and the views of Cameron J. in this Court who held, after full argument on the subject, that the Crown could not be estopped from alleging that the requirements of section 51 of the Indian Act had not been complied with.

For the reasons given there will be judgment declaring that the lease of October 16, 1912, is null and void. The plaintiff is also entitled to costs.

Judgment accordingly.

(1) (1866) 1 H.L. 129

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BETWEEN :

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

AND

PACIFIC BEDDING COMPANY, }
 LIMITED, } DEFENDANT.

Revenue—Sales tax—Excise Tax Act R.S.C. 1927, c. 179, s. 86, 108 (8 & 9), 113(8)—Assessment—Amendment dealing with procedural matter is retroactive—Res judicata—Admissibility of evidence—Liability for tax.

The action is one for sales tax. Plaintiff's evidence consisted *inter alia* of exhibit 1 being an assessment dated September 18, 1948, made by the Minister of National Revenue under the provisions of s. 113(8) of the Excise Tax Act and the certificate of the Deputy Minister dated August 31, 1948, made under s. 108(9) of the Act.

Defendant contended that exhibit 1 was inadmissible because the liability of defendant for sales tax, if any, had arisen before s. 108(8 & 9) of the Act came into effect and further that plaintiff was estopped from alleging exhibit 1 was an assessment by virtue of a judgment of the Court of Appeal of the Province of British Columbia which was *res judicata* and binding on this Court. The judgment dealt with the prosecution of the defendant in the Police Court at Vancouver, B.C. for the recovery of penalties incurred for violation of the Excise Tax Act.

Held: That s. 108 (8 & 9) of the Excise Tax Act R.S.C. 1927, c. 179, as enacted by 13 George VI, c. 21, s. 8, relates to a matter of procedure and is retroactive. *Rez v. Kumps* (1931) 39 M.R. 445 and *The King v. Alhson* (1950) Ex. C.R. 269.

2. That where a plea of *res judicata* is raised it is necessary for the Court to have recourse to the record and the judgment and such pleadings and other proceedings as tend to show what particular questions of law or issues of fact must necessarily have been determined by the tribunal of first instance in adjudicating the matter before it.
3. That the plea of *res judicata* fails because there has been no adjudication upon the merits of the question now before this Court.
4. That the assessment made by the Minister and certificate by the Deputy Minister are admissible in evidence and the assessment purported to have been made by the document is in fact the assessment.

INFORMATION to recover sales tax alleged owing by defendant.

The action was tried before the Honourable Mr. Justice Cameron at Vancouver.

G. F. Murray for plaintiff.

H. R. Bray, K.C. and *W. C. Thompson* and *M. F. Bray* for defendant.

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

CAMERON J. now (October 4, 1950) delivered the following judgment:

In this matter the plaintiff claims from the defendant company the sum of \$1,366.70 said to be due and owing for sales tax under the provisions of section 86 of The Excise Tax Act, R.S.C. 1927, c. 179, and amendments thereto, together with interest thereon.

The evidence adduced by counsel for the plaintiff consisted of (a) the examination for discovery of an officer of the defendant corporation; (b) the letter written by the Assistant Deputy Minister of National Revenue to the defendant dated August 17, 1948, in which the defendant was notified that the Department had under consideration a proposed assessment against the defendant for sales tax for the period November 1, 1947, to May 31, 1948; that full details of the proposed assessment could be obtained at the Vancouver office of the Department; that the defendant could make such representations in regard thereto as it thought fit until September 8, 1948; and that thereafter and following consideration of the matter an assessment would be made under section 113(8) of the Act for such amount of sales tax as might be payable.

Counsel for the plaintiff also tendered Exhibit 1, consisting of an "Assessment" made by the Minister under the provisions of section 113(8) of the Act and dated September 18, 1948, and the certificate of the Deputy Minister made under the provisions of section 108(9) and dated August 31, 1950. Counsel for the defendant submitted that Exhibit 1 was inadmissible on two grounds. In view of the nature of these objections, I reserved my opinion as to the admissibility of Exhibit 1 until I had had the advantage of hearing argument on the case itself.

The first objection taken was that subsections (8) and (9) of section 108 of the Act could not apply to this case, that they could not be construed as retroactive in effect, and that the liability of the defendant for sales tax, if any, had arisen prior to the two subsections coming into effect.

Subsections (8) and (9) were enacted by section 8 of c. 21, Statutes of Canada, 1949, assented to on December 10,

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1949, and by virtue of section 14(1) thereof were deemed to have come into force on March 23, 1949. Section 8 is as follows:

8. Section one hundred and eight of the said Act is amended by adding thereto the following subsections:—

(8) Where any question arises in a proceeding under this Act as to whether the Minister has formed a judgment or opinion or made an assessment or determination, a document signed by the Minister stating that he has formed the judgment or opinion or made the determination or assessment is evidence that he has formed the judgment or opinion or made the determination or assessment and of the judgment, opinion, determination or assessment.

(9) In any proceedings under this Act a certificate purporting to be signed by the Deputy Minister that a document annexed thereto is a document or a true copy of a document signed by the Minister shall be received as evidence of the document and of the contents thereof.

The proceedings now before me were commenced on March 4, 1950, almost one year after the amendment was deemed to have come into effect. Moreover, the amendment in my opinion is entirely one relating to procedure. Its purpose was to deal with a matter of evidence and evidence has been held to be a procedural matter, *Rex v. Kumps* (1).

In Craies on Statute Law (Third Edition), at p. 332 it is stated, "But there is no vested right in procedure or costs. Enactments dealing with these subjects apply to pending actions unless a contrary intention is expressed or clearly implied."

Reference may also be made to *The King v. Allison* (2), where Kelly J., acting as Deputy Judge of this Court, reached the same conclusion. The objection on this ground must fail.

The second objection was that the "Assessment" dated September 18, 1948, was not in fact an assessment at all and that the plaintiff was estopped from alleging that it was an assessment by reason of the decision of the Court of Appeal of the Province of British Columbia. It was submitted that such decision was *res judicata* and binding on this Court.

In support of his plea, counsel for the defendant tendered in evidence certified copies of certain proceedings originat-

(1) (1931) 39 M.R. 445.

(2) (1950) Ex. C.R. 269.

ing in the Police Court at Vancouver in which the defendant herein was charged with "Being a person required to pay sales tax pursuant to the Special War Revenue Act and amendments thereto and to the Excise Tax Act and amendments thereto, unlawfully did fail to pay within the time prescribed by the said Act, sales tax in the total amount of \$1,388.75 for the period between November 1, 1947, and May 31, 1948, both dates inclusive."

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The evidence tendered consisted of the following records:

(1) Exhibit D, the Information and Complaint.
 (2) Exhibit E, the Certificate of Conviction of the Defendant.

(3) Exhibit B, the case stated by the Magistrate.

(4) Exhibit A, copy of the Appeal Book, containing also the judgment of Manson, J., who had affirmed the decision of the Magistrate.

(5) Exhibit C, a certified copy of the Judgment of the Court of Appeal, which by majority reversed the judgment of Manson, J.

Counsel for the plaintiff, while not objecting to the form in which these records were produced, submitted that they were irrelevant and therefore inadmissible. Again I felt it advisable to defer my opinion on this point until I had heard full argument on the case.

I have now reached the conclusion that in this case—where the parties are the same as in the other proceedings—these records constitute admissible evidence. The defendant in his defence has pleaded *res judicata* and for the purpose of ascertaining the subject matter of the decision relied upon as *res judicata*, it is necessary to have recourse to the record and the judgment and such pleadings and other proceedings as tend to show what particular questions of law or issues of fact must necessarily have been determined by the tribunal in adjudicating as it did, Spencer Bower on *res judicata* 1924 Ed. 113. To deny the defendant the right to introduce such documents might be to deprive it of the only evidence that might be available in proof of its defence of *res judicata*. I therefore find that these exhibits are admissible in evidence, *Margison v. Blackburn Borough Council*. (1).

(1) (1939) 1 A.E.R. 273 at 278.

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Exhibit C is the formal judgment of the Court of Appeal. It answered in the negative the three questions set out in the stated case submitted by the Magistrate, which questions were as follows:

- (1) Was I right in holding that the said paper writing was admissible as evidence?
- (2) Was I right in holding that the said paper writing was evidence of the facts therein stated?
- (3) Was I right in holding that the said paper writing was the assessment of the Minister of National Revenue within the meaning of section 113, subsection (8) of the Excise Tax Act (Canada)?

Counsel for the defendant submits that the finding of the Court of Appeal that the "paper writing" (which is the identical assessment forming part of Exhibit 1 herein) was not the assessment of the Minister within the meaning of section 113(8) of the Act concludes the matter and that Exhibit 1 is therefore inadmissible.

I am of the opinion that this objection must also fail. In order that a defence of *res judicata* may succeed it is necessary to show not only that the cause of action is the same, but also that the plaintiff had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. (Halsbury 2nd Ed., Vol. 13, p. 411). The proceedings in the Police Court at Vancouver were for the recovery of penalties incurred for violation of the Excise Tax Act and that Court had jurisdiction to hear the matter by reason of the provisions of section 108(2) (b) of the Act. The taxes now claimed could not have been recovered in the proceedings in the Police Court, but only in the Exchequer Court, or in any other Court of competent jurisdiction, section 108(1), or by proceeding under section 108(4). It is the case that in proceedings in the Police Court the penalties assessed for a non-payment of taxes could include an amount equal to the unpaid taxes, but section 109(2) makes it abundantly clear that even if the penalties assessed included an amount equal to the unpaid tax, the taxpayer is not absolved from liability to pay the taxes which are properly due.

Moreover, there has been no adjudication upon the merits of the question now before me, that is, is the defendant liable for the sales tax now claimed? It is a fact that the defendant in the Police Court proceedings

could not have been found guilty unless it was established that it had failed to pay the tax. It is apparent, however, from the exhibits placed in evidence before me and from the reasons for judgment of the Court of Appeal (*Rex v. Pacific Bedding Co. Ltd.* (1)) that the only matter disputed before the Magistrate and in the Court of Appeal was the admissibility of the "Assessment" in evidence, and the proof of the statements made therein. I think that there can be no doubt that the Court may look at the reasons for judgment, as well as at the formal judgment itself. (*Marginson v. Blackburn Borough Council, supra.*)

In the Court of Appeal, Sloan, C.J.B.C., after considering the admissibility of the document, said at p. 581:

I do not think it is required of me to express any view as to the manner in which the assessment under said sec. 113(8) of the Excise Tax Act might properly be proved. It is sufficient for me to say in this case that in a criminal proceeding and in the absence of any express legislative provision authorizing its use the mere production of a signed document of this character cannot, in my view, be regarded as either conclusive or *prima facie* proof of the facts contained therein. That being so the document has no evidentiary value and ought not to have been admitted in evidence.

In my opinion then, with deference, this appeal ought to be allowed and the three questions answered in the negative.

I think, therefore, that while question 3 of the stated case was answered in the negative, the reasonable interpretation to be put upon the matter was that it constituted a finding that the evidence in the Police Court was insufficient to prove that an assessment had been made. Reference may also be made to *Bureau v. The King* (2), *La Fonciere Compagnie D'Assurance de France v. Perras et al.* (3), *Kantyluk v. Graham and Kostick* (4).

There is still another reason why the defence of *res judicata* is not now available to the defendant; following the decision of the Court of Appeal of British Columbia the Excise Tax Act was amended in 1949 by adding subsections (8) and (9) to section 108 (*supra*). As I have pointed out above, Exhibit 1 filed by counsel for the plaintiff consists of the "Assessment" and the certificate of the Deputy Minister provided for in subsection (9). The assessment is as follows:

I, James Joseph McCann, of the City of Ottawa, Minister of National Revenue for the Dominion of Canada, having considered an audit report

(1) (1949) 2 W.W.R., 575.

(2) (1949) S.C.R. 367.

(3) (1943) S.C.R. 165.

(4) (1948) 3 D.L.R. 464.

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made by Excise Tax Auditor C. Privat and no reply having been received to departmental letter of August 17, 1948, to Pacific Bedding Co. Ltd., Vancouver, B.C., for representations regarding or objections to a proposed assessment for sales tax in the amount of \$1,388.75 for the period from November 1, 1947, to May 31, 1948, and after making further enquiries and having given full consideration to the matter and being of the opinion that the said Pacific Bedding Co. Ltd., while carrying on business in the City of Vancouver, B.C., has in my opinion failed to maintain adequate records of account for the purpose of the Excise Tax Act during the period from November 1, 1947, to May 31, 1948, by virtue of the powers vested in me do hereby assess pursuant to the provisions of Section 113(8) of the Excise Tax Act, R.S.C. 1927, Chapter 179 and amendments thereto, the said Pacific Bedding Co. Ltd., for the said period, the sum of \$1,388.75 for sales tax exigible under the said Act, which sum shall be deemed to have been payable as follows:

1947	November	\$ 348.78
	December	274.74
1948	January	172.15
	February	119.55
	March	131.26
	April	213.19
	May	129.08
		<hr/>
		\$1,388.75

This assessment of \$1,388.75 shall be in addition to the sales tax already paid.

Dated at Ottawa, this 18th day of September, 1948.

(Sgd.) James J. McCann
 Minister of National Revenue.

The certificate of the Deputy Minister is as follows:

I hereby certify that the document dated the 18th day of September, 1948, annexed hereto, is a document signed by the Honourable the Minister of National Revenue.

(Sgd.) D. Sim
 Deputy Minister of National Revenue
 for Customs and Excise.

Under the provisions of subsection (9), therefore, the effect of the Deputy Minister's certificate is that the document attached thereto (which is the Assessment) is a document signed by the Minister and that it shall be received as evidence of the document and of the contents thereof. Moreover, it follows from the provisions of subsection (8) that the statements in the Assessment, that the Minister has formed the opinion that the defendant has failed to maintain adequate records of account for the purpose of the Excise Tax Act for the period mentioned, and that he has assessed the defendant for the sum now claimed, constitute admissible evidence that he has formed

the opinion and made the Assessment and of the opinion and Assessment. It follows, therefore, that whatever weight would have had to be given to the judgment of the Court of Appeal that the "Assessment" was not an assessment of the Minister, *before* the law was amended by adding subsections (8) and (9) to section 108, the result of the amendment is that upon production of the certificate of the Deputy Minister attached to the document signed by the Minister, that certificate and document (Exhibit 1) are admissible in evidence and that the assessment purported to have been made by the document is in fact the assessment. My finding is, therefore, that Exhibit 1 is to be admitted as evidence on behalf of the plaintiff, the objections of counsel for the defendant being overruled.

The authority of the Minister to make the assessment when a person has failed to keep the required records or books of account is as follows:

Section 113(8). Where a person has, during any period, in the opinion of the Minister, failed to keep records or books of account as required by subsection one of this section, the Minister may assess

- (a) the taxes or sums that he was required, by or pursuant to this Act, to pay or collect in, or in respect of, that period; or
- (b) the amount of stamps that he was required, by or pursuant to this Act, to affix or cancel in, or in respect of, that period, and the taxes, sums or amounts so assessed shall be deemed to have been due and payable by him to His Majesty on the day the taxes or sums should have been paid or the stamps should have been affixed or cancelled.

The assessment having been admitted in evidence, it follows that the taxes, sums or amounts so assessed shall be deemed to have been due and payable by the defendant and payable to His Majesty on the dates mentioned. There is, therefore, before me *prima facie* evidence that the amount claimed by the plaintiff is payable by the defendant. The only defence raised by the defendant was that of *res judicata* and having rejected that defence it follows that there must be judgment for the plaintiff for the amount claimed in the Information filed, namely, \$1,366.70, for sales tax, together with interest thereon, as provided by section 106(4) of the Excise Tax Act, up to the date hereof. The plaintiff is also entitled to be paid his costs, after taxation.

Judgment accordingly.

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BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

GREATER VANCOUVER WATER } PLAINTIFF;
 DISTRICT, }

AND

THE SHIP *SPARROWS POINT* and } DEFENDANT.
 NATIONAL HARBOURS BOARD, }

Practice—Extension of time to appeal—The Exchequer Court Act, R.S.C. 1927, c. 24, s. 82 as amended by 13 Geo. VI, c. 5, s. 2—Sufficient grounds must be shown—Solicitor's error.

Held: That a solicitor's error is not a valid and sufficient ground to warrant an extension of time to appeal. But in view of the implicit wish of the Supreme Court of Canada to have the plaintiff join in the appeal in order to give the Supreme Court jurisdiction to enter a judgment against the defendant, National Harbours Board, in favour of plaintiff, in the event it found that the damages were caused wholly or partially by the said defendant, the motion is granted.

MOTION for extension of time to appeal.

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

Lee A. Kelley, K.C. and *Douglas McK. Brown* for the motion.

Alfred Bull, K.C. and *D. S. Montgomery* contra.

ANGERS J. now (October 10, 1950) delivered the following judgment:

This is a motion by plaintiff asking for an order extending the time within which the plaintiff, Greater Vancouver Water District, may appeal from the judgment of the Honourable Mr. Justice Sidney Smith delivered following the trial of the action on March 2, 1950, until the 15th day of October 1950.

In support of his motion plaintiff filed an affidavit by Douglas McKenzie Brown, of the firm of Russell and DuMoulin, solicitors for the plaintiff, in which it is stated in brief:

the plaintiff initially brought action against the ship *Sparrows Point*; counsel for the said ship moved before

the local Judge in Admiralty for an order joining the National Harbours Board as a defendant, or alternatively, as a third party;

by an order made in January 1949 Mr. Justice Smith directed that the National Harbours Board be made a party defendant and that plaintiff be at liberty to join issue against the said National Harbours Board;

the trial of this action was heard on February 27 and 28 and March 1 and 2, 1950, and at the conclusion thereof the trial Judge gave oral Reasons for Judgment, but indicated that he would give extended Reasons later; the said extended Reasons were handed down on March 28, 1950; the formal judgment was rendered on May 11, 1950, condemning the defendant, the ship *Sparrows Point* and other bail in an amount to be assessed and costs and dismissing the action against the National Harbours Board; the damages have not been assessed but a list of the plaintiff's damages allegedly caused by the negligence of the defendants was filed at the trial in the sum of \$69,340.26.

on March 29, 1950, the ship *Sparrows Point* filed a Notice of Appeal to the Supreme Court of Canada and served the same upon Greater Vancouver Water District and National Harbours Board;

the plaintiff, Greater Vancouver Water District, in view of the fact that the defendant ship had appealed against the judgment dismissing the action against the National Harbours Board, as well as against the judgment obtained by plaintiff against the defendant ship, were advised by counsel that the Supreme Court of Canada could render whatever judgment the trial Judge had failed to render. As issue had been joined between plaintiff and both defendants the trial Judge, had he taken a different view on the question of liability, could have given judgment in favour of plaintiff against the defendant, National Harbours Board, in whole or in part;

for these reasons, the plaintiff was advised by counsel that there was no necessity for it to appeal formally the judgment of the trial Judge as against the defendant, National Harbours Board;

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during the argument of the appeal now proceeding before the Supreme Court of Canada, the Court has raised the question, without deciding it, as to whether it is necessary for the plaintiff to appeal formally in order to give the Court jurisdiction to enter a judgment against the defendant, National Harbours Board, in favour of plaintiff in the event that it should find that the damages were caused wholly or in part by the said defendant;

if the time for appealing is extended and the appeal by Greater Vancouver Water District against the judgment is completed at this time, the National Harbours Board will be in no wise prejudiced, as all the issues and the evidence are at present before the Supreme Court.

The question of an appeal from a judgment of this Court to the Supreme Court of Canada is governed by section 82 of the Exchequer Court Act, as enacted by section 2 of chapter 5 of 13 George VI, assented to on October 27, 1949.

The material part of section 82 reads thus:

82. (1) An appeal to the Supreme Court of Canada lies
- (a) from a final judgment or a judgment upon a demurrer or point of law raised by the pleadings, and
 - (b) . . . pronounced by the Exchequer Court in an action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars.

Subsection 2(a) is thus worded:

(2a) The notice of appeal shall be served and filed and the security shall be deposited within sixty days (in the calculation of which July and August shall be excluded) from the signing or entry or pronouncing of the judgment appealed from or within such further time as a judge of the Exchequer Court, or in the case of an appeal from an interlocutory judgment a judge of the Supreme Court of Canada, may either before or after the expiry of the said sixty days fix or allow.

The trend of the jurisprudence is that, when sufficient grounds are shown, the time for leave to appeal from a judgment of this Court may be extended after that prescribed by section 82.

In *Clarke v. The Queen* (1) it was held that the fact that a solicitor, who has received instructions to appeal, has fallen ill before carrying out such instructions affords a sufficient ground upon which an extension of delay may be allowed, after the time for leave to appeal prescribed by law has expired.

(1) (1892) 3 Ex. C.R. 1.

In the case of *MacLean, Roger and Company v. The Queen* (1) it was held that, where an application was made by the Crown for an extension of time for leave to appeal long after the period prescribed in section 51 (now 82) of the Exchequer Court Act had expired, and the material read in support of the application did not show any special grounds why an extension should be granted, the application should not be allowed.

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In the matter of *The Alliance Assurance Company v. The Queen* (2) the headnote discloses that judgment against suppliants was delivered on January 17, and the time allowed for leave to appeal by section 51 of The Exchequer Court Act expired on February 17; that on April 22 the suppliants applied for an extension of the time to appeal on the ground that before judgment the suppliants' solicitor had received instructions to appeal in the event of the judgment in the trial Court going against them; that there was no affidavit establishing this fact by the solicitor for suppliants, but that there was an affidavit made by an agent of suppliants stating that such instructions were given and that he personally did not know of the judgment being delivered until March 27.

It was held that the knowledge of the solicitor must be taken to be that of the company, that notice to him was notice to the company, and that as between suppliants and respondent the matter should be disposed of upon the basis of what he knew and did and not upon the knowledge or want of knowledge of suppliants' manager or agent. The order was accordingly refused.

In *Baker v. Faber* (3) an application for an extension of the time for appealing was made. The report discloses that the action was tried before a judge and a jury; that on November 21 the jury found a verdict in favour of defendant; that the judge thereupon entered judgment in his favour; that during the trial the defendant admitted that there was an obligation upon him to pay to plaintiff the sum of £904 in reduction whereof the defendant had paid to plaintiff the sum of £750; that the defendant also claimed to take credit for the balance of £154 which was paid by defendant to a third party, as the plaintiff

(1) (1894) 4 Ex. C.R. 257.
 (2) (1898) 6 Ex. C.R. 126.

(3) (1908) The Weekly Notes, 9

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alleged, without his knowledge or consent, and that at the trial the plaintiff submitted to the Judge that the defendant was not entitled in law to take credit for this sum, but that the Judge overruled this contention; that on December 6 plaintiff presented at the associate's office a notice of appeal asking the Court of Appeal to enter judgment in his favour for £154 on the ground that the trial Judge was wrong in entering judgment for the defendant upon the facts admitted and proved in the course of the trial, that the plaintiff had been advised by counsel that he had three months within which to appeal; that the officials, however, declined to accept the notice of appeal on the ground that the appeal was one which came within the terms of Order XXXIX, rr. 1-a and 4, and should have been filed within eight days of the trial. Plaintiff asked for an extension of time under Order LXIV, r. 7; the Court granted the application.

In *Smith v. Hunt* (1) it was held by Moss, C.J.O. that upon an application to extend the time for appealing the applicant must show a bona fide intention to appeal and that no such case having been made, and the Court not being impressed with the merits of the defence, leave to extend the time was refused.

In the matter of an arbitration between *Coles and Raven-shear* (2) the headnote, fairly comprehensive and exact, reads as follows:

Where, through a mistake of counsel as to the effect of Order LVIII, r. 15, an appeal was not brought until after the expiration of the time thereby allowed for appealing: *Held*, upon the authority of *In re Helsby*, (1894) 1 Q.B. 742, and *International Financial Society v. City of Moscow Gas Co.*, (1877) 7 Ch. D. 241, that there was no sufficient ground for granting special leave to appeal under the before-mentioned rule.

In a recent case before the Chancery Division of the Supreme Court of Judicature, *Gatti v. Shoosmith* (3), it was held by the Court (Sir Wilfrid Greene, M.R. and MacKinnon and Finlay, L.J.) that under Order LVIII, r. 15, where leave to appeal has not been served within the time prescribed by the rule owing to a mistake by a legal adviser, the Court may, in its discretion, grant leave to appeal, notwithstanding that the time for appealing has expired.

(1) (1903) 5 O.L.R. 97.

(3) (1939) 1 Ch. 341.

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

See also: The Annual Practice (1949), volume 1, p. 1456, para. 967. *Woodburn v. The Queen* (1); *The King v. Quebec North Shore Turnpike Road Trustees and Burroughs* (2).

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Had it not been the implicit wish of the Supreme Court to have the plaintiff, Greater Vancouver Water District, join in the appeal in order to give the Supreme Court jurisdiction to enter a judgment against the defendant, National Harbours Board, in favour of plaintiff, in the event it found that the damages were caused wholly or partly by the said defendant, I would have been loath to grant the extension of time sought. I do not think that a solicitor's error is a valid and sufficient ground to warrant such an extension. I may say that the Courts in England have recently shown an inclination to be more liberal in this regard. Moreover, it will likely be useful, nay advantageous, to have the standing of all parties unfolded and determined on the same occasion. In the circumstances I believe that the motion should be granted, with costs against plaintiff fixed at \$20.

Judgment accordingly.

BETWEEN:

IRVING H. GROSSMAN and GUS SUN. . . . SUPPLIANTS; Oct. 4, 5 & 6

AND

HIS MAJESTY THE KING. RESPONDENT.

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Crown—Petition of Right—Airplane damaged in landing on airfield owned and operated by the Crown—Crown liable to licensee for damage sustained because of a danger not obvious and not warned against—Failure of suppliant to ascertain conditions at landing field before landing plane—Action dismissed.

Suppliant Grossman when attempting for the first time to land his airplane operated by himself at an airport owned and operated by respondent and which was open to the public and which he was entitled to use, came in contact with an open ditch on the grass strip of the landing field used by him, with the result that his plane was seriously damaged. He now claims for the value of the damage done to his plane and suppliant Sun seeks to recover for certain out-of-pocket expenses incurred because of personal injuries sustained by him.

(1) (1898) 6 Ex. C.R. 69.

(2) (1917) 17 Ex. C.R. 488.

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The Court found that pilots with previous knowledge of the ditch could readily locate its position: that a pilot with no previous knowledge of its existence could observe its location and nature if he flew over the landing field at height of 1,000 feet or less, on the date of the accident: that a pilot with no previous knowledge of the existence of the ditch who failed to fly over the landing field at a height of 1,000 feet or less would have difficulty in seeing the ditch or the warning flags and under those circumstances the ditch would not be obvious to him.

Held: That the status of suppliant Grossman when using the airfield was that of a licensee to whom respondent owed a duty to give adequate warning of any danger unless such danger were obvious, Grossman being required to use reasonable care under all the circumstances.

2. That suppliant Grossman failed to take reasonable care in that he did not inform himself of the nature of the ground on which he proposed to land his plane and failed to take any steps to acquaint himself with the nature of the landing field and which were available to him for his own protection.
3. That the failure to give adequate warning to licensees, lawfully using the facilities of a public airport, of the existence of a ditch which constitutes an obstruction on the runway, is negligence on the part of the Crown for which it would be liable unless the obstruction would be obvious to those using reasonable care.

