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CANADA
LAW REPORTS

Exchequer Court of Canada

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1933

JUDGES
OF THE
EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE ALEXANDER K. MACLEAN
(Appointed 2nd November, 1923)

PUISNE JUDGE:

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

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF
CANADA

The Honourable ARCHER MARTIN, British Columbia Admiralty District—appointed
4th March, 1902.
do CHARLES D. MACAULAY, Yukon Admiralty District—appointed 6th
January, 1916.
do W. S. STEWART, Prince Edward Island Admiralty District—
appointed 26th July, 1917.
do SIR J. DOUGLAS HAZEN, New Brunswick Admiralty District—
appointed 9th November, 1917.
do HUMPHREY MELLISH, Nova Scotia Admiralty District—appointed
25th November, 1921.
do LOUIS PHILIP DEMERS, Quebec Admiralty District—appointed 3rd
November, 1928.
His Honour FRANK M. FIELD, Toronto Admiralty District—appointed 7th December,
1932.

DEPUTY LOCAL JUDGE:

The Honourable J. A. CHISHOLM—Nova Scotia Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE HUGH GUTHRIE, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE MAURICE DUPRÉ, K.C.

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1. *Dominion Building Corporation Ltd. v. The King* (1933) Ex. C.R. 164. Appeal to the Supreme Court of Canada allowed. Leave to appeal to the Privy Council granted. Appeal allowed and judgment of this Court restored.
2. *Holden v. Minister of National Revenue* (1931) Ex. C.R. 215. Appeal to the Supreme Court of Canada allowed. Leave to appeal to Privy Council granted. Appeal allowed in part.
3. *King, The, v. Consolidated Distilleries Ltd.* (1931) Ex. C.R. 85. Appeal and cross appeal to the Supreme Court of Canada dismissed. Leave to appeal to the Privy Council granted. Appeal allowed.
4. *Lightning Fastener Co. v. Colonial Fastener Co. Ltd.* (13145) (1932) Ex. C.R. 89. Appeal to the Supreme Court of Canada allowed. Leave to appeal to the Privy Council granted. Appeal pending.
5. *Reilly v. The King* (1932) Ex. C.R. 14. Appeal to the Supreme Court of Canada dismissed. Leave to appeal to the Privy Council granted. Appeal dismissed.
6. *Spooner v. Minister of National Revenue* (1930) Ex. C.R. 229. Appeal to the Supreme Court of Canada allowed (1931) S.C.R. 399. Leave to appeal to the Privy Council granted. Appeal dismissed.

B. To the Supreme Court of Canada:

1. *Boone v. The King* (1933) Ex. C.R. 33. Pending.
2. *Burt Business Forms Ltd. v. Autographic Register Systems Ltd.* (1932) Ex. C.R. 39. Appeal dismissed.
3. *Dominion Manufacturers Ltd. v. Electrolier Manufacturing Co. Ltd.* (1933) Ex. C.R. 141. Pending.
4. *Gillette Safety Razor Co. of Canada Ltd. v. Pal Blade Corpn. Ltd.* (1932) Ex. C.R. 132. Appeal dismissed.
5. *King, The, v. Attorney-General of Ontario et al* (1933) Ex. C.R. 44. Appeal dismissed.
6. *King, The, v. Capital Brewing Co.* (1932) Ex. C.R. 171. Appeal dismissed.
7. *King, The, v. Colgate-Palmolive Peet Co. et al* (1932) Ex. C.R. 120. Appeal and cross appeal allowed.
8. *King, The, v. Consolidated Lithographing Mfg. Co. Ltd.* (1933) Ex. C.R. 204. Pending.
9. *King, The, v. Pickleman* (1932) Ex. C.R. 202. Appeal dismissed.
10. *Lightning Fastener Co. v. Colonial Fastener Co. Ltd.* (13674) (1932) Ex. C.R. 127. Appeal dismissed. Leave to appeal to the Privy Council refused.
11. *Mason v. The King* (1933) Ex. C.R. 1. Appeal dismissed.
12. *Ross Engineering Corpn. et al., J. O., v. Canada Paper Co. et al* (1932) Ex. C.R. 141. Appeal dismissed. Leave to appeal to the Privy Council refused.
13. *Ross Engineering Corpn. et al., J. O., v. Paper Machinery Co.* (1932) Ex. C.R. 120. New trial ordered. Leave to appeal to the Privy Council refused.
14. *Vandeweghe Ltd. et al v. The King* (1933) Ex. C.R. 59. Pending.
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EXCHEQUER COURT OF CANADA
AT FIRST INSTANCE

1932
June 20.
Oct. 24.

AND
IN THE EXERCISE OF ITS APPELLATE
JURISDICTION

BETWEEN:—

GEORGE MASON SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

*Petition of right—Jurisdiction—Damages—Interference with navigation—
Fisheries Act—Public work—Assumption of risk*

At Livingstone's Cove, Nova Scotia, is a breakwater owned by the respondent, to provide a shelter for boats of shallow draught. In this cove suppliant had set a salmon trap net under licence from the Department of Marine and Fisheries. Dredging operations were being carried on in the vicinity of the breakwater by the Department of Public Works under the supervision and direction of one of its officers. The tug *A.*, hired by the respondent, whilst moving a loaded scow to the dumping grounds came into contact with the suppliant's net, seriously damaging the same. The present action is to recover the value, or cost of repairing the net and the loss of the use thereof for about one month.

Held, that where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment must be dealt with as the servant of the person to whom he is lent, although he remains the general servant of the person who lends him.

2. That the master and crew of the tug *A.*, the crew of the scow, and the master and crew of the dredge were servants of the Crown employed upon a public work within the meaning of section 19c of the Exchequer Court Act, and that this Court has jurisdiction to hear and entertain the present action.
3. That it cannot be implied from the fact that suppliant was earlier requested to move his net, which he did not do, that he therefore assumed the risk of damage to the net. Consent involves an express or implied agreement that the act may be rightfully done or danger rightfully caused, mere knowledge of the risk does not necessarily involve an agreement to accept the risk, it may be some evidence of an agreement, but nothing more.
4. That, on the evidence, the net in question was not an interference to navigation within the meaning of section 33 of the Fisheries Act (R.S., 1927, c. 73); that the master of the tug *A.*, was negligent in

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moving the scow as and when he did, and that the suppliant was entitled to damages for the injury caused to his net and damages for the loss of the use of his net.

PETITION OF RIGHT by Suppliant herein to recover from His Majesty the King damages suffered by him by reason of destruction of his salmon trap net and loss of use of same for a certain time due to the negligence of a servant of the Crown in the exercise of his duties.

The action was heard before the Honourable Mr. Justice Maclean, President of the Court at Saint John, N.B.

C. J. Burchell, K.C., and *R. Smith, K.C.*, for Suppliant.

H. McInnes, K.C., and *F. B. A. Chipman, K.C.*, for Respondent.

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

THE PRESIDENT, now (October 24, 1932), delivered the following judgment:

This is a Petition of Right, wherein the suppliant seeks to recover damages from the respondent for alleged damage caused, on or about June 28, 1930, to a salmon trap net which the suppliant, the owner, had set at Livingstone's Cove, Antigonish Co., N.S., under a licence issued by the Department of Marine and Fisheries under the authority of the Fisheries Act, R.S.C., 1927, Chap. 73, and also for damages for the loss of the use of the salmon net consequent upon the alleged injuries to the same.

At Livingstone's Cove there is a breakwater 376 feet long, owned by the Government of Canada; the coast line at this point was much exposed, particularly to north and northwest winds, and the breakwater was, I understand, constructed for the purpose of affording shelter for boats and craft of shallow draught, south of the breakwater. The water on the southern side of the breakwater being comparatively shallow, the Department of Public Works of Canada, at the time material here, was engaged in the dredging of a defined area immediately south of the breakwater, from the outer edge of the breakwater well into the shore line, and this area was to be dredged to secure a depth of 8 feet at low water, ordinary spring tides. Immediately south of the area proposed to be dredged the water was

also quite shallow while to the southwest, and for quite a distance, there was a depth of some 12 or 13 feet. While little evidence was given upon the point, it would appear, that the waters inside the outer end of the breakwater on the southerly side, would be frequented only by small boats, fishing boats and motor boats, and could hardly be said to constitute a main channel or fairway for shipping of any kind entering or leaving St. George's Bay. The same might also be said of the waters immediately north and east of the breakwater and towards the sea. Large loose rocks had been piled along this side of the breakwater as a protection to the same from storms, and besides, a considerable shoal or rock ledge projected from the shore line pretty well out to the end of the breakwater, and in close proximity to the location occupied by the suppliant's net.

On the occasion in question, dredging operations were in progress, the dredge and scows in use being the property of the respondent. The tug boat *Amlah*, hired by the respondent, was in attendance upon the scows; the scows were about 75 feet in length and from 25 to 28 feet in width, and carried about 200 tons of dredged material which was conveyed to a dumping ground outside the breakwater. The *Amlah* was drawing about 9 feet aft and about 5 feet forwards. It was the general practice of the *Amlah*, at least at low tide, to approach the laden scows on a course southwest from the dredge bow on, and having made fast a line to the scow she would move astern; this practice was owing, as I understand it, to the shallow water within and in close proximity to the area being dredged. The master of the tug testified that on the occasion in question, when he started with a laden scow to the dumping grounds, the tide though low was strong, setting down northeast past the outer end of the breakwater, the wind was about southwest blowing quite a breeze with a choppy sea, and in pulling the scow out beyond the end of the breakwater and in a southwesterly direction, the current and wind forced the scow down in a northeasterly direction towards the suppliant's net with which it collided and seriously damaged. McEachern, an experienced seaman, testifying on behalf of the suppliant, stated that he had witnessed the movement of the tug and tow at the time in question; he stated that the weather was fine with a nice breeze from the south-

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west with "just a wind chop," which I understand to mean that while there was a choppy sea there was nothing unusual about it. He further stated that the scow drifted northeastwardly, after being pulled out from inside the breakwater, and that both tug and tow came in contact with the suppliant's net; that usually the tug backed out in a westerly direction and in such a movement there would be no danger of tug or tow colliding with the net; and that there was ample sea room for both tug and tow to emerge from inside the breakwater towards the southwest where there was about 12 feet of water, and that had this been done they would not have drifted upon the fishing net as they did. That the scow,—which was without motive or governing power—or the tug, or both, came in contact with and seriously damaged the suppliant's salmon net is quite clear, and does not call for any discussion.

The respondent's case is that the net was an unlawful hindrance to navigation; that the tug and tow was navigated with caution and without negligence; and that in the circumstances everything reasonably to be expected of the master of the tug in towing the scow from the scene of dredging operations out to the dumping grounds, was done. The suppliant contends that the net was lawfully set and was not a hindrance to navigation; that the tug was negligently navigated; that the tug and tow should have departed from inside the breakwater on a more southerly or southwesterly course, as had been done frequently before, which would have avoided contact with the suppliant's net; and that in view of the tide and wind conditions, if as described by the respondent's witnesses, the scow should not have been moved until more favourable conditions prevailed.

It was agreed between counsel, that the breakwater in question was owned by the Crown in the right of the Dominion of Canada; that the dredging operations were being carried on by the Department of Public Works of the Dominion of Canada, under the supervision and direction of an officer of that Department; and that the tug *Amlah*, its officers and crew, was under hire to the Department of Public Works, and under the orders and direction of the captain of the scow. The weight of authority and legal principle is to the effect that, in a case of this kind,

we have only to consider in whose employment the tug and its crew were at the time when the acts complained of occurred. When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him. See Cockburn C.J. in *Rourke v. White Moss Colliery Co.* (1), and Bowen L.J., in *Donovan v. Laing, Wharton and Down Construction Syndicate* (2). Therefore, I think, no difficulty arises upon this aspect of the case.

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I entertain no doubt as to the jurisdiction of the Court to entertain this Petition. The Exchequer Court Act, R.S.C., 1927, Chap. 34, s. 19 (c) is as follows:—

The Exchequer Court of Canada shall also have 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 upon any public work.

There cannot I think be any doubt, but that the master and crew of the tug *Amlah*, the crew of the scow, and the master and crew of the dredge were servants of the Crown employed upon a public work. The case of *Schrobounst v. The King* (3), is I think conclusive upon the point.

Sec. 33 of the Fisheries Act, Chap. 73, R.S.C., 1927, provides:

Seines, nets or other fishing apparatus shall not be set or used in such manner or in such place as to obstruct the navigation of boats and vessels, and, no boats or vessels shall destroy or wantonly injure in any way seines, nets or other fishing apparatus lawfully set.

Sec. 35 provides:

One-third of the width of any river or stream and not less than two-thirds of the width of the main channel at low tide, in every tidal stream shall be always left open, and no kind of net or other fishing apparatus or any material of any kind shall be used or placed therein.

The suppliant's net was licensed to be set, as it had been in the eight preceding years, "off Government wharf at Livingstone's Cove, Leader running North." It seems to me, upon the evidence, that the suppliant's net was not an interference with navigation. I do not think that in the true and practical sense of the term, or within the meaning

(1) (1877) 2 C.P.D. 205, 209.

(2) (1893) 1 Q.B. 629, at pp. 633, 634.

(3) (1925) Ex. C.R. 167; (1925) S.C.R. 458.

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of the Fisheries Act, the area occupied by the net was in navigable waters, or in the fairway of shipping, or that less than two-thirds of the main channel being a tidal stream was at low tide obstructed by the suppliant's net. If the main channel was in any substantial way obstructed by the suppliant's net, or if it was in any way a public nuisance or a real hindrance to navigation there should, I think, have been some evidence of it. But even if, in a technical sense, the waters occupied by the net were navigable that did not relieve the tug from the exercise of caution and good seamanship while in that vicinity, particularly as the master had knowledge of the exact location of the net, and by experience he should have known precisely what was required to be done to avoid contact with the net. Therefore, I think, just because of these facts that more than ordinary caution and skill, but of course, not an unreasonable amount of caution and skill, was required of the master of the tug and those in charge of the conduct of the public work. I might also add that I do not think the suppliant suffers in any way by reason of the fact that one end of the leader, a rope 100 fathoms long, was attached to the breakwater as it had been every fishing season since 1926. I do not think this adds anything to the respondent's case. As was urged by Mr. Smith, that was not a factor causing the casualty which befell the net; the same thing would presumably have happened had the same end of the leader been attached to a rock or a pole in the water immediately adjacent the breakwater. Neither do I think that the net was set quite in the direction off the breakwater as described by the master of the tug. I think it was set in a north northwest direction from the breakwater as described by McEachern, and not reasonably in the path of the tug or tow in moving out from the south side of the breakwater.

The important point for determination is whether or not the damage to the net was caused by negligence on the part of the master of the tug, or possibly the person in charge of the dredge, and with this aspect of the case I shall next deal. The master of the tug, according to his evidence, believed, that when the tow was about to commence on the occasion in question, conditions were unfavourable and that what did occur was more or less imminent. This is to

be inferred from the following questions put to the master by Mr. Burchell and his answers thereto:—

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Q. You did not suggest to the captain that it was a little dangerous with the tide running as it was?—A. He was on the bridge; I did not mention it to him.

Q. But it was dangerous?—A. Yes, dangerous at any time.

Q. With the tide running north?—A. Yes.

Q. And there was danger of running into the net?—A. It could not be any other way.

Q. With the tide changing the other way it is different?—A. It is not nearly so bad at high water. At high water I had no bother.

Q. Or at slack water?—A. At slack water either but you could not go with the scow.

Q. But at high water you go alongside of it and tow her?—A. Yes and steer the boat south and southwest.

* * * * *

Q. Did you think it was dangerous to go at that time?—A. It was often dangerous to go out.

Q. But at this particular time did you think it dangerous to go out with the tide the way it was?—A. Yes, I did, with a leader and twine leading off the northwest corner of the breakwater.

Q. But sometimes it would not be dangerous, for instance at high water?—A. No, sir.

Q. But at that time you thought it was dangerous?—A. Yes, and more times besides that.

Q. But at this time you did not suggest to the Captain that he wait for half an hour or so?—A. I never suggested it; I obeyed his orders when he blew for me; I was under his orders.

From the evidence of the master of the tug which I have just quoted, it will be seen that the tide was low which had the effect of reducing the capacity of the tug to control the tow particularly when towing stern first and when not alongside the scow, and that a strong current was flowing accompanied by a considerable breeze; and the master of the tug elsewhere testified that when he started the tow, a strong current was setting down northeast past the outer end of the breakwater, with a strong southwest wind and choppy sea, and this, together with the fact that the tug and tow were moving slowly until they got headway, brought the tug and tow in collision with the leader of the net with the consequence stated. Now, if the facts be as described by the master of the tug, then he should not, in my opinion, have ventured or have been required by the captain of the dredge to commence the tow until conditions of wind, tide and current had become more favourable, or until the tide had materially changed, when, as the master testified he would not have encountered any diffi-

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culty. For that reason I do not think the charge of negligent navigation has been repelled. Aware of the location of the net, the unfavourable conditions of wind, current and tide, the imminence of collision with the net, I cannot avoid the conclusion that the tow should not have commenced when it did, but should have been delayed until a material change in the tide had taken place. In any event, when it was found that the tug and tow were likely to drift upon the net, the scow at least should have anchored, and she was equipped with anchors, and a crew of two were aboard; and it was not contended that this could not have been done or would not have been effective. I am rather disposed to think that conditions were not quite so unfavourable as described by the master of the tug; I do not think they were very unusual or occasioned any real difficulty in handling the tow. I am unable to appreciate just why the tug and tow could not emerge from behind the breakwater upon such a course as would compensate for the counter-acting forces of wind and current, and had this been done, and I believe it might have been done, the accident would have been avoided. Upon this aspect of the case, I therefore think the accident was attributable to the negligence of the servants of the respondent.

Mr. McInnis strongly pressed the view that inasmuch as the captain of the dredge had at one time requested the suppliant to move his net to another location to avoid the possibility of a collision with the tug or tow, and to which request the suppliant apparently replied that there was sufficient sea room for the tug to perform its services to the scow and that he had a right to retain his net where it was set, that there followed the implication that the suppliant was assuming all the risk of an occurrence of that nature. I do not think that the statements made by the suppliant in this connection implied an assumption by him of the risk of damage to the net by the tug. Consent involves an express or implied agreement that the act may be rightfully done or the danger rightfully caused. Mere knowledge of the risk does not necessarily involve an agreement to accept the risk, it may be some evidence of an agreement, but nothing more. Upon the facts disclosed, I do not think it can be inferred that the suppliant agreed to accept the risk in the sense that he exempted the re-

spondent from his duty not to create the danger and that he agreed to take the chance of an accident. See Lindley, L.J., in *Yarmouth v. France* (1); *Thomas v. Quartermaine* (2), and *Smith v. Baker* (3).

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The next point to be considered is one by no means free of difficulties. The suppliant also claims damages for the loss of the use of his net during the month of July. The rule as to the recovery of damages, the consequences of tortious acts, is not so clearly marked as in the cases of contract. It is settled law, I think, that if one injures the property of another, damages may be recovered, not only for the amount which it may be necessary to spend in repairs, but also damages—not merely nominal damages—for the loss of the use of the property injured during the period, that the repairing may occupy, even if he cannot prove that he is out of pocket a definite sum of money owing to the wrong he has sustained, provided of course that such loss is the natural and direct result of the wrongful injury done to the property. I would refer to the well known cases of *The Greta Holme* (4), *The Argentino* (5), and *The Mediana* (6). The respondent claims that the damages are too remote and he relies on the case of *The Anselma De Larrinaga* (7). The general rule is that damages which are uncertain, contingent and speculative in their nature, cannot be made a basis of recovery; but this rule against the recovery of uncertain damages is, I think, directed against uncertainty as to the cause rather than as to the extent or measure. In the case of *The Anselma de Larrinaga* the plaintiffs' trawler was sunk in consequence of a collision between it and the defendants' steamship, the latter vessel being held alone to blame. Upon reference being made to the Registrar for assessment of damages, he held that in addition to the value of the trawler, the plaintiffs were entitled to recover a sum in respect of fishing until a new trawler was delivered. Upon appeal from the Registrar, the President of the Probate Division held that a claim by the plaintiffs for loss of fishing till they secured a new vessel to replace the one that was sunk was not maintain-

(1) (1887) 19 Q.B.D. 647, at p. 660.

(2) (1887) Q.B.D. 685 at p. 696.

(3) (1891) A.C. 325.

(4) (1897) A.C. 596 at p. 597.

(5) (1889) 14 A.C. 519.

(6) (1900) A.C. 113.

(7) (1912-13) 29 T.L.R. 587.

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able. The learned President in his judgment referred to the case of *The Columbus* (1) which, so far as we are here concerned, was a claim by the master of a fishing smack which was sunk in collision with *The Columbus*, for wages which he would have earned as master of the smack, and also for a claim of the average profits he would have received as owner had the fishing voyage not been terminated by the collision. Upon a Reference for the assessment of damages for the loss of the fishing smack, and for the additional claim which I have just mentioned, the latter was rejected, and upon a review of the Registrar's Report, Dr. Lushington declined to disturb the same and held that where compensation is awarded by the Court of Admiralty to the full value of the vessel as for a total loss, the plaintiff was not entitled to recover anything in the nature of a demurrage for the loss of the employment of his vessel, or his own earnings, or freight, and he distinguished the case from that where there was only a partial loss. In the case of *The Clarence* (2) Dr. Lushington stated:

It does not follow as a matter of necessity, that anything is due for the detention of a vessel while under repairs. Under some circumstances, undoubtedly such a consequence will follow, as for example where a fishing voyage is lost or where the vessel would have been beneficially employed.

The onus of proving the loss was on the claimant. In so far as freight is concerned, the decision in *The Columbus* was modified by the decision in the case of *The Racine* (3) where it was held that when a ship is chartered, this is sufficient evidence that her owner will, subject to contingencies, incur a loss in respect of any freight to be paid under the charter after the date of the collision. In that case damages for the loss of profit on a charter concluded but not entered upon were allowed. On the other hand in *The Risoluto* (4) a collision occurred on the fishing banks off Newfoundland between two ships, one of which was a French fishing vessel which was acquitted of any blame for the collision, and the owners claimed damages, for demurrage of their vessel from the date of collision to the date of her return to the fishing grounds, and such damages were allowed. Evidence was taken from other vessels fishing in the place where, but for the collision, the injured

(1) (1847-50) 3 W. Rob. 158.

(2) (1847-50) 3 W. Rob. 283.

(3) (1906) P. 273.

(4) (1883) 8 P. 109.

fishing vessel would have fished, as to the catch made by them. Roscoe on Measure of Damages at page 44 refers to an English case in which the fishing continued throughout the year, and where the owners of a lost fishing vessel with reasonable promptitude obtained a new vessel, and damages in respect of the loss of prospective fishing were allowed until the date when the new vessel took the place of a lost trawler. In another case, he stated, a trawler went out fishing for a period of about two months and was sunk by collision at the beginning of the second month, and damages were allowed based on the actual catch to the date of the collision and the prospective catch until the vessel should have completed the two months fishing. These cases are not to be found in the Law Reports. In *Rheinhardt v. The Cape Breton* (1), a fishing vessel was so much injured in a collision with the defendant ship that she was prevented from continuing her trip to the fishing grounds, and Drysdale, J., held that the proper measure of damages was the estimated value of the prospective catch of fish by the injured vessel had she been permitted to prosecute her fishing voyage.

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It will be seen therefore that there is an apparent conflict of judicial opinion as to the principle to be applied in respect of damages for the loss of the use of a ship, or a fishing net, or in respect of prospective profits in such cases. I think the suppliant is entitled to damages for the loss of the use of his net and I rest my decision upon the law as stated by Lord Herschell in the House of Lords in *The Argentino*, which I think is the true rule of law to be applied in this case. He said:

I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision.

The judgment in *The Mediana*, supra, lays down the principle that the mere taking away from a shipowner of his vessel for a longer or shorter time in consequence of a collision is ground for the award of general damages when such owner could not prove any special loss as of freight or

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of profits. The suppliant's claim for damages for the loss of the use of his net is, I think, in the nature of general damages and the quantification of such damages are to be determined as they would be by a jury. I do not think it unreasonable or speculative to say that had the suppliant had the use of his net during the month of July, the best fishing month of the season it is said, his net would have impounded some salmon, but it would be absurd to speculate as to the number. His catch for that season, in quantity and therefore in value, was much below that of the preceding year or the year following, and during that fishing season others engaged in that form of fishing at Livingstone's Cove we were told did well, which I take to mean that their catch of salmon was of the average in quantity. I think the evidence shows with reasonable certainty that the suppliant may reasonably be supposed to have suffered some damage, or a loss of some profits, on account of the loss of the use of his net.