PETITION OF RIGHT by suppliant to recover from the Crown damages sustained by his airplane when landing on an airfield owned and operated by the Crown.

The action was tried before the Honourable Mr. Justice Cameron at Saskatoon.

J. M. Cuelenaere, K.C. for suppliant.

G. H. Yule, K.C. and *A. J. MacLeod* for respondent.

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

CAMERON J. now (November 15, 1950) delivered the following judgment:

The suppliants claim damages for losses sustained on July 19, 1948, when a 1948 model Stinson Station Wagon Aircraft, owned and operated by the suppliant Grossman and in which the suppliant Gus Sun was a passenger, landed on the Saskatoon Airport and ran into the side of an open ditch thereon. While admitting that at all material times the airport was owned by the respondent in the right

of Canada and was established, constructed and operated by the Department of Transport, the respondent denies all liability and alleges that such damages as the suppliants sustained were caused by the negligence of the suppliant Grossman.

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The airport is situated a few miles north of the City of Saskatoon. It was originally operated by the Royal Canadian Air Force, but after the late war was taken over by the Department of Transport and many additional facilities added. Ex. B is a plan dated April 9, 1946, which shows those parts of the port area which are here of any importance. When used by the Royal Canadian Air Force there were two hard-surfaced landing strips as lightly outlined on Ex. B; these will be referred to as the R.C.A.F. strips. There was also in the northeast corner of the airport area a grass landing strip running about north and south; and a small frame building having the word "Airport" on its roof, clearly visible from the air, and owned by the Canadian Pacific Air Lines. Some of the boundary markings originally used on that grass landing strip were still there at the date of the accident.

When the airport was taken over by the Department of Transport, it was decided to build two new hard-surfaced landing strips capable of being used by the heaviest planes. These are shown in heavy outlines on Ex. B (they will be referred to as the new strips). Each is about 1 mile long, 200 feet in width, and there are unsurfaced safety strips on each side, one being 200 feet wide and the other 300 feet wide. These new strips had been in use long before July 19, 1948. The R.C.A.F. strips were also used when needed and had not been abandoned (except in some parts), some maintenance work being done thereon. The grass strip in the northeast corner, so far as the Department was concerned, was considered to be abandoned and no monies were being spent thereon for maintenance. It was used, however, by the Saskatoon Flying Club, the Saskatchewan Air Lines and by other companies using light planes, although these organizations did not use it exclusively.

At the time the new strips were built it was deemed necessary to provide for their adequate drainage, and for that purpose about one million dollars was expended.

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Much of this drainage was accomplished by special installations, including underground piping. As part of the drainage scheme it was decided to construct a large open ditch commencing 1,000 feet from the easterly end of the new strip "14 to 26," the ditch as so constructed in 1946 being marked in red on Ex. B. It is about 2,000 feet in length, about 48 feet in width at the top, and varies in depth from 7 feet to 11 feet. Being 1,000 feet distant from the end of the new strip, it was deemed unnecessary to fill it in owing to the very large additional expense that would be involved. This ditch intersects the old grass strip at about right angles and is about 2,800 feet from the north limit of the airport and about 1,300 feet from the hangars, situate at the southern limit of the old grass strip. On each side of the ditch, poles about 10 feet in height had been erected and on each were placed red flags made of cloth, to serve as danger warnings.

The suppliant Grossman is a theatrical producer and agent residing at DesMoines, Iowa. He first obtained a pilot's license in 1946, holds a Federal licence, and had about 450 hours' flying experience. On this trip he entered Canada at Winnipeg about two weeks previously and had stopped at airports in Saskatchewan, Manitoba and Western Ontario. His plane was equipped with a two-way radio which permitted him to contact and to be guided by airport control towers and ranges where these facilities existed. He says that at Winnipeg he endeavoured to secure suitable aerial maps of the airports at which he intended to call, but was unsuccessful.

On July 19 he left Prince Albert about 2.30 p.m. to proceed to the Saskatoon Airport, equipped with a small scale map he had previously obtained—Ex. 1. It was printed at the Hydrographic and Map Services in Ottawa in 1941. He made inquiries at Prince Albert and was informed as to the four surfaced strips which were available at the Saskatoon Airport, but was told nothing about the grass landing strip or the radio range, and his map did not contain any information about them.

He arrived over the airport about 3.30 p.m., weather and flying conditions being very good with excellent visibility. He observed from the wind sock and the tetrahedrant

that the wind was light from the southeast and variable. He tuned in to tower frequency and made one attempt to contact the control tower, but received no answer. He flew over the airport and, intending to land on the new runway "14 to 32" descended to a height of about 200 feet. He then observed men and equipment on that strip about halfway between its ends, and, deciding not to land there because of these obstructions, regained altitude to about 600 feet and turned along the east boundary of the airport. There he observed the frame building marked with the word "Airport," and to the west thereof a grass landing strip which he says was marked as available by conventional signs, with markers at the ends and at the cross points of the runway, limiting the landing strip. He decided to land there and, having observed the Administration Buildings and hangars at the south end thereof and wishing to finish his run on the ground at that point, decided to land well down on the grass strip. He therefore approached it from the north and landed at about the point "B" on Ex. 2. He describes his landing speed as a "stalled landing," about 55 m.p.h., and that it was an excellent landing. He continued to roll towards the hangars at the south. When he was about 200-300 feet north of the ditch to which I have referred and was about to cross a portion of the old R.C.A.F. surfaced strip, he says that for the first time he saw the ditch and the red flags on its edges. Faced with the danger of running into the ditch and being of the opinion that if he applied his brakes his plane would turn over, he decided immediately to endeavour to take off. His speed at that time he estimated at 45 m.p.h. and he considered that he had a chance to make a successful take-off. He attempted to do so but was unsuccessful, the under part of his plane caught on the far side of the ditch and the plane was crashed into the ground about 25 feet south of the ditch, causing the damages for which recovery is now sought.

Mr. Cuelenaere, counsel for the suppliants, while admitting that no objection could be taken to the actual construction of the ditch, submitted that it was the duty of the respondent to provide adequate warning of the danger occasioned by the open ditch on the grass strip, and that

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the Crown had failed in that regard; that, while certain flags had been placed at the edges of the ditch, they were insufficient and inadequate to give notice of the danger and that the respondent was therefore liable for the losses sustained. Mr. Yule, counsel for the respondent, submitted that the evidence disclosed no cause of action against the Crown, that what was here done by the respondent amounted merely to non-feasance and that the Crown is not liable therefor; and that the damages sustained by the suppliants were occasioned by the negligence of Grossman.

Reference may be made to *The King v. Hochelaga Shipping & Towing Co. Ltd.* (1). In that case the Supreme Court of Canada unanimously affirmed the judgment of Angers, J., in this Court, finding liability on the Crown under the following circumstances: "The Dominion Government undertook the construction of a jetty projecting from a breakwater; the upper part was carried away in a storm leaving the lower part in position, but entirely submerged. The suppliant's vessel some two years later became a total loss as a result of having struck the submerged portion of the jetty which had been left without any buoy or other warning to indicate its presence there." It was

Held, affirming the judgment of the Exchequer Court of Canada and dismissing the appeal to this Court, that, upon the facts of the case, the submerged cribwork, which was left with nothing to warn navigators of its presence, constituted a dangerous menace to navigation, and in leaving that obstruction without providing any such warning, the officials and servants of the Crown in charge of these works were chargeable with negligence for which the Crown is responsible by force of section 19(c) of the Exchequer Court Act.

At p. 163 Crocket, J. said:

The evidence of the material facts I have endeavoured to outline is undisputed and I think fully justifies the conclusion of the learned trial judge, not only that the *Ostrea* struck the submerged and invisible obstruction in turning around the end of the jetty, but that its collision therewith was attributable to such negligence on the part of officers and servants of the Crown, while acting within the scope of their duties or employment upon a public work as rendered the Crown responsible therefor under the provisions of s. 19(c) of the Exchequer Court Act. It was not a case of mere non-repair or non-feasance, but of the actual creation of a hidden menace to navigation by a Department of the Government through its fully authorized officers and servants in the construction of a public work.

And at p. 169 Davis, J. said:

The case made against the Crown is that having undertaken and completed the restoration and change in the structure, leaving the impression upon those using the waters at the point that the end of the jetty was as it appeared above water, it was negligence on the part of the officers or servants of the Crown not to have either removed the submerged rocks and cribwork, or, placed a buoy or some warning of their existence and danger; in other words that it was not, as contended by the Crown, a case of nonfeasance but was in fact a case of misfeasance. That was the view of the evidence accepted by the learned trial judge and I think it was right. The Crown undertook the repair and reconstruction of the structure and did it in such a manner as to create a condition dangerous to those using the waters beside it. While in one sense the acts complained of might be regarded as an omission, in substance the result of the acts of those in charge of the work of restoration of the jetty constituted misfeasance . . . but I agree with the view taken by the learned trial Judge on the evidence, that is, that in the restoration and changes made in the jetty, there was negligence on the part of the officers or servants of the Crown while acting within the scope of their duties or employment upon the public work.

The principles there laid down, in my opinion, are equally applicable to the construction of a ditch which constitutes an obstruction on the runway of a public airport. Failure to give adequate warning thereof to those lawfully using the facilities of the airport and exercising reasonable care, would, I think, constitute negligence for which, in the absence of contributory negligence, the Crown would be liable.

The first question to be considered is the nature of the duty, if any, of the respondent to the suppliants under the circumstances above disclosed and that necessarily involves the further question of the status of the suppliants. The airport was admittedly one which was open to public use and Grossman was therefore entitled to use it and so could not be considered a trespasser. There is no evidence as to whether any fees were charged to the owners of airplanes which landed on the airport or whether such services as the supplying of gasoline and oil or storage were supplied by the respondent or by tenants on the property. Grossman said that he intended to land on the runway and to finish up his run somewhere near the hangars, but whether he intended to avail himself of the services supplied at the hangars, and who occupied the hangars, is not made clear. On this limited evidence I am unable to find that Grossman was "invited into the premises by the owner or occupier

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for some purpose of business or of material interest." In my opinion, therefore, he is not an invitee. But having permission to enter the premises although lacking a common interest with the occupier of the premises, he was, I think, a licensee.

The duty of an occupier of premises to a licensee was laid down by the House of Lords in *Fairman v. Perpetual Building Society* (1) where Lord Wrenbury said:

The licensee must take the premises as he finds them; but this is apart from and subject to that which follows as to concealed dangers. The owner must not expose the licensee to a hidden peril. If there is some danger of which the owner has knowledge, or ought to have knowledge, and which is not known to the licensee or obvious to the licensee using reasonable care, the owner owes a duty to the licensee to inform him of it. If the danger is not obvious, if it is a concealed danger, and the licensee is injured, the owner is liable.

In *Mersey Docks and Harbour Board v. Procter* (2), Lord Sumner at p. 274 stated:

A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself; if it is one to be expected, he must expect it and take his own precautions . . . The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee.

While the grass landing strip may have been officially abandoned by the department in charge (which spent no money on its maintenance), it was well known to those in charge that that part of it north of the ditch was in daily use by a large number of light planes. Mr. Burbidge, Inspector of Civil Aviation for the Department of Transport, a witness for the respondent, admitted that the ditch was an obstruction and that by reason of its existence the area north thereof (where Grossman landed) would be unfit for taking off and landing. He also stated that the place where Grossman landed was within the landing area of the airport for light aircraft; and that a pilot, seeing the grass strip with the ground markings that remained there adjacent to a building marked "Airport" would be entitled to assume—as did Grossman—that there would be a small area in which he could land. Mr. Burbidge also stated that it was the duty of Mr. P. R. Nicholas,

(1) (1923) A.C. 74.

(2) (1923) A.C. 253.

Foreman of the Saskatchewan Airport, to mark any obstructions and that Mr. Nicholas was actually in the position of Aerodrome Manager.

Mr. Nicholas must have recognized, also, that the ditch constituted an obstruction, for without orders from any superior authority in 1946 he placed red cloth flags (about 24" x 36") on poles 10 feet high on each side of the ditch, spacing them about 100 feet apart. These were the only markers or warnings placed at or near the ditch, and it is admitted that they were placed there to give warning to pilots who were intending to land, as well as to those who were taking off from or manoeuvring on the grass strip itself.

These posts were originally old boundary markers and when first placed on the ditch were brightly painted. At the time of the accident they had become quite dull and had not been repainted, but the cloth flags when worn out had been replaced. Many of the original posts seem to have disappeared and the actual number in use at the time of the accident is quite uncertain. Some witnesses placed the number as low as six in all. Nicholas said there must have been eighteen or twenty but was not sure whether there were any on the south side of the ditch. In the year following the accident the posts were painted international orange and white and the red flags were put on a solid panel or framework capable of swinging a full circle. The evidence is that the new flags are much more easily discernible from the air and ground than were the former ones.

The respondent therefore had knowledge of the danger created by the ditch, and, unless such danger was obvious, owed a duty to give adequate warning thereof to the licensee, the latter being required to use reasonable care under all the circumstances.

In dealing with what is obvious in this connection, Lord Wrenbury in the *Fairman* case (*supra*) said at p. 96:

If the danger is not obvious, if it is a concealed danger, and the licensee is injured, the owner is liable. But something must be said as to the meaning of "obvious". Primarily a thing is for this purpose obvious if a reasonable person, using reasonable care, would have seen it. But this is not exhaustive unless the words "reasonable care" are properly controlled. There are some things which a reasonable person is entitled to assume, and as to which he is not blameworthy if he does not see

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them when, if he had been on the alert and had looked, he could have seen them. For instance: if one step in a staircase or one rung in a ladder has been removed in the course of the day and a man who had used the staircase or the ladder in the morning comes home in the evening finding the staircase or ladder still ostensibly offered for use, and comes up or down it without looking out for that which no one would reasonably expect—namely, that a step or rung has been removed, he has nevertheless suffered from what has been generally called a “trap,” although if he had stopped and looked he would have seen that the step or rung had been removed. He was not guilty of negligence, he was not bound to look out for such an unexpected danger as that, although if he had proceeded cautiously and looked out it would have been obvious to him. He was entitled to assume that there was no such danger.

The difficulty of determining whether the danger here was obvious is increased because of the fact that Grossman was approaching it from the air and the question therefore arises as to the place from which it must be obvious. To that extent the problem differs from the relatively simple case of one using a defective stairway or ladder.

The ditch was not concealed. As I have said it was an open ditch with very considerable dimensions, being 200 feet long, 48 feet in width, and in depth varied from 7 to 11 feet. Its visibility was somewhat lessened by the presence of weeds along its upper edges. From very high altitudes and at great distances it would not be seen by a pilot who had no knowledge of its existence.

The evidence as to its visibility is most conflicting. Leslie Deane at the time of the accident was Superintendent of Maintenance and Operations for the Saskatchewan Government Airways, located at Prince Albert. The following day he was flown to the Saskatoon Airport to inspect the damaged plane. He said that he was unable to spot it as a ditch and did not notice any warning flags. He emphasized the fact that he was not a pilot and was speaking merely as a layman. I do not attach much weight to this evidence, particularly as he could not recall whether he landed on one of the paved strips or on the grass strip, nor did he know the height at which he had been flying over the airport.

Floyd R. Glass, the Manager of the Saskatchewan Airways, is a very experienced pilot and well acquainted with the Saskatoon Airport. He says that to him the ditch was fairly visible but that to inexperienced persons not trained in detecting a ditch of that sort it would be quite

possible not to see it; but added that in failing to see it "they may have been somewhat careless." On his first landing at the airport after the construction of the ditch he had no difficulty in seeing it from the air although he had no knowledge that it had been constructed. He did know, however, that new runways were being built at the airport.

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Harold Mitchinson is the owner and operator of a flying service at the airport and also an experienced pilot. He knows the airport well and often uses the north part of the grass strip as a landing field. He says that in 1948 the warning flags from the air were not very visible and that one would have to be looking for them to see them, and that otherwise one might not see them. Normally, he adds, one would not be looking for a ditch of that sort.

J. R. Turner in 1948 was Managing Instructor for the Saskatoon Flying Club at the airport and held a commercial pilot's licence. In regard to the ditch he says, "Well, passing directly over the airfield, say a thousand feet, there definitely appears a black line that could be a roadway or a ditch. The only indication of its depth looking straight in an easterly or a westerly direction, down the length of the ditch, you might get an idea of its depth at a height of 800, using a radius of two miles that could easily be mistaken for a road leading to the ILS marker. I have had to drive up the field and lead visting aircraft round the edge of that field. Whether these people didn't recognize it I don't know, but they definitely landed on the northeast part and taxied out and threw them to the land on the north part and we have to go out and lead them around."

He added, "I would say any normal flag from the air, you would be lucky if you saw one."

Archie Neal is a flying instructor at Des Moines, Iowa, and landed at the airport shortly before the trial. He says, "I knew the ditch was there and was looking for it. To me it looked as if it might be just a little roadway or passage for vehicles, such as I have seen before. From 2,500 to 3,000 feet you cannot spot the depth, nor at 1,500 feet. Nor could you recognize it as a ditch."

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Mr. B. F. Burbidge, Inspector of the Department of Transport, Civil Aviation, an experienced pilot holding a public transport pilot's licence, gave evidence for the respondent. He says that a few days before the trial he flew over the ditch to observe it, and stated, "I saw the ditch from the air at 600 feet, at 800 feet, a radius from the ditch of 360 degrees. At all times I could recognize it as a ditch." He says that from the same height one could have seen the red flag markers in place at the time of the accident if one were looking out for them.

Mr. S. L. Young—the officer in charge of the radio range at the airport—observed the landing and crash of the suppliant's plane from a point quite near the ditch and he said that at that time all the red flags along the ditch (some 15 or more) were fluttering vigorously in the wind.

In this connection it should be noted also that since the construction of the ditch in 1946 the grass strip north thereof had been used by a great many light planes. Students receiving instruction in flying landed or took off from that field as did the planes of the Saskatchewan Government Airways and many visiting planes from other areas, and in no case had the presence of the ditch resulted in an accident of any sort. Some of the witnesses who used it frequently described it as something of a nuisance but I think that they meant that to reach the hangars at the south it was necessary to taxi around it rather than that it constituted any danger so far as they were concerned. Knowing of its location, they could and did use the grass strip north of the ditch with perfect safety.

On the whole of the evidence on this point, I have come to the following conclusions: (a) that pilots with previous knowledge of the existence of the ditch could readily locate its position and that to them it was obvious and constituted no danger; (b) that a pilot with no previous knowledge of the existence of the ditch would easily observe its location and nature if he flew over the landing field at a height of 1,000 feet or less, the visibility being as it was on the date in question; and (c) that a pilot with no previous knowledge of the existence of the ditch who failed to fly over the landing field at a height of 1,000

feet or less would have difficulty in seeing the ditch or the warning flags and to him, under those circumstances, the ditch would not be obvious.

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Under the principles laid down by Lord Wrenbury in the *Fairman* case (*supra*), the owner owes a duty to inform the licensee of the danger only if it is not known to the licensee or obvious to the licensee using reasonable care. In this case Grossman did not know of the ditch and the question therefore arises as to whether it would have been obvious to him had he used reasonable care in making his landing.

I accept that part of the evidence which indicates very clearly that for the protection of planes and passengers, as well as for persons or objects on the ground, it is essential for a pilot before landing to know the conditions existing on the landing field. Glass stated, "I always look for obstructions," and "A good pilot always looks on the ground itself." He also said that calling on a control tower or radio range for information as to the landing area was advisable, if not essential. Mitchinson said that if he were approaching a strange airport and knew there was a radio range there he would (if equipped with a two-way radio) as an experienced pilot, contact radio range to make sure that it was safe to land. Burbidge, whose right to give expert opinion evidence on the matter was not objected to, gave evidence as follows:

Q. What information or steps should a pilot follow before proceeding from one airport to another airport with which he is not familiar? . . . (to Counsel): Have you any objection?

Mr. CUELENAERE: I was wondering, if he starts on opinion evidence, if he has qualified the witness.

HIS LORDSHIP: There is not much question about it now?

Mr. CUELENAERE: No, I won't raise the objection.

A. He should first of all obtain all the rules and data regarding the serviceability of the other airport he is going to. He should in my opinion carry navigation maps, he should check the weather. If he is flying with the aid of radio he should know the frequency of the different ranges en route and also the frequency of the flying control. He should also check the weather.

Q. In your opinion what procedure should a pilot follow when landing on an unfamiliar airport?

A. He should first of all land on a serviceable runway. If he is not familiar with that particular airport, if he never landed there before, if he is not in touch with flying surely he should make a dummy run on the landing strip on which he chooses to land.

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Q. What do you mean by a dummy run?

A. To run over the area of the ground he intends to land on at a low altitude.

Q. At what altitude?

A. Any safe altitude.

Q. HIS LORDSHIP: What do you mean by that?—low enough to give him—?

A. Accurate vision.

Q. Observation of the strip?

A. Yes.

Q. Mr. MacLEOD: What do you say as to the necessity of a dummy run at a familiar airport as compared with an unfamiliar airport?

A. If a familiar airport, if a pilot takes off in the morning and he is stationed at that particular airport, he knows the hazards of the obstructions on the airport, and therefore he would not always require to make a dummy run.

Q. What do you say as to the procedure to be followed by a pilot when confronted at an unfamiliar airport by two vehicles and two men on the runway that he intends to use?

A. That is a common practice, when that happens many pilots make a dummy run at such an altitude to warn the workers that they intend to use that particular runway.

Q. What happens ordinarily when that is done?

A. The workmen on the runway clear the vehicles and all obstructions on the ground away, off the runway, and the pilot makes a complete circuit and comes in to land after these obstructions are removed from the runway. Or he may make two dummy runs to make sure the second time everything is off the runway.

Q. Have you ever observed obstructions on Canadian airports?

A. Yes.

Q. What kind of obstructions?

A. On the general airport, or on the runway?

Q. On the area within the airport boundaries?

A. I have been a pilot and always looked for obstructions on any runway. There is a certain amount of maintenance has to be carried out to keep these runways in good working order. Therefore I ran into such things as cracks in the runway, and if work had been going on and the runway had just been repaired, to keep on the other side of that area.

Q. But are there other kinds of obstruction that you have observed on Canadian airports?

A. Yes, off the runways you can have soft ground, boulders, you can have workmen, you can have buildings, you can have radio facilities, you can have ditches.

Reference may also be made to *Peavey v. City of Miami* (1) where at p. 36 it is stated:

As a practice, it should seem that common sense would require a careful pilot to obtain in advance such information available, from reliable sources, as would enable him to determine the condition of the field which is his destination; and if the circumstances indicate that dangers not ordinarily encountered are to be apprehended, as in the case at bar, prudence should demand such a course. The evidence in this case shows that a pilot could ignore this practice, however, and still

exercise that care and caution required in landing at an airport under construction by observing the procedure known as "dragging the field"; that is, by flying over the field at a reasonably low altitude so that obstructions which would be hazardous to a landing plane might be spotted. One witness, who was also a pilot, testified this was a rule or general practice which airmen followed. This witness also said he thought the plaintiff exercised "poor judgment", and that such a landing as was made could not be justified unless the pilot had been "familiar" with the field on a local flight and knew the condition of the field.

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After giving the matter the most careful consideration, I have reached the conclusion that Grossman completely failed to take any of the steps which were available to him for his own protection and which, had he taken them, would have been the "reasonable care" which on the evidence I find he was required to exercise under the circumstances. Because of his failure to do so he lacked proper knowledge of the ground on which he proposed to land. On the other hand, had he acquainted himself with the ground conditions in any of the ways which I shall enumerate, the accident admittedly would not have occurred.

A knowledge of the conditions existing at the airport or on a particular landing strip could have been ascertained in several ways. Information could be obtained from pilots at other airports who had an intimate knowledge of conditions existing at Saskatoon. A telephone call to the airport would have secured all necessary data. It is common knowledge among aviators in Canada that air navigation charts for the various large airports are published by the Department of Transport and available upon request to the proper authorities. Ex. 2 is such a chart for the Saskatoon Airport, dated May 17, 1948, and contains much information regarding runways, the existence of a radio range and its frequency, a chart of the landing strips (but not including the grass strip), length of runways, approach procedure and the like. But Grossman did not secure any such up-to-date information. He was equipped only with an out-of-date map (Ex. 1) issued in 1941 before the radio range was installed. At the Prince Albert Airport he was informed "by the boys at the hangars" that there were four paved landing strips at Saskatoon, namely, the two newly installed ones and the older R.C.A.F. runways, but was told nothing about a grass strip or the existence of such

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facilities as a control tower or radio range and concerning which he made no inquiries. From advance sources, therefore, Grossman had no information whatever about the grass landing strip, its conditions, limits, dangers, or anything else.

The second method of securing the information is by using the two-way radio in the plane to contact either the control tower or radio range on the airport, where there are such facilities. In this case there was no control tower, but the radio range took its place and was so equipped that it would receive any such calls and furnish all information relative to weather conditions, landing conditions, and give information to pilots where and how to land and what obstructions were to be avoided. Grossman seems to have considered it normal practice to call the control tower for in this case he did call once, and, not receiving a reply, came to the conclusion that none existed and did not repeat the call. The manager of the radio range says that the records show that no such call was received and he seemed to be of the opinion that had it been given within the proper area it would have been received and answered. It may have been that the call was given out of range or that the attending operator at the radio range was momentarily absent from his post. In any event, I think it would have been wiser for Grossman to have repeated his call when over the airport, or at least when he came to the conclusion that he could not land on the 14-32 runway due to the obstruction thereon. Had he done so his call would have been received and full information would have been given him.

Again, I think Grossman erred in not landing on one of the paved strips which he had been told at Prince Albert were the strips he could use. Had he "buzzed the field" over the 14-32 runway, the workmen there engaged in making repairs would at once have cleared the landing strip for him. In any event, under the wind conditions existing at the time, he could have landed safely on any of the other three paved strips in perfect safety. Being paved, their length and surface conditions could have been readily ascertained.

But there is no regulation which requires private planes to use the facilities of radio range or control tower prior to landing, or to land on the paved runways, however advisable it may have been to do so. The evidence is that many light planes do land on the grass strips without contacting radio range. Moreover, as Burbidge stated, the existence of the old boundary markers there and of the building marked "Airport" would indicate to a pilot that there was there a small area available for landing.

Assuming, therefore, that he had a right to land on the grass strip—and I think he had—I think he was negligent in not first ascertaining the conditions existing in the landing area there. He saw no planes taking off or landing on the grass strip. He knew nothing about its extent or any obstruction thereon and took no steps to inform himself in regard thereto. I accept the evidence that the proper practice to follow in approaching a strange landing area and where the facilities of the control tower or radio range are not used is that of "dragging the field," or making "a dummy run" over the landing strip at such an altitude as would give full information as to existing conditions thereon. There was nothing which prevented Grossman from doing so but, in fact, he did nothing which would have assisted him in noting obstructions or the available length and width of the runway. He did not fly over the landing area at any time. From the east side of the airport—a very considerable distance away—he observed the building at the north marked "Airport," a grass strip with markers thereon, and no doubt the hangars at the south. But he made no inspection or examination of the extent of the landing strip available but merely assumed that it ran from the northerly limit as far south as the hangars and that everything was alright. He said that he was taught that where there is an airport he could make a safe landing without reference to any control; that "a runway is a runway to be used as such and you do not have to examine it if you are coming to a civilized field; that you do not have to examine the runway to see if there is anything that might be a hazard." Acting in that belief he admitted that he had made no examination of the runway at all.

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I am quite unable to agree that the duty that lies on a pilot who proposes to land on an airport (where he has not previously landed and of which he knows nothing) to take reasonable care, is as limited as that suggested by Mr. Grossman. In my opinion, to assume under these circumstances that an unknown runway was of a suitable length or extended to a certain point, or that it was clear of traffic or other hazards, would be contrary not only to law but to sound common sense. Runways may be in use by other planes taking off or taxiing on the ground, or may be undergoing repairs. Or, as pointed out by Burbidge, there may be cracks on the runway and near the runways there may be soft ground, boulders, buildings, ditches and the like. Pilots who have a personal knowledge of current conditions in the landing area would probably not be required to "drag the field," but would in any event have to ensure by observation that the field was clear for landing. But the degree of care required of pilots who have no knowledge of the local conditions and who are not controlled or under the direction of a control tower or radio range should be much more than that. They should make an inspection of the area in such a manner as to ascertain the limits of the field, the obstructions and warning flags, that practice being commonly described as "dragging the field." Had Grossman taken such precautions I think undoubtedly he would have seen both the ditch and the warning flags and the danger therefore would have been obvious to him. It follows, therefore, that as the duty of the respondent to the suppliants was that of giving adequate warning only when the danger was not obvious to a licensee *using reasonable care*, and as my finding is that the danger would have been obvious to Grossman had he used reasonable care, the suppliant's claim must fail. It was his lack of care which in my opinion caused the damages sustained.

I have not overlooked the requirements of the Air Regulations (P.C. 2129-Ex. 7) established under The Aeronautics Act, R.S.C. 1927, ch. 3 as amended, or the fact that the respondent had not placed yellow panels in the area as required by section 13(d) (1-2) thereof. Inasmuch as

Grossman did not fly over the landing area at any time prior to landing, I think it improbable that he would have seen them had they been in position.

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The amount of the damages should in any event be ascertained.

Grossman's plane was purchased on January 8, 1948, for \$7,292.95. It was damaged to such an extent that it was not worth repairing. Due to Customs regulations it could not be sold in Canada without payment of duty on the original value. It was therefore removed to Des Moines and efforts were made to dispose of it. It was finally sold at the highest offer received, namely, \$850. Deducting from the cost price of \$7,292.95 the sum of \$570, which was established as the amount of depreciation, and the sum of \$850 realized on the sale, Grossman's loss in regard to the plane itself is fixed at \$5,872.95. In addition he expended or lost the following amounts:

(a) Saskatchewan Government Airways—inspection of plane following the accident	\$ 70 95
(b) Removing wreckage from the airport and storage charges	15 00
(c) Dismantling plane	150 00
(d) Moving plane to Des Moines.....	355 00
(e) Expenses in returning home, less estimated cost had he returned by his own plane.....	80 00
(f) Telephone calls following the accident.....	60 00
(g) Living expenses and disbursements incurred at Saskatoon following the accident	100 00
(h) Loss of income resulting from the accident	300 00
	<hr/>
	\$ 7,003 90

I find, therefore, that Grossman's total damage amounted to \$7,003.90.

The suppliant Gus Sun suffered personal injuries and was confined to hospital in Saskatoon for about ten days. No claim is advanced for his personal injuries but the following disbursements are claimed, and, if the suppliants had succeeded, would have been allowed.

(a) Paid Saskatoon City Hospital	85 00
(b) Paid Dr. Langford	75 00
(c) Paid Dr. Coldwell	20 00
(d) Paid Dr. Daymond.....	10 00
(e) Expenses incurred in returning home	145 00
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	\$ 335 00

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A further claim is advanced on behalf of the suppliant Sun, namely, \$100 for loss of earnings due to the accident. No satisfactory proof was given as to this item and it will be disallowed.

In the result, I find that the suppliants are not entitled to any of the relief sought in the Petition of Right and the claims will therefore be dismissed with costs.

Judgment accordingly.

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BETWEEN:
TREVELYN SPENCESUPPLIANT;
AND
HIS MAJESTY THE KING.....RESPONDENT.

Crown—Petition of Right—Collision—Driver of army truck acting within scope of his duties even if journey made pursuant to orders of superior officer given without authority—Damages.

Suppliant claims damages for injuries suffered by him as a result of a collision between a taxicab driven by him and an army truck owned by the respondent and driven by Corporal Ryan, a servant of the respondent in the Royal Canadian Armoured Corps (Reserve), who was driving the truck pursuant to the order of his commanding officer.

The Court found no negligence on the part of suppliant and found that the negligence of the driver of the army truck was the sole cause of the accident and found further that the use of the truck for the purpose used was contrary to army regulations and that Ryan's commanding officer had no authority to use it for such purpose. The Court found also that on the day the accident occurred Ryan was on duty with the military category of driver and that it was within the scope of his duties to drive military vehicles when directed to do so by his commanding officer and that it was not open to him to question the authority of that commanding officer. The scope of his duties was not lessened by the fact that the orders of his commanding officer were given contrary to the regulations for military operated vehicles.

Held: That the driver of the army vehicle was acting within the scope of his duties or employment at the time suppliant was injured and the respondent is liable for the damages sustained.

PETITION OF RIGHT by suppliant to recover from the Crown damages for injuries suffered by suppliant because of the alleged negligence of an officer or employee of the Crown, acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice Cameron at Charlottetown.

R. R. Bell, K.C. and *G. R. Foster* for suppliant.

Honourable A. W. Matheson, K.C., J. L. Nicholson and *K. E. Eaton* for respondent.

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

CAMERON J. now (November 15, 1950) delivered the following judgment:

This is a Petition of Right in which the suppliant claims damages for personal injuries sustained on July 24, 1947, when a taxicab operated by the suppliant was in collision with an Army truck, the property of the respondent and driven by Corporal H. W. Ryan, admittedly a servant of the respondent in the Royal Canadian Armoured Corps (Reserve), at a point on the St. Peter's Road a short distance southwest of Mt. Stewart in Queen's County, Prince Edward Island.

For the suppliant it is contended that the collision occurred solely through the negligence of Corporal Ryan in that he drove at an excessive speed, failed to keep a proper lookout, was on the wrong side of the road, failed to have proper control of his truck, did not have proper brakes or lights or failed to use them in the proper manner, and was otherwise negligent under all the circumstances.

For the Crown it is submitted that Ryan was not negligent in any manner; that the collision occurred solely through the negligence of the suppliant in that he was travelling at an excessive rate of speed, was on the wrong side of the road, did not keep a proper lookout, did not have good and sufficient brakes, and that otherwise he contravened the provisions of The Highway Traffic Act of the Province of Prince Edward Island, 1936, c. 2, as amended. Alternatively, he alleges contributory negligence on the part of the suppliant. He also submits that at all material times Corporal Ryan was not an officer or servant of the Crown acting within the scope of his duties or employment. A counter claim is also made for the damages caused to the Army truck, the repairs costing \$131.89.

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St. Peter's Road is a provincial highway leading in a northeasterly direction from Charlottetown to Souris. Ex. "E" is a plan and profile of part of the road where the accident occurred, prepared by J. A. Reardon, P.L.S. The vertical line AA thereon is about 600 feet southwesterly of the road leading southerly to Mt. Stewart and the collision occurred at or about that line and about seventeen miles from Charlottetown. The asphalt pavement is 18 feet in width. On each side of the road is a drainage ditch with level shoulders between the road and the ditch, the shoulders on the north and south sides being respectively 6 feet and 5 feet in width. That part of the road shown on the plan extends for about 2,300 feet and, as will be seen, it is for all practical purposes a straight road. From the point of the collision westerly it is also a level road, but easterly thereof there is a slight grade of $2\frac{1}{4}$ per cent. It is not suggested that this slight grade had anything to do with the accident. The weather was fine and the pavement dry.

The suppliant had been driving a taxi for some years and was licensed as an operator and taxi driver. His story of the events leading up to the collision is as follows. He had been hired by L. Feehan to drive to Mt. Stewart. When he left Charlottetown about 1.20 a.m., Feehan and his friend A. MacDonald were in the rear seat. In the front were Spence, who was driving, his friend Rita Sherren, and her brother Roland Sherren.

When he first saw the lights of the approaching truck some 200 yards away, he was travelling at about 40 m.p.h. and, as was his practice, he lowered his lights, but noticing that the truck lights—which he described as extra bright—were not lowered, he raised his lights again momentarily and at once re-lowered them. As the vehicle approached he slowed down somewhat, driving his vehicle on the right edge of the paved part of the road, keeping his position there by watching the shoulder of the road at his right. No horn was sounded by either vehicle. He says that the truck lights were so bright that he could not tell precisely where the truck was on the road but he expected no collision until just before the impact when he realized that the truck was coming directly towards him. When slowing up he

used his brakes but could not say that they had been fully applied at any time. He was rendered unconscious by the collision, but upon recovering shortly thereafter found himself lying on the road near its centre and adjacent to his car which was between him and the south ditch, entirely on the south side of the road facing about parallel to the road but with the rear right wheel off slightly on the shoulder. He had been driving with his left elbow out of the window and that arm was so badly injured that the following day it was amputated just below the elbow. His eyesight was normal and he did not wear glasses.

Corporal Ryan, the driver of the Army truck, gave the following account. He had served in the Army overseas and had "standing orders," which apparently means that he had the permanent status of a driver and he had had considerable experience with driving trucks and jeeps. Following his discharge he joined the 17th Prince Edward Island (Recce) Regiment, which regiment formed part of the 21st Armoured Brigade (Reserve Force), and his training included the driving of Army vehicles and trucks. His brother, C. E. Ryan, who was then a sergeant in the Regiment and in charge of its transport, gave him instructions to take the 60 cwt. truck and to transport a ball team from the Knights of Columbus house in Charlottetown to Souris where they would play a ball game. The game was played in the early evening and was followed by a dance. The truck left Souris to return to Charlottetown about 12.15 a.m. Ryan was driving and at his left was Corporal McFarlane who was in charge of the team. In the open truck at the rear were the boys comprising the team and three men who represented the Knights of Columbus organization which sponsored the team. Ryan was travelling at about 25 m.p.h., but as he entered the intersection at Mt. Stewart he geared down to lessen his speed. When he was about the top of the slight grade west of Mt. Stewart Road and at the point marked "X" on Ex. E, he first noticed the lights of the approaching car which was then about the point marked "Y" on the plan. He was unable to estimate the car's speed but thought it was travelling fast. He said the car lights were dimmed and raised but not again lowered. He had his truck in

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second gear as he came over the hill and kept it in that position travelling at about 10 to 15 m.p.h. and gradually losing speed. He states that his truck was entirely on its own side of the road, with its right wheels just at the shoulder; that the truck had a right-hand drive and he could observe and did observe his position on the road when the lights on the approaching car were first dimmed, by looking out of the right door. He saw no pavement at his right at all. He did not apply his brakes or sound his horn at any time. When the impact occurred he felt a tug to the left on his steering wheel and the truck veered in that direction. When the truck came to rest it was considerably in rear of the car with part of the front over the centre line of the road.

Constable Warbey of the R.C.M.P. was called to the scene of the accident and it is admitted that the truck and car had not been moved prior to his arrival. I accept his evidence as to the size of the vehicles and their position on the road and as to certain other matters that his investigation disclosed. The truck is an unusually large one having a carrying capacity of 60 hundred weight, being one of the largest trucks in use on the roads of the province. The car has an overall length of about 16 feet and a width of 6 feet. It was entirely on the south half of the road with the front wheels close to the centre. Both rear wheels were on the south shoulder and the car was not quite at right angles to the road, and facing about northeast. He found scattered glass from the car on the south half of the road at the left side of the car, and mud under the car. He could not say definitely that the mud had come from the car but seemed to be of the opinion that it had been knocked from it by the impact, and added, "if the mud came from the car it had not proceeded far after the crash."

He found the truck about 50 feet to the rear of the car on the "wrong" side of the road facing generally towards Charlottetown, but angled to the south. North of it there was sufficient room on the road itself for a car to pass safely. The left front wheel was 2½ feet from the south edge of the road. The truck was of solid steel construction with a large open steel box. It had an overall length of 20 feet with a width at the front of 84 inches, the box at

the rear having an overall width of 90 inches; the wheel base was 7 feet. The centre of the front lights on the truck was 4'4" above the ground, that of the car being about 2'6". The left front wheel of the truck was damaged; the left 16 inches of the front bumper and the left part of the front axle were bent back; the front shackles of the longitudinal springs were torn loose and the retaining bolt broken off.

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I find, also, that neither driver sounded his horn. Further there is no evidence that the brakes of either vehicle were defective. There is no evidence that the truck at any material time was travelling at a speed in excess of 15 m.p.h. I find, also, that the suppliant at the time was not travelling at an excessive speed or that he was in breach of the requirements of section 35(4) of The Highway Traffic Act, 1936, which provides that anyone driving at a speed in excess of 30 m.p.h. when meeting another vehicle between sunset and sunrise shall prima facie be deemed to be driving in other than a careful and prudent manner. Spence says that before seeing the lights of the truck he was travelling at 40 m.p.h. but that he immediately lowered his speed and continued to do so until the crash. The passengers in his car corroborate him on this point. Ryan could not estimate the suppliant's speed in miles and McFarlane, who was in the cab with Ryan, could not say anything at all about it.

Moreover, the damage caused to the vehicles would indicate that the impact was not "head-on," but rather in the nature of "a side swipe," and had the suppliant been travelling at any great speed his car would have gone forward a considerable distance thereafter. I am quite satisfied that it did not move forward more than a very few feet. Spence was thrown out of the car and was found at its left side, as was also the broken glass from the car itself. The mud which was observed by Warbey was under the car and may have been dropped at the moment of impact.

The truck lights were described by Spence as "extra bright" and the passengers in his car were all of the same opinion. Ryan had never examined the lights and could give no opinion as to how they would affect the driver

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of an approaching car. McFarlane, who saw them only from his seat in the cab of the truck, described them as medium or normal. They were fixed lights and the beam could not be lowered by the driver. As I have said above, they were much higher from the road than those of a car and this may have been the reason why they were described as "extra bright." The beam was probably of much greater length than that of a motor car. Spencer said they "dazzled" him only while looking towards the truck but did not prevent him from observing the side of the road where he was travelling.

As to the lights on the suppliant's car, I accept the statement of Spence that he lowered his lights immediately on noticing the truck lights; and that as the truck lights were not lowered he signalled the driver of the latter to do so by raising his own momentarily and immediately relowering them. That was the normal course to follow and the passengers in Spence's car said it was done. Ryan, however, said they were not lowered a second time and McFarlane said merely that he did not notice them relowered. In any event, Ryan does not suggest that the car lights, whether raised or lowered, affected his driving in any way. I do not think that the use of the lights on either vehicle contributed in any way to the collision.

The one remaining factor to be considered in this connection is the position of the vehicles relative to the centre of the road. The applicable provisions of The Highway Traffic Act of the Province of Prince Edward Island are as follows:

46. (1) Drivers of vehicles proceeding in opposite directions shall pass each other on the right, each giving to the other at least one-half of the main travelled portion of the roadway as nearly as possible, but if a driver finds it impracticable to give to the other at least one-half of the main travelled portion of the roadway, he shall immediately stop and if required shall assist such other driver to pass in safety.

I think it is well established that the suppliant's car at the time of the impact and at all material times was on its own side of the road and very close to the south side of the paved part thereof. Spence said that he could see his position on the road quite clearly, could distinguish the shoulder and that he drove in such a manner as to keep his right wheels as close to that shoulder as possible. All

his passengers gave evidence to the same effect although one or two had stated earlier in reports to the R.C.M.P. that they had not observed the position carefully. Ryan did not say that the car at any time was north of the centre line of the road, in fact he said nothing about its position on the road whatever. McFarlane, who was in the cab with Ryan (and was called as a witness for the respondent) and who was the only passenger in the truck who could say anything about the position of the car, stated, "As the car approached us *it seemed to me to be well over on its side of the road*, but I cannot give its speed." He was in a most favourable position to observe the approaching car and had observed it from the moment when the truck was approaching the Mt. Stewart side road. He had no interest whatever in the outcome of these proceedings and I accept his statement in that regard as being entirely correct. Moreover, as I have said above, the car did not move any appreciable distance after the impact and then it was entirely on the south side. Spence was thrown out of the left front door and when picked up was on the north side of the car and south of the centre line. The damaged glass was all on the south side. I find nothing in the evidence or any inference to be drawn from the accepted facts which would even suggest that the car or any part of it was at any material time north of the centre line of the road.

On the other hand, I find very convincing evidence that the truck at the moment of impact was in part south of the centre line. Spence could not say exactly where the truck was but at the last moment knew that "it was coming directly for me—a direct head-on." Roland Sherren said that just before the crash it looked to be fairly well over on the centre of the road. Rita Sherren who was also in the front seat said it was in the middle of the road. Feehan said that, "It is hard to say but I think the lights (of the truck) were pretty well in the centre of the road." McDonald, who was seated behind Spence, could not see where the truck was on the highway. Ryan said that when he first saw the car lights dimmed several hundred yards away, he glanced to the right through the door and could see no pavement there; and that he could see the road

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ahead without any trouble. He did not identify his position on the road beyond stating that when he looked out on that one occasion he could see the north shoulder but no pavement. McFarlane stated that Ryan drove very carefully. He could not say whether the truck had previously been travelling in the centre of the road, adding that there was no reason for it to travel on the side. He was not watching Ryan and did not see him glance toward the shoulder. He estimated that as the truck came down the slope its right wheels would be about 6 inches from the north side of the pavement and that there was a distance of about 9 feet from his left side to the south side of the road at the time when the car lights were first dimmed several hundred yards away.

Weighing this conflicting evidence, I can reach no other conclusion than that the truck at the moment of impact was on the south half of the road. McFarlane's estimate—and it was that only—placed the left side of the cab of the truck at the centre line, and the box, being wider, would then be over the centre line. McFarlane was not accustomed to driving in this unusually wide truck and he could quite easily have underestimated its width, as I think he did, and could also have erred in estimating the distance from the left side of the truck to the south side of the road at 9 feet. The weight of the evidence is that the truck was in part south of the centre line. If my finding that the car was well over on its south side of the road and very close to the south side is correct, there can be no doubt that the truck was south of the centre line or otherwise the collision would not have occurred. I find, therefore, as a fact that such was the case and that Ryan's failure to observe the requirements of section 46(1) of the Provincial Highway Traffic Act constituted negligence and was the only negligence which caused or contributed to the accident. I am quite unable to find that the suppliant was in any way negligent.

That, however, does not dispose of the matter. The respondent, while admitting that Ryan at the time was a servant or officer of the Crown denies that he was then acting within the scope of his duties or employment.

The claim is based on the provisions of section 19(c) of the Exchequer Court Act, R.S.C., c. 34, as amended, which is as follows:

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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.

Section 50A of the said Act as added by c. 25, Statutes of Canada, 1943, is as follows:

50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

The question for determination is whether Corporal Ryan was at the time of the accident "acting within the scope of his duties or employment." It now becomes necessary to set out in some detail the evidence as to the purpose of the trip from Charlottetown to Souris and the manner in which it is said to have been authorized.

Brigadier W. W. Reid gave evidence on behalf of the suppliant. In 1947 he was a Lieutenant-Colonel commanding the 17th Prince Edward Island Reconnaissance Regiment (to be referred to herein as "the Regiment"). The 60 cwt. truck was a military vehicle which had been issued to the 28th Light Anti-Aircraft Regiment, the commanding officer of which had loaned it to the officer commanding the P.E.I. Regiment for the purposes of the trip. It was not on the charge of the P.E.I. Regiment but Reid assumed responsibility for it while it remained with his unit.

Colonel Reid desired to build up the strength of his unit by securing recruits from his area, in which was included Souris, a small town about fifty-three miles from Charlottetown. He thought it would be a good plan to show the young men of that district that the Army was interested in many activities, including sports, and thereby encourage them to become recruits. He therefore arranged for a baseball match to take place at Souris in which it was planned that a team in the junior Charlottetown League, sponsored by the Regiment, would play the young men

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from Souris. The team sponsored by the Regiment was called "the Recce team" and was made up in part of men from the Regiment (about 1/5 of the total), the remaining consisting in part but not entirely of cadets from the Queen's Square School Cadet Corps which was affiliated with the Regiment. For some reason, that team could not make the trip and Col. Reid decided to substitute for it another team in the same league, namely, the Knights of Columbus team, the average age of its boys being sixteen to seventeen years. He said, "My reason for that, being that they were in the same league, with our own boys in the city, and members of the team were from our affiliated cadet corps, Queen's Square School, and the acting principal of the Queen's Square School at the time, was a cadet instructor, and was making the trip, and the team itself was in charge of one of our band corporals, Corporal McFarlane." Later he said that in his opinion the trip was "official" because it was for the purpose of securing recruits for the Canadian Army. That was his main object, but another purpose was to give the Souris boys and the boys from Charlottetown some recreation. Reid had no personal knowledge as to the boys who made up the Knights of Columbus team that day and did not see the team at any time.

However, James McCallum, Vice-Principal of Queen Mary School and instructor of the Cadet Corps, went with the team to Souris and gave evidence as to its composition. Queen Mary's School is one of four schools under the control of the Charlottetown Board of Education. It is a combined high and elementary school for boys. It had its own Separate School baseball team quite apart from the Knights of Columbus team and the school had no affiliation whatever with the Knights of Columbus organization. McCallum's son was captain of the junior Knights of Columbus baseball team and so the witness knew for a day or so that that team would make the trip. He accompanied it on his own initiative and without any request from any one, his status being completely unofficial. As far as he was concerned, neither Col. Reid nor the Army had anything to do with the trip except that a military truck was provided for purposes of transport. The team con-

sisted of twelve or thirteen boys, most of them members or ex-members of the Queen Mary's School Cadet Corps. He said that four were not cadets but whether they were ex-cadets does not appear.

McFarlane, whose evidence has been previously referred to, was then a trooper in the Regiment and was also manager of the Knights of Columbus ball team. He says that Col. Reid called him, *as manager of the team*, and instructed him to go on the trip. He had no knowledge as to whether the members of the team were or were not cadets.

L. J. Butler and Preston Curley, members of the Knights of Columbus, accompanied the team, the former as its coach and the latter as a member of its baseball committee. Neither were veterans or had anything to do with the Army. They paid most of the expenses incurred by the team that day and were reimbursed by the Knights of Columbus. All the witnesses are in agreement that the team at Souris wore distinctive Knights of Columbus baseball uniforms, that no one (including the truck driver) wore military uniforms; and that apart from the use of a military vehicle as a means of conveyance, nothing took place at Souris to indicate to any one in any way that the Army had sponsored the trip. As Butler said, "We went out to play ball. There was nothing of a military nature took place. There were no banners or speeches and the only thing connected with the Militia was that there was a military truck." Curley said, "I know that the Army had nothing to do with the trip. Nobody told me so and I saw nothing which would lead me to believe it."

Col. Reid said that Corporal McFarlane "up to a point" was authorized to take the trip. He explained that by saying, "Corporal McFarlane, being manager of the team, and I was interested in him and he was interested in the Regiment, and I was definitely interested in the boys under his charge, and he, being a member of the Regiment, would be in possession of a uniform, on normal duty, and when instructed, would have authority to wear it." Later Reid said that he instructed McFarlane to take the trip as the *Manager of the Knights of Columbus baseball team in the League*.

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Corporal Ryan received his authority to operate the truck on that trip by a transport work ticket, of which Ex. 1 is a certified copy. The original could not be found but Ex. 1 by consent was admitted as a true copy. It bears the signature of Col. Reid as that of the officer authorizing the journey and was made out for a trip from Charlottetown to Souris, the "service performed" being indicated as "sports." Nothing is said thereon as to what persons or teams were to be conveyed but there is no doubt that Col. Reid gave the work ticket to Sergeant Ryan with instructions that the Knights of Columbus team was to be conveyed to and from Souris and that Sergeant Ryan in turn passed on these instructions to the driver, Corporal Ryan.

Counsel for the respondent submits that Corporal Ryan in driving the truck from Charlottetown to Souris for the purpose of conveying the Knights of Columbus ball team to a ball game was not acting within the scope of his duties or employment, inasmuch as the regulations in effect for the use of military vehicles prohibited its use for such a purpose. A copy of King's Regulations and Orders for the Canadian Army, 1939, was filed (Ex. H). Authority for making such regulations by the Governor-in-Council is contained in section 139 of the Militia Act, R.S.C. 1927, ch. 132. By section 11 of K.R.O. the duties at Army Headquarters respecting the administration of the Canadian Militia shall be as apportioned by the Minister; and by Appendix VI of the said regulations, the Quartermaster General is charged with:

Control of employment (subject to requirements of C.G.S.) of all load-carrying vehicles, both regimental and administrative, in order to ensure that the most economical use is made of militia transport as a whole.

Ex. A is a pamphlet entitled "Regulations for Military Operated Vehicles, 1947, Part I." It provides regulations for the control, operation and employment of such vehicles and is for the convenient use of all drivers. It gives in a summary way the effect of the existing regulations in regard to such matters and while the particular pamphlet filed was issued in 1949, it is established that the regulations to which I shall refer were all based on regulations and directions laid down by the Quartermaster General in

various general orders, all of which were circulated to the various district commands, and in turn passed down by their orders to all officers commanding units in the area—including the Commanding Officer of the 17th P.E.I. Regiment. Such regulations as I shall refer to were all in effect on July 23, 1947—the date of the accident.

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These regulations are:

20. Military transport vehicles are to be used for official purposes only. Exception is permitted in the case of officers of the rank of brigadier or higher, when required to carry out semi-official duties, on account of their appointment and official position. On these occasions this privilege will be extended to the wives of officers concerned.

22. Military transport vehicles may be used to transport service personnel to sports fields, playgrounds and recreational centres, subject to the following conditions:

- (a) That vehicles and drivers are available, and that their use will not prejudice or interfere with training, administration or other official duties.
- (b) Recreational transport will only be used in the case of properly authorized and organized military sports
- (c) (i) Unit transport may be used on the authority of the OC for journeys to and from places which are within a radius of 20 miles from the barracks or offices of the Unit concerned.
- (ii) Pool transport may be used on the authority of the officer responsible for the control and employment of MT at Army, Command or Area HQ for distances as in (i) above.
- (iii) Use of transport for recreational purposes for distances in excess of 20 miles will only be allowed on the authority of the QMG at AHQ, or the GOC of the Command concerned.
- (d) Under no circumstances will civilians or persons other than service personnel be transported.

23 No unauthorized persons will be allowed to ride in military vehicles.

25. It is forbidden:

(d) For civilians to ride in military vehicles except:—

- (i) Civilians employed by the army will be permitted to use military vehicles on official duties when vehicles have been specially detailed for such service. In such cases, the driver of the vehicle will be issued a pass by the officer detailing the transport, which will show the names of those authorized to travel and the nature of the duty to be performed. This pass will be turned in with the Transport Work Ticket by the driver upon completion of the detail.
- (ii) Civilians while employed by the army or by a contractor engaged on work under the supervision of the army may, if necessary in the course of their duties, ride in military vehicles without written authority providing they do so only within the boundaries of the project on which they are employed.