Now, as to the quantum of damages to be awarded under each head. Upon the evidence, it seems to me, the injury to the net was a case of partial loss and not a total loss, notwithstanding the suppliant pleads in his Petition that the net became a total loss. The net was rendered absolutely useless as a fishing instrument, but it was not beyond repair though portions of it, or its accessories, were entirely lost. The suppliant gave very convincing evidence as to the cost of repairing the net and he put it at over \$1,000, though that amount only is claimed. It seems that Mr. Harris, the chief fishery officer for Antigonish county, suggested to the suppliant very early after the accident, that the value of the net, or the cost of repairing the net,—it is not clear which—was \$800 to which apparently the suppliant at the time made no objection, but no safe deduction can, I think, be made from this evidence. While Mr. Harris gave evidence at the trial, still no questions were put to him by either side upon this point. The suppliant's evidence upon the cost of the repairs to the net is of such a nature that it cannot be disregarded, and it was not in any way controverted. I think there is nothing to do but to fix the cost of restoring the net at \$1,000. In regard to the claim for general damages for the loss of the use of the net for one month, I have concluded, after taking into con-

sideration every contingency inherent in the use to which the net would have been put had it not been injured, to fix the same at \$500. In concluding I perhaps should say that there is no evidence which would go to show that the suppliant could have minimized the damages by replacing the injured net earlier than he did. About one month after the accident he hired or borrowed a net but there is no evidence as to the terms on which this was done.

The suppliant will therefore have judgment for \$1,500 and he will have his costs of the action.

Judgment accordingly.

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BETWEEN:

WESTERN ELECTRIC COMPANY, }
 INCORPORATED, AND NORTHERN } PLAINTIFFS;
 ELECTRIC COMPANY, LIMITED. }

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 Sept. 26, 27,
 28,
 Nov. 29.

AND

BALDWIN INTERNATIONAL LIMITED. DEFENDANT.

(12774)

Patents—Patentability—Invention—Combination—Anticipation

The patent in suit is for a loud speaker. Previous to this patent the best loud speakers had a frequency range of somewhere from 300 cycles to about 2,500 cycles, which meant that the overtones were not reproduced and the tones of high and low pitch were distorted or not faithfully reproduced. By certain structural changes in the sound box, the present invention overcomes these defects. With it a frequency response as low as 60 cycles and good response as high as 4,000 cycles can be obtained. Between 4,000 and 6,000 cycles there is slightly reduced response, and a useful response as high as 8,000 cycles, thus permitting the overtones to be reproduced, giving a faithful reproduction of the tones of high pitch and a more uniform amplitude.

Held, that the invention in question being for a new and valuable loud speaker, structurally and operatively different from anything which preceded it, and giving much more satisfactory results, such invention disclosed ingenuity and was patentable.

2. That even if all elements in a combination are old, where the combination produces an old result or object in a more convenient, cheaper, or more useful way, it is proper subject matter for a patent assuming there is evidence of ingenuity or skill in the production of such combination.
3. That it is not sufficient to prove anticipation, to point to something in one published patent and something in another, and so on, and by an imaginary assemblage of all these things in combination to say

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that this mosaic constitutes anticipation. The patented article must be found as fully described in the prior art as it is described in the patent under attack in order to anticipate it.

ACTION by the plaintiffs herein to have it declared that their patent No. 287,240 for Improvements in Loud Speakers was valid and was infringed by the defendant company.

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

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

E. G. Gowling and D. K. MacTavish for defendant.

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

THE PRESIDENT, now (November 29, 1932), delivered the following judgment:

This action is brought against the defendant for the infringement of patent no. 287,240 which is owned by the plaintiffs. The patentee was Edward C. Wentz, a telephone engineer, the date of his application for patent being May 9, 1927, and the date of issue thereof being February 12, 1929.

The invention is said to relate to improvements in acoustic devices such as are used for receiving and transmitting sound, and ordinarily referred to as loud speakers. An object of the invention was to receive or transmit sound with high and substantially uniform efficiency over a wide frequency range. A specific object was to improve the transmission characteristics of loud speaking receivers at the upper portion of the sound frequency range.

Describing the alleged invention, the specification states:

In accordance with a preferred embodiment of the invention, a piston diaphragm is provided to radiate into a sound chamber having a plug therein which decreases the area of a portion of the sound passage there-through. The diaphragm and plug are so shaped and arranged that converging sound passages are formed thereby extending from the centre of the diaphragm and from its peripheral portion to a common sound passage. The cross sectional areas of the converging sound passages preferably increase as the common sound passage is approached and these areas are such, moreover, that the air displaced by the diaphragm flows from each of the converging sound passages into the common sound passage with substantially the same velocity. The meeting point of the converging sound passages is effectually the throat of the horn since the volume of the sound passage beyond this point is not appreciably affected by the displacement of the diaphragm. Extending from this throat portion to

the mouth of the horn, it is preferable to have the cross-sectional area of the sound passage such that the area of the wave front of the transmitted sound progressively increases exponentially with respect to the distance travelled.

The specification further states:

When employed in conjunction with a horn having no inherent losses, a loud speaker constructed in accordance with the above description has an efficiency of approximately 30 per cent, measured from the electrical energy input to the acoustic energy output, over a wide range of frequencies. Measurements made on a loud speaker of this type, from which the plug 23 has been removed from the sound chamber, and which employs a diaphragm about 2.75" in diameter, show that the frequency response falls off at frequencies above about 3,000 cycles per second at such a rate that practically no radiation takes place at a frequency of about 6,300 cycles. By inserting the plug into the sound chamber the frequency response characteristic of the loud speaker is improved to such an extent that the point of low radiation is moved up to a frequency of about 14,000 cycles per second and the efficiency of the loud speaker is practically uniform up to a frequency above 5,000 cycles.

The claims relied upon are nos. 4 and 9 which are as follows:

4. An acoustic device comprising a piston diaphragm having a flexible peripheral portion and a substantially dish-shaped central portion, means for driving said diaphragm at the periphery of its central portion, a horn, a sound chamber between said diaphragm and said horn, a plug in said sound chamber for decreasing the cross-sectional area of a portion of the sound passage therethrough.

9. An acoustic device comprising a diaphragm having a dish-shaped portion and a flexible portion, a coil attached to said dish-shaped portion for driving said diaphragm, and means juxtaposed to one face of said diaphragm for directing sound waves from the centre of the diaphragm outwardly and from the outer edge of said diaphragm inwardly to an annular passage, the face of said means conforming substantially to the face of the diaphragm juxtaposed thereto.

Sound, as heard by the human ear, consists of a vibration of the air with two characteristics, that of pitch, and that of loudness or intensity; the pitch is determined by the number of vibrations per second, or the frequency; the intensity is dependent upon what is called the amplitude of these vibrations. For any given frequency the greater the amplitude the louder is the sound. In translating or reproducing sound waves that had been recorded, on a talking picture film, into the replica of the original tones of the instrument, or voice, as the case might be, there arose problems unknown in the reproduction of sound in the telephone or the phonograph. In talking pictures it was desirable and necessary to reproduce sound not only with fidelity but with sufficient loudness or intensity so as to be heard

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by a theatre audience who were without telephone receivers at their ears, and who were not closely seated to the reproducing apparatus. There accordingly came to be developed a device called a loud speaker, generally comprising a horn, and a sound box containing a vibratory diaphragm, the diaphragm usually being a thin vibratile piece of material so arranged that it would move backwards and forwards in response to electric impulses corresponding to the sounds desired to be reproduced. Many forms of diaphragms were suggested by patentees and others, the quality desired was that of physical strength combined with sufficient flexibility to permit it to be actuated by the electrical impulses set up in the electric circuit of the loud speaker. The diaphragm had generally taken two forms, the flat or flexible type, or, what is known as the piston type. The diaphragm was generally actuated either by what is known as a magnetic drive, or a dynamic drive. In the case of the magnetic drive the diaphragm is directly actuated by a magnet, the magnetism of which is varied in sympathy with the electrical impulses. In the case of the dynamic drive the diaphragm is actuated by a coil fixed on the diaphragm and placed between the poles of a magnet.

Prior to Wente's invention, in 1926, loud speakers then known and in use, while marking a step forward, were not satisfactory or efficient in talking picture reproduction, although for some purposes they may have been satisfactory, for example, where naturalness of sound, or clarity of enunciation, was not required to be of the highest order. Loud speakers in use prior to 1926 were marked by certain imperfections. One shortcoming was their limited range in frequency response, and the other was the variation in the intensity with which they reproduced certain frequencies. or, to state it in another way, there was a large number of frequencies the loud speaker could not reproduce at all, and the other was the irregularity in the intensity of the sound at different frequencies, causing a distortion in the resulting reproduction. A consequence of this was that the characteristic sound, say of an individual voice, was not faithfully reproduced; one could understand a substantial portion of what was spoken or sung, but the sound as reproduced did not convey the voice characteristics of the speaker, or singer, as the case might be. In order to sur-

mount these difficulties, it was necessary that there should be a considerable extension of the range in frequency response, and a greater uniformity in the intensity throughout the range of the reproducing device. One of the best loud speakers then available was one commercially known as Magnavox, the frequency range of which was somewhere from 300 cycles to about 2,500 cycles or possibly less. For a given energy input it gave no response to frequencies below 200 cycles. For the same energy input, as the frequency was increased, a limited response was obtained up to 400 cycles, and then from 400 to 2,000 cycles, there was a good response. After reaching a high point, at 2,000 cycles, the response began to fall off, and at 3,000 cycles it was again quite limited, while at a frequency of 4,000 cycles there was none at all. The importance of this will be recognized when it is pointed out that the soprano voice actually goes up to 4,000 cycles with its fundamentals, and there are important overtones all the way up to 8,000 cycles. It was a general defect in loud speakers in use at that time, in talking pictures, that they were unable to reproduce satisfactorily either the upper or lower registers, if at all, overtones were lacking, and the S's and F's were reproduced in such a manner as to give the singer, or speaker the effect of lisping. So it was therefore in the highest degree desirable to extend, if possible, the range of frequency response in the reproduction apparatus and to improve the fidelity of the voice or music emitted therefrom. Until Wentz came on the market there was no loud speaker that could adequately reproduce sound with sufficient strength or volume to fill a theatre of any size. Several things were in the way of producing sound of sufficient intensity. Most of the loud speakers of that time were magnetic drive devices. The effective area of the diaphragm of the magnetic driven type was usually so small that it was impossible to get sufficient amplitude to disturb the air to the extent necessary to produce a loud sound. Then there was the difficulty of what is known in the art as "blasting," a distortion, then inherent in all loud speakers. That was explained by one witness as occurring when the amplitude of the oscillations of the diaphragm got suddenly larger when certain frequencies were struck, the sound output in such frequencies becoming unduly en-

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hanced as compared with that produced at other frequencies with the same energy input. Two ill effects might result from such a combination, one, the undue loudness of the sound in the neighbourhood of this resilient frequency, and the other, that the great increase in the amplitude at such frequency might cause the diaphragm to strike some mechanical stop and make undesirable mechanical noises. There are some frequencies at which the mechanical impedance of the diaphragm is low and the force required to drive it is correspondingly small, so that the amplitude becomes disproportionately larger when you strike such frequencies. It is therefore to be seen that prior to Wentz, the frequency response of existing devices in the upper range did not extend beyond 3,000 cycles and in the lower range did not go below 200 cycles, or thereabouts, the amplitude or sufficiency of sound was not adequate, and the fidelity of the reproduction was imperfect. The Magnavox, as I have already stated, was one of the best reproducing devices on the market when Wentz came on, and it is sufficiently established, I think, that its effective frequency range was from 300 cycles to somewhere around 2,500 cycles.

Now, referring more specifically to the patented device in suit. We may entirely eliminate the horn because it is not here in question. Wentz's device, broadly speaking, comprises a sound box which has a domed shape plug in it, and a piston diaphragm which is coil driven; the piston diaphragm is driven from the periphery of the rigid or stiff portion of the diaphragm by a coil. The diaphragm is constructed with a dish shaped centre and might be compared to a hat with a round brim. The outer edge of the diaphragm, the brim of the hat, is flexible and corrugated, but the centre portion, the crown of the hat, is stiff, and the whole acts as a piston when actuated by electrical impulses; when a current is passed through the coil sound waves originate in the slight space between the diaphragm and the plug, the sound chamber having been decreased by the space occupied by the plug; the sound displaced by the diaphragm escapes through the passages formed between the surface of the plug and the sound box and thence into the horn. This form of diaphragm, it is claimed, makes it possible to move a comparatively large amount of air, because the flexible portion permits the whole diaphragm to

swing to wide amplitudes. The coil type of driving system has the advantage, it is claimed, of drawing the maximum amount of electrical power from the source at all frequencies, while devices in use prior to Wenté were capable only of drawing its maximum power at some one frequency and discriminated against all but those of a very limited frequency range, and good sound power was not sufficiently obtained at these other frequencies.

The utility of Wenté is conceded by the defendant, and the principal question for determination is whether there is sufficient novelty in the combination to constitute invention. The ready and wide adoption of anything that is useful is frequently, but not always, evidence of novelty and invention. Wenté seems to have been successful since it first went into use in talking picture reproduction in theatres, in August, 1926. That improvement in loud speakers was deemed desirable is evidenced by the fact that in this connection the Western Electric Co., one of the plaintiffs, had expended in experimental and research work, over a period of ten years, well over a million dollars up to the time Wenté appeared; I do not emphasize the amount of money or time expended, but the fact that a large expenditure of time and money was made is evidence that loud speakers prior to the time of Wenté were not regarded as perfect and that the field was open for improvement. The plaintiffs have sold some 70,000 loud speakers made according to the Wenté patent. They have equipped about 8,000 theatres with Wenté, besides those sold for public address systems. It is an established fact, I think, that with the advent of Wenté's loud speaker in 1926, came a very marked improvement in the quality of talking picture reproduction. That it increased the reproduction of frequencies above and below the range of anything before accomplished by any other known devices is, I think, clearly established. It has been shown that by the use of Wenté a frequency response can be obtained as low as 60 cycles, and that the response does not begin to fall off until over 4,000 cycles is reached, a slightly reduced response is obtained up to 6,000 cycles, and a useful response up to 8,000 cycles; so there was a considerable extension in frequency response at both ends of the scale, and there was in addition an improvement in the intensity or volume of

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the sound. Apparently the use of the plug had never before been used in such a combination. It matters not if all the elements in the combination are old, because if old elements in combination produce an old result or object in a more convenient, cheaper, or more useful way, it is proper subject matter for a patent if there is any evidence of ingenuity or skill in the production of such combination. Wenté, I think, did produce a new and valuable loud speaker, structurally and operatively different from anything preceding it; it produced much more satisfactory results than any loud speaker previously known, and, I think, there is enough invention disclosed to hold that the patent in suit contains subject matter.

As to the defence of anticipation I do not think much need be said. I have carefully examined all the cited prior art and in no one of them can I find the combination of Wenté. It is not permissible, it almost needless to say, to point to something in one published patent and something in another, and so on, and by an imaginary assemblage of all these things in combination say that this mosaic constitutes anticipation. You must find the patented article as fully described in the prior art as it is described in the patent under attack, and I am of the opinion that Wenté cannot be found described in the prior art cited on behalf of the defendant. Mr. Cornwell, one of the defendant's witnesses, referred to a loud speaker, made by de Forest, which he heard in use in 1926, and which he said seemed satisfactory, but no description of the details of that loud speaker was given. It would be impossible to base anticipation on that kind of evidence.

Now, as to the question of infringement. It is quite clear that all the elements found in Wenté's loud speaker are to be found in that of the defendant's. We find an air chamber interposed between the diaphragm and the horn, and there is a plug in the air chamber. The diaphragm in each is substantially the same, except in that of the defendant's the central and stiff portion of the diaphragm is dished in the opposite direction to which it is in Wenté. In the latter, the central portion is dished back on itself so that the central portion is dished away from the horn side of the sound chamber. Each diaphragm is of the piston type, each is driven from the periphery of the stiff portion of the

dish-shaped diaphragm by a coil interposed between the two poles of the magnet. Barring the hole, the plug in the sound chamber in each is the same except for the change in form required by the fact that the defendant's diaphragm is dished one way, while Wenté is dished the other way; this difference in the plugs, does not in my opinion, call for serious consideration. The plug in the defendant's device has a hole in it, and in that respect it differs from the plug in Wenté. Response curves of the defendant's device, taken according to standard practice, indicate that the sound intensity for the different frequencies are practically the same with the hole free, or with the hole plugged. The hole does not seem to have any practical effect in so far as results are concerned. On examining the loud speaker of the plaintiffs, and that of the defendant I really fail to see any difference of substance between them; such as there are seem to me to be minor distinctions. All the chief characteristics of Wenté are found in the defendant's apparatus. The defendant's loud speaker, I think, comes within the claims of the plaintiffs' patent which are here relied upon. Even if there was an improvement in having a hole in the plug, I should doubt very much if that would save the defendant from infringement if there is invention in Wenté, because at most it could only be a patentable improvement which the defendant could not use or put into practice without infringing Wenté's combination.

The plaintiffs therefore succeed, and are entitled to the relief claimed together with their costs of the action.

Judgment accordingly.

BETWEEN:

LYSOL (CANADA) LIMITED.....PETITIONER;

AND

SOLIDOL CHEMICAL LIMITED...OBJECTING PARTY.

Trade-mark—"Lysol" and "Lysotab"—Calculated to deceive—Descriptive word—Expunging—Burden of proof.

The petitioner, owner of the trade-mark "Lysol" which was registered in 1890 and renewed in 1915 for twenty-five years, asks that the trade-mark "Lysotab" be expunged from the Register for the statutory reasons. The owner of the latter mark contended that "Lysol,"

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being the name given to the product by the patentee thereof, was therefore descriptive, was an improper trade-mark and should never have been registered.

The Court found, on the evidence, that the word "Lysol" was properly registered, was a valid trade-mark and that "Lysotab" was calculated to deceive and mislead the public, and ordered that it be expunged.

The Court also held that the burden of establishing that the registration was improperly made was upon the Objecting Party herein; and particularly in this case where the trade-mark had continued on the Register, and in use, for over forty years subsequent to its registration.

2. That where a person has invented and patented a new substance and gave to it a new name, and during the continuance of the patent had alone made and sold the substance by that name, there being in question no registered trade-mark of the same name during the life of the patent, he would not be entitled to the exclusive use of that name after the expiration of the patent, the name being descriptive of the substance itself. That in such cases it is a question of fact whether or not the name is descriptive of the article itself.

PETITION by the petitioner herein to have the trade-mark of the Objecting Party expunged as calculated to deceive the public.

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

*R. S. Smart, K.C.*, and *A. W. Langmuir, K.C.*, for petitioner.

*R. D. Moorehead, K.C.*, *A. E. Honeywell, K.C.*, and *H. W. Alles* for objecting party.

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

THE PRESIDENT, now (November 14, 1932), delivered the following judgment:

The objecting party registered in June, 1929, as a specific trade-mark, the word *Lysotab*, to be applied to the sale of chemical substances used for agricultural, horticultural, veterinary and sanitary purposes.

The petitioner carries on the manufacture and sale, in Canada, of a disinfectant compound, and in connection with the sale of which article the registered trade-mark *Lysol* is applied. On July 18, 1890, the partnership concern of Schulke and Mayr, of Hamburg, Germany, manufacturing chemists, registered in Canada the word mark *Lysol*, to be applied to the sale of disinfectants. This mark was re-

newed on July 18, 1915, for a further period of twenty-five years. The petitioner, by assignment, is now the proprietor of that mark. On April 25, 1928, the petitioner registered the word *Lysol* as a specific trade-mark to be applied to the sale of disinfectants, shaving cream, soaps, toilet articles and preparations, and pharmaceutical preparations. The first registered word mark *Lysol* has therefore been continuously on the register of trade-marks in Canada, and in actual use I understand, for over forty years.

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The petitioner seeks to expunge the registered mark of the objecting party, the word *Lysotab*. The objecting party contends that the petitioner's mark, *Lysol* was not properly registrable as a trade-mark in that the word was at the time of registration the name that was given to an article similar to that manufactured and sold by the petitioner, by one Dammann, who, in an English patent, gave the name *Lysol* to the substances to be made under that patent; that the mark is descriptive; and that the mark is now *publici juris*.

It will be convenient to begin by stating that on May 8, 1889, a German patent issued to one Dammann, a citizen of Germany, and which related to a process of rendering tar-oils completely soluble in water. In 1889, Dammann procured a patent in France relating to the same subject matter. On January 20, 1890, Dammann applied in England for a patent of the same invention and on that date he filed a provisional specification. The complete specification was left on Oct. 15, 1890, and the patent was accepted on January 10, 1891. The provisional specification states:

My invention relates to a process for rendering tar-oils completely soluble in water and to the manufacture of new commercial products by addition of certain substances thereto.

At the end of the provisional specification the following words appear:

I propose to call my new products *Lysol* or *Lysoline*.

The complete specification states:

My invention relates, firstly, to a process by which I render tar-oils completely soluble in water and produce tar-oils containing halogens, sulphur, nitrates, or phosphorous, and soluble in water; secondly, to these novel soluble products themselves which for the sake of brevity I call *Lysol* or *Lysoline*.

The principal part of the case of the objecting party, as already stated, is based on the contention that in the pro-

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visional and complete specifications of Dammann, the name *Lysol* was given by the patentee to the articles to be made under his patented processes, and that therefore the word *Lysol* was always descriptive of such articles, or the name of such articles, and therefore not properly registrable as a trade-mark. I should mention that in the case of the German and French patents no name such as *Lysol*, or any other, was mentioned by the patentee to designate any product or substance made under his patent. The English patent expired in 1900. Dammann never applied for a Canadian patent.

As already stated the word mark *Lysol* was first registered in Canada on July 18, 1890, by Schulke and Mayr. Obviously, it could only be for the most conclusive reasons that the petitioner should now be deprived of that trade-mark in Canada. Though not in chronological order I might next refer to registrations of the same mark made in the United States, by Schulke and Mayr, in 1895 and 1906 respectively. In each case the word *Lysol* was registered to be applied generally to drugs and chemicals, but particularly to disinfectants and anti-septics; in each case the applicant affirmed in the application for registration that the mark had been continuously used in the business of Schulke and Mayr since 1899; the latter application fixed the date as of July 15, 1889. The partnership firm of Schulke and Mayr, I might add, commenced to exist on April 15, 1889. On April 15, 1890, Schulke and Mayr registered at Hamburg, as a trade-mark, the word *Lysol* inside a white circle which was within a blank triangle, to be applied to disinfectants and anti-septics. It seems that it was not then permitted by law for a German national to register a word alone as a trade-mark, and hence the reason for associating the word with the circle and triangle. It might be appropriate here to point out that in 1890, there appeared in a German medical journal an article by one Dr. Schottelius, a Professor of Freiburg University, who stated that two bottles filled with a liquid and marked respectively *Lysol* II and *Lysol* III, had been submitted to him by Schulke and Mayr. In the year book of a German State Institution for the Sick, of 1889, there appeared an article by one Dr. Simmonds who stated that

a substance which was recently recommended by Dr. Schottelius, *Lysol*, seems to satisfy all requirements of an effective disinfectant.

So it would appear that Schulke and Mayr had adopted the trade-mark, *Lysol*, sometime in 1889, for disinfectants. On July 7, 1890, Schulke and Mayr registered the mark *Lysol* in England, to be applied to disinfectants; in the same year they registered the same mark in France. The mark was undoubtedly used in England to denote the goods of Schulke and Mayr, and it remained on the register there down till October, 1914, when as a war measure it was voided. There is no suggestion that any other manufacturing chemists sold in England, prior to 1914, any disinfectant under the trade name of *Lysol*, but subsequent to the voidance of the mark, the same began, in one form or other, to be used there by others. The goods of Schulke and Mayr, prior to October, 1914, were being imported into England by one Zimmerman, the agent of Schulke and Mayr.

Two other points should perhaps be mentioned, because reference was made to them at the trial, though I do not think anything really turns upon either. In June, 1891, there was organized in France a company known as Société Française du Lysol, having for its object the acquisition of Dammann's French patent rights, and the Schulke and Mayr trade-mark, *Lysol*, registered in France. The evidence regarding this transaction is somewhat confusing, yet, I think it is only susceptible of the meaning that Dammann transferred his rights under his French patent, and Schulke and Mayr their trade-mark registered in France, to the new company, which was to exploit the patent and the mark in France, and its Protectorates. The other point is the following. In 1893, Schulke and Mayr induced the Société Française du Lysol to apply for registration of the word *Lysol*, as a word mark only, in Germany, which they themselves could not then do, but which, by some international convention, the French company might do. It is not necessary or useful to go into the details of this matter, but in effect what was done was to enable Schulke and Mayr to secure the use of the registration of the word mark *Lysol*, in Germany, and without explaining how this was done, it is sufficient to say it was done, and, I think, for the benefit of Schulke and Mayr. When the legal formalities had been complied with Schulke and Mayr had the sole use of the

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mark in Germany, and the French company retained no rights whatever in the mark there, nor did it sell its products in Germany under that mark.

The first point for decision is whether or not, at the date of registration in Canada, the word *Lysol* was properly placed on the register of trade-marks. If it was then properly registered as a trade-mark it is still a valid registration. *The Bayer Co. v. American Druggists Syndicate* (1). The burden of establishing that the registration was improperly made in 1890 rests, in my opinion, upon the objecting party, particularly in a case where the trade-mark has continued on the register, and in use, for over forty years subsequent to registration. As was said by Stirling L.J., in the *In re Chesebrough's Trade-Mark "Vaseline"* (2):

It is manifestly unreasonable to expect that the owners of a registered trade-mark should preserve evidence of the way in which it was used at and prior to the time of registration for a long period, in this case of more than twenty years subsequent to registration.