26. Prospective army recruits may be permitted to ride in military transport vehicles if required in connection with any phase or procedure preliminary to enlistment, provided the driver of the vehicle is issued a

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pass by the officer detailing the transport. Such pass will show the names of those authorized to travel, and the nature of the duty to be performed. The pass will be turned in with the Transport Work Ticket by the driver on completion of the detail.

27. Members of the Royal Canadian Cadet Corps may be permitted to ride in military transport vehicles when required to do so in connection with a duly authorized parade or authorized training activity.

28. As the transportation of cadets in a military vehicle at any other time is not authorized, should the cadet be injured or killed while being transported other than on a parade or in the course of training as set out above, sections 73 to 80 inclusive of the Regulations for the Cadet Services of Canada, 1942, would not apply to provide compensation and medical treatment as set out therein. The liability of the Department in such a case would be merely that of the owner of a vehicle to a gratuitous passenger.

I do not think it is necessary to outline in detail the opinions expressed by the various witnesses as to the meaning and effect of these regulations. In my view, the only possible support that could be provided for Col. Reid's opinion that the trip was authorized under the regulations would be that the team was composed of members of the Royal Canadian Cadet Corps. Sections 27 and 28 of the regulations are particularly applicable to the use of military vehicles by members of that corps and section 28 makes it abundantly clear that only under section 27 are they allowed to ride in military vehicles. No other section has any application to members of the Cadet Corps. Their use of vehicles is strictly limited to occasions "when required to do so in connection with a duly authorized parade or authorized training activity," and by section 28 their transportation in military vehicles at any other time is not authorized.

Colonel Reid admitted at once that the trip could not be considered an "authorized parade" but considered it to be something in the nature of an authorized duty. There is no evidence whatever that it was an authorized training activity. One would expect that the details of an authorized training activity would be found in General Orders or at least in a syllabus of training activities laid down for the training of the Cadet Corps by the commanding officer of the battalion to which it was attached, or by Command Headquarters. Nothing of that sort was produced or even suggested. It was the Knights of Columbus ball team which assembled that day; the Queen Mary's School Cadet Corps as such was not in any way concerned with the

matter and it is shown that some of the players were not, in fact, members of the Cadet Corps. It will be noted, also, that in regard to the transport of service personnel of the Regiment itself for recreational purposes, military vehicles could be used by authority of the officer commanding only within a radius of twenty miles from the barracks. For distances in excess of that, authority would have to be secured from Army or Command Headquarters. It is admitted that no such authority was asked for or granted and I think it is clear that had it been requested for the purpose of this trip permission would have been refused, in view of the existing regulations.

I find, therefore, that the use of the vehicle for the purpose I have described was contrary to the regulations and that Colonel Reid had no authority to use it for such purposes. I do not question his good faith in the matter. At the time he was busily engaged in an effort to secure recruits for his regiment, and doubtless thought that an exhibition baseball game, between a team sponsored by the Regiment and the young men of Souris, would assist in recruiting. He says that later on recruits were obtained from that area, but it is difficult to agree with his opinion that the game actually played by the Knights of Columbus team had anything to do with the matter.

I have already found negligence on the part of Ryan, and the inquiry as to whether that negligence was within the scope of employment must be directed so as to ascertain what was the scope of *his* duties or employment. Ryan was a member of the Reserve Army and as such it was his duty to give implicit obedience to the orders and directions of his Commanding Officer, unless, of course, such orders were clearly contrary to law. He was undoubtedly on duty that day and it is shown that for his day's work he received a day's pay from Army sources. Having the military category of a driver it was within the scope of his duties to drive military vehicles when directed to do so by his Commanding Officer. Reid was his Commanding Officer and gave the order for him to take the truck, to pick up the Knights of Columbus team and to take them to and from Souris.

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Even if he had had actual knowledge of the existing regulations regarding the use of military vehicles—and it is not shown that he had—it was not open to him to question the order of his superior officer or to demand proof that the order so given was within the authority of his Commanding Officer. One can readily envisage the chaotic results which would flow if an enlisted man under such circumstances could question the authority of his superior. The control of military vehicles on charge, the power to direct who should operate them and where and in what manner they are to be used, are matters which in my opinion an enlisted man would have the right to assume as coming under the authority of his Commanding Officer. Ryan had been on active service for some years and realized fully that the orders of a commanding officer were of such a nature that they were to be obeyed and not challenged.

What effect, then, have these regulations on the scope and employment of Ryan, keeping in mind that Ryan was bound to and did obey the orders of his Commanding Officer on a matter which quite obviously Ryan would consider came within the control of the latter? I consider that the answer thereto is to be found in the general law applicable to master and servant.

Reference may be made to *Irwin v. Waterloo Taxi-Cab Co. Ltd.* (1). The facts in that case were as follows:

Action was brought by the plaintiff to recover damages for personal injuries sustained by him in consequence of the negligence of the defendants' servant, Bird, while driving a taxi-cab. The defendants carried on business as the proprietors of taxi-cabs; one Black was their general manager, and Bird was employed by them as a driver, whose duty it was to obey the orders of the general manager. In pursuance of the orders of Black, Bird drove him in a taxi-cab of the defendants to see his private friends and not upon any business of the defendants. Black had no authority from the defendants to use any of their taxi-cabs in this way. The defendants had agreed with one of their customers that he should have the exclusive use of this taxi-cab for a specified period which was still current. Bird had no reason to suppose that Black was acting improperly in ordering him to drive him in this taxi-cab on the occasion in question. While Bird was thus driving Black the plaintiff was injured owing to his negligent driving.

At the trial, judgment was entered for the plaintiff and the Court of Appeal dismissed an appeal from that judgment. Fletcher Moulton, L.J. said in part at p. 592:

The defendants are a company which carries on the business of letting out motor cars for hire. Their general manager was a man named

Black, who was in the car at the time of the accident. Bird, the driver of the motor car, was in their employment, and there was evidence which justified the jury in coming to the conclusion that driving was a part of his duties. He was, of course, under the orders of Black as general manager, and therefore the jury were entitled and, I think, bound to find that at the time of the accident Bird was driving the car as servant to the defendant company to the knowledge and by the direction of Black, whose orders in such matters he was bound to obey.

The ground on which the defendants contest their liability is that Black was guilty of a breach of duty in thus ordering Bird to drive him in the motor car. They say, in the first place, that Black was driving to see a private friend and not on the business of the company, and that he had no right to use the car for such purposes without previously providing for the fare. In the second place, they say that Black had no right to make use of that particular car because the defendant company had contracted with a customer to give him the exclusive use of it. There is evidence to support both these allegations and they must be taken to be facts. At the same time there is no evidence that Bird knew anything about these matters, and the jury were justified in finding that he was wholly unaware that Black was acting improperly in ordering him to drive him.

And at p. 593 he continued:

Under these circumstances I am of opinion that Bird was acting within the scope of his employment and under the order of his masters, the defendant company, when he was guilty of negligence. If a master directs a servant to take his orders in respect of matters within his contract of service from A.B., such orders, when given, become the orders of the master. A master can always delegate his authority and he does so when either expressly or impliedly he designates a person as authorized to give orders for him and on his behalf. In the present case the fact that Black was the general manager implied that it was the duty of a servant in the position of Bird to obey the orders given to him in the ordinary matters of his service. His driving the car on this occasion was thus in fulfilment of his duty of obedience to his masters, the defendant company, and therefore he was at the time their servant doing what he was engaged upon by their orders. Nothing more than this is needed to make the principle respondent superior apply.

A little consideration will make it clear that the contrary view would not only be unjust but would lead to endless confusion. Suppose that the general manager of a railway company wires orders to a stationmaster to send a special train to a certain station and in going there it runs over a member of the public by the negligence of the servants of the company. Could the company be allowed to raise as a defence that the general manager gave the order improperly, say, because he intended to use the train for his private ends? For the convenience, I might even say for the necessities, of working its system, the company orders all its servants to obey implicitly the orders of the general manager, and therefore in obedience to the command of the company itself all its staff and plant are at his orders. If the company takes the advantage of this arrangement, it cannot say that one of its servants who in matters appertaining to his service obeys an order of the general manager is doing otherwise than obeying an order of the company itself. An accident happening to the servant under such circumstances would unquestionably be an accident

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arising out of and in the course of his employment and would entitle him to compensation, and conversely a negligent act by him, which caused damage to a third party, would be done in the course of his employment in carrying out his master's orders and the master must bear the consequences of it.

The principles laid down in the *Irwin* case seem to me to be particularly applicable to the case at bar. Colonel Reid as Commanding Officer was designated by the respondent as one authorized to give orders for him and on his behalf to Corporal Ryan. Further, it was the duty of one in the position of Ryan to obey the orders of Reid given to him in the ordinary matters of his service, and driving military vehicles was one of such ordinary matters. His driving the truck to Souris was thus in fulfilment of his duty of obedience to his master, the respondent, and therefore he was at the time the servant of the respondent doing what he was required to do by the respondent's orders given through Reid. I am of the opinion that while Reid committed a breach of the regulations regarding the use of military vehicles, in using the truck for this purpose, such breach did not narrow the scope of Ryan's duties or employment. His duties included that of driving a truck when and where his Commanding Officer directed him, and that is what he did.

I find, therefore, that Corporal Ryan, who at the time of the accident was admittedly a servant or officer of the respondent, was then acting within the scope of his duties or employment. The principle respondent superior therefore applies and the respondent is liable for the damages sustained.

I turn now to the question of damages. The suppliant at the time of the accident was twenty-five years of age and was employed as a taxi driver in Charlottetown. He was attended at the scene of the accident by a local physician and it was found that he was bleeding and in considerable pain, and that his left arm was badly damaged. He was taken to the Charlottetown hospital and there it was found necessary to amputate his left arm just above the elbow. He made a quick recovery and was released from hospital in ten days, although for a short time thereafter he was required to return there for treatment. He purchased an artificial arm but says that while it is of some assistance he

cannot use it in operating a car. As a result of the accident he was incapacitated from doing any work for about four months and was out of work for one year. He says he could not return to his former occupation of taxi driving as he thought that he could not secure the necessary chauffeur's licence, but made no inquiries in regard thereto. He then became a part-time life insurance salesman in Charlottetown but did not succeed very well, his income for the balance of 1949 being only \$200. In the early part of 1950 he became a salesman for the Fuller Brush Company and has been earning about \$35 per week out of which he has to pay the costs of operating his car for which he now has an operator's licence. He is continuing his insurance business part time.

His parents reside in the country at Honey Harbour and he spends part of his time there assisting with the farm work. Prior to his accident he was employed as a taxi driver at intermittent periods only, a considerable part of his time being spent on his parent's farm. His earnings as a taxi operator were said to average about \$35 per week but that was merely a rough estimate, no adequate records being kept by him or his employer. His education is limited, his formal schooling not having extended beyond the second grade in high school. He has no means of his own and is entirely dependent on his earnings. He complains that at times he still has some pain in the stump of his left arm, particularly when fatigued or when the weather is damp.

For loss of wages he claims \$35 per week for forty-five weeks. That claim in my opinion is excessive. His recovery was speedy and I have no doubt had he desired to do so he could have taken up some form of employment much earlier than he did. As I have said his employment previous to the accident was very irregular but when not employed in Charlottetown he worked on his father's farm, taking in return only what his father gave him. No record of such receipts was kept and I think it improbable that he had more than his support and spending money. In 1944 he worked until October on the farm. From then until August, 1945, he drove a taxi-cab in Charlottetown and from the latter date until the accident in 1947

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he had no regular employment except for one month prior to the accident when he operated the taxi. I consider that he could have taken up some gainful employment six months from the time of the accident and therefore he will be allowed for loss of wages the sum of \$910, being twenty-six weeks at \$35 per week.

For his other special damages, the following items are allowed:

Hospital Account	\$ 67 85
Doctors' and Surgeons' Account	125 00
Ambulance	10 00
Nurses' Accounts	38 00
Cost of Artificial Arm	168 00
	<hr/>
	\$408 85

His pain and suffering were of short duration. The loss of his arm is a serious one but it has not prevented him from earning a living. It is a permanent disability which to some extent will hinder his prospects in life and limit the nature of the work which he can undertake. Taking all the evidence into consideration, I award him for general damages, including pain and suffering, the loss of his arm, disability and loss of earning power incidental thereto, the sum of \$9,000.

There will therefore be judgment declaring that the suppliant is entitled to be paid by the respondent the sum of \$10,318.85, being part of the relief sought in the Petition of Right. The suppliant is also entitled to his costs after taxation. Inasmuch, however, as counsel for the suppliant in this case were the same as counsel appearing for the suppliant in certain other proceedings taken in this Court by Bradshaw (the owner of the damaged car), I direct that on the taxation of costs in the two cases only one set of counsel fees will be allowed.

The counter claim of the respondent will be dismissed without costs.

Judgment accordingly.

BETWEEN:

THE MINISTER OF NATIONAL }
 REVENUE } APPELLANT;

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 Nov. 13

AND

MR. E. RESPONDENT.

Revenue—Income Tax—Government Annuity—Income War Tax Act, R S C. 1927, c. 97, s. 5(i) (k)—Date of commencement of payment of annuity advanced—“Amount of the annuity specified in the contract” —“Annuity” means the annual amount to be paid under the annuity contract—Advancing date of payment of annuity does not increase the amount paid—Appeal dismissed.

On March 24, 1936, respondent was issued a Canadian Government annuity providing for annual payments by him for 18 years after which he was to receive an annuity of \$1,200 per year. Pursuant to certain terms and conditions in the original contract, respondent completed the purchase of a fully paid up annuity of \$1,200, the first instalment of which was payable on March 24, 1947.

In 1947 respondent received certain instalments under the annuity contract and was assessed for income tax on these instalments. An appeal to the Income Tax Appeal Board was allowed and from that decision the Minister of National Revenue appeals to this Court.

Held: That “the amount of the annuity actually specified” in the contract entered into prior to June 25, 1940, was not increased, exceeded or enlarged by advancing the date of the first payment of the annual income from 1954 to 1947 and the proviso in s. 5(1) (k) of The Income War Tax Act as enacted by c. 34, s. 13 of the Statutes of Canada for 1940 here has no application and the appeal must be dismissed.

APPEAL by the Minister of National Revenue from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

W. R. Jackett, K.C. and *Miss H. W. Currie* for appellant.

The respondent appeared in person.

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

CAMERON J. now (November 13, 1950) delivered the following judgment:

This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board, dated March 22, 1950, (1) which Board unanimously allowed

(1) 2 Tax A.B.C. 55 at p. 60.

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the respondent's appeal from an assessment to income tax for the taxation year 1947. The appeal before the Board was heard in camera and the appellant there was given the designation of Mr. E. The appeal to this Court was also heard in camera and for purposes of convenience I shall herein refer to the taxpayer as Mr. E.

The facts are not in dispute. In March, 1936, Mr. E. made application for the purchase of a deferred annuity from the Government of Canada through the Annuities Branch of the Department of Labour. His application (Ex. A-2) was on a form supplied by the Annuities Branch and in part read as follows:

\$1,200, or for such other annuity as the payments which I may make will purchase, the annuity to be paid to me in equal quarterly instalments, the first payment of annuity to be made at Ottawa, or as may be arranged 18 years from the date of first payment of purchase money.

The annuity which I desire to contribute for and to purchase is that sold under Plan "A" Gtd. 10 years, for which I agree to pay the authorized monthly rate of \$39.65 reserving, however, the right to complete the contract by periodical payments and lump sums; or by paying lump sums of varying amounts and at regular intervals; or by a single payment; or by such other plan as may be authorized and approved by the Government; and with the understanding that such an annuity will in any event be granted to me as the total amount paid in by me improved at four per cent compounded yearly will purchase at the rates in effect at the date of this application, the same not to exceed \$1,200; and with the further understanding that in case the payments made by me are not sufficient to purchase an annuity of \$10, the payments I make will be returned to me or to my legal representatives with compound interest at four per cent.

Pursuant to that application, a Canadian Government Annuity under Plan "A", Deferred Annuity Contract, guaranteed for ten years and dated March 24, 1936, was issued by the Dominion of Canada over the signatures of the Acting Deputy Minister of Labour and the Superintendent of Annuities. That annuity contract is Ex. A-3 herein. It provided that upon the payment of \$475.80 yearly, payable at the rate of \$39.65 on the 24th day of each month, commencing on the 24th day of March, 1936, and continuing until payments for eighteen years had been paid, a life annuity of \$1,200, payable in quarterly instalments, was to be received by Mr. E., the first of such annuity payments to become due on the 24th of March, 1954, such annuity to be payable in quarterly instalments of \$300, for ten years certain or for the lifetime of the annuitant, whichever period was the longer.

The contract further provided as follows:

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

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Attached to the annuity contract were certain "conditions," two of which were as follows:

4. If for any reason the annuity is required at an earlier age than specified in the contract, the contract may be converted, on any anniversary of the date of issue, into an Immediate Annuity, to commence at once, for the amount that had been purchased at the date of the said conversion.

5. Under this plan, the annuitant has the option of changing to any other plan, provided change is made at least five years before the date of maturity of the contract.

When the annuity contract was issued in 1936, Mr. E. paid the first monthly instalment of \$39.65. He made no further payments until the 24th day of February, 1944, when he paid \$5,000. Then, on August 29, 1946, he made a further payment of \$8,600.16. These payments, totalling \$13,639.86, were sufficient to complete the purchase of a fully paid up annuity of \$1,200, *the first instalment of which was payable on March 24, 1947*. The payment of the premiums in lump sums instead of in monthly instalments, and the change in time of payment of the first instalment of the annuity from March 24, 1954, to March 24, 1947, were made in accordance with the terms and conditions of the annuity contract itself. On January 31, 1947, the Superintendent of the Annuities Branch wrote Mr. E. stating:

I am sending you herewith a statement which is of the same force and effect as if an endorsement had been made on the contract itself and which should be attached thereto as soon as convenient.

The statement therein contained was as follows:

In compliance with the expressed wish of the annuitant, the date of maturity of this contract is hereby changed from March 24, 1954, to March 24, 1947. In consideration of the total payment of \$13,639.81 made under this contract, the purchase of an annuity of \$1,200 guaranteed ten years has been completed.

In 1947 Mr. E. received certain instalments under his annuity contract, and the question is whether such amounts constituted taxable income in his hands. The matter falls

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to be determined under the provisions of section 5(1) (*k*) of The Income War Tax Act, which in 1947 was as follows:

5. 1. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:

(*k*) The income arising from any annuity contract entered into prior to the twenty-fifth day of June, 1940, to the extent provided by section three of chapter twenty-four of the Statutes of 1930 and section six of chapter forty-three of the Statutes of 1932; Provided that such exemption shall not extend to that portion of the income which exceeds the amount of the annuity actually specified in the contract before the twenty-fifth day of June 1940, where such excess amount arises by reason of any option or contractual right to enlarge the annuity income by the payment of additional sums or premiums, unless such additional sums or premiums have actually been paid before the said date.

The Tax Appeal Board allowed the appeal on the grounds: (1) that the income in question arose from an annuity contract entered into prior to June 25, 1940, and being one which provided for an annuity of \$1,200, was totally exempt under section 6 of ch. 43 of the Statutes of 1932, thereby coming within the first part of subsection (*k*); (2) that the proviso in subsection (*k*) has here no application; and (3) that the advancing of the date of maturity of the annuity contract from 1954 to 1947, by the payment of additional premiums, did not constitute a new contract.

Mr. E. appeared in person, and in the main his submission was based on the findings of the Income Tax Appeal Board.

Counsel for the Minister admits that the method of payment followed by Mr. E. and the advancing of the date of maturity of the contract from 1954 to 1947 were carried out under the options and conditions in the original contract. He admits further that had the payments been made at the times when they were actually made, but in amounts sufficient only to provide for the maturity of the contract in 1954 as originally planned, under section 5(1) (*k*) the total amount of the annual payments would have been exempt in 1954 and thereafter and that the proviso in that case would have no application.

His submission is one which I think was not made to the Income Tax Appeal Board. As I understand that submission, it is this. He says, that the sum of \$1,200 mentioned in the contract is the annual *rate* at which the

annuity is payable; and that the "amount of the annuity specified in the contract" is "the annuity of \$1,200 a year commencing in 1954 and running until death"; so that "the amount of the annuity actually specified in the contract is the series of payments beginning at a definite time and ending at a determinable time." Then he says that by changing the maturity date from 1954 to 1947 the annuity income was enlarged by a period of seven years, and as the payments required to provide for the additional seven years were not made prior to June 25, 1940, the proviso applies. While not specifically so stated by counsel for the Minister, I think the result of placing such an interpretation on the proviso would be that for the period 1947 to 1953 the annuity income would not be exempt but would fall to be taxed under the other provisions of The Income War Tax Act; and that the annuity income in 1954 and thereafter would be exempt under section 5(1) (*k*).

In order to arrive at the proper interpretation to be placed on the subsection, it will be of some assistance to examine, in part, the history of the exemptions or deductions allowed in respect of the income from Government Annuities. Under the Government Annuities Act, R.S.C. 1927, ch. 7, s. 8, the maximum annual amount payable by way of annuity thereunder was fixed at \$5,000. By ch. 54, s. 3 of the Statutes of Canada, 1930, The Income War Tax Act was amended by adding section 5(1) (*k*) which provided for an exemption from income tax of income derived from Dominion and provincial annuities (and certain other like annuity contracts) up to a maximum of \$5,000. Then, by ch. 33, s. 8, Statutes of Canada, 1931, the Government Annuities Act was amended, limiting the amount of annuities thereafter granted under that Act to a maximum of \$1,200. That was followed by an amendment to The Income War Tax Act by ch. 43, s. 6, Statutes of 1932, limiting the exemption in respect of such contracts issued thereafter to \$1,200 per year, but preserving the exemptions up to a maximum of \$5,000 in respect of such contracts issued prior thereto.

Then, by ch. 34, s. 13, Statutes of 1940, subsection (*k*) was amended, and as so amended it included the provisions

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I have set out above. The general part of the subsection is intended to preserve the exemptions to annuitants who had entered into contracts prior to June 25, 1940. The proviso constituted the only amendment to such exemptions and was doubtless enacted in view of the much higher rates of taxation which were then levied, due to the outbreak of war. Had holders of annuity contracts been permitted thereafter to increase the amount of their annual income beyond the amount which they had specifically agreed to purchase and for which they had not then completed payment, they would have been put in a much more favourable position in regard to exemptions than the great majority of taxpayers. The proviso was therefore enacted to meet this situation.

The amendments made in subsection (*k*) from time to time would indicate a general intention to preserve all the rights of such annuitants in regard to exemptions as they existed at the time the contracts were entered into. The proviso, I think, was enacted to deal with one class only, namely, those who had contracts issued prior to June 25, 1940, which gave them a fixed yearly payment but which, under options contained therein, could be increased in amount by paying additional sums or premiums. If such additional sums or premiums had, in fact, been paid prior to June 25, 1940, the annuity holders were entitled to the full extent of the exemption previously provided; but the additional annual income arising from the exercise of such option, and in respect of which the additional sums or premiums had not been paid prior to June 25, 1940, would not be entitled to exemption under this subsection.

Turning now to the words of the subsection, I find that the first thing to be ascertained under the proviso is "the amount of the annuity actually specified in the contract." It is only the excess beyond that amount which may not be exempt. The word "annuity" as there used does not mean the same as the "annuity contract," which words are used in the first line of the subsection to mean the formal agreement embodying the terms of the contract. In my opinion, the "annuity," as used in the phrase I have just quoted above, means the annuity income—the annual amount to be paid under the annuity contract. That that

is so is made clear in the later words of the subsection where reference is made to the excess amount which arises by reason of any contractual right *to enlarge the annuity income*. Now to enlarge the "annuity income" must mean to enlarge it beyond the amount of the annuity income actually specified in the contract before June 25, 1940. I am quite unable to find that "the amount of the annuity actually specified" means the sum total of the series of payments originally provided for or that the change in the date of maturity of the contract had any bearing on the matter. The proviso has to do with the *amount* of the annual income originally provided for, and the *amount* by which it was increased under the option in the contract. It is not concerned with the *time* when the payments commenced. It was well known that Government Annuity Contracts provided options by which an annuitant could, under certain conditions and upon making certain payments, change the date of maturity of his contract to an earlier date than that originally stipulated. Had it been the intention to make the proviso applicable to such a change, appropriate words could have been used to bring about that result. I find no such words in the subsection.

My finding is that "the amount of the annuity actually specified" in this contract entered into prior to June 25, 1940, was \$1,200. That amount not having been increased, exceeded or enlarged by advancing the date of first payment of the annual income from 1954 to 1947, the proviso here has no application. Mr. E., therefore, was entitled to claim as an exemption from his 1947 income, all the income received by him in that year under his annuity contract.

Counsel for the Minister rested his whole case on the point which I have discussed and conceded that, should I interpret the proviso in the manner in which I have done, the appeal must fail.

The appeal by the Minister of National Revenue will therefore be dismissed. Mr. E. was not represented by counsel and he will therefore be entitled only to such costs as may be properly taxable to him under the Rules of this Court.

Judgment accordingly.

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BETWEEN:

GORDON KENNETH DALEY.....APPELLANT;

AND

THE MINISTER OF NATIONAL }
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Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 6(a), 6(b)—Section 6 to be read with section 3—Deductibility of proper disbursements and expenses inherent in concept of annual net profit or gain—Fee for call to the Bar and admission as solicitor in Ontario not deductible.

The appellant, a lawyer practising in Toronto, sought to deduct from his 1946 income one-third of the \$1,500 fee which he had paid in 1946 to the Law Society of Upper Canada for his call to the Bar and admission as a solicitor in Ontario. He had previously been called to the Bar and admitted as a solicitor in Nova Scotia but had not practised therein. The Minister disallowed the deduction and the appellant appealed to the Income Tax Appeal Board which unanimously dismissed his appeal.

Held: That the amount of the taxpayer's profits or gains to be assessed must be ascertained or estimated according to the ordinary principles of commercial trading or accepted business and accounting practice.

- 2. That the deductibility of the disbursements and expenses that may properly be deducted in computing the amount of the profits or gains to be assessed is inherent in the concept of "annual net profit or gain" in the definition of taxable income contained in section 3 and stems from it and not, even inferentially, from paragraph (a) of section 6.
- 3. That a disbursement or expense such as the \$1,500 which the appellant paid for his call to the Bar and admission as a solicitor in Ontario, which is laid out or expended not in the course of the operations, transactions or services from which the taxpayer earned his income but at a time anterior to their commencement and by way of qualification or preparation for them, is not the kind of disbursement or expense that could properly be deducted in the ascertainment or estimation of his "annual net profit or gain".
- 4. That there is no portion of the \$1,500 fee that could have any relationship to the appellant's law practice in any one year.
- 5. That the expenditure which the appellant sought to deduct was not properly deductible from his 1946 receipts in the ascertainment or estimation of his taxable income for that year according to the ordinary principles of commercial trading or accepted business and accounting practice.

APPEAL from the decision of the Income Tax Appeal Board dismissing the appellant's appeal against his 1946 assessment.