Upon the facts before me I do not think it can properly be said, that at the date of registration, the petitioner's mark was intended, in Canada, not to indicate an article put up by Schulke and Mayr, but one manufactured according to the processes of Dammann's patent. It is more than probable that the mark *Lysol* was first adopted by Schulke and Mayr, to identify the disinfectant compound sold by them, and to distinguish their disinfectant from that made by others; they and Dammann were evidently in close business relations from the start, and the fact is, I understand, that Schulke and Mayr acquired the German patent, and it would be natural that they should adopt a mark to indicate their manufacture of articles made under Dammann's patented process; and if they acquired the rights of Dammann under the English patent, which also appears to be the fact, it was natural that they should adopt the same mark in England, and they apparently used the mark in that country for fourteen years after the expiration of the patent without any question as to its validity, and except for the incidence of war the mark would probably have continued on the register of trade-marks there. There is no evidence before me that Dammann ever manufactured or sold anywhere any substance or product according to the

(1) (1924) S.C.R. 558.

(2) (1902) 2 Ch. D. 1 at p. 9.

processes indicated in his English patent, or that he ever used the word *Lysol* in Canada, or elsewhere, to denote the name of any article made under his English patent. To say, as did Dammann in his English patent, that he proposed to call his patented product *Lysol*, is not evidence that this in fact was ever done, or that anywhere the public associated any disinfectant made and sold under the name of *Lysol*, with Dammann, or with the processes of manufacture described in his patent. A name is not given to a newly invented substance merely by saying in a patent that it is proposed to give to that substance such and such a name. Trade-mark law cannot be made by that process. If it were shown that Dammann having invented and patented a new substance gave it a new name, and during the continuance of the patent had alone made and sold the substance by that name, there being in question no registered trade-mark of the same name during the life of the patent, he would not be entitled to the exclusive use of that name after the expiration of the patent, the reason for that being that the name was then in fact descriptive of the substance itself and therefore not registrable as a trade-mark. That is the *Linoleum Mfg. Co. v. Nairn (The Linoleum Case)* (1), which was decided before there was enacted in England any Trade Marks Act, which, I think, is always important to remember. In all such cases it is a question of fact whether or not the name was descriptive of the article itself, and if it was, then, if an application is made to register that name as a trade-mark it should be refused, or, as in the *Linoleum Case*, if an action is brought to restrain others from using the name the same would fail. The principle would obviously be just as applicable if the article in question was not the subject matter of a patent.

I think it is to be presumed that the word *Lysol*, always indicated, in Canada, an article manufactured by Schulke and Mayr, or their successors, and not an article manufactured according to the processes described in Dammann's patent, or the article which Dammann said he proposed to call *Lysol* in his English patent and which could not possibly have been known in Canada at the time of the registration of the petitioner's mark. It would be impossible to

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hold, upon the evidence before me, that the mark was registered and used, in Canada, otherwise than to denote the goods of Schulke and Mayr. The case was put to me by counsel for the objecting party on the footing that the mark was at all times since its registration descriptive, and therefore void, so the issue is not whether the mark once distinctive, had become descriptive, but whether at the date of registration it was descriptive.

I was referred to the New Zealand case of *De Meric Ltd. v. Lysol Ltd.* (1). But the decision there turned altogether upon the validity of the assignment of the trade-mark in question. The South African case, *The Drug Club et al v. Lysol Ltd.* (2), is more in point, but the Court there declined to express any opinion upon the point whether the word *Lysol* was a name given by Dammann to describe a new product or substance discovered by him, but they held, that prior to 1914, the word *Lysol* had, in South Africa acquired a distinctive meaning as signifying the particular article manufactured by Schulke and Mayr, that is to say, if originally the word was descriptive it had by subsequent user become distinctive in South Africa of the goods of Schulke and Mayr and the validity of the registered mark *Lysol* was upheld. But that is not quite the case under consideration. There is no evidence here that the petitioner's mark, even if it was once descriptive in Canada, had by long user become distinctive of the goods of the petitioner. The case was presented by counsel for the objecting party, as I have already said, on the footing that the mark was always descriptive and therefore void from the date of registration, and the petitioner did not attempt to set up the case that though its mark was originally descriptive it had become distinctive. There is no evidence whatever that in Canada, the petitioner's trade-mark was descriptive in that it was generally known as the name of the article itself. The presumption is that when the registration was made it was a valid one, and that presumption has not been repelled. I am therefore of the opinion that the petitioner's trade-mark *Lysol*, was at the time of registration properly made and that it is still a

(1) (1926) N.Z.L.R. 221.

(2) (1924) S.A.L.R. (Transvaal Prov. Div.) 614.



valid trade-mark. The only question remaining for consideration is whether the mark of the objecting party should be expunged.

As already stated, the objecting party has registered the word *Lysotab*, and this mark the petitioner seeks to expunge on the ground that it is a colourable imitation of and resembles its mark, and is so similar thereto as to be calculated to deceive or mislead the public, and to cause goods to which the same would be applied, to be sold as and for the goods of the petitioner. The objecting party now manufactures in England a disinfectant tablet, under the unregistered trade name of *Lysotab*, and it is admitted that it is its intention to manufacture or sell the same tablet in Canada, if the validity of its registered mark here in question is sustained. The objecting party applied to register the word *Lysotab*, in England, in 1929, and its application was there opposed by the Pharmaceutical Society of Great Britain, and their opposition was based upon the ground that *Lysol*, a liquid disinfectant, was in common use in the drug trade there, and, I should observe, that then the word *Lysol* was publici juris in England. This application was refused and in the decision of the Assistant Comptroller it is stated:

The word *Lysotab* is clearly formed by the elision of the final "l" from the word *Lysol* and the combination of the remaining letters of that word with the abbreviation "tab." The letters "Lyso" constitute the principal and characteristic part of the word *Lysol* and would I think be readily recognized as referring in the combined word to that substance, while the whole word LYSOTAB differs but slightly from the words *Lysol* tab and would I have no doubt by chemists and others be taken to mean *Lysol* tablet.

I think these words are here applicable. I think it is a fair inference that the use of the word *Lysotab* by the objecting party would be calculated to mislead the public. There would seem to me no reason why the objecting party should not be able to obtain another registration which would as well serve its purposes.

The petitioner therefore succeeds in its claim to have the registered mark of the objecting party expunged, with the usual consequence as to costs.

*Judgment accordingly.*

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Oct. 31.

BETWEEN :

CANADIAN GOODRICH CO. LTD.....PETITIONER;

AND

BLANCHE F. HALL.....RESPONDENT.

*Trade-mark "Zipper"—Calculated to deceive—Class of goods—  
Expunging.*

The petitioner, owner of the specific trade-mark "Zipper" to be used in connection with the manufacture and sale of footwear, by its petition, asks that the trade-mark of the respondent, consisting of the same word "Zipper" as applied to the sale of corsets or corsets and brassieres combined, be expunged.

*Held*, on the facts, that there was no likelihood of confusion in the mind of the public, that the registration of the respondent's mark was not calculated to deceive the public into purchasing the goods of the respondent believing them to be those of the petitioner, and the petition herein was refused.

2. That the petitioner, having chosen to limit its mark to footwear, cannot now ask that the respondent's mark be expunged, on the ground that it (petitioner) may at some future time make or vend corsets, or corsets combined with brassieres, wherein the sliding fasteners are employed.

PETITION to expunge the word "Zipper" used by the respondent in connection with the sale of corsets and combination garments.

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

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

*J. T. Richard* for respondent.

The facts of the case are stated in the reasons for judgment.

THE PRESIDENT, now (September 6, 1932), delivered the following judgment.

This is a petition to expunge from the register a specific trade-mark, registered in July, 1929, by Blanche F. Hall, and consisting of the word *Zipper* "to be used in connection with the sale of corsets and combination garments, namely a corset and brassiere connected together."

The petitioner, in February, 1924, registered the word *Zipper* as a specific trade-mark "to be applied to the sale of footwear," and it is set forth in the petition herein that it introduced upon the Canadian market a line of over-

shoes equipped with separable fasteners of the well known slide-controlled type, and that it was the first to apply the word *Zipper* to overshoes so equipped; it is alleged also that the B. F. Goodrich Company, a United States Corporation, which controls the petitioner corporation, had earlier introduced upon the United States market, overshoes equipped with the same kind of fasteners. The petitioner's registered mark *Zipper* was not however to be confined to footwear equipped with sliding fasteners; the mark was to be applied to footwear produced by the petitioner whatever the fastening means, and no reference whatever is to be found in the application for registration, or in the certificate of registration, indicating that the mark was to be associated with footwear equipped with sliding fasteners. The plain fact is that others may manufacture footwear employing sliding fasteners, but they cannot use the petitioner's word mark *Zipper*. In October, 1927, and prior to the respondent's application for registration, the petitioner applied for the registration of the word *Zipper* as a general trade-mark, and it subsequently varied such application by limiting the application of the proposed general trade-mark to the sale of sliding fasteners, and articles containing sliding fasteners. That application for registration was later the subject matter of proceedings in the Exchequer Court of Canada with the result that the application was there refused, and on appeal to the Supreme Court of Canada, *Lightning Fastener Co. Ltd. v. Canadian Goodrich Co. Ltd.* (1), this was in substance affirmed. The petitioner is now only claiming that the respondent's mark should be expunged.

The petitioner claims that the respondent's mark should be expunged, first, on the ground that it was registered while the petitioner's prior application for the registration of the same word as a general trade-mark was pending, and that therefore the respondent's application for registration should not have been granted while the prior application of the petitioner was pending and the subject matter of proceedings in the courts. The petitioner also claims that it was the first to apply the word mark *Zipper* to overshoes equipped with sliding fasteners; that the word has become generally associated by the Canadian public with goods

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manufactured by the petitioner when equipped with the sliding fastener and that if others are permitted to use the trade-mark *Zipper* for articles equipped with such fasteners the public will be misled and caused to believe that such articles bearing such mark were manufactured or sold by the petitioner; and that the respondent should not now have the benefit of the public popularity acquired by the petitioner's mark by marketing her corset and brassiere equipped with sliding fasteners, under the trade name *Zipper*. And the petitioner's counsel also advanced the theory of "natural extension," that is to say, that the use of the word *Zipper* should be available for use by the petitioner in the natural extension of its business in connection with any goods made by it other than footwear, for example, corsets, or a corset and brassiere connected together, in which sliding fasteners are employed.

The respondent was not a party to the proceedings in the Courts to which I have referred, concerning the petitioner's application for registration of the word *Zipper* as a general trade-mark, and I am not inclined to hold that the Commissioner was without authority to act upon the application of the respondent in the meanwhile. I do not know why he should refrain from disposing of the application, even though it turned out to be a nullity had the petitioner's application had a different reception in the Courts. In view of the decision rendered by the Supreme Court of Canada in the proceedings referred to, I do not think the first ground upon which the petitioner in this proceeding relies, is now a practical one.

Then the sole question for determination is whether or not the respondent is entitled to maintain her registration. This registered mark is not associated with sliding fasteners, or any particular form of fastening; it is a word mark to be applied to a finished article, a specific mark to be applied to the particular class of goods or manufacture mentioned in the application for registration, namely, corsets, and combination garments comprising a corset and brassiere connected together, without any mention whatever of sliding fasteners. It does however appear from the pleadings, that the respondent is the holder of a Canadian patent of invention relating to the same articles as are referred to in the respondent's trade-mark registration, and it would fur-

ther appear that in the case of the combination garments, the corset and brassiere are to be connected together by means of a sliding fastener. The patent is not in evidence and it is impossible to say whether the patentee is limited to that form of fastening, but at any rate, according to the pleadings, it is to such patented article that the respondent pleads she is entitled to apply her registered mark *Zipper*. I do not think I am justified in looking at the patent at all. The fact is, that the respondent has registered the word *Zipper* to be applied to corsets, etc., and there is no mention in either the application for registration or the certificate of registration of the use of sliding fasteners. A specific trade-mark means a trade-mark used in connection with the sale of a class of merchandise of a particular description. The petitioner has the same mark for footwear, but I cannot see that if the respondent has the same mark for a corset, or a corset and brassiere combined, that confusion will result, nor do I think the petitioner can be heard to say that the respondent is not entitled to her mark because the petitioner may some time in the future make and vend corsets, or corsets combined with brassieres, wherein sliding fasteners are employed. The petitioner chose to limit its mark to footwear, and to that it is to be reasonably restricted. Upon the evidence presently before me, and the statute, I see no ground for expunging the mark of the respondent.

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The petition is therefore refused with costs to the respondent.

*Judgment accordingly.*

FRANK L. BOONE.....SUPPLIANT;  
 AND  
 HIS MAJESTY THE KING.....RESPONDENT.

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 June 6 & 7.  
 Dec. 6.

*Contract—Crown—Alterations of conditions—Authority of District Engineer and Chief Engineer*

The contract in question was for the construction of an Ice Pier at Barrington Passage, N.S. The specification, inter alia, provided that the foundations for the crib "must be excavated by means of a dredge to the rock and cleared off by a diver." This the contractor found more difficult than he anticipated, and he told the District Engineer that the excavation by dredge was impossible of performance. Thereupon

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the District Engineer verbally relieved him of the dredging, the foundation area for crib to be levelled off with bags of concrete, etc., but refused to put the instructions in writing. The contractor would not carry on and the work was taken out of his hands for delay in execution of the contract. Hence the present action for damages alleged to have been suffered.

Held, that if a party by his contract charges himself with an obligation possible to be performed he must make good, unless the performance becomes impossible in law or in fact, or by the conduct of the other party. If what is agreed is possible and lawful, it must be done.

2. That the changes in the work under the contract made by the District Engineer in this case were not matters of detail, but, from an engineering standpoint, were fundamental changes which could only be authorized by the Chief Engineer.

PETITION OF RIGHT by Suppliant herein to recover from the respondent the sum of \$13,386.53 as damages resulting from the fact that the contract between him and his partner had been taken over by the Crown and the work completed by it.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court at Saint John, N.B.

P. J. Hughes, K.C., for suppliant.

H. A. Carr for respondent.

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

THE PRESIDENT, now (December 6, 1932) delivered the following judgment.

On September 22, 1928, the petitioner, F. L. Boone, and one Voyer, severally and jointly entered into a written contract with His Majesty the King, represented by the Minister of Public Works of Canada, to construct Ice Pier No. 5, at Barrington Passage, Nova Scotia, according to a certain plan and specification, which form a part of the contract. Tenders had been publicly invited by the Department of Public Works for the construction of this work, and that of Boone and Voyer was the lowest and was accepted. The contract was to be completely performed on or before September 1, 1929, and time was to be of the essence of the contract. I might here state that after the contract in question was entered into, Boone and Voyer on March 21, 1929, entered into a written partnership agreement in respect of this contract, and two other contracts

which had been awarded them and which were to be performed at Halifax, N.S. On September 25, 1929, Voye, by a very informal letter, withdrew from the partnership, and it seems that any work done under the contract was carried out by Boone, and at his expense. It would appear that Boone accepted Voye's letter as the termination of the partnership, at least in so far as the work in question was concerned. It does not appear that the Department of Public Works was advised of this change in the partnership, or that it released Voye from his obligations under the contract. The respondent now claims that the petitioner Boone could not alone begin this proceeding by Petition of Right, and that Voye should have been joined, and for that reason the petitioner must fail, or that Voye should yet be joined. I shall return later to this point. It will be convenient hereafter to refer to the suppliant as the "contractor."

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The specification provided that the pier was to be a certain size and shape and to be crib built to a specified elevation of squared creosoted timber and filled practically to the top with approved stone ballast; the top was to be of concrete. It provided also that the foundation for the crib "must be excavated by means of a dredge to the rock and cleared off by a diver." The footing for the crib work was then to be built with concrete in bags, which I understand to mean, that after the dredging was completed the floor was to be levelled off with bags of concrete, and the crib or pier was to rest on top of such bags of concrete. The contract provided that the same was made and entered into by the contractor on the distinct understanding that he had before execution, investigated and satisfied himself of everything and of every condition affecting the works to be executed and the labour and material to be furnished, and that the execution of the contract by the contractor was based on his own examination and judgment, and not upon any data contained in specifications, plans, maps or files, etc., furnished by the respondent, his officers or agents. Parties intending to tender were requested to visit the site of the proposed works and make their own estimates of the facilities and difficulties attending the execution of the work. The tender of Boone and Voye certified that they had visited and examined the site of the works, or had

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caused this to be done by a competent person. This in fact, I find, was not done. Boone had once worked near that locality, as a contractor in connection with another public work, and he was relying upon his observation of the general character of the locality at that time, and not upon any examination of the proposed site of the pier. The specification contained a clause, under the head of "Foundation," to the effect that while the section shown on the plan accompanying the specification, showing soundings or borings, or the nature or condition of the bottom was believed to be correct, still the Department of Public Works was not to be responsible for any errors which might be discovered during the progress of the work, in respect of any of the soundings or borings, or the nature or condition of the bottom where the foundation of the pier was to be placed. The contract provided for the payment of the following unit prices to the contractor in respect of the work to be performed.

Dredging for foundation, scow measurement, \$3 per cu. yd.

Bag concrete in place, \$24 per cubic yard.

Creosoted stone fill crib work in place, 65c. per cu. yd.

Concrete top in place \$32 per cubic yard.

The bed of the stream where the foundation of the pier was to be laid was composed of large and small boulders, gravel, etc., and this is shown on the plan, soundings and borings having been made by the Department of Public Works some time previous to tenders being invited for the construction of the works in question. The contractor chartered one dredge, what is known as an orange peel dredge, which arrived on the scene of operations about July 1, 1929, but on account of the current and after a short trial, this dredge at once abandoned all intention of attempting to perform the dredging required by the contract. Then another dredge was brought to the scene, the latter part of July, a powerful bucket dredge, but she was unable to make satisfactory progress, and the superintendent of the dredge refused to continue dredging because it was causing serious injury to the dredge buckets. The contractor had made no examination of the bottom, and had made no preparation for the dredges in the way of blasting the boulders. I think it is probable, as was stated in evidence by some witnesses,

that only a dipper dredge could do this work, and then possibly some of the boulders would need to be first drilled and blasted. There is no evidence that the contractor made any attempt to procure another dredge nor do I think he ever intended to do so. It may be that the requirement of dredging the foundation down to the rock was perhaps difficult, expensive, and unnecessary, but nevertheless the contract required this to be done, and the contractor agreed to do it. The contractor then approached the District Engineer at Halifax, Mr. Locke, and represented that the excavation of the foundation for the pier by dredging was impossible of performance, or that he was unable to carry out that portion of the contract, and the District Engineer then informed the contractor that he would endeavour to alter the plan and specification to meet the apparent difficulties that had developed in that regard, and in the course of a few days the District Engineer presented the contractor with a plan indicating the changes that he was willing to make. The contractor was to be relieved of the dredging, the foundation area was to be levelled off with bags of concrete up to a certain elevation and thereon the crib work would be placed, and a talus, consisting of bags of concrete, was to be placed around the outer sides of the pier up to a determined point. These contemplated changes would eliminate the dredging of an approximated quantity of 975 yards, it would decrease the height of the crib work by ten feet, and it would, I think, call for the use of more concrete in the foundation and talus. On that occasion, I think, the contractor requested written instructions regarding these proposed alterations in the plan and specification, and this the District Engineer declined to do. The contractor had in the meanwhile constructed the crib-work up to a certain height, on shore, intending later to float it into position when it would be filled with stone, and practically all the material and equipment required was on the ground.

On August 28, 1929, the District Engineer wired the contractor as follows:

Kindly start concrete bag foundation for pier Barrington Passage. . . .

On the following day the contractor wrote the District Engineer as follows:—

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Dear Sir:

Re Contract 809 Barrington Passage

I received your wire yesterday *re* proposed changes in foundation. While I am willing and most anxious to do the work just as you wish it done, I wish to point out that in my opinion this change calls for work outside the provisions of the contract.

By the terms of the contract it is provided that the footing of the crib must be excavated by means of a dredge to the rock. We had the largest and most powerful dredge available undertake to do this excavation, and it was found impossible to excavate because the material was such that a dredge could not remove it.

The change now proposed is to meet the situation arising from the impossibility of using a dredge. I claim that this makes an entire change and a modification of the contract as to price and as to time for completion of the work should be made with us as a result.

We have also been put to large expense in connection with the attempt made to operate the dredge which under the circumstances ought to be paid by the Department.

As already requested I would like to have the instructions concerning the proposed changes made in writing before commencing the work.

The District Engineer did not furnish the written instructions requested, and the contractor did not take any steps to proceed with the works.

The contractor claims, it will be seen from his letter, that the alterations proposed were substantial and involved the introduction of something outside the contract, and that "an entire change and modification of the contract as to price and time and completion of the work," should be made. And the contractor seems to have taken this position because of the fact that he thought that the dredging required by the contract was impossible of performance. The District Engineer took the position that the proposed alterations did not mean that there was to be any substantial departure from the contract; that the provisions of the contract requiring the written permission of the Engineer to alterations in the plan and specification did not apply here, and that the proposed alterations involved only additions or deductions in the materials required for the works. If I understand it correctly, the ground which the District Engineer took—and he gave evidence at the trial—was that the contract provided that if the quantities of materials were increased or decreased, or if the pier was lowered or heightened, the contractor would be paid more or less as the case might be, according to the unit prices which I have mentioned, and that all that was involved in

the proposed changes was the abandonment of the dredging, the shortening of the height of the pier, the use of additional cement in the foundation and talus, and that alterations of this character were matters of detail, were within the authority of the District Engineer to make, and did not call for anything outside the provisions of the contract. There is a clause in the specification, which I have already mentioned, and which seems to mean that if for any reason the contractor is obliged to build to a greater or less height, presumably the crib work or pier, the increased or decreased quantities involved would be proportionately paid for or deducted from the amount of the contract.

By the terms of the contract the respondent was authorized to take the work out of the hands of the contractor for any delay in executing the works, and on September 18, 1929, notice was served upon the petitioner by the Chief Engineer of the Public Works Department at Ottawa, stating that the date of completion of the works was September 1, 1929, that the contractor was in default in not diligently continuing to advance or execute the works, and it called upon the contractor to put an end to his default and delay, and if within six days from the service of such notice, satisfactory progress was not made with the works, the Minister of Public Works would take over the works from the contractor together with all materials, articles, equipment and tools provided by the contractor on the works, which the Minister did, and he finished the work largely according to the modified plan proposed by the District Engineer to the contractor, and, it is alleged, at a cost of \$23,994.67 which exceeded the contractor's contract price of \$18,190. The contractor did not proceed with the work after such notice from the Chief Engineer, alleging to the Chief Engineer as the reasons for his default, the same as were advanced in his letter to the District Engineer. The contract provides that if the Minister took over the work, that the contractor would have no claim for any further payment in respect of the work performed, and that the contractor should be chargeable and liable for all loss and damage suffered by the respondent, that no claim should be raised or made by the contractor by reason of the ultimate cost of the works so taken over, for any reason proving greater than, in the

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opinion of the contractor, it should have been, and that any material, equipment, property, belonging to the contractor and taken over by the respondent, should remain and be the property of the respondent for all purposes incidental to the completion of the work, and might be used and exercised by the respondent as they might therefor have been used by the contractor, and that the Minister might at his option, on behalf of His Majesty, sell or dispose of such material, equipment, etc., at such prices as he may see fit, and detain the proceeds of such sale or disposition, on account of, or in part satisfaction of any loss or damage which His Majesty may have sustained.

The contractor claims to have suffered damage in the sum of \$13,386.53 which includes the deposit of \$1,850 accompanying the tender as security for the performance of the work, cost of material, freight, wages, and other sundry expenses, with interest on the several items of disbursement from the date thereof. The respondent has forfeited the deposit so pledged by reason of the default of the contractor in not executing the contract; and he has forfeited, as I understand it, all the plant and material on the works when the same was taken over.

The case is not free from difficulties, and I have given it anxious consideration, yet, I think, whatever hardship it works, the contractor must fail in his petition. In the first place, there is but one contract before the Court, and in respect of that contract the contractor is clearly in default, and the respondent was empowered thereunder to take the works out of the hands of the contractor and complete the same. The contractor agreed to dredge the foundation down to rock bed, and he seems to have been dilatory indeed, in making arrangements to procure the services of any dredge let alone one capable of doing the required dredging, and in informing himself as to the nature of the bottom to be dredged, before he sought the services of a dredge. At any rate the contract stands, and no new or amended contract has taken its place. The contractor cannot complain that to dredge the foundation was a difficult task. It is a settled rule of law that if a party by his contract charges himself with an obligation possible to be performed he must make it good unless the performance becomes impossible in law or in fact, or by the conduct of

the other party. If what is agreed to be done is possible and lawful, it must be done. There is no reason for holding that the foundation could not have been dredged as required; I think it could though perhaps that was not necessary. The contractor assumed the position that the proposed changes were such as to require "a complete re-adjustment of the contract," and that the proposed changes involved work outside the contract necessitating written directions from some one. If that were so, the District Engineer could not alter the contract, and the contractor did not appeal to the Chief Engineer for written authorization for such changes. He refused to follow the directions of the District Engineer, with the result that the contract remained to be executed according to the original plan and specification. The attitude of the contractor is somewhat difficult to understand because the changes proposed were, I think, for his benefit, and it is probable that had he acted upon the suggestion of the District Engineer, the changes in the plan and specification would have been approved of by the Chief Engineer. He seems to have assumed that because he had failed to dredge the foundation as required, with two dredges, that therefore he was relieved from this obligation, and was entitled virtually to a new and perhaps a more favourable contract.