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

The appellant appeared in person.

R. S. W. Fordham K.C. and *P. H. McCann* for respondent.

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

THE PRESIDENT now (November 21, 1950) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board dismissing the appellant's appeal against his income tax assessment for the year 1946. The facts from which it rises are simple. The appellant is a barrister and solicitor practising in Toronto, Ontario. He took his law course at Dalhousie University in Halifax, Nova Scotia, graduated therefrom in May, 1939, commenced a year of post-graduate study at Columbia University in New York City, returned to Halifax in December, 1939, to be called to the Bar and admitted as a solicitor in Nova Scotia and then completed his year at Columbia University in May, 1940. He paid the Nova Scotia Bar Society the sum of \$50 as the fee on filing his articles of clerkship and the sum of \$125 as the fee on his call to the Bar and admission as a solicitor, but did not practise in Nova Scotia. After the completion of his year at Columbia University he enlisted in the Canadian Navy and remained in that service until after the end of the war. On his return to civilian life he decided, for personal reasons, to practise law in Ontario rather than in Nova Scotia and, on application therefor, was called to the Bar and admitted as a solicitor in Ontario on September 19, 1946, having previously, on September 4, 1946, paid the Law Society of Upper Canada the sum of \$1,500 as the fee for such call and admission, that being the fee charged to members of the legal profession outside of Ontario who apply for call and admission in Ontario. Thereupon the appellant commenced the practice of law in Toronto. In his income tax return for the year 1946 he claimed as a deduction the

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sum of \$500, being one-third of the \$1,500 that he had paid as the fee for his call and admission in Ontario. On his assessment for that year this deduction was disallowed, as appears from the notice of assessment, dated September 28, 1948. On November 27, 1948, the appellant gave notice of his objection to the assessment and on May 11, 1949, the Minister notified the appellant that he agreed to amend the assessment in respect of one of the objections taken by the appellant, with which we are not here concerned, but that he confirmed it in other respects on the ground that "the expense of a call to the Bar of Ontario claimed as a deduction from income is not a disbursement or expense wholly, exclusively and necessarily laid out or expended for the purpose of earning the income within the meaning of paragraph (a) of subsection (1) of section 6 of the Act but is a capital outlay within the meaning of paragraph (b) of subsection (1) of section 6 of the Act." On August 3, 1949, the appellant gave notice of appeal to the Income Tax Appeal Board. His appeal was heard by the Board on December 8, 1949, and unanimously dismissed on January 26, 1950. It is from this decision that the present appeal is taken.

The appellant's right to deduct the annual licence or practising fee charged by the Law Society of Upper Canada to its members is not disputed. The issue in the case of *Bond v. Minister of National Revenue* (1) does not, therefore, arise in this case. Here the only issue is whether the appellant was entitled, in computing the amount of his taxable income for the year 1946, to deduct from his receipts in 1946 one-third of the amount that he had paid the Law Society of Upper Canada for his call and admission.

There are several Canadian cases in which the Court has discussed the principles to be applied in determining whether in the computation of taxable income a particular expenditure is deductible and considered the construction to be placed on sections 6(a) and 6(b) of the Income War Tax Act, R.S.C. 1927, chap. 97, which read as follows:

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

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

(1) (1946) Ex. C.R. 577.

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

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and on section 3, in which the definition of taxable income appears, in part, as follows:

3. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; . . .

It was stated in *Imperial Oil Limited v. Minister of National Revenue* (1) that the words "profits or gains to be assessed" in the introductory portion of section 6 have the same meaning as the words "annual net profit or gain" in section 3, with which section 6 must be read, and that the principles to be applied in the computation of such profits or gains are not defined in the Act but stated in judicial decisions such as *Gresham Life Assurance Society v. Styles* (2) where Lord Halsbury L.C. said:

Profits and gains must be ascertained on ordinary principles of commercial trading,

and *Usher's Wiltshire Brewery, Limited v. Bruce* (3) where Earl Loreburn approved the statement:

profits and gains must be estimated on ordinary principles of commercial trading by setting against the income earned the cost of earning it,

There are many other decisions in which similar statements are made. The law on the subject is well settled. In the *Imperial Oil Limited* case (*supra*) stress was placed on the fact that section 6(a) was not concerned with the deductibility of disbursements or expenses but dealt only with the exclusion from deductibility of those disbursements or expenses that fell within its negative terms, and the opinion was expressed that if a particular disbursement or expense was not within the express terms of the exclusions of the section its deduction ought to be allowed if it would otherwise be in accordance with the ordinary principles of commercial trading or well accepted principles of

(1) (1947) Ex. C.R. 527. (3) (1915) A.C. 433 at 444.
 (2) (1892) A.C. 309 at 316.

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business and accounting practice. At page 530, I put my view of the purpose of section 6(a) and the construction that ought to be placed on it in these words:

The section is couched in negative terms. It is not primarily concerned with what disbursements or expenses may be deducted and does not define them, so that their deductibility is determinable only by inference. But it is concerned with and does define the disbursements or expenses whose deduction is not allowed. It is a specific instruction to the Minister that in his assessment operation he is not to allow the deduction of disbursements or expenses that are "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income". The section directs that such disbursements or expenses are not to be deducted, even although they might be deductible according to ordinary principles of commercial trading or, as it has been suggested "well accepted principles of business and accounting practice". The range of deductibility according to such principles may be wider than that which is inferentially permitted under the section. To that extent they must give way to the express terms of the section, which must, of course, prevail. The result is that the deductibility of disbursements or expenses is to be determined according to the ordinary principles of commercial trading or well accepted principles of business and accounting practice unless their deduction is prohibited by reason of their coming within the express terms of the excluding provisions of the section. These provisions were, no doubt, inserted in the interests of the revenue as a protecting safeguard against deductions which might otherwise be made but, while it is necessary to enforce the prohibitions of the section, it is not proper to go beyond its express requirements. The section ought not, in my opinion, to be read with a view to trying to bring a particular disbursement or expense within the scope of its excluding provisions. If it is not within the express terms of the exclusions its deduction ought to be allowed if such deduction would otherwise be in accordance with the ordinary principles of commercial trading or well accepted principles of business and accounting practice.

And later, at page 545, after expressing the opinion that it was obvious that the words "for the purpose of earning the income" in section 6(a), as applied to disbursements or expenses, could not be applied literally, for the laying out or expending of a disbursement or expense could not by itself ever accomplish the purpose of earning the income, and adopting the statement of Watermeyer A.J.P. in *Port Elizabeth Electric Tramway Company v. Commissioner for Inland Revenue* (1) that income is earned not by the making of expenditures but by various operations and transactions in which the taxpayer has been engaged or the services he has rendered in the course of which expenditures may have been made, I described the disbursements and expenses that were inferentially deductible as being outside the exclusions of section 6(a) as "those that

(1) (1935) 8 S.A. Tax Cases 13 at 14.

are laid out or expended as part of the operations, transactions or services by which the taxpayer earned the income”, and then went on to say:

They are properly, therefore, described as disbursements or expenses laid out or expended as part of the process of earning the income. This means that the deductibility of a particular item of expenditure is not to be determined by isolating it. It must be looked at in the light of its connection with the operation, transaction or service in respect of which it was made so that it may be decided whether it was made not only in the course of earning the income but as part of the process of doing so.

Since the decision in the *Imperial Oil Limited* case (*supra*) I have given further consideration to the statement or implication in that case, and in several others, that section 6(a) inferentially permits the deductibility of the disbursements and expenses that fall outside its exclusions, and am now of the opinion that such a statement or implication is, strictly speaking, not correct. If any inference of deductibility is to be drawn it can only be from the opening words of section 6 “In computing the amount of the profits or gains to be assessed” and not from paragraph (a), which is concerned only with the exclusion from deductibility of the disbursements or expenses therein specified and not at all with the deductibility of any disbursements or expenses. The correct view, in my opinion, is that the deductibility of the disbursements and expenses that may properly be deducted “in computing the amount of the profits or gains to be assessed” is inherent in the concept of “annual net profit or gain” in the definition of taxable income contained in section 3. The deductibility from the receipts of a taxation year of the appropriate disbursements or expenses stems, therefore, from section 3 of the Act, if it stems from any section, and not at all, even inferentially, from paragraph (a) of section 6.

That being so, it follows that in some cases the first enquiry whether a particular disbursement or expense is deductible should not be whether it is excluded from deduction by section 6(a) or section 6(b) but rather whether its deduction is permissible by the ordinary principles of commercial trading or accepted business and accounting practice. If the answer to such enquiry is in the negative then that is the end of the matter and it is not necessary to make any further enquiry, for it would

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then automatically fall within the exclusions of section 6(a) and it would not be necessary to consider whether it would fall within those of section 6(b).

There are, in my judgment, several reasons for thinking that this is one of such cases and concluding, quite apart from sections 6(a) and 6(b), and as if they were not in the Act, that the expenditure which the appellant sought to deduct was not properly deductible from his 1946 receipts in the ascertainment or estimation of his taxable income for that year according to the ordinary principles of commercial trading or accepted business and accounting practice.

In the first place, the fee of \$1,500 which he paid for his call to the Bar and admission as a solicitor in Ontario was an expenditure that was anterior to his right to practice law in Ontario and earn an income therefrom. Except that it was nearer in point of time it was no more related to the operations, transactions or services from which he earned his income in 1946, or in any year, than the cost of his legal education would have been or, for that matter, the cost of his general education or any cost or expense involved in bringing him to the threshold of his right to practice. If the fee he paid for his call and admission in Ontario were deductible so also would be the fee he paid for his call and admission in Nova Scotia before he enlisted in the Canadian Navy for the fact that he was a member of the legal profession from outside Ontario saved him from the time and expense of being enrolled as a student-at-law and serving as an articled clerk. If the fee or any portion of it were deductible there would be no reason why a young man commencing a business career should not similarly be entitled to offset against his business receipts the costs of his university course in commerce or business administration or any other costs of qualifying himself for a business career. It seems clear that a disbursement or expense such as this which is laid out or expended not in the course of the operations, transactions or services from which the taxpayer earned his income but at a time anterior to their commencement and by way of qualification or preparation for them is not the kind of disbursement or expense that could be properly deducted in the ascertain-

ment or estimation of his "annual net profit or gain". In my view, no accountant or business man could reasonably so regard it.

There is another way of looking at the matter. The appellant's taxable income for 1946 consisted basically of the receipts from his law practice in that year less the costs and expenses of his practice in that year. It is inconceivable that any accountant or professional or business man could reasonably consider that the fee of \$1,500 which the appellant paid for his call and admission could properly be offset against his receipts from his first year of practice. There is an implied admission of this in the fact that the appellant claims a deduction of only \$500. But if \$1,500 is not deductible, how can \$500 be deductible? And why should the deduction be spread over only three years? And if three years is too short a period over how long a period should the deduction be spread? The fee was not paid for any year or number of years. It is, in my view, quite different from the annual licence fee that was held to be deductible in *Bond v. Minister of National Revenue (supra)*. The call and admission for which the fee was paid is not like a depreciable asset. It does not lend itself to an annual write-off and no one could reasonably apportion it over any given period of time. There is no portion of it that could have any relationship to the appellant's practice in any one year. The fee is not the kind of disbursement or expense that could properly enter into the ascertainment or estimation of his "annual net profit or gain". There could be no place for any portion of it in any annual statement of profit or loss prepared with proper regard to the ordinary principles of commercial trading or accepted business and accounting practice.

It is not necessary in this case to discuss the kind of disbursement or expense that might be deductible according to the ordinary principles of commercial trading or accepted business and accounting practice and yet be excluded from deduction by section 6(a). We have not that problem here for, since the expenditure which the appellant sought to deduct is not the kind of disbursement or expense that could properly enter into the ascertain-

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ment or estimation of his annual net profit or gain in 1946, or in any year, according to the principles referred to, it is outside the range of deductibility altogether. It cannot, then, have been wholly, exclusively and necessarily laid out or expended for the purpose of earning his income of 1946 or any year and must automatically fall within the exclusions of section 6(a).

The appellant argued that his call and admission fee was not the kind of expenditure that was excluded from deduction by section 6(b). In view of the conclusion I have reached it is not necessary to consider whether the words of the section are apt enough for the purpose or whether the fact that the fee was paid once and for all and the contention that its payment gave the appellant a lasting advantage made it an outlay of capital within the meaning of the section.

In my judgment, the deduction claimed by the appellant was properly disallowed by the Minister and the appeal herein must be dismissed with costs.

Judgment accordingly.

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his copyright and sought an injunction and damages. *Held*: That an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own. Every one may freely adopt and use the ideas but no one may copy his literary work without his consent. 2. That under the Copyright Act copyright in a literary work does not depend on registration but arises automatically from authorship. The registration of a copyright does not confer upon the author of a literary work any right that did not already belong to him by virtue of his authorship. 3. That no person has any copyright in any arrangement or system or scheme or method for doing a particular thing even if he devised it himself. It is only in his description or expression of it that his copyright subsists. *Hollinrake v. Truswell* (1894) 3 Ch. D. 420 at 427 followed. 4. That to succeed in an action for infringement of copyright the plaintiff must show that his literary work has been copied. It will not be enough to prove that his ideas have been adopted or that an arrangement or system devised by him has been used. The copying need not be word for word if there is colorable imitation. *ALFRED MOREAU V. ROLAND ST. VINCENT*..... 198

2—*Infringement—Copyright Act, R.S.C., 1927, c. 32, ss. 2(j), 3—Title as subject matter of copyright—“Infringing”—The Unfair Competition Act, 1932, 22-23, Geo. V, c. 38, s. 3(b) 52—Passing off—Plaintiffs’ mark not registered in Canada—Registration of defendant’s mark obtained by means of a false representation expunged.* Plaintiff King Features Syndicate Inc. is owner of the Canadian Copyright in a well-known comic strip consisting of drawings and text, the copyright extending to both. The most widely known character in the comic strip is “Popeye” and that word has been used at times as the title of the strip. Defendant is the registered owner in Canada of the trade mark “Popeye”. Plaintiffs allege that defendant, a wholesale and retail dealer in watches and jewellery carrying on business in Montreal, P.Q., without the authorization or consent of plaintiffs in 1948 was advertising and selling in Canada watches bearing on their dials reproductions of the characters in the above mentioned comic strip and that such were advertised and sold as “Popeye” watches. In an action for infringement of plaintiffs’ copyright defendant admitted that the plaintiffs were the owners or licensees of the four characters so reproduced on the dials of defendant’s watches and that the reproduction of such characters on his watches infringed plaintiff’s copyright in such

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characters. The Court found that in addition to this admission the use of the word “Popeye” in connection with such characters constituted an infringement of plaintiffs’ rights. The Court also found that the evidence did not establish that the plaintiffs—or any of them—had acquired any common law trade mark rights in the word “Popeye” in Canada and they had no registered trade marks for that word in Canada. *Held*: That the very limited use of the dial in plaintiffs’ “Popeye” watch does not constitute such distribution of the wares in Canada as to bring the name “Popeye” used in connection therewith, within the ambit of s. 3(b) of The Unfair Competition Act, 1932. 2. That mere intent to deceive is not enough, there must be grounds of apprehending actual deception, and plaintiffs are not entitled to restrain defendant from using the trade mark “Popeye” unless that word be used in association with the characters or literary work in which plaintiffs have a copyright, or a copy or a colorable imitation thereof. 3. That since the entry in the register of trade marks does not accurately express or define the existing rights of the defendant as there was no user by him prior to registration it should be expunged. *KING FEATURES SYNDICATE INC., et al v. BENJAMIN H. LECHTER.. 297*

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March, 1944, was that "approved coal mine operators in the fields indicated to be entitled to a maximum production subsidy as follows . . ." and that the members of the Board "approved putting the scheme into force for the fiscal year April 1, 1944, to March 31, 1945 . . ." In a letter addressed to the Coal Mine Operators in the Domestic Fields of Alberta it was stated "the Board has approved a payment of a flat rate production subsidy as from April 1, 1944, on coal production of approved operators." Suppliant claims payment of the subsidy on the basis of 35 cents per ton instead of at the rate of 12 cents and 16 cents per ton approved by the Board. *Held:* That the Board offered a grant or gift of a subsidy to the coal operators and such action did not constitute an offer which could be accepted by performance thereby creating a contract between the Board and the coal operators. 2. That no contract having been created there was no covenant on the part of the Board to pay a subsidy in consideration of the production of coal and therefore the suppliant was not entitled to recover the same. **LETHBRIDGE COLLIERIES LIMITED V. HIS MAJESTY THE KING. . . 1**

2.—*Information—Foreign Exchange Control Act, Statutes of Canada 1946, c. 53, s. 22(1)*—"Forthwith declare to an authorized dealer"—"Forthwith" in s. 22 of the Foreign Exchange Control Act means within a reasonable time—No declaration of forfeiture. *Held:* That "forthwith" in s. 22(1) of the Foreign Exchange Control Act, Statutes of Canada, 1946, c. 53, means within a reasonable time in view of the circumstances of the case and of the subject matter. **HIS MAJESTY THE KING V. HERB CUTHBERTSON. 83**

3.—*Information—Seizure under provisions of Foreign Exchange Control Act—Forfeiture—When offence proved Court must declare forfeiture of whole property seized.*—Defendant admittedly attempted to export from Canada a sum of money contrary to the Foreign Exchange Control Act, Statutes of Canada 1946, c. 53. The money was seized and detained by the representatives of the Foreign Exchange Control Board and the plaintiff in this action asks for an order declaring forfeiture to the plaintiff of the sum of money so seized. *Held:* That when the Attorney General has claimed forfeiture and it is established that the defendant has, in fact, done or omitted to do any of these things enumerated in s. 60(1) of the Act the Court has no power to declare there shall be no forfeiture. 2. That s. 60(1) of the Act, unlike s. 59(1) of the Act, confers no discretion on the Court and the Court cannot declare anything forfeited less than the whole of the property seized and detained. **HIS MAJESTY THE KING V. STEVE GOMORI. 89**

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5.—*Petition of Right—Damage for injury to infant suppliant from picking up a No. 69 close action grenade—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c), 50A—Crown not responsible unless statutory conditions of liability proved to have been present—Onus of proof on suppliant—Liability of Crown not to be determined on basis of conjecture—No duty on Crown to explain presence of bomb—Negligence of officer or servant of Crown not to be presumed.*—On March 30, 1945, the infant suppliant, a boy of 13, while walking along part of the river bed of the Rideau River, the water being low and leaving a considerable distance between the river bank and the water's edge, picked up a No. 69 close action grenade thinking it was a bottle. While he was holding it in his right hand and jumping from stone to stone to keep out of the mud it exploded with the result that he was seriously hurt and lost his right hand and right eye. *Held:* That unless there is evidence of negligence of an officer or servant of the Crown while acting within the scope of his duties or employment the Crown cannot be held responsible for the suppliant's injury under section 19(c) of the Exchequer Court Act and there is no liability apart from it. The Crown's liability is a statutory one and cannot arise until all the conditions of liability fixed by the statute have been proved to have been present. 2. That there was no evidence of how or when the grenade came to be where the suppliant found it or who had thrown it there. There was no proof that it was thrown there by any

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officer or servant of the crown while acting within the scope of his duties or employment. The opinion of a witness that it was thrown as a demonstration to troops or in the course of a tactical scheme is no more than speculation or surmise and cannot take the place of the evidence of fact that must be given to discharge the onus of proof that lies on the suppliant. 3. That it is not permissible to determine the liability of the Crown under section 19(c) of the Exchequer Court Act on the basis of conjecture that the conditions of liability fixed by it were present. 4. That there was no duty on the part of the Crown to explain how the grenade came to be where the suppliant found it and that negligence on the part of an officer or servant of the Crown should not be presumed from the absence of such explanation. In a claim under section 19(c) of the Exchequer Court Act the suppliant must prove not only that his injury resulted from the negligence of an officer or servant of the Crown but also that such officer or servant was negligent while acting within the scope of his duties or employment. *The King v. Moreau* (1949) S.C.R. (not yet reported) followed. 5. That no No. 69 grenades were issued to the Ottawa area depot prior to May 21, 1945. Consequently, whoever threw the grenade must have brought it into the area from outside. If he did so it could not have been thrown in the course of duty. 6. That there was no evidence of lack of care in the issue or handling of the grenades on the part of the military authorities. **ROBERT JOHN GINN v. HIS MAJESTY THE KING.... 208**

6.—*Information—The Excise Act, S. of C. 1934, c. 52, ss. 112(1), 124, 169(2), 169(A)—Seizure—Forfeiture—Vehicle which “had been or was being used for the purpose of transporting spirits unlawfully manufactured”—Court vested with no discretion when offence proved even when owner of vehicle had no knowledge it carried such spirits—Partial relief under s. 169(A) of the Act not available to claimant in whose possession vehicle was seized—Intention or purpose of owner or driver of vehicle in transporting illicit spirits need not be established by Crown officers—Powers to relieve from forfeiture reserved to Governor in Council under the Consolidated Revenue and Audit Act, S. of C. 1931, c. 27, s. 33—Claim dismissed.* One M. and one S. while motoring towards Charlottetown observed a man standing on the side of the road and signalling for a lift. M. stopped his car. He had never seen the man before but S. recognized him as one L. Upon being invited into the car, L. took a parcel from the ground, placed it in the rear seat and got into the front seat with M. and S. who paid no attention to the parcel. After proceeding but a very short distance they were ordered by R.C.M.P. constables to stop. The car was searched and the officers

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upon examining the parcel found it to be a potato sack in which there were two one-quart tins which contained spirits commonly called “moonshine”. The spirits and car were then seized as forfeited. Subsequently both M. and S. were charged under s. 169 of the Excise Tax Act with having in their possession spirits unlawfully manufactured or imported and were acquitted by the magistrate. L., also charged, pleaded guilty. M.’s and S.’s evidence was accepted by the Court as true statements of what occurred: that until his car was searched and the spirits discovered M. had no knowledge that it was carrying spirits illicitly manufactured. *Held:* That the matter is in the nature of a proceeding *in rem* and, if it be established—as it has been done in this case—that the vehicle “had been or was being used for the purpose of transporting spirits unlawfully manufactured” the Court is vested with no discretion in the matter, but must declare the vehicle condemned as forfeited, and that is so even when the owner had no knowledge that such spirits were carried in his vehicle. 2. That the partial relief afforded under the provisions of s. 169(A) of the Excise Tax Act is not available to the claimant since the vehicle was seized in his possession. 3. That if in such proceedings the Crown officers had to prove the intention or purpose of the owner or driver of a vehicle in transporting illicit spirits they would have a very difficult task and the whole intention of s. 169(A) of the Excise Act might readily be evaded. **HERBERT FREDERICK MAYBERRY v. HIS MAJESTY THE KING..... 402**

7.—*Indian Act, R.S.C. 1906, c. 81, s. 51—Lease of surrendered Indian Reserve lands not valid without direction of Governor in Council—No estoppel to defeat express requirements of statute.—The plaintiff sought a declaration that a lease of certain lands, dated October 16, 1912, and made by the Superintendent General of Indian Affairs to the defendant, was null and void on the ground that it had been made without the direction of the Governor in Council. The lands are at Duncan on Vancouver Island in British Columbia and formed part of the Indian Reserve of the Somenos Band of Cowichan Indians. They had been surrendered by the Indians on June 29, 1888, on certain conditions and leased for 21 years by the Superintendent General to the defendant to enable it to erect an agricultural hall and lay out the grounds to hold annual exhibitions. The lease was renewed on November 29, 1905, for a further period of 21 years and subsequently a new lease, dated October 16, 1912, for 99 years was made. The surrender was accepted by the Governor in Council by Order in Council P.C. 1880, dated August 16, 1888, which gave authority for the issue of a lease to the defendant but no Order in Council was ever passed with reference to*

CROWN—Continued

the lease of October 16, 1912. *Held*: That section 51 of the Indian Act requires a direction by the Governor in Council before there can be a valid lease of surrendered Indian lands, that the responsibility for controlling the leasing of such lands thus vested in the Governor in Council cannot be delegated to the Superintendent General of Indian Affairs or any one else and that a lease of such lands without the direction of the Governor in Council is void. *St. Ann's Island Shooting and Fishing Club Ltd. v. The King* (1950) Ex. C.R. 185; (1950) S.C.R. 211 followed.

2. That there cannot be an estoppel to defeat the express requirements of a statute, particularly when they are designed, as section 51 of the Indian Act is, for the protection of the interests of special classes of persons. *HIS MAJESTY THE KING v. COWICHAN AGRICULTURAL SOCIETY*... 448

8.—*Petition of Right—Airplane damaged in landing on airfield owned and operated by the Crown—Crown liable to licensee for damage sustained because of a danger not obvious and not warned against—Failure of suppliant to ascertain conditions at landing field before landing plane—Action dismissed.*—Suppliant Grossman when attempting for the first time to land his airplane operated by himself at an airport owned and operated by respondent and which was open to the public and which he was entitled to use, came in contact with an open ditch on the grass strip of the landing field used by him, with the result that his plane was seriously damaged. He now claims for the value of the damage done to his plane and suppliant Sun seeks to recover for certain out-of-pocket expenses incurred because of personal injuries sustained by him. The Court found that pilots with previous knowledge of the ditch could readily locate its position: that a pilot with no previous knowledge of its existence could observe its location and nature if he flew over the landing field at a height of 1,000 feet or less, on the date of the accident: that a pilot with no previous knowledge of the existence of the ditch who failed to fly over the landing field at a height of 1,000 feet or less would have difficulty in seeing the ditch or the warning flags and under those circumstances the ditch would not be obvious to him. *Held*: That the status of suppliant Grossman when using the airfield was that of a licensee to whom respondent owed a duty to give adequate warning of any danger unless such danger were obvious, Grossman being required to use reasonable care under all the circumstances.

2. That suppliant Grossman failed to take reasonable care in that he did not inform himself of the nature of the ground on which he proposed to land his plane and failed to take any steps to acquaint himself with the nature of the landing field and which were available to him for

CROWN—Concluded

his own protection. 3. That the failure to give adequate warning to licensees lawfully using the facilities of a public airport, of the existence of a ditch which constitutes an obstruction on the runway, is negligence on the part of the Crown for which it would be liable unless the obstruction would be obvious to those using reasonable care. *IRVING GROSSMAN et al v. HIS MAJESTY THE KING* 469

9.—*Petition of Right—Collision—Driver of army truck acting within scope of his duties even if journey made pursuant to orders of superior officer given without authority—Damages.*—Suppliant claims damages for injuries suffered by him as a result of a collision between a taxicab driven by him and an army truck owned by the respondent and driven by Corporal Ryan, a servant of the respondent in the Royal Canadian Armoured Corps (Reserve), who was driving the truck pursuant to the order of his commanding officer. The Court found no negligence on the part of suppliant and found that the negligence of the driver of the army truck was the sole cause of the accident and found further that the use of the truck for the purpose used was contrary to army regulations and that Ryan's commanding officer had no authority to use it for such purpose. The Court found also that on the day the accident occurred Ryan was on duty with the military category of driver and that it was within the scope of his duties to drive military vehicles when directed to do so by his commanding officer and that it was not open to him to question the authority of that commanding officer. The scope of his duties was not lessened by the fact that the orders of his commanding officer were given contrary to the regulations for military operated vehicles. *Held*: That the driver of the army vehicle was acting within the scope of his duties or employment at the time suppliant was injured and the respondent is liable for the damages sustained. *TREVELYN SPENCE v. HIS MAJESTY THE KING*... 488

CROWN LIABLE TO LICENSEE FOR DAMAGE SUSTAINED BECAUSE OF A DANGER NOT OBVIOUS AND NOT WARNED AGAINST.