The contractor's claim for damages is based upon the written contract of September 22, 1928, and there is no other contract. He contends he was damaged by the respondent taking over the works, together with the plant, materials, etc., on the site, not that he was not in default under the terms of the contract, but because the District Engineer declined to put in writing certain proposed changes in the plan and specification which he, the District Engineer, apparently was willing to authorize the contractor to act upon. The respondent was not under any obligation to revise the contract. Then, it seems to me that the contractor was left with the contract on his hands just as it stood on the day it was executed, and he was in default. The District Engineer could not vary the contract, or direct the contractor to do work outside the contract, and this the contractor is presumed to have known. If the District Engineer was authorized to make and direct such changes, and if the plan as modified and the telegram

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asking the contractor to lay the concrete bag foundation, constitute a direction in writing, then again the contractor is in default; and if the District Engineer was not authorized to make such changes, then his proposals go by the board, and the contractor was bound to proceed with the work according to the contract. It seems to me that however one looks at the matter the contractor was in default. On September 11, 1929, when the Chief Engineer notified the contractor to cure his default by proceeding with the work, the contract stood unvaried, and the contractor thereafter made no effort to proceed with the work and to complete the contract, and it appears from all the circumstances that he intended to remain in default.

Now, was the District Engineer empowered to make the changes in the plan and specification which he proposed to the contractor? While, I think, the District Engineer should have procured from the Chief Engineer authorization in writing directing the proposed changes, and in turn given the contractor directions in writing, thus expediting the work, and avoiding possible injustice to the contractor and needless litigation, still I cannot see how this can assist the contractor in establishing legal liability for damages against the respondent. According to para. 9 of what is called the General Conditions accompanying the specification at the time of tender, and forming a part of the contract, the work was to be done in accordance with the plan unless the Chief Engineer deemed alterations should be made, and para. 14 states that the contractor was not to make any change or alteration in the works or in the dimensions and character of the materials to be used without the consent and permission in writing of the Engineer, which there means the Chief Engineer. "Alterations" is defined in para. 15, and it seems to me that the alterations proposed were such as could only be authorized by the Chief Engineer, because, for example, the change proposed in the foundation of the pier was not of a trifling nature, but from the engineering standpoint was a fundamental change indeed, and it seems to me was one that the District Engineer could not possibly authorize. Then para. 37 of the General Conditions makes it quite plain that the District Engineer had no power to order changes which would entail an increase or decrease in the cost of the work without re-

ferring the matter to the Chief Engineer, and it is not shown that he did; he could only direct that the work be substantially carried out in accordance with the plan and specification. I do not think that the changes in the plan and specification that were proposed were in the nature of extras, as defined by para. 7 of the contract, and as claimed by the District Engineer; nor were the suggested changes matters of detail, but were changes of such a character as to require authorization in writing by the Chief Engineer. It seems to me therefore that the changes in the plan and specification proposed by the District Engineer, and which the contractor required be put in writing, were not authorized by the Chief Engineer, and I can only regard them as being just as ineffective as if they had never been proposed at all. Then the contract, the plan and specification, remain as they were. The Chief Engineer then resting on the contract, required the contractor to proceed to completion with the work, but he refused to do so. The notice was not, I think, unreasonable as to time, and it appears from the facts that the contractor had no intention to proceed to the completion of the contract; and the Chief Engineer apparently would not authorize the contractor to proceed with the work subject to the alterations in the plan and specification proposed by the District Engineer. So again, it seems to me that the contractor being in default under his contract his action is without ground.

The terms of the contract are exceedingly onerous so far as the contractor is concerned. It was evidently designed to meet the case where contracts entered into by the Crown at Ottawa, were to be executed at far distant places, and consequently the power and authority of local or district officers was designedly limited to the direction of the works as actually set forth in the contract, unless otherwise authorized in writing by the Chief Engineer. It seems to me that the controversy which arose between the parties here could have been avoided, and that the differences between the contractor and those representing the Crown might have been adjusted. In view of all the circumstances I am disposed to think that abstract right between the parties would entitle the contractor to some return of the moneys expended by him in the premises; but that is a matter for the grace and bounty of the Crown, and it must

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be left at that. While I find for the respondent there will be no order as to costs.

One point further is to be mentioned. While in the view I take of the case it is not perhaps now necessary to decide whether or not Voye should have been added as a suppliant, yet in the event of an appeal, I perhaps should express an opinion upon the point. A motion was made at the trial by counsel for the respondent to dismiss the petition for the non-joinder of Voye. To amend the petition by adding Voye does not involve any substantial alteration in the cause of action, and if the petition had originally been presented with the name of Voye added as a suppliant, it is improbable that the fiat would have been refused. I have considered the authorities cited to me by counsel, and I am inclined to the view, though not without some doubt, that it is proper that Voye should be added as a suppliant, and I understood him to say at the trial that he did not now object to this being done though he did at an earlier stage; I therefore grant leave to add Voye as a suppliant, but on the condition that the suppliant Boone indemnify Voye, if the latter so requires, against any costs to which he may be subjected by his being joined as a suppliant. This would dispose of the point to the satisfaction of both parties I should think, and it will entail no serious hardship upon the suppliant Boone, if indemnity is required of him on this account.

Judgment accordingly.

BETWEEN:

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Oct. 4 & 5.
Dec. 22.

HIS MAJESTY THE KING, in right of the Dominion
of Canada,

PLAINTIFF;

AND

THE ATTORNEY-GENERAL OF ONTARIO and
WILLIAM L. FORREST,

DEFENDANTS.

Constitutional law—British North America Act, Section 108—Rights of the Province and Dominion thereunder—Harbours—“River improvement.”

The Court found upon the evidence that it was open to serious doubt if Ship Island was in 1867 situate within the bounds of what was then known as Goderich Harbour. That in any event it did not then

form part of the said Harbour and was not then a harbour or river improvement.

Held that even assuming that Ship Island was in 1867 situate within the bounds of the harbour of Goderich, inasmuch as it was not part of the said harbour and was not at that time a harbour or river improvement, it did not pass to the Crown in right of the Dominion of Canada under section 108 of the British North America Act.

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INFORMATION by the Attorney-General of Canada asking that it be declared that that certain piece of land known as Ship Island was, prior to the expropriation thereof, vested in His Majesty the King, in right of the Dominion of Canada, and if not, that, in the alternative, it be declared that it became so vested by the said expropriation, and that the Court fix the compensation for the said lands.

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

H. H. Davis, K.C., and *D. Guthrie* for the plaintiff.

J. Sedgwick for the Attorney-General of Ontario.

A. G. Slaght, K.C., and *W. G. Pugsley, K.C.*, for William L. Forrest.

The questions of law raised at the hearing are stated in the reasons for judgment.

THE PRESIDENT, now (December 22, 1932), delivered the following judgment:

The facts of this case, rather than the law, present unusual difficulties and it will become necessary to mention them at some length. Before referring to the facts, it will be convenient first to state the nature of this proceeding, and the scope of the claims of the several parties thereto.

In the month of September, 1929, a certain dredging company, under the terms of a contract in writing between His Majesty represented by the Minister of Public Works of Canada, and the said dredging company, commenced to dredge a certain parcel of land known as Ship Island, (earlier known as No. 2 Island) lying in close proximity to the mainland in the Harbour of Goderich, Ontario, it being the intention to remove the whole of that island for the improvement of navigation in the Harbour of Goderich.

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The island at this time was about one acre in extent, but in earlier years its area comprised something over four acres; the reduction in area was, I understand, due to dredging operations carried on by the Government of Canada in recent years for the improvement of the harbour. The plaintiff then, as now, believed himself to be the owner of Ship Island in fee simple. The defendant Forrest, claiming an interest in Ship Island by virtue of a lease obtained from the Government of the Province of Ontario, and otherwise, commenced an action in the Supreme Court of Ontario against the dredging company, and obtained an interim injunction restraining the dredging company from removing or dredging any part of the island. The injunction was dissolved, the plaintiff agreeing to expropriate the interest, if any, of Forrest, without prejudice to the claim that Ship Island was vested in and the property of His Majesty the King in right of the Dominion of Canada.

The lands in question were then expropriated under the authority of The Expropriation Act, Chap. 64, R.S.C., 1927, and the same then became and new remain vested in His Majesty the King in right of the Dominion of Canada. If it be held that the lands were not vested in the plaintiff prior to the expropriation proceedings, then the plaintiff is willing to pay whatever compensation may be eventually fixed by the Court. The defendant, the Attorney-General of Ontario, claims that the fee simple to Ship Island is (subject to an outstanding leasehold interest) in His Majesty the King in right of the province of Ontario. The defendant Forrest, as already stated, claims a leasehold interest in the island by virtue of a lease of the same made to him by His Majesty the King in right of the province of Ontario, in August, 1929, for the period of twenty-one years. It was also urged on behalf of Forrest that he had obtained a prescriptive title to the lands in question against the Crown by an adverse possession of sixty years, but that claim was abandoned at the end of the trial. Forrest also claims title to the lands by virtue of a continuous and exclusive possession of ten years by himself and his predecessors, under the provisions of The Limitation Act, Chap. 106, R.S.O., 1927. It might be convenient here to remark that the island or a portion of it had been occupied by one Marlton, and later by his son, for many years,

going back at least to 1875, and thereon the Marltons carried on the business of building and repairing vessels, boats, scows and dredges; it was also the base of dredging operations carried on by them in Goderich Harbour for some years. Forrest purchased in 1920 from William Marlton all the buildings, plant, machinery, tools, scows, barges, etc., paying therefor the sum of \$15,500, and he carried on a business there similar to that conducted by Marlton and his son, and he also lived on the island. Forrest apparently received from Marlton a paper title to two barges for registry at Customs, but Marlton at that time informed Forrest that he had no title to the land and consequently no conveyance was made by Marlton to Forrest of any interest in the island. The plaintiff claims title to the lands in question, because at the date of Confederation, Goderich Harbour, then within the province of Canada, passed to the Crown in the right of the Dominion as a public harbour, by virtue of section 108 of the British North America Act, and Schedule Three thereto, and that Ship Island was a part of that public harbour, or was a harbour improvement. The plaintiff also asserts title to the lands in question through various grants or leases made by the province of Upper Canada and the province of Canada, all interests in which were eventually acquired, it is claimed, by His Majesty the King in the right of the Dominion of Canada, and to which I shall shortly refer with greater particularity. The plaintiff resists the claim of the defendant Forrest to possession of the lands by reason of ten years undisturbed occupation. The Canadian National Railways is no longer a defendant.

Before referring to the documentary evidence tendered by the respective parties relating to the matter of title to Ship Island, it might be useful to state a few facts concerning the early history of Goderich Harbour. Goderich Harbour is located at the mouth of the River Maitland, which river was, in earlier days at least, a stream of considerable size, and its upper reaches flowed generally through a narrow valley, but when it reached a point about two miles distant from Lake Huron, into which it flowed, the valley broadened out to a width of from a quarter to half a mile, and through this flat valley the river wound through a series of islands of various sizes, one of which

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was Ship Island; some of these islands were larger than Ship Island, and some were smaller. These islands, it may be assumed were of alluvial origin, but it is, I think, a fact that Ship Island existed as such prior to any of the dates material here. Between these islands and the outlet of the river into Lake Huron was a comparatively shallow flat or basin of considerable extent, which, I think, came to be later called the Inner Harbour. The outlet of the river into Lake Huron was through a beach and it was evidently difficult in the early days to maintain an adequate opening in the beach. In 1835 it was evident that the harbour, then, I think, only the end of the River Maitland, was not sufficiently safe or commodious for the accommodation of even small shipping, and it is apparent that the public authorities were at that time desirous of having a harbour constructed at or near the junction of the river and lake. The town of Goderich had been earlier laid out; it lay along the lake shore and on the south side of the Maitland river and extended up the river for quite a distance. On the opposite side of the river was what was known as Colborne Township. The construction of a harbour at this place, according to a report made in 1870 by John Page, Chief Engineer of Public Works, was first undertaken by the Canada Company, which company we shall hear more about, and he states that though this company made a considerable expenditure on harbour works they were allowed to fall into decay. This work was required by the terms of a lease to which I shall later refer. The Canada Company transferred its rights in the harbour to the Buffalo and Lake Huron Railway Company and which will be later mentioned. In a report made by Hon. H. H. Killaly, on Harbours of Refuge, in 1862, he states that the principle adopted in the construction of Goderich Harbour was to convert the extensive flat at the mouth of the river, some 20 acres in extent, into an inner basin, to have a depth of 14 feet of water, the entrance to it being between two piers, the width between the piers being 170 feet at the narrowest point; it would appear that considerable harbour improvement work had been carried out prior to the date of this report, either by the Canada Company, or by the Buffalo and Lake Huron Company, or by both.

A very considerable amount of documentary evidence in the form of grants, leases, plans, and official reports, was put in evidence at the trial, not all of which was in the end claimed to be relevant. In 1830 the province of Upper Canada granted to the Canada Company a large tract of land, designated as the township of Goderich, in the county of Middlesex, in the district of London, but it was conceded by Mr. Davis that this grant did not comprise Ship Island, and it need not therefore be further considered. In 1835, the Government of the Province of Upper Canada leased to the Canada Company, for the period of twenty-one years, certain parcels of land, covered with water in the townships of Goderich and Colborne in the county of Huron. Though this lease is not now of importance it is still desirable to examine it. The land covered with water that was demised is described as follows: "Commencing at the Water's Edge of Lake Huron in the Southern limit of the Tier of small farm lots abutting on the South side of the Town Plot of Goderich—Thence West 500 yards more or less to deep or navigable Water, thence Northerly parallel with the Shore always at the distance of 500 yards more or less in a manner to continue in navigable Water one mile, thence East to the Water's Edge in the Township of Colborne, thence Southerly along the Water's Edge of Lake Huron to the River Maitland, thence up along the Water's Edge of the River Maitland, along the Colborne Side thereof one Mile and seven-eighths of a Mile more or less, till a line produced Westerly will strike the North East Corner of the said Town of Goderich—Thence Westerly crossing the River to the Goderich side thereof; thence down along the Water's Edge of the River Maitland along the Goderich side thereof to Lake Huron, Thence Southerly along the Water's Edge of Lake Huron to the place of beginning." From this description it is clear, I think, that it was the bed of the River Maitland from its outlet at the shore of Lake Huron, and a mile and seven-eighths up the river, that was leased, within which area was situated Ship Island; land covered with water in Lake Huron, was also included in the lease, but in that we are not interested. The Canada Company, as a condition of the lease, was required within five years to build and maintain a substantial wharf or pier extending into the water such a distance as

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to ensure the free navigation of vessels, of the burthen of at least 20 tons, into the Harbour of Goderich through the River Maitland; it was to excavate and remove so much of the sand bar, rock, or other obstructions that impeded navigation at the entrance of the said river and harbour; it was to deepen the bed of the river and lake so as to permit the free navigation of vessels of the tonnage mentioned. In 1837, the Canada Company was authorized by Chapter 50 of the Statutes of Upper Canada "to erect a harbour at Goderich on Lake Huron." That statute seems to recognize the lease which I have just referred to but beyond that I do not think it sheds any light upon the controversy. This lease expired after twenty-one years, and as it did not purport to part with the title to the land covered with water, or the islands in the river, consequently no title in fee simple can be derived from it, and it may therefore be disregarded. Then, in 1840, a grant issued from the province of Upper Canada to the Canada Company conveying certain "parcels or tracts of land covered with water," in the Huron Tract of the county of Huron. Describing the land demised the grant reads: "Being composed of the River Maitland from the northerly boundary of the Huron Tract to Lake Huron." In the same manner the Rivers Thames, Bayfield, and Aux Sables, or portions of them are granted. This grant it seems to me comprised that part of the River Maitland in which we are interested, although Mr. Davis seemed to think it applied to the upper reaches of that river, but as it reserves such portions of River Maitland as constitute the bed of navigable waters, it would seem to be of no importance. There is nothing in the grant which suggests the demise of any islands in the River Maitland. In June, 1859, the Canada Company agreed to sell to the Buffalo and Lake Huron Railway Company certain described lands within and without the Town of Goderich, also the rights, interests and privileges which the Canada Company "may now have, to and in Goderich Harbour in virtue of the Provincial Act, Seven, William the Fourth, Chapter fifty, with all their right to the wharves and piers thereof, the boundaries of the said Harbour being constructed by the said Act as situate, lying and being in accordance with the lease from the Crown of date the twenty-eighth day of July, 1835, or otherwise" The Canada Company also agreed to sell "the land covered with

water lying between the Townships of Goderich and Colborne that is to say, by the River Maitland from its confluence with Lake Huron for a distance up stream of one mile and seven-eighths of a mile." There is no mention of any island in the River Maitland being included in this instrument. Some years later the Canada Company conveyed by deed to the Buffalo and Lake Huron Railway Company all the property described in this agreement of sale. After the Act of Union, in 1862, the province of Canada, leased to the Buffalo and Lake Huron Railway Company, for 99 years, precisely the same land covered with water as was described in the lease made by the Government of Upper Canada to the Canada Company. There is no explanation as to why this lease was made to this railway company, but one might surmise that the Buffalo and Lake Huron Railway Company was of the opinion that possibly the Canada Company was in default in performing the conditions mentioned in the grant of 1840 to it, and that therefore a lease direct to itself was desirable as a measure of protection. This lease was upon the condition that the lessee would perform and execute certain improvements in Goderich Harbour, but these need not be enumerated. There is not in this lease any reservation as to the bed of navigable portions of the land covered with water, and the lease is silent as to any islands falling within the bounds of the described land covered with water. Whatever right or title the Buffalo and Lake Huron Railway Company acquired in Goderich Harbour later became vested in the Grand Trunk Railway Company; there is no evidence as to whether or not the Buffalo and Lake Huron Company was in default under the terms of the lease of 1862. In 1870, by an Order in Council of the Government of the Dominion, the Minister of Public Works of Canada was authorized to acquire from the Grand Trunk Railway Company any rights which the latter had in Goderich Harbour, whatever they were, but it appears this was not acted upon. Then the next event was that the Canadian National Railways, as successor to the Grand Trunk Railway Company, and the Buffalo and Lake Huron Railway Company, quitted claim to His Majesty the King, in the right of the Dominion of Canada represented by the Minister of Marine and Fisheries, such rights as they had in the Harbour of Goderich.

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The plaintiff's claim to the fee simple of Ship Island, or to the unexpired term of the lease of 1862, through the chain of title I have mentioned, I think must fail. If the bed of the River Maitland passed from the Crown under any of the grants referred to, or was leased, it does not follow that Ship Island was granted or leased by the Crown. The demise of the river bed, to grantees or lessees, was upon the condition that certain harbour improvements were to be performed, and at the date of the grants or leases which I have mentioned, it is improbable that the islands in the River Maitland would in any way be regarded as an element of importance in the construction or improvement of the harbour, but in any event, there is not, in my opinion, evidence to show that Ship Island was ever granted or leased by the province of Upper Canada, or the province of Canada, in fact the weight of evidence is against such a presumption. The title to Ship Island must therefore be held to have been, prior to the expropriation proceedings, in the Crown in right of the province of Ontario, unless it was acquired by the Dominion as a portion of a public harbour, or a river improvement, at the date of Confederation, and to which I shall at once refer.

The point which, I think, plaintiff's counsel chiefly relied upon was that the lands taken passed to the Crown in the right of the Dominion of Canada at the date of Confederation, under sec. 108 of the British North America Act, which provided that the Public Works and Property of each province, enumerated in the Third Schedule to the Act, should become the property of Canada, and the Schedule, inter alia, enumerates "Public Harbours" and "Rivers and Lake Improvements." "Public harbour" means not merely a place suitable by its physical characteristics for use as a harbour but a place to which on the relevant date the public had access as a harbour, and which they had actually used for that purpose. The date at which the test must here be applied is the date at which the British North America Act, by becoming applicable, effected a division of assets between the province, here the province of Ontario, and the Dominion. See *Attorney-General of Canada v. Ritchie Contracting and Supply Company* (1) and *The Fisheries Case* (2). As to the division of assets between

(1) (1919) A.C. 999 at p. 1004.

(2) (1893) A.C. 700.

the new provinces of Ontario and Quebec, which belonged to the old province of Canada, no question was raised before me. Assuming Ship Island was within the bounds of what was known as the Harbour of Goderich, and which I shall assume was a public harbour, in 1867, it does not follow that that island was a part of the harbour, and in my opinion it was not. The bounds of the harbour would be one thing, but whether Ship Island was a part of the harbour would be an entirely different question. There would not seem to be any reason for holding that Ship Island was a part of a public harbour, in fact such a contention does not appear to me to be one of substance in view of the facts. It is open to serious doubt if Ship Island was in 1867 situated within the bounds of what was known and used as Goderich Harbour. Nor do I think it tenable to say that Ship Island was then a "river improvement." It was a parcel of land containing about four acres. The Canada Company may have at one time constructed some crib work on the island, as a part of, or an anchor for, an "ice breaker" built from the mainland to Ship Island, to protect the harbour, but that would not be sufficient to make the island a harbour or river improvement, or a portion of the harbour, and at any rate it has not been shown that the icebreaker was in existence in 1867, and I do not think it was. To say that Ship Island was in use as a harbour or river improvement in 1867 as was urged, cannot, in my opinion, be sustained. Ship Island is regarded to-day as a nuisance, rather than a harbour improvement, and so much so, that to meet the expanding business of the present Goderich Harbour it is proposed to enlarge it by dredging the island away altogether. "Improvements" in a harbour or river in 1867 meant, in my opinion, some Public Work or Property constructed or created and then in existence and use for some purpose or other.

Having reached the conclusion that the title to Ship Island was not in the Crown in the right of the Dominion of Canada, but in the Crown in the right of the province of Ontario, it is not necessary to pronounce upon any other point; it was stated by Mr. Slaght that if I reached this conclusion it would not be necessary to express an opinion upon the claim of the defendant Forrest to Ship Island, by reason of ten years undisturbed occupation of the same by himself or his predecessor Marlton. It follows that the

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defendant the Attorney-General of Ontario, as owner of the fee simple, and the defendant Forrest as lessee, of the lands taken must succeed and I see no reason for withholding costs to the successful parties in respect of this aspect of the case. The question of the amount of compensation is of course reserved as agreed upon. The Court will either hear evidence later in respect of the amount of compensation, or will direct a reference to ascertain the amount of the same, at a time to be fixed on application in the usual way.

Judgment accordingly.

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 Oct. 5.
 Dec. 30.

BETWEEN:

I. MURRAY CAPON.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Petition of Right—Public work—Collision of motorboat with a buoy—
 Exchequer Court Act, Sec. 19, ss. "C."*

Suppliant's motorboat collided with a buoy at the mouth of the Bracebridge river, in the Muskoka Lakes region, on which there was no light, and by his petition seeks to recover \$500 by way of damages to the boat, alleged to be the result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work, to wit, in not seeing that the buoy carried a light.

Held, that the buoy in question, was not a public work within the meaning of Sec. 19, ss. "C" of the Exchequer Court Act, and that, in consequence, the suppliant was not entitled to the relief sought by his petition of right.

PETITION OF RIGHT by suppliant seeking to recover a certain sum by way of damages for injury to his motorboat due to a collision with a buoy on the Muskoka Lakes alleged to be due to the negligence of a servant of the Crown in not keeping a light thereon.

The questions of law raised in the action, namely, whether the buoy in question was a public work, and that if the same was a public work, whether the person responsible for maintaining the buoy in good condition was an officer or servant of the Crown, were heard before the Honourable Mr. Justice Angers, at Ottawa.

C. A. Thoburn for Suppliant.

F. P. Varcoe, K.C., for respondent.

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

ANGERS J., now (December 30, 1932), delivered the following judgment:

By his petition of right the suppliant seeks to recover from the Crown the sum of \$500, with interest and costs.

The petition alleges that on the 14th day of August, 1931, at about 10.30 p.m., a motorboat, belonging to suppliant, and driven by one Shields, an expert driver of motorboats in the Muskoka Lakes, left Bracebridge, Ontario, en route to the suppliant's home on Lake Joseph, and that, upon reaching the mouth of Bracebridge River, the said Shields drove in the proper channel past the range or beacon lights keeping a sharp lookout. The petition relates that the motorboat, having passed the last light which should have marked the entrance to the shallow channel, collided with a buoy, which