See CROWN, No. 8.

CROWN NOT RESPONSIBLE UNLESS STATUTORY CONDITIONS OF LIABILITY PROVED TO HAVE BEEN PRESENT.

See CROWN, No. 5.

DAMAGE FOR INJURY TO INFANT SUPPLIANT FROM PICKING UP A No. 69 CLOSE ACTION GRENADE.

See CROWN, No. 5.

DAMAGE TO CARGO.*See SHIPPING, No. 7.***DAMAGE TO WATER MAINS OWNED BY PLAINTIFF CAUSED BY DEFENDANT SHIP'S ANCHOR.***See SHIPPING, No. 4.***DAMAGES.***See CROWN, No. 9.
SHIPPING, NOS. 1, 3 AND 5.***DATE OF COMMENCEMENT OF PAYMENT OF ANNUITY ADVANCED.***See REVENUE, No. 13.***DEDUCTIBILITY OF PROPER DISBURSEMENTS AND EXPENSES INHERENT IN CONCEPT OF ANNUAL NET PROFIT OR GAIN.***See REVENUE, No. 14.***DEDUCTIONS.***See REVENUE, No. 5.***DEFENDANT SHIP MAINLY AT FAULT IN VIOLATING CUSTOMARY RULE FOR PASSING.***See SHIPPING, No. 5.***DEFENDANT'S WORD MARK ORDERED EXPUNGED FROM THE REGISTER.***See TRADE MARK, No. 4.***DEPRECIATION CLAIMED BY EXECUTORS PAID TO APPELLANT IS INCOME OF APPELLANT.***See REVENUE, No. 3.***DEVISE TO THE GOVERNORS OF THE UNIVERSITY OF TORONTO IS NOT ONE WITHIN S. 7(1) (E) OF DOMINION SUCCESSION DUTY ACT.***See REVENUE, No. 6.***DISBURSEMENT PROPERLY INCURRED IN PREPARATION FOR TRIAL ALLOWED.***See PRACTICE, No. 1.***DISCONTINUANCE OF ACTION BY PLAINTIFF.***See PRACTICE, No. 1.***DISCRETION OF COURT.***See SHIPPING, No. 10.***"DOCUMENT" REFERRED TO IN S. 108(8) OF THE ACT.***See REVENUE, No. 7.***DOMINION SUCCESSION DUTY ACT, S. OF C. 1940-41, C. 14, SS. 2(M), 7(1), (D) (E).***See REVENUE, No. 6.***DOMINION SUCCESSION DUTY ACT, STATUTES OF CANADA 1940-41, SS. 3, 4 AND 58, REGULATION 19.***See REVENUE, No. 4.***DONATION INTER VIVOS AND IRREVOCABLE BY A FUTURE CONSORT TO THE OTHER,***See REVENUE, No. 9.***DRIVER OF ARMY TRUCK ACTING WITHIN SCOPE OF HIS DUTIES EVEN IF JOURNEY MADE PURSUANT TO ORDERS OF SUPERIOR OFFICER GIVEN WITHOUT AUTHORITY.***See CROWN, No. 9.***DUTY OF OCCUPIER OF DOCK TO OWNERS OF SHIPS INVITED TO USE IT.***See SHIPPING, No. 3.***DUTY OF REASONABLE CARE TO ENSURE THAT DOCK IS REASONABLY SAFE FOR NORMAL AND PROPER USE.***See SHIPPING, No. 3.***EASE OF PUTTING ITEM INTO PRACTICE NOT EVIDENCE OF LACK OF INVENTION.***See PATENTS, No. 2.***EMERGENCY COAL PRODUCTION BOARD.***See CROWN, No. 1.***ESSENTIALS OF COMBINATION INVENTION.***See PATENTS, No. 3.***EVASIVE DENIALS.***See PRACTICE, No. 2.***EVIDENCE OF ACTUAL CONFUSION NOT NECESSARY.***See TRADE MARK, No. 5.***EVIDENCE OF APPELLANT UNSATISFACTORY.***See REVENUE, No. 1.***EVIDENCE OF COMMERCIAL SUCCESS COUPLED WITH EVIDENCE OF A PROBLEM AND ITS SOLUTION STRONG EVIDENCE OF INVENTION.***See PATENTS, NOS. 2 AND 3.***EVIDENCE OF MINISTER'S SIGNATURE.***See REVENUE, No. 7.***EXCESS PROFITS.***See REVENUE, No. 2.*

- EXCESS PROFITS TAX ACT, 1940,**
S. 2(1) (I), 4(1) (B) (I), 4(1) (B) (III),
5(3), 5(5).
See REVENUE, No. 2.
- EXCESS PROFITS TAX ACT, 1940,**
S. 15(A).
See REVENUE, No. 8.
- EXCHEQUER COURT ACT, R.S.C.**
1927, C. 34, S. 19(C), 50(A).
See CROWN, No. 5.
- EXCISE ACT, STATUTES OF CAN-**
ADA, 1934, C. 52, SS. 112(1) (2),
169.
See REVENUE, No. 10.
- EXCISE TAX.**
See REVENUE, No. 7.
- EXCISE TAX ACT, R.S.C. 1927, C. 179,**
S. 86, 108 (8 and 9), 113(8).
See REVENUE, No. 12.
- EXCISE TAX ACT, R.S.C. 1927, C. 179**
SS. 101(A), 108(1) (8) AND (9),
113(8) (A and B).
See REVENUE, No. 7.
- EXEMPTION FROM DUTY "WHERE**
THE SUCCESSOR IS THE DO-
MINION OF CANADA OR ANY
PROVINCE OR POLITICAL SUB-
DIVISION THEREOF".
See REVENUE, No. 6.
- EXTENSION OF TIME TO APPEAL.**
See PRACTICE, No. 3.
- EYE-GLASSES.**
See PATENTS, No. 2.
- FAILURE OF APPELLANT TO SHOW**
THAT DEDUCTIONS CLAIMED
HAD BEEN "WHOLLY, EXCLU-
SIVELY AND NECESSARILY LAID
OUT OR EXPENDED TO EARN
THE INCOME".
See REVENUE, No. 5.
- FAILURE OF SHIP TO COMPLY**
WITH REGULATIONS GOVERN-
ING OPERATION OF NARROWS
BRIDGE AT VANCOUVER RE-
QUIRING SHIP TO "REMAIN
AT A SAFE DISTANCE" UNTIL
GREEN LIGHT APPEARS.
See SHIPPING, No. 4.
- FAILURE OF SUPPLIANT TO ASCER-**
TAIN CONDITIONS AT LANDING
FIELD BEFORE LANDING
PLANE.
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- FAILURE TO FILE PROPER RE-**
TURNS.
See REVENUE, No. 1.
- FAILURE TO PROVE THAT WORD**
HAS BECOME RECOGNIZED
"GENERALLY" BY CANADIAN
DEALERS AS ATTACHING RE-
SPONSIBILITY TO THE OWN-
ERS.
See TRADE MARK, No. 3.
- FAILURE TO REDUCE SPEED**
WHEN MADE AWARE OF EACH
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- FEE FOR CALL TO THE BAR AND**
ADMISSION AS SOLICITOR IN
ONTARIO NOT DEDUCTIBLE.
See REVENUE, No. 14.
- "FINAL AND CONCLUSIVE".**
See REVENUE, No. 2.
- "FOOTGLUV".**
See TRADE MARK, Nos. 1 and 2.
- FOREIGN EXCHANGE CONTROL**
ACT, STATUTES OF CANADA
1946, C. 53, S. 22(1).
See CROWN, No. 2.
- FOREIGN SHIP.**
See SHIPPING, No. 10.
- FORFEITURE.**
See CROWN, Nos. 3 AND 6.
REVENUE, No. 10.
- "FORTHWITH DECLARE TO AN**
AUTHORIZED DEALER".
See CROWN, No. 2.
- "FORTHWITH" IN S. 22 OF THE**
FOREIGN EXCHANGE CON-
TROL ACT MEANS WITHIN A
REASONABLE TIME.
See CROWN, No. 2.
- FULVUE CONSTRUCTION.**
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- GENERAL DENIALS.**
See PRACTICE, No. 2.
- GENERAL RULES AND ORDERS,**
RULES 95 AND 96.
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- GET-UP OF MAGAZINE COMMON**
TO THE TRADE.
See TRADE MARK, No. 3.
- GIFT TAX.**
See REVENUE, No. 9.

GOVERNMENT ANNUITY.*See* REVENUE, No. 13.**GRANT IN FULFILMENT OF DONATION NOT A TRANSFER TO EVADE TAXATION AND NOT SUBJECT TO PROVISIONS OF S. 32(2) OF THE INCOME WAR TAX ACT.***See* REVENUE, No. 9.**INCOME.***See* REVENUE, Nos. 1 AND 3.**"INCOME".***See* REVENUE, No. 11.**"INCOME OR OTHER ESTATE".***See* REVENUE, No. 4.**INCOME TAX***See* REVENUE, Nos. 1, 3, 9, 11, 13 AND 14.**INCOME WAR TAX ACT, R.S.C. 1927, C. 97.***See* REVENUE, No. 3.**INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SS. 2(H), 3(1)(F), 5(1)(A), 33(1), 36(2), 77(1)(C), 77(2).***See* REVENUE, No. 11.**INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SS. 3, 6(A), 6(B).***See* REVENUE, No. 14.**INCOME WAR TAX ACT, R.S.C. 1927, C. 97, S. 5(I)(K).***See* REVENUE, No. 13.**INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SS. 6(1)(A), 47, 92(3).***See* REVENUE, No. 5.**INCOME WAR TAX ACT, R.S.C. 1927, C. 97, SS. 32(2), 88.***See* REVENUE, No. 9.**INCOME WAR TAX ACT, R.S.C. 1927, C. 97, S. 47.***See* REVENUE, No. 1.**INDIAN ACT, R.S.C. 1906, C. 81, S. 51.***See* CROWN, No. 7.**INDIAN ACT, R.S.C. 1906, C. 81, SS. 51 AND 64.***See* CROWN, No. 4.**INFORMATION.***See* CROWN, Nos. 2, 3 AND 6.**INFRINGEMENT.***See* COPYRIGHT, Nos. 1 AND 2.
TRADE MARK, No. 3.**"INFRINGEMENT".***See* COPYRIGHT, No. 2.**INTENTION OR PURPOSE OF OWNER OR DRIVER OF VEHICLE IN TRANSPORTING ILLICIT SPIRITS NEED NOT BE ESTABLISHED BY CROWN OFFICERS.***See* CROWN, No. 6.**INTENTION TO ABANDON TRADE MARK "SHUGLOV" NOT ESTABLISHED.***See* TRADE MARK, No. 1.**"IRON MAN".***See* TRADE MARK, No. 5.**IT IS NOT NECESSARY TO BE THE OWNER OF A REGISTERED TRADE MARK IN CANADA TO BE A "PERSON INTERESTED" WITHIN S. 2(1) OF THE ACT.***See* TRADE MARK, No. 4.**LEASE INVALID WITHOUT AUTHORIZING ORDER IN COUNCIL.***See* CROWN, No. 4.**LEASE OF SURRENDERED INDIAN RESERVE LANDS NOT VALID WITHOUT DIRECTION OF GOVERNOR IN COUNCIL.***See* CROWN, No. 7.**LIABILITY AT COMMON LAW.***See* SHIPPING, No. 4.**LIABILITY FOR DUMPING INJURIOUS SUBSTANCE IN NAVIGABLE WATERS.***See* SHIPPING, No. 8.**LIABILITY FOR TAX.***See* REVENUE, No. 12.**LIABILITY OF CROWN NOT TO BE DETERMINED ON BASIS OF CONJECTURE.***See* CROWN, No. 5.**"LIFE ESTATE"***See* REVENUE, No. 4.**LOSS DUE TO FAILURE ON PART OF APPELLANT TO TRANSSHIP GOODS OR CHARTER OTHER VESSELS.***See* SHIPPING, No. 6.**MARK LACKING REGISTRABILITY EXPUNGED FROM THE REGISTER.***See* TRADE MARK, No. 3.**MARRIAGE CONTRACT WHEREIN SEPARATION AS TO PROPERTY IS STIPULATED.***See* REVENUE No. 9.

- MEASURE OF COMPENSATION SUCH FAIR AND REASONABLE PRICE OR CONSIDERATION AS WOULD BE ARRIVED AT BETWEEN WILLING LICENSOR AND WILLING LICENSEE BARGAINING ON EQUAL TERMS.**
See PATENTS, No. 1.
- METHOD OF VALUING AN "ANNUITY, TERM OF YEARS, LIFE ESTATE, INCOME OR OTHER ESTATE" IN RESPECT OF WHICH DUTY IS PAYABLE.**
See REVENUE, No. 4.
- MOTION FOR DECLARATION UNDER S. 29 OF THE UNFAIR COMPETITION ACT, 1932, DISMISSED.**
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- MOTION FOR DISMISSAL OF ACTION ALLOWED.**
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- NEGLIGENCE OF OFFICER OR SERVANT OF CROWN NOT TO BE PRESUMED.**
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- NO COPYRIGHT IN ARRANGEMENT, SYSTEM, SCHEME OR METHOD.**
See COPYRIGHT, No. 1.
- NO COPYRIGHT IN IDEAS.**
See COPYRIGHT, No. 1.
- NO DECLARATION OF FORFEITURE.**
See CROWN, No. 2.
- NO DUTY ON CROWN TO EXPLAIN PRESENCE OF BOMB.**
See CROWN, No. 5.
- NO ESTOPPEL AGAINST THE CROWN HEREIN.**
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- NO ESTOPPEL TO DEFEAT EXPRESS REQUIREMENTS OF STATUTE.**
See CROWN, No. 7.
- NO INTEREST AGAINST CROWN UNLESS UNDER STATUTE OR CONTRACT.**
See PATENTS, No. 1.
- NO RECOVERY AGAINST THE CROWN.**
See CROWN, No. 1.
- NON-COMPLIANCE WITH REQUIREMENTS OF ACT.**
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- OFFER OF A GRANT OR GIFT OF A SUBSIDY BY THE BOARD IS NOT AN OFFER ACCEPTABLE BY PERFORMANCE TO CREATE A CONTRACT.**
See CROWN, No. 1.
- ONUS OF PROOF ON SUPPLIANT.**
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- ONUS ON APPELLANT.**
See REVENUE, No. 1.
- ONUS ON APPELLANT TO ESTABLISH UNDER WHICH CLAUSE OF S. 5(3) OF THE ACT THE MINISTER WAS SATISFIED THAT EXCESSIVE TAXATION MIGHT RESULT.**
See REVENUE, No. 2.
- ONUS ON APPELLANT TO PROVE EXPENSES CLAIMED AS DEDUCTIBLE.**
See REVENUE, No. 5.
- ONUS ON APPELLANT TO SHOW NO REASONABLE PROBABILITY OF CONFUSION.**
See TRADE MARK, No. 5.
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- OPHTHALMIC MOUNTINGS.**
See PATENTS, No. 3.
- ORDERS IN COUNCIL, P.C. 6982, DATED DECEMBER 4, 1940, P.C. 11081, DATED DECEMBER 8, 1942, AND P.C. 449, DATED JANUARY 24, 1944.**
See PATENTS, No. 1.
- OWNERSHIP IN TRADE MARK CREATED BY ITS ADOPTION AND ITS USE.**
See TRADE MARK, No. 2.
- PARTIAL RELIEF UNDER S. 169(A) OF THE ACT NOT AVAILABLE TO CLAIMANT IN WHOSE POSSESSION VEHICLE WAS SEIZED.**
See CROWN, No. 6.
- PASSING OFF.**
*See COPYRIGHT, No. 2.
TRADE MARK, No. 3.*
- PATENTS.**
1. ACTION BY CROWN FOR DECLARATION THAT PATENT INVALID. Nos. 2 AND 3.
 2. ADVANTAGES OF INVENTION NEED NOT BE DISCLOSED. No. 3.
 3. ANTICIPATION OF INVENTION BY PRIOR PUBLICATION. Nos. 2 AND 3.

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4. ANTICIPATION OF INVENTION BY PRIOR USER. No. 3.
5. APPELLATE JURISDICTION OF COURT UNDER ORDER IN COUNCIL P.C. 11081 OF DECEMBER 8, 1942, NOT LIMITED TO QUESTIONS OF LAW. No. 1.
6. COMBINATION OF TEMPLES CONNECTED ABOVE HORIZONTAL CENTRE LINE OF LENSES AND NOSE PADS CONNECTED BELOW IT. No. 3.
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8. ESSENTIALS OF COMBINATION INVENTION. No. 3.
9. EVIDENCE OF COMMERCIAL SUCCESS COUPLED WITH EVIDENCE OF A PROBLEM AND ITS SOLUTION STRONG EVIDENCE OF INVENTION. NOS. 2 AND 3.
10. EYE-GLASSES. No. 2.
11. FULVUE CONSTRUCTION. No. 3.
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16. PRESUMPTION OF VALIDITY IN FAVOUR OF PATENT. No. 2.
17. PRIOR PUBLICATION TO BE READ IN THE LIGHT OF COMMON KNOWLEDGE. No. 2.
18. REASONABLE COMPENSATION FOR USE OF INVENTION. No. 1.
19. THE PATENT ACT, 1935, S. OF C. 1935, c. 32, s. 19. No. 1.
20. THE PATENT ACT, 1935, S. OF C. 1935, c. 32, s. 60(1). Nos. 2 AND 3.
21. TWO-POINT NU-MONT MOUNTING. No. 2.
22. VALUE OF USE OF INVENTION A MATTER OF EVIDENCE. No. 1.

PATENTS—Reasonable compensation for use of invention—The Patent Act, 1935, S. of C. 1935, c. 32, s. 19—Orders in Council P.C. 6982, dated December 4, 1940, P.C. 11081, dated December 8, 1942, and P.C. 449, dated January 24, 1944—Value of use of inventions a matter of evidence—Measure of compensation such fair and reasonable price or consideration as would be arrived at between willing licensor and willing licensee bargaining on equal terms—No interest against Crown unless under statute or

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contract—Appellate jurisdiction of Court under Order in Council P.C. 11081 of December 8, 1942, not limited to questions of law.—The respondent Aluminum Company of Canada Limited (Alcan) was a producer of aluminum for war purposes for His Majesty the production of which involved the use of 5 inventions owned by a Norwegian company (Elektrokemisk). On the invasion of Norway by the German forces it became proscribed territory and the patents were vested in the appellant as Custodian. Subsequently the Minister of Munitions and Supply gave the respondent Alcan a letter of indemnity under Order in Council P.C. 11081 of December 8, 1942. The appellant then brought proceedings before the Commissioner of Patents for reasonable compensation for the use of the inventions and then appealed from the Commissioner's decision. *Held*: That the compensation payable by His Majesty under Order in Council P.C. 11081 of December 8, 1942, is for the use of the inventions in the production of aluminum for war purposes. 2. That the value of an invention for the purpose of determining what compensation is reasonable for its use cannot be estimated by what is claimed for it in the patent. Its commercial value is a matter not of construction of the claims but of evidence. 3. That when there is no dispute as to the validity of a patent or its user by or for His Majesty for war purposes the reasonable compensation payable by His Majesty under Order in Council P.C. 11081 of December 8, 1942, for the use of the inventions is such fair and reasonable price or consideration as would be arrived at between a willing licensor and a willing licensee bargaining on equal terms. *The King v. Irving Air Chute Inc.* (1949) S.C.R. 613 followed. 4. That the revised royalty agreed upon between Alcan and Elektrokemisk under the first amending agreement was fair and reasonable and ought to have been adopted by the Commissioner as the measure of the reasonable compensation payable by His Majesty, subject to the ceiling agreed upon in the second amending agreement. 5. That interest may not be allowed against the Crown unless there is a statute or a contract providing for it. 6. That the appellate jurisdiction of the Court under Order in Council P.C. 11081 of December 8, 1942, is not limited to questions of law, and that it is the duty of the Court when it finds that the Commissioner's decision was based on wrong principles to determine itself the compensation that is reasonable, when there is evidence from which it can properly do so, rather than put the parties to the expense and delay of sending the matter back to the Commissioner. THE HONOURABLE THE SECRETARY OF STATE OF CANADA v. HIS MAJESTY THE KING AND ALUMINUM COMPANY OF CANADA LIMITED..... 33

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2.—*Action by Crown for declaration that patent invalid—The Patent Act, 1935, S. of C. 1935, c. 32, s. 60(1)—Eye-glasses—Two-point Nu-mont mounting—Anticipation of invention by prior publication—Prior publication to be read in the light of common knowledge—Presumption of validity in favour of patent—Basis of putting item into practice not evidence of lack of invention—Evidence of commercial success coupled with evidence of a problem and its solution strong evidence of invention.* The Crown brought action under section 60(1) of The Patent Act, 1935, for a declaration that the defendant's patent covering an invention relating to a mounting means for the temples of spectacles was invalid for lack of novelty and lack of subject matter. *Held:* That lack of novelty and lack of subject matter as grounds for holding a patent invalid are closely related, but are not the same. 2. That in order that an invention should be held to have been anticipated by a prior publication, the information as to the alleged invention given by the prior publication must, for the purposes of practical utility, be equal to that given by the subsequent patent. Whatever is essential to the invention or necessary or material for its practical working and real utility must be found substantially in the prior publication. It is not enough to prove that an apparatus described in it could have been used to produce a particular result. There must be clear directions so to use it. Nor is it sufficient to show that it contained suggestions which, taken with other suggestions, might be shown to foreshadow the invention or important steps in it. There must be more than the nucleus of an idea which, in the light of subsequent experience, could be looked on as being the beginning of a new development. The whole invention must be shown to have been published with all the directions necessary to instruct the public how to put it into practice. It must be so presented to the public that no subsequent person could claim it as his own. The test is whether the man attacking the problem finds what he wants as a solution in the prior so-called anticipations. 3. That in considering whether an invention was anticipated by a prior patent, the prior patent must be read in the light of the common knowledge which a person skilled in the art would have had immediately prior to the alleged invention. 4. That there is a presumption of validity in favour of the patent by reason of its issue and the onus of proving that it is invalid for lack of invention is on the person attacking it. 5. That invention may be present notwithstanding the fact that there was no difficulty in putting the idea into effect once it had been conceived. *Hickton's Patent Syndicate v. Patents and Machine Improvements Company Ltd.* (1909) 26 R.P.C. 339 at 347 followed. 6. That evidence of the practical utility and commercial success of

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an invention coupled with evidence of the existence of a problem and its solution is strong evidence of invention. *Non-Drip Measure Coy., Ltd. v. Stranger's Ltd. et al* (1943) 60 R.P.C. 135 at 142 followed. 7. That if there were any doubt as to the validity of the patent by reason of lack of invention the commercial success of the defendant's mountings and its substantial displacement of mountings previously in use would be sufficient to turn the scale in its favour. *HIS MAJESTY THE KING v. UHLEMANN OPTICAL COMPANY*..... 142

3.—*Action by Crown for declaration that patent invalid—The Patent Act, 1935, S. of C., 1935, c. 32, s. 60(1)—Ophthalmic mountings—Fulvrie construction—Combination of temples connected above horizontal centre line of lenses and nose pads connected below it—Anticipation of invention by prior publication—Anticipation of invention by prior user—Essentials of combination invention—Advantages of invention need not be disclosed—Evidence of commercial success coupled with evidence of a problem and its solution strong evidence of invention.* The Crown brought action under section 60(1) of The Patent Act, 1935, for a declaration that the defendants' patent covering improvements in ophthalmic mountings was invalid for lack of novelty, and lack of subject matter. *Held:* That there was no anticipation of the invention, either by a prior publication or by prior user. 2. That it is not necessary to the validity of a combination invention that its elements should be new. If the combination is the invention, then it is immaterial that the elements are old. 3. That it is essential to the validity of a patent for a combination invention, apart from considerations of novelty and inventive ingenuity, that the combination should lead to a unitary result rather than a succession of results, that such result should be different from the sum of the results of the elements and that it should be simple and not complex. The elements may interact with one another provided they combine for a unitary and simple result that is not attributable to any of the elements but flows from the combination itself and would not be possible without it. 4. That an inventor need not state the effect or advantages of his invention if he describes his invention so as to produce it. If he has adequately defined his invention he is entitled to its benefit even if he does not fully appreciate or realize the advantages that flow from it or cannot give the specific reasons for them. 5. That the practical utility and commercial success of a new device may be material in determining whether the new result produced by it was an obvious workshop improvement or involved the exercise of inventive ingenuity. Commercial success by itself, without the solution of a difficulty, is not sufficient to establish subject matter. But when it is found that there has been a

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problem calling for solution and that the new device has solved it then its practical utility and commercial success in displacing alternative devices should be considered strong evidence that its production required the taking of an inventive step and that the applicant for the patent was the first to take it. *Samuel Parkes & Co. Ltd. v. Cocker Brothers Ltd.* (1929) 46 R.P.C. 241 at 248 and *Non-Drip Measure Coy., Ltd., v. Stranger's Ltd. et al.* (1943) 60 R.P.C. 135 at 142 followed. HIS MAJESTY THE KING v. AMERICAN OPTICAL COMPANY *et al.*..... 344

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See REVENUE, No. 3.

PENALTY ADDED BY MINISTER FOR FAILURE TO FILE ESTATE INCOME TAX RETURN WITHIN DELAY.

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"PERSON".

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See CROWN, Nos. 1, 5, 8 AND 9.

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See COPYRIGHT, No. 1.

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PLEADINGS.

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POSITION OF THE APPELLANT DURING THE STANDARD PERIOD CONSIDERED IN FIXING STANDARD PROFITS AND NOT AS IT WAS AFTER CAPITAL REDUCED.

See REVENUE, No. 2.

POWER TO ADJUST STANDARD PROFITS AS CONFERRED BY S. 4 OF THE ACT APPLIES TO ALL STANDARD PROFITS HOWEVER ASCERTAINED.

See REVENUE, No. 2.

POWERS TO RELIEVE FROM FORFEITURE RESERVED TO GOVERNOR IN COUNCIL UNDER THE CONSOLIDATED REVENUE AND AUDIT ACT, S. OF C., 1931, C. 27, S. 33.

See CROWN, No. 6.

PRACTICE.

1. COSTS. No. 1.
2. COSTS TO BE TAXED ON THE BASIS OF TARIFF IN FORCE AT TIME OF DISCONTINUANCE OF ACTION. No. 1.
3. DISBURSEMENTS PROPERLY INCURRED IN PREPARATION FOR TRIAL ALLOWED. No. 1.
4. DISCONTINUANCE OF ACTION BY PLAINTIFF. No. 1.
5. EVASIVE DENIALS. No. 2.
6. EXTENSION OF TIME TO APPEAL. No. 3.
7. GENERAL DENIALS. No. 2.
8. GENERAL RULES AND ORDERS, RULES 95 AND 96. No. 2.
9. PLEADINGS. No. 2.
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11. SOLICITOR'S ERROR. No. 3.
12. SPECIFIC DENIALS. No. 2.
13. SUFFICIENT GROUNDS MUST BE SHOWN. No. 3.
14. THE EXCHEQUER COURT ACT, R.S.C. 1927, c. 34, s. 82 AS AMENDED BY GEO. VI, c. 5, s. 2. No. 3.

PRACTICE—Costs—Discontinuance of action by plaintiff—Rules 107 and 263—Costs to be taxed on the basis of tariff in force at time of discontinuance of action—Disbursement properly incurred in preparation for trial allowed. Held: That where an action has been discontinued the defendant's right to tax its costs arose upon the filing of the notice of discontinuance and that right was to tax such costs upon the basis of the tariff then in force, and it is not open to the taxing officer to take into consideration an amendment to the Rules made on a later date, unless such amendment is clearly retroactive in its terms. 2. That a disbursement of a reasonable amount incurred for services rendered in preparation for trial and not done prematurely or from an excess of caution is a proper item for taxation on discontinuance as well as after trial. *GAR WOOD INDUSTRIES INC. v. SICARD LIMITEE*..... 136

2.—*General Rules and Orders, Rules 95 and 96—General Denials—Evasive denials—Specific denials—Pleadings. Held:* That in

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this case these paragraphs of the statement of defence cannot be deemed general denials of the facts alleged in the statement of claim. They are specific in denying each and every one of the allegations referred to in the specifically named paragraphs of the statement of claim. The appellant is not left in doubt as to what is meant by these clauses in the defence. They mean that he will be required to prove each statement of fact which is so denied. **BERT W. WOON v. MINISTER OF NATIONAL REVENUE..... 327**

3.—*Extension of time to appeal—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 32 as amended by 13 Geo. VI, c. 5, s. 2—Sufficient grounds must be shown—Solicitor's error. Held: That a solicitor's error is not a valid and sufficient ground to warrant an extension of time to appeal. But in view of the implicit wish of the Supreme Court of Canada to have the plaintiff join in the appeal in order to give the Supreme Court jurisdiction to enter a judgment against the defendant, National Harbours Board, in favour of plaintiff, in the event it found that the damages were caused wholly or partially by the said defendant, the motion is granted. GREATER VANCOUVER WATER DISTRICT v. THE SHIP Sparrows Point AND NATIONAL HARBOURS BOARD..... 464*

PRESUMPTION OF VALIDITY IN FAVOR OF PATENT.

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REGISTRATION OF DEFENDANT'S MARK OBTAINED BY MEANS OF A FALSE REPRESENTATION EXPUNGED.

See COPYRIGHT, No. 2.

REGISTRATION OF A TRADE MARK ADOPTED IN CONTRAVENTION OF S. 3(B) OF THE ACT INVALID.

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1. ADMISSIBILITY OF EVIDENCE. No. 12.
2. ADVANCING DATE OF PAYMENT OF ANNUITY DOES NOT INCREASE THE AMOUNT PAID. No. 13.
3. ALLOWANCE MADE BY MINISTER FOR EXHAUSTION "JUST AND FAIR". No. 11.
4. AMENDMENT DEALING WITH PROCEDURAL MATTER IS RETROACTIVE. No. 12.
5. AMENDMENT ONE OF PROCEDURE AND APPLICABLE TO PENDING ACTION. No. 7.
6. "AMOUNT OF THE ANNUITY SPECIFIED IN THE CONTRACT." No. 13.
7. AMOUNT OF STANDARD PROFIT FIXED BY S. 15A OF THE ACT. No. 8.
8. AN ACT TO AMEND THE INCOME WAR TAX ACT, 1917, ST. OF C. 1926, c. 10, s. 7. No. 9.
9. "ANNUITY" MEANS THE ANNUAL AMOUNT TO BE PAID UNDER THE ANNUITY CONTRACT. No. 13.
10. APPEAL ALLOWED. No. 9.
11. APPEAL ALLOWED IN PART. No. 11.
12. APPEAL DISMISSED. Nos. 1, 4, 5, 6, 8 AND 13.
13. APPEALS DISMISSED. No. 2.
14. APPELLANT ASSESSED ON BASIS OF NET WORTH OVER A PERIOD OF YEARS. No. 1.
15. APPELLANT LIFE BENEFICIARY OF ESTATE. No. 3.

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16. ARTS. 755, 819, 821, 1257, 1422 cc. No. 9.
17. ASSESSMENT. No. 12.
18. BURDEN OF PROOF. No. 10.
19. CLAIM DISMISSED. No. 10.
20. CLAIMANT ENTITLED TO SUCCEED IF ON ALL THE EVIDENCE HE SHOWS THERE IS PREPONDERANCE OF PROBABILITY IN THAT WHICH HE IS CALLED ON TO ESTABLISH. No. 10.
21. CONTROLLED COMPANY. No. 8.
22. DATE OF COMMENCEMENT OF PAYMENT OF ANNUITY ADVANCED. No. 13.
23. DEDUCTIBILITY OF PROPER DISBURSEMENTS AND EXPENSES INHERENT IN CONCEPT OF ANNUAL NET PROFIT OR GAIN. No. 14.
24. DEDUCTIONS. No. 5.
25. DEPRECIATION CLAIMED BY EXECUTORS PAID TO APPELLANT IS INCOME OF APPELLANT. No. 3.
26. DEVISE TO THE GOVERNORS OF THE UNIVERSITY OF TORONTO IS NOT ONE WITHIN s. 7(1)(e) OF DOMINION SUCCESSION DUTY ACT. No. 6.
27. "DOCUMENT" REFERRED TO IN s. 108(8) OF THE ACT. No. 7.
28. DOMINION SUCCESSION DUTY ACT, S. OF C. 1940-41, c. 14, ss. 2(m), 7(1)(d)(e). No. 6.
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30. DONATION INTER VIVOS AND IRREVOCABLE BY A FUTURE CONSORT TO THE OTHER. No. 9.
31. EVIDENCE OF APPELLANT UNSATISFACTORY. No. 1.
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33. EXCESS PROFITS. No. 2.
34. EXCESS PROFITS TAX ACT, 1940, s. 2(1)(i), 4(1)(b)(i), 4(1)(b)(iii), 5(3), 5(5). No. 2.
35. EXCESS PROFITS TAX ACT, 1940, s. 15A. No. 8.
36. EXCISE ACT, STATUTES OF CANADA, 1934, c. 52, ss. 112(1)(2), 169. No. 10.
37. EXCISE TAX. No. 7.
38. EXCISE TAX ACT, R.S.C. 1927, c. 179, s. 86, 108(8 AND 9), 113(8). No. 12.
39. EXCISE TAX ACT, R.S.C. 1927, c. 179, ss. 101(a), 108(1)(8) AND (9), 113(a AND b). No. 7.
40. EXEMPTION FROM DUTY "WHERE THE SUCCESSOR IS THE DOMINION OF CANADA OR ANY PROVINCE OR POLITICAL SUBDIVISION THEREOF". No. 6.
41. FAILURE OF APPELLANT TO SHOW THAT DEDUCTIONS CLAIMED HAD BEEN "WHOLLY, EXCLUSIVELY AND NECESSARILY LAID OUT OR EXPENDED TO EARN THE INCOME". No. 5.

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43. FEE FOR CALL TO THE BAR AND ADMISSION AS SOLICITOR IN ONTARIO NOT DEDUCTIBLE. No. 14.
44. "FINAL AND CONCLUSIVE." No. 2.
45. FORFEITURE. No. 10.
46. GIFT TAX. No. 9.
47. GOVERNMENT ANNUITY. No. 13.
48. GRANT IN FULFILMENT OF DONATION NOT A TRANSFER TO EVADE TAXATION AND NOT SUBJECT TO PROVISIONS OF s. 32(2) OF THE INCOME WAR TAX ACT. No. 9.
49. INCOME. NOS. 1 AND 3.
50. "INCOME." No. 11.
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52. INCOME TAX. NOS. 1, 3, 9, 11, 13 AND 14.
53. INCOME WAR TAX ACT, R.S.C. 1927, c. 97. No. 3.
54. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 2(h), 3(1)(f), 5(1)(a), 33(1), 36(2), 77(1)(c), 77(2). No. 11.
55. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 3, 6(a), 6(b). No. 14.
56. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, s. 5(i)(k). No. 13.
57. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 6(1)(a), 47, 92(3). No. 5.
58. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, ss. 32(2), 88. No. 9.
59. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, s. 47. No. 1.
60. LIABILITY FOR TAX. No. 12.
61. "LIFE ESTATE". No. 4.
62. MARRIAGE CONTRACT WHEREIN SEPARATION AS TO PROPERTY IS STIPULATED. No. 9.
63. METHOD OF VALUING AN "ANNUITY, TERM OF YEARS, LIFE ESTATE, INCOME OR OTHER ESTATE" IN RESPECT OF WHICH DUTY IS PAYABLE. No. 4.
64. ONUS ON APPELLANT. No. 1.
65. ONUS ON APPELLANT TO ESTABLISH UNDER WHICH CLAUSE OF s. 5(3) OF THE ACT THE MINISTER WAS SATISFIED THAT EXCESSIVE TAXATION MIGHT RESULT. No. 2.
66. ONUS ON APPELLANT TO PROVE EXPENSES CLAIMED AS DEDUCTIBLE. No. 5.
67. ONUS ON CLAIMANT. No. 10.
68. PAYMENT OUT OF CORPUS MAY PROPERLY BE ASSESSABLE INCOME IN HANDS OF RECIPIENT. No. 3.
69. PENALTY ADDED BY MINISTER FOR FAILURE TO FILE ESTATE INCOME TAX RETURN WITHIN DELAY. No. 11.
70. "PERSON". No. 11.

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71. POSITION OF THE APPELLANT DURING THE STANDARD PERIOD CONSIDERED IN FIXING STANDARD PROFITS AND NOT AS IT WAS AFTER CAPITAL REDUCED. No. 2.
72. POWER TO ADJUST STANDARD PROFITS AS CONFERRED BY S. 4 OF THE ACT APPLIES TO ALL STANDARD PROFITS HOWEVER ASCERTAINED. No. 2.
73. "PRODUCTION". No. 11.
74. RECEIPTS EITHER ROYALTIES OR LIKE ROYALTIES. No. 11.
75. REDUCTION IN CAPITAL BY APPELLANT. No. 2.
76. RES JUDICATA. NOS. 10 AND 12.
77. "ROYALTY". No. 11.
78. SALES TAX. No. 12.
79. SECTION 6 TO BE READ WITH SECTION 3. No. 14.
80. STANDARD PROFITS. NOS. 2 AND 8.
81. "SUCCESSION". No. 6.
82. SUCCESSION DUTY. NOS. 4 AND 6.
83. "SUCCESSOR". No. 6.
84. TAXPAYER NOT TO BE ASSESSED FOR AMOUNT OF DEPRECIATION CLAIMED BY EXECUTORS AND WITHHELD BY THEM. No. 3.
85. VALUATION OF INTEREST IN ESTATE. No. 4.
86. WORDS "PRODUCTION OR USE OF ANY REAL OR PERSONAL PROPERTY" IN S. 3(1) (f) OF THE ACT INCLUDE OIL PRODUCED FROM LAND. No. 11.

REVENUE—Income tax—Income—Income War Tax Act, R.S.C. 1927, c. 97, s. 47—Onus on appellant—Evidence of appellant unsatisfactory—Failure to file proper returns—Appellant assessed on basis of net worth over a period of years—Appeal dismissed.—Appellant filed income tax returns for the years 1942 to 1945 inclusive. The returns as filed were not accepted by the respondent and appellant was assessed on the basis of the total taxable increase in worth of the appellant during those years. On appeal to this Court appellant contended that certain items included in the calculation are wrong. *Held:* That the onus is on appellant to establish affirmatively that her taxable income was not that for each of the years for which she was assessed and this she failed to do. 2. That the conduct of the appellant and her agent in failing to produce proper records or accounts to the income tax inspector and in withholding information from him caused the inspector to adopt the "net worth" increase method as a basis for assessments and the appellant having failed to establish that her taxable income for each of the years in question is not that on which she has been assessed the appeal must be dismissed. 3. That the appellant at trial failed to establish her income with proper deductions and allowances by the production of

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records available to her and in the absence of such records the appellant failed to prove that on a proper and complete "net worth" basis the assessments were wrong. **LISUNIA CHERNENKOFF V. MINISTER OF NATIONAL REVENUE**..... 15

2.—*Excess Profits—Standard Profits—Excess Profits Tax Act, 1940, s. 2(1) (i), 4(1) (b) (i), 4(1) (b) (iii), 5(3), 5(5)—"Final and conclusive"—Power to adjust standard profits as conferred by s. 4 of the Act applies to all standard profits however ascertained—Onus on appellant to establish under which clause of s. 5(3) of the Act the Minister was satisfied that excessive taxation might result—Reduction in capital by appellant—Position of the appellant during the standard period considered in fixing standard profits and not as it was after capital reduced—Appeals dismissed.*—In December, 1944, appellant's standard profits were ascertained by the Board of Referees under s. 5(3) of the Excess Profits Tax Act, 1940, and were duly approved by or on behalf of the respondent under s. 5 (5) of the Act. The capital employed by the appellant in its business had, in February, 1944, and since the commencement of the last fiscal period of the appellant in the standard period, been reduced and such reduction had been accompanied by an equivalent reduction in capital stock. Respondent, in 1946 and in 1948 adjusted appellant's standard profits for the fiscal years ending November 30, 1944, and November 30, 1945, and computed the tax payable by appellant accordingly. From these assessments the appellant appealed to this Court. *Held:* That the power to adjust standard profits, as conferred on the respondent by s. 4 of the Act, applies to all standard profits whether ascertained by the Board of Referees or otherwise, subject to the conditions and within the limits therein provided. 2. That the appellant having failed to establish affirmatively under which clause of s. 5(3) of the Act the Minister was satisfied that standard profits ascertained by reference to capital employed would result in the imposition of excessive taxation the Court is unable to determine that in exercising his discretion under s. 4 of the Act the Minister must have reached a conclusion opposed to that which he had reached in considering appellant's application under s. 5 (3).

3. That in ascertaining the standard profits the Board of Referees considered the position of the appellant as it was during the standard period and not as it was after its capital was reduced in 1944 and the appellant had the full benefit of the standard profits so fixed by the Board of Referees from the coming into effect of the Act until 1944 when its capital was reduced and there is nothing to show that that reduction in capital was taken into consideration by the Board of Referees or that

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when the Minister approved of the decision of the Board of Referees he had any knowledge of such reduction in capital. **EAGLE LAKE SAWMILLS LIMITED v. MINISTER OF NATIONAL REVENUE**..... 24

3.—*Income—Income tax—Income War Tax Act, R.S.C. 1927, c. 97—Appellant life beneficiary of estate—Depreciation claimed by executors paid to appellant is income of appellant—Payment out of corpus may properly be assessable income in hands of recipient—Taxpayer not to be assessed for amount of depreciation claimed by executors and withheld by them.* Executors in filing the Income Tax Return for 1938 of an estate claimed depreciation on various assets of the estate in the sum of \$11,468.37. Appellant, the life tenant of the estate, in her Income Tax Return included as revenue from the estate the sum of \$7,189.69. The respondent amended this return by adding thereto the sum of \$11,468.37, claimed as depreciation and assessed appellant accordingly. From this assessment an appeal was taken to this Court. It was shown at the hearing of the appeal that the executors had received in the taxation year the sum of \$18,658.06 and had paid to appellant a total sum of \$14,850 which was \$7,660.31 in excess of the net amount payable to her after deducting depreciation. *Held:* That depreciation claimed by executors in filing an income tax return for an estate but in reality paid to the life beneficiary of that estate is taxable income in the hands of the recipient. 2. That the life beneficiary is not liable for income tax on the amount claimed by executors as depreciation but not paid to the beneficiary. **HELEN COOPER v. MINISTER OF NATIONAL REVENUE** 78

4.—*Succession Duty—Dominion Succession Duty Act, Statutes of Canada 1940-41, ss. 3, 4 and 58, Regulation 19—Valuation of interest in estate—“Life estate”—“Income or other estate”—Method of valuing an “annuity, term of years, life estate, income or other estate” in respect of which duty is payable—Appeal dismissed.*—The appeal is brought by the beneficiaries of the estate of Mary Catherine Fisher, a daughter of the late Charles Woodward. By the terms of Charles Woodward's will, Mary Catherine Fisher became entitled absolutely to a share of the income arising from certain real estate belonging to him. The appeal is concerned with the valuation placed by the respondent on the interest of the deceased Mary Catherine Fisher in that real estate. Appellants contend that this interest should be assessed at its fair market value. *Held:* That Mary Catherine Fisher had acquired a “life estate” or an “income or other estate” which was within the terms of s. 34 of the Dominion Succession Duty Act, Statutes of Canada 1940-41, c. 34, and must be valued accordingly. **CHARLES MCCARROLL SMITH et al. v. MINISTER OF NATIONAL REVENUE**... 104

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5.—*Income War Tax Act, R.S.C. 1927, c. 97, ss. 6(1) (a), 47, 92(3)—Deductions—Onus on appellant to prove expenses claimed as deductible—Failure of appellant to show that deductions claimed had been “wholly, exclusively and necessarily laid out or expended to earn the income”—Appeal dismissed.*—Appellant, a securities salesman, was paid by his employer on a commission basis solely, no allowance being made to him for expenses incurred in the course of his employment. In his income tax return for the taxation year 1945 appellant deducted certain items of expense incurred by him. Respondent, in the absence of vouchers or receipts to establish that the amounts had been expended, disallowed part of the deduction so claimed on the ground that they had not been shown to have been wholly, exclusively and necessarily laid out or expended for the purpose of earning the income within the meaning of s. 6(1) (a) of the Income War Tax Act, and assessed appellant accordingly. Appellant appealed to this Court. *Held:* That the onus is on the appellant to show by acceptable evidence that he did expend the sums he claims as deductions and since appellant has not satisfied that onus the appeal is dismissed.—**WILLIAM KEPPIE MURRAY v. MINISTER OF NATIONAL REVENUE**... 110

6.—*Succession Duty—Dominion Succession Duty Act, S. of C. 1940-41, c. 14, ss. 2(m), 7(1) (d) (e)—“Succession”—“Successor”—Exemption from duty “where the successor is the Dominion of Canada or any province or political subdivision thereof”—Devise to the governors of the University of Toronto is not one within s. 7(1) (e) of Dominion Succession Duty Act—Appeal dismissed.* *Held:* That a bequest to the governors of the University of Toronto is not one to the Province of Ontario or a political subdivision thereof and consequently does not come within the exemption from succession duty provided for in s. 7(1) (e) of the Dominion Succession Duty Act, Statutes of Canada 1940-41, c. 14; the governors are not agents or servants of the Crown. **THE GOVERNORS OF THE UNIVERSITY OF TORONTO v. MINISTER OF NATIONAL REVENUE**..... 117

7.—*Excise Tax—Excise Tax Act, R.S.C. 1927, c. 197, ss. 101 (a), 108 (1) (8) and (9), 113 (8) (a and b)—Evidence of Minister's signature—“Document” referred to in s. 108 (8) of the Act—Amendment one of procedure and applicable to pending action.* *Held:* That a document in accordance with s. 108 (8) of the Excise Tax Act setting out the opinion of the Minister of National Revenue that a person required to do so has failed to keep records or books of account and making an assessment against such person, and having attached thereto the Certificate of the Deputy Minister as required by s. 108 (9) of the Act, is proper evidence of the opinion formed by the

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Minister and of his assessment. 2. That the document referred to in s. 108 (8) of the Excise Tax Act includes the signature of the Minister, and when certified by the Deputy Minister is evidence of such signature in the manner directed by the Statute. 3. That the amendment to the Act as set out in ss. 8 and 9 of s. 103 deals with procedure and applies to an action begun before and pending at the time the amendment was enacted. HIS MAJESTY THE KING v. FRANK H. ALLISON. . . . 269

8.—*Excess Profits Tax Act, 1940, s. 15A—Standard profits—Controlled company—Amount of standard profit fixed by s. 15A of the Act—Appeal dismissed. Held:* That the standard profit of a controlled company is fixed at an amount not exceeding \$5,000 by s. 15A of the Excess Profits Tax Act, 1940, notwithstanding that such company may have been formerly granted a greater standard profit. ROYAL CITY SAWMILLS LIMITED v. MINISTER OF NATIONAL REVENUE. 276

9.—*Income Tax—Gift Tax—An Act to amend the Income War Tax Act, 1917, St. of C. 1926, c. 10, s. 7—Income War Tax Act R.S.C. 1927, c. 97, ss. 32(2), 88—Marriage contract wherein separation as to property is stipulated—Donation inter vivos and irrevocable by a future consort to the other—Arts. 755, 819, 821, 1257, 1422 cc.—Grant in fulfilment of donation not a transfer to evade taxation and not subject to provisions of s. 32(2) of the Income War Tax Act—Appeal allowed.—By his marriage contract entered into on June 7, 1911, wherein separation as to property was stipulated, D., domiciled in the Province of Quebec, gave to his future wife, by donation *inter vivos* and irrevocable, a sum of \$10,000 and as security for said sum he mortgaged and hypothecated an immovable property. D. paid his wife a first instalment and in 1943 the balance, namely \$9,000 by handing over to her Dominion of Canada Victory bonds and Province of Quebec bonds and obtained from her a release and discharge of the mortgage. D. was assessed for the year 1943 in respect of income derived from the said bonds and in respect of gift tax, and from such assessments he appealed. *Held:* That the grant made by Dobell to his future wife was not a transfer to evade taxation: it is not subject to the provisions of s. 32(2) of the Income War Tax Act, R.S.C. 1927, c. 97. The grant was effected in fulfilment of the donation which Dobell had made and had the right to make to his wife by his marriage contract. *Molson et al v. The Minister of National Revenue* (1937) Ex. C.R. 55 followed. *David Fasken Estate v. The Minister of National Revenue* (1948) Ex. C.R. disapproved. ALFRED CURZON DOBELL v. MINISTER OF NATIONAL REVENUE. 315*

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10.—*Excise Act, Statutes of Canada, 1934, c. 52, ss. 112(1) (2), 169—Forfeiture—Res judicata—Burden of proof—Onus on claimant—Claimant entitled to succeed if on all the evidence he shows there is a preponderance of probability in that which he is called on to establish—Claim dismissed. Held:* That the quashing by the Manitoba Court of Appeal of a conviction by the city magistrate that the claimant had had liquor unlawfully in his possession is not *res judicata* in his favor of the fact that his automobile had not been unlawfully used for transportation of liquor contrary to the Excise Act. 2. That under s. 112 of the Excise Act the onus is on the claimant and he is entitled to succeed if upon all the evidence he has satisfied the Court that there is a preponderance of probability in that which he is called upon to establish; the claimant having failed to do so his claim must be dismissed JOHN KOSCHUK v. HIS MAJESTY THE KING. 332

11.—*Income Tax—Income War Tax Act, R.S.C. 1927, c. 97, ss. 2(h), 3(1) (f), 5(1) (a), 33(1), 36(2), 77(1) (c), 77(2)—“Income”—“Royalty”—“Production”—Receipts either royalties—Words “production or use of any real or personal property” in s. 3(1) (f) of the Act include oil produced from land—Allowance made by Minister for exhaustion “just and fair”—Penalty added by Minister for failure to file estate income tax return within delay—“Person”—Appeal allowed in part.—Section 3(1) (f) of the Income Tax Act reads as follows: For the purposes of this Act “income” . . . shall include . . . (f) rents, royalties, annuities or other like periodical receipts which depend upon the production or use of any real or personal property, notwithstanding that the same are payable on account of the use or sale of any such property. As executrix of the will of her late mother, Annie McDougall, who owned certain lands in the province of Alberta, appellant transferred all hydro carbons (oil and gas) except coal in said lands and the right to work the same to a company in consideration of a sum in cash and the execution of an incumbrance to secure to and for her benefit a further sum of \$60,000 payable out of 10 per cent of oil produced from the land with the option, however, to the company to pay her the cash market value of such production. The company made certain payments in the years 1944 and 1945 which appellant did not include in the estate returns for those years. Respondent, considering these payments to be “income” within s. 3(1) (f) of the Act, allowed a deduction of 25 per cent for exhaustion and assessed the balance to tax, adding a penalty of \$500 to the assessment for the taxation year 1945 because the appellant was late in filing the return. *Held:* That the payments received by appellant were like royalties, if not royalties themselves, and they come within that part of subsec-*

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tion (f) of the Act. 2. That the words "production or use of any real personal property" in the same subsection, include the bringing forth or yielding up of hydro carbons from an oil well and that the payments so received fall also within that part of the subsection. 3. That appellant has not established that the allowance of 25 per cent for exhaustion made by the Minister is other than a "just and fair" one. 4. That Parliament in enacting s. 77(2) of the Income War Tax Act intended to provide special and distinct penalties for the classes of persons described in ss. 36 to 38 of the Act and that they should not be liable under any other part of s. 77. The intention is so manifest that it cannot be overridden merely by the broad definition of "person" contained in the Act. *MAY McDUGALL ROSS v. MINISTER OF NATIONAL REVENUE*..... 411

12.—*Sales Tax—Excise Tax Act R.S.C. 1927, c. 179, s. 86, 108 (8 and 9), 113(8)*—*Assessment—Amendment dealing with procedural matter is retroactive—Res judicata—Admissibility of evidence—Liability for tax.*—The action is one for sales tax. Plaintiff's evidence consisted *inter alia* of exhibit 1 being an assessment dated September 18, 1948, made by the Minister of National Revenue under the provisions of s. 113(8) of the Excise Tax Act and the certificate of the Deputy Minister dated August 31, 1948, made under s. 108(9) of the Act. Defendant contended that exhibit 1 was inadmissible because the liability of defendant for sales tax, if any, had arisen before s. 108(8 and 9) of the Act came into effect and further that plaintiff was estopped from alleging exhibit 1 was an assessment by virtue of a judgment of the Court of Appeal of the Province of British Columbia which was *res judicata* and binding on this Court. The judgment dealt with the prosecution of the defendant in the Police Court at Vancouver, B.C., for the recovery of penalties incurred for violation of the Excise Tax Act. *Held*: That s. 108 (8 and 9) of the Excise Tax Act R.S.C. 1927, c. 179, as enacted by 13 George VI, c. 21, s. 8, relates to a matter of procedure and is retroactive. *Rex v. Kumps* (1931) 39 M.R. 445 and *The King v. Allison* (1950) Ex. C.R. 269. 2. That where a plea of *res judicata* is raised it is necessary for the Court to have recourse to the record and the judgment and such pleadings and other proceedings as tend to show what particular questions of law or issues of fact must necessarily have been determined by the tribunal of first instance in adjudicating the matter before it. 3. That the plea of *res judicata* fails because there has been no adjudication upon the merits of the question now before this Court. 4. That the assessment made by the Minister and certificate by the Deputy Minister are admissible in evidence and the assessment purported to have been made by the docu-

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ment is in fact the assessment. *HIS MAJESTY THE KING v. PACIFIC BEDDING COMPANY LIMITED*..... 456

13.—*Income Tax—Government Annuity—Income War Tax Act, R.S.C. 1927, c. 97, s. 5(i) (k)*—*Date of commencement of payment of annuity advanced*—*"Amount of the annuity specified in the contract"*—*"Annuity" means the annual amount to be paid under the annuity contract—Advancing date of payment of annuity does not increase the amount paid—Appeal dismissed.*—On March 24, 1936, respondent was issued a Canadian Government annuity providing for annual payments by him for 18 years after which he was to receive an annuity of \$1,200 per year. Pursuant to certain terms and conditions in the original contract, respondent completed the purchase of a fully paid up annuity of \$1,200, the first instalment of which was payable on March 24, 1947. In 1947 respondent received certain instalments under the annuity contract and was assessed for income tax on these instalments. An appeal to the Income Tax Appeal Board was allowed and from that decision the Minister of National Revenue appeals to this Court. *Held*: That "the amount of the annuity actually specified" in the contract entered into prior to June 25, 1940, was not increased, exceeded or enlarged by advancing the date of the first payment of the annual income from 1954 to 1947 and the proviso in s. 5(i) (k) of The Income War Tax Act as enacted by c. 34, s. 13 of the Statutes of Canada for 1940 here has no application and the appeal must be dismissed. *MINISTER OF NATIONAL REVENUE v. MR. E.*..... 509

14.—*Income Tax—Income War Tax Act, R.S.C. 1927, ss. 3, 6(a), 6(b)*—*Section 6 to be read with section 3—Deductibility of proper disbursements and expenses inherent in concept of annual net profit or gain—Fee for call to the Bar and admission as solicitor in Ontario not deductible.*—The appellant, a lawyer practising in Toronto, sought to deduct from his 1946 income one-third of the \$1,500 fee which he had paid in 1946 to the Law Society of Upper Canada for his call to the Bar and admission as a solicitor in Ontario. He had previously been called to the Bar and admitted as a solicitor in Nova Scotia but had not practised therein. The Minister disallowed the deduction and the appellant appealed to the Income Tax Appeal Board which unanimously dismissed his appeal. *Held*: That the amount of the taxpayer's profits or gains to be assessed must be ascertained or estimated according to the ordinary principles of commercial trading or accepted business and accounting practice. 2. That the deductibility of the disbursements and expenses that may properly be deducted in computing the amount of the profits or gains to be assessed is inherent in the concept of "annual net profit or gain" in

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the definition of taxable income contained in section 3 and stems from it and not even inferentially from paragraph (a) of section 6. 3. That a disbursement or expense such as the \$1,500 which the appellant paid for his call to the Bar and admission as a solicitor in Ontario, which is laid out or expended not in the course of the operations, transactions or services from which the taxpayer earned his income but at a time anterior to their commencement and by way of qualification or preparation for them, is not the kind of disbursement or expense that could properly be deducted in the ascertainment or estimation of his "annual net profit or gain". 4. That there is no portion of the \$1,500 fee that could have any relationship to the appellant's law practice in any one year. 5. That the expenditure which the appellant sought to deduct was not properly deductible from his 1946 receipts in the ascertainment or estimation of his taxable income for that year according to the ordinary principles of commercial trading or accepted business and accounting practice. **GORDON KENNETH DALEY v. MINISTER OF NATIONAL REVENUE..... 516**

"ROYALTY".

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SECTION 6 TO BE READ WITH SECTION 3.

See REVENUE, No. 14.

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SHIP DAMAGED IN PROCESS OF DOCKING.

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3. APPEAL FROM DISTRICT JUDGE IN ADMIRALTY DISMISSED. No. 7.
4. APPORTIONMENT OF FAULT. No. 5.
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22. FAILURE OF SHIP TO COMPLY WITH REGULATIONS GOVERNING OPERATION OF NARROWS BRIDGE AT VANCOUVER REQUIRING SHIP TO "REMAIN AT A SAFE DISTANCE" UNTIL GREEN LIGHT APPEARS. No. 4.
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25. LIABILITY AT COMMON LAW. No. 4.
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38. WAGES. No. 10.

SHIPPING—Collision—Both vessels to blame—Damages.—In an action for damages brought by the plaintiffs for the sinking and total loss of their ship as a result of a collision with defendant vessel the Court found both ships negligent. *Held*: That defendant vessel being three-quarters to blame and plaintiffs' ship one-quarter to blame judgment would go accordingly. *SHERMAN et al v. THE SHIP Good Hope II* 98

2.—Collision in dense fog—Both ships equally to blame—Reasonable steps taken to lessen the loss—Plaintiff entitled to an accounting.—In an action arising out of a collision between the motor ship *Island Mail* and a boom of logs in tow of the tug *Brunette* the Court found both vessels equally to blame. *Held*: That the steps taken by the tug after the collision to retrieve the logs being reasonable in the circumstances the plaintiff is entitled to an accounting for the loss sustained by it. *M. R. CLIFF TUGBOAT COMPANY LIMITED v. THE M. S. Island Mail*..... 102

3.—Damages—Ship damaged while manoeuvring around corner of dock—Duty of occupier of dock to owners of ships invited to use it—Duty of reasonable care to ensure that dock is reasonably safe for normal and proper use. The plaintiff sued for damage to its steamer the *J. R. Sensibar* incurred while manoeuvring around the north-east corner of the Hamilton Harbour Commission terminal wharf in the course of delivering coal to the defendant at that portion of the wharf of which it was the lessee and occupant. *Held*: That the occupant of a wharf owes a duty to the owners of vessels which he invites to come to it to take reasonable care to ensure that it is reasonably safe for such vessels for their normal and proper use. There is no warranty that it is safe. 2. That there is no difference in the duty of the occupant of the wharf or enlargement of its scope by reason of the fact that the occupant was the consignee of the coal which the ship-owner was delivering pursuant to a contract to do so. 3. That there was no hidden or unusual obstruction or danger or defect in the condition of the dock prior to the arrival of the *Sensibar* that would make it

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unsafe for normal and proper use by ships invited to it but, on the contrary, that it was in a safe and proper condition for such use. 4. That the *Sensibar* came to her damage by her own manoeuvring. *THE COLUMBIA TRANSPORTATION COMPANY V. THE F. P. WEAVER COAL COMPANY LIMITED* 167

4.—Damage to water mains owned by plaintiff caused by defendant ship's anchor—Failure of ship to comply with regulations governing operation of second Narrows Bridge at Vancouver requiring ship to "remain at a safe distance" until green light appears—"Safe"—Liability at common law—Costs incurred by co-defendant payable by ship.—Defendant ship in approaching the second Narrows Bridge at Vancouver, B.C., failed to comply with the regulations governing the operation of the bridge which require a ship approaching the bridge to "remain at a safe distance" until the green light appears. She found it necessary to drop her anchor to take her way off. The anchor dragged across the water-mains owned and laid by plaintiff under statutory authority causing considerable damage. *Held*: That "safe distance" in the regulations means a safe distance for every one concerned including any one affected by emergency measures. 2 That aside from the regulations at common law the ship would not be justified in proceeding against a barrier, having no assurance when it would be removed to a point where, if the barrier remained, she could not save herself except at the expense of a third party's property. 3. That defendant National Harbours Board having been added as a co-defendant by the ship any costs incurred by plaintiff to the National Harbours Board must be repaid it by the ship. *GREATER VANCOUVER WATER DISTRICT V. THE SHIP Sparrows Point AND NATIONAL HARBOURS BOARD*..... 279

5.—Collision—Both ships proceeding at too great speed in fog-shrouded area—Radar aid to navigation only—Failure to reduce speed when made aware of each other's presence—Defendant ship mainly at fault in violating customary rule for passing—Apportionment of fault—Damages.—In an action for damages arising from a collision between plaintiff and defendant ship in a narrow fog-shrouded channel the Court found both ships to blame. Both ships were proceeding at too great a speed, plaintiff originally and defendant ship as she approached the fog-shrouded area. Both ships failed to reduce speed sufficiently when their respective radars indicated the other's approach on a bearing that changed little, if at all. *Held*: That in a dense fog the most extreme degree of caution must be exercised. 2. That radar is an aid to navigation only and does not over-ride the general principles applicable to navigation in fog, the first of which is moderate speed and second great care. 3. That defendant ship was

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more at fault than plaintiff ship in choosing to pass starboard to starboard, thereby violating the customary rule for north and south bound vessels to pass port to port. 4. That the establishment of different degrees of fault must be a conclusion proved by evidence judicially arrived at and sufficiently made out; conjecture or sympathy or a leaning in favour of one ship rather than the other will not do; nor will the question be answered by deciding who was the first wrongdoer nor even of necessity who was the last. 5. The liability to make good the damages or loss shall be in proportion to the degree in which each vessel was in fault, that is in fault as regards the collision; if she is in fault in other ways which had no effect on the collision such matters are not to be taken into consideration. **PUGET SOUND NAVIGATION COMPANY v. THE SHIP *Dagmar Salen* AND REDERIAKTIEBOLAGET PULP v. THE MOTOR VESSEL *Chinook*..... 283**

6.—*Appeal from assessment of damages—Loss due to failure on part of appellant to tranship goods or charter other vessels—Claim for loss of profits of substitute vessel too remote—Appeal dismissed.*—An appeal from the disallowance by the Registrar, British Columbia Admiralty District, of two items in an assessment of damages claiming for loss of earnings through interruption of scheduled service and loss of profits of a substitute vessel placed on the run of the damaged vessel was dismissed. *Held:* That the failure of appellant to tranship freight to other lines and to charter other available vessels was the direct cause of whatever loss it sustained by way of decreased subsequent earnings rather than the collision with respondent's bridge. 2. That the loss of profits claimed through the service of the substitute vessel was the result of an error in judgment of appellant in making its dispositions of its vessels and cannot be charged to respondent. **THE OWNERS OF THE SHIP *Island Prince* v. NATIONAL HARBOURS BOARD 291**

7.—*Damage to cargo—Bill of lading—Contractual voyage—The Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49, s. 3, articles III and IV—Peril of the sea—Ship damaged in process of docking—Appeal from District Judge in Admiralty dismissed.*—Appellant's claim is for damage to a cargo of grain consigned by appellant from Fort William, Ontario, to the Sarnia Elevators at Sarnia, Ontario, for carriage on the S.S. *Laketon* owned and operated by respondent. Appellant contends that respondent did not use due diligence to make the *Laketon* seaworthy prior to and at the time when the voyage was commenced and that there was a deviation from the contractual voyage in that the *Laketon* passed the dock of the consignee and proceeded down stream for two miles. Upon her return upstream she stopped at the

SHIPPING—Concluded

Imperial Oil dock to refuel and when docking struck the dock with considerable force. Later it was discovered that a quantity of the grain was wet and that the *Laketon* had a jagged hole on the starboard side which was responsible for the wet grain. The hole was below the water line as long as the ship was loaded. The District Judge in Admiralty for the Ontario Admiralty District dismissed an action brought by appellant against respondent company. On appeal the Court found that the *Laketon* was in a seaworthy condition when she left for Fort William and that the hole made in one of her plates was caused by her striking the Imperial Oil dock and that this occurrence was due to a peril of the sea. *Held:* That the *Laketon* in fueling at the Imperial Oil dock did not depart from her contractual voyage and that in any event it was fair and reasonable for her to take on fuel as she did and no liability was created. **TORONTO ELEVATORS LIMITED v. COLONIAL STEAMSHIPS LIMITED..... 371**

8.—*Liability for dumping injurious substance in navigable waters.* *Held:* That the dumping of an injurious substance, oil in the particular instance before the Court, in a navigable river, renders the person so doing liable at common law for damage resulting from such action. **SUZUKI et al v. *Ionian Leader*..... 427**

9.—*Collision—Appeal from assessment of damages—Claim for salvage disallowed.*—*Held:* That a claim for salvage not supported by evidence that such was a reasonable disbursement must be disallowed. **SHERMAN et al v. THE SHIP *Good Hope II*.. 430**

10.—*Wages—Foreign ship—Protest by Foreign Consul—Discretion of Court—Motion for dismissal of action allowed.*—In an action for wages brought by seamen of Greek nationality who had served on defendant ship, owned by a Panamanian corporation and registered at the Port of Panama City, the defendant moved for a dismissal of the action on the ground that the consul-general for the Republic of Panama in and for the Province of British Columbia protests against its continuance. The articles signed at Mobile in the state of Alabama, one of the United States of America, written in Spanish and English, prohibited seamen from attempting action against the Master or ship, and provided for the submission of any dispute to the competent authorities of the Republic of Panama. While the vessel was in Vancouver, British Columbia, the men went on strike and caused a delay in loading until the strike was ended by an injunction issued out of the Supreme Court of British Columbia. *Held:* That the grounds for the protest were reasonable and the Court declined to exercise its discretion to adjudicate. **ARMANEKIS et al v. THE S.S. *Cnosaga*..... 445**

"SHUGLOV".

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AND 2.

"SIMILAR".

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SIMILARITY OF WORD MARKS.

See TRADE MARK, No. 5.

**SIMILARITY OF WORD MARKS A
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SION.**

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SPECIFIC DENIALS.

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See REVENUE, NOS. 2 AND 8.

"STARTLING CONFESSIONS".

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"SUCCESSOR".

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**SUPERINTENDENT GENERAL OF IN-
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**THE EXCHEQUER COURT ACT, R.S.C.
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**THE PATENT ACT, 1935, S. OF C.
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See PATENTS, NOS. 2 AND 3.

**THE TRADE MARK AND DESIGN
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**THE UNFAIR COMPETITION ACT,
1932, 22-23 GEO. V, C. 38, SS. 2(H),
2(M), 3(B), 10(D), 44(2), 52(1).**

See TRADE MARK, No. 4.

**THE UNFAIR COMPETITION ACT,
1932, S. OF C. 1932, C. 38, SS. 2(K),
23(1), 23(5)(C), 26(1) (F).**

See TRADE MARK, No. 5.

**THE UNFAIR COMPETITION ACT,
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2(L), 23, 26(1) (F).**

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1932, 22-23 GEO. V, C. 38, SS. 2(K),
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42. THE UNFAIR COMPETITION ACT, 1932, 22-23 GEO. V, c. 38, ss. 2(k), 2(m), 11, 26(1) (c), 28(1) (d), 29, 32. No. 3.
43. THE UNFAIR COMPETITION ACT, 1932, 22-23 GEO. V, c. 38, s. 52(1). No. 2.
44. TOTALITY OF TRADE MARKS TO BE CONSIDERED. No. 5.
45. TRADE MARKS NOT TO BE CAREFULLY ANALYSED. No. 5.
46. TRADE MARKS REGISTERED IN THE UNITED STATES AND WIDELY USED AND ADVERTISED THERE AND ALSO KNOWN IN CANADA. No. 4.
47. "TRUE CONFESSIONS". No. 3.
48. WHETHER MARKS SIMILAR. No. 1.
49. WHETHER WARES SIMILAR. No. 1.
50. WORD MARK. No. 4.

TRADE MARK—*The Unfair Competition Act, 1932, 22-23 Geo. V, c. 38, ss. 2(k), 2(l), 23, 26(1) (f)*—"Shuglov"—"Footgluv"
 —application to expunge—Whether marks similar—Whether wares similar—Intention to abandon trade mark "Shuglov" not established.—Alleging similarity of the two marks and of the wares on which they were respectively registered, the B. F. Goodrich Company, an American corporation and the owner of the trade mark "Shuglov" as applied to "footwear, particularly rubber boots and shoes and rubber overshoes" registered in October, 1932, but very scarcely used or advertised in Canada, sought to have expunged from the register the trade mark "Footgluv" registered in May, 1942, by respondent as applied to "footwear in the form of boots and shoes" and, since July, 1945, by amendment to "leather boots and shoes". *Held*: That the respondent's wares are not similar to those of applicant and they are not likely to be associated with each other by dealers in them or users thereof so as to cause such dealers or users to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin.

TRADE MARK—Continued

2. That the parties' trade marks are not so similar that the contemporaneous use of both would create confusion among dealers in their wares or users thereof. 3. That the intention by the applicant to abandon its trade mark "Shuglov" has not been established. **THE B. F. GOODRICH COMPANY v. J. A. & M. COTE LIMITEE**..... 221

2.—*The Trade Mark and Design Act, R.S.C. 1927, c. 201, s. 45—The Unfair Competition Act, 1932, 22-23 Geo. V, c. 38, s. 52(1)—"Footgluv"—"Shuglov"—Application to expunge or to have trade mark registration restricted to certain wares—Ownership in trade mark created by its adoption and its use—Registration mere confirmation of title. Applicant, owner of the trade mark "Footgluv" as applied to "leather boots and shoes," sought to have expunged from the register the trade mark "Shuglov" previously registered by respondent in respect of "footwear, particularly rubber boots and shoes and rubber overshoes," or, in the alternative, to have the trade mark registration restricted to "rubber boots and shoes and rubber overshoes," on the grounds that the trade mark "Shuglov" did not accurately define the existing rights of respondent. *Held*: That one can only obtain the registration of a mark which has already been used. It is the adoption of a trade mark and its use which create a right of ownership therein and the registration merely confirms the title. 2. That the trade mark registration "Shuglov," appearing in the name of the respondent, should be expunged and struck out from the register. **J. A. & M. COTE LIMITEE v. THE B. F. GOODRICH COMPANY**..... 239*

3.—*Infringement—Passing off—Registrability—The Unfair Competition Act, 1932, 22-23 Geo. V, c. 38, ss. 2(k), 2(m), 11, 26(1) (c), 28(1) (d), 29, 32—Mark lacking registrability expunged from the register—Claim based on infringement dismissed—Claim based on passing off dismissed—"True Confessions"—"Startling Confessions"—"Sensational Crime Confessions"—"Similar"—Secondary and distinctive meaning—Get-up of magazine common to the trade—Motion for declaration under s. 29 of The Unfair Competition Act, 1932, dismissed—Failure to prove that word has become recognized "generally" by Canadian dealers as attaching responsibility to the owners—Costs.—In an action for infringement of a trade mark and passing off the Court found that at the time of registration of the plaintiff's trade mark it lacked registrability as being in contravention of s. 26(1) (c) of The Unfair Competition Act, 1932, and that it did not comply with s.28(1) (d) of the Act nor was any application made under s. 29 of the Act, nor was the procedure required under s. 32 of the Act followed. In considering plaintiff's claim for passing off on the ground that defend-*

TRADE MARK—Continued

ant's magazines published under the names of "Startling Confessions" and "Sensational Crime Confessions" resemble plaintiff's mark "True Confessions" the Court found that the evidence did not establish that actual confusion had arisen; nor did the evidence indicate that the combination of the features of the magazine, all common to the trade, as used by the plaintiff had in Canada become distinctive of or identified with the plaintiff's trade. *Held*: That the plaintiff's mark lacking registrability must be expunged from the Register of Trade Marks and plaintiff's claim based on infringement fails. 2. That the evidence did not establish that the mark "True Confessions" or "Confessions" had through use in Canada acquired a secondary and distinctive meaning nor that the defendant had passed off or had attempted to pass off his magazines as those of the plaintiff or that the defendant had practised any fraud and that on the whole of the evidence the titles of the defendant's magazines are not "similar" to that of the plaintiff within the meaning of the definition in s. 2(k) of the Act and the claim for passing off fails. 3. That a motion for a declaration under s. 29 of The Unfair Competition Act must be dismissed since the evidence in support fails to establish that the word mark "True Confessions" has become recognized "generally" by Canadian dealers as attaching responsibility to the owners. **FAWCETT PUBLICATIONS INC. v. ALEXANDER VALENTINE**..... 246

4.—*Word mark—Petition to expunge—The Unfair Competition Act, 1932, 22-23 Geo. V, c. 38, ss. 2(h), 2(m), 3(b), 10(d), 44(2), 52(1)—"Bartons"—"Barton's Bonbonniere"—Trade marks registered in the United States and widely used and advertised there and also known in Canada—It is not necessary to be the owner of a registered trade mark in Canada to be a "person interested" within s. 2(1) of the Act—Symbol becomes a trade mark upon becoming adapted to distinguish particular wares, by use—Prior use of mark before application for registration essential to its registrability—Registration of a trade mark adopted in contravention of s. 3(b) of the Act invalid—Defendants' word mark ordered expunged from the Register.—Bartons Inc., manufacturers of candy and chocolates in New York City since 1940, were the owners of the trade mark "Barton's Bonbonniere" registered in the United States, their principal trade mark, however, being the single word "Bartons". Both trade marks were widely used and advertised there and were also "known" in Canada by reason of mail order sales, retail sales to residents of Canada visiting in New York and others who either sent or bought the chocolates in Canada by reason of advertisements having circulation there. Mary Lee Candy Shoppes Ltd., manufacturers of chocolates in Montreal, P.Q., applied for registration of the word "Bar-*

TRADE MARK—Continued

tons" as a trade mark for their chocolates, giving as date of first user, September 2, 1947. The application was granted. The plaintiffs now bring this action, asking that the word mark "Bartons" be expunged. On the evidence the Court found that the word "Bartons" was not used by Mary Lee Candy Shoppes Ltd. as a trade mark at any time prior to the date of its application for registration and that the word had never been used by them as their trade mark within the meaning of "trade mark" as defined in s. 2(m) of the Unfair Competition Act, 1932, since it was never used on wares for the purpose of indicating to dealers or users that such wares were made or sold by them. *Held*: That the plaintiffs fall within the definition of a "person interested" as defined in s. 2(h) of the Unfair Competition Act, 1932. By the registration of "Bartons" as its trade mark, Mary Lee Candy Shoppes Ltd. has narrowed the area of business open to its rivals, such as the plaintiffs. The possession of that registered trade mark excludes, or with reasonable probability would exclude, the plaintiffs from a portion of that trade into which they desire to enter. By reason of the registration and the existence of the mark, the applicants cannot lawfully do that which but for the existence of the trade mark, they would otherwise lawfully do, and therefore they have a *locus standi* to be heard as "persons interested". 2. That the definition of a "persons interested" as contained in s. 2(h) of the Act does not require that he must have a registered mark in Canada and must have used his mark there by making sales of his wares there or be in business there. 3. That a symbol cannot in Canada become a trade mark as defined in s. 2(m) of the Act until it has become adapted to distinguish particular wares from other wares, by use. Until it has become so adapted to distinguish it is not a trade mark entitled to registration. *Standard Brands Ltd. v. Staley* (1946) Ex. C.R. 615; *J. H. Munro Ltd. v. Newman Fur Co. Ltd.* (1947) Ex. C.R. 1; *William Candy Co. v. Crothers* (1924) Ex. C.R. 183, referred to. 4. That there being no use of the mark "Bartons" prior to the application for registration, the mark lacked registrability, should not have been registered and the same must be expunged from the Register of Trade Marks. 5. That the trade mark also lacked registrability since it was adopted in direct contravention of s. 3(b) of the Act. **BARTON INC. AND BARTON'S BONBONNIERE INC. v. MARY LEE CANDY SHOPPES LIMITED AND BARTON'S BONBONS LIMITED..... 386**

5.—"Iron Man"—"The Iron King"—*The Unfair Competition Act, 1932, S. of C. 1932, c. 38, ss. 2(k), 23(1), 23(5)(c), 26(1)(f)*—*Similarity of word marks—Onus on appellant to show no reasonable probability of confusion—Registrar's decision not to be set aside lightly—Evidence of actual con-*

TRADE MARK—Continued

fusion not necessary—Tests of similarity of trade marks—Totality of trade marks to be considered—Trade marks not to be carefully analysed—Similarity of word marks a matter of first impression.—The Registrar refused the appellant's application to register "The Iron King" as a word mark for use in association with men's work trousers on the ground that the proposed word mark is confusingly similar to the objecting party's registered trade mark "Iron Man" for use in association with overalls, pants, shirts, mackinaws and leather coats. The appellant appealed from the Registrar's refusal and the objecting party was subsequently added as a party to the proceedings. *Held*: That the objecting party is entitled to have the words "Iron Man" in its specific trade mark, registered under the Trade Mark and Design Act, treated as a word mark under The Unfair Competition Act, 1932, as if it had been registered as such thereunder. 2. That when the Registrar has refused an application for the registration of a word mark on the ground that it is similar, within the meaning of section 26(1)(f) of The Unfair Competition Act, 1932, to some other word mark already registered for use with similar wares and the applicant for registration has appealed from the Registrar's decision the onus is on the appellant to show that there is no reasonable probability of confusion through the contemporaneous use of both marks in the same area in association with wares of the same kind. 3. That the Registrar's decision that the two marks are similar must not be set aside lightly. 4. That where there has been a long contemporaneous use of two marks in the same area in association with wares of the same kind the lack of evidence of confusion through such use would afford support for the conclusion that the two marks are not confusingly similar but where there has been no substantial contemporaneous use of the two marks the fact that there is no evidence of actual confusion is not of much importance. 5. That on an appeal from the Registrar's refusal to register a word mark on the ground that it is confusingly similar to an already registered word mark evidence of actual confusion is not necessary. 6. That it is essential to the valid registration of a word mark that it should be outside the scope of the implied prohibitions of section 23(1) of The Unfair Competition Act, 1932, and the onus of showing that it is so is on the applicant for the registration, whether in the proceedings before the Registrar or on an appeal from his refusal to register

7. That it is not a proper approach to the determination of whether trade marks are similar to break them up into their elements, concentrate attention upon the elements that are different and conclude that, because there are differences in such elements the marks as a whole are different. Trade marks may be similar when

TRADE MARK—Concluded

looked at in their totality even if differences may appear in some of the elements when viewed separately. It is the combination of the elements that constitute the trade mark and gives distinctiveness to it, and it is the effect of the trade mark as a whole, rather than of any particular element in it, that must be considered. 8. That it is not a correct approach to the solution of the problem whether two marks are similar to lay them side by side and make a careful comparison of them with a view to observing the differences between them. The Court should not subject the two marks to careful analysis but should seek to determine the issue of similarity from the point of view of a person who has only a general and not a precise recollection of the earlier mark and then sees or hears the later one by itself. 9. That the answer to the question whether two word marks are similar must nearly always depend on first impression. 10. That the proposed word mark "The Iron King" is confusingly similar to "Iron Man". **FREED & FREED LIMITED v. REGISTRAR OF TRADE MARKS**..... 431

TRADE MARKS NOT TO BE CAREFULLY ANALYSED.

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TRADE MARKS REGISTERED IN THE UNITED STATES AND WIDELY USED AND ADVERTISED THERE AND ALSO KNOWN IN CANADA.

See **TRADE MARK**, No. 4.

"TRUE CONFESSIONS".

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TWO-POINT NU-MONT MOUNTING.

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VEHICLE WHICH "HAD BEEN OR WAS BEING USED FOR THE PURPOSE OF TRANSPORTING SPIRITS UNLAWFULLY MANUFACTURED".

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See **TRADE MARK**, No. 1.

WHETHER WARES SIMILAR.

See **TRADE MARK**, No. 1.

WORD MARK.

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WORDS "PRODUCTION OR USE OF ANY REAL OR PERSONAL PROPERTY" IN S. 3(1)(f) OF THE ACT INCLUDE OIL PRODUCED FROM LAND.

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 "IRON MAN". See **FREED AND FREED LTD. v. THE REGISTRAR OF TRADE MARKS AND THE GREAT WESTERN GARMENT CO. LTD.**..... 431
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- "Person". See MAY MCDUGALL ROSS v. MINISTER OF NATIONAL REVENUE... 411
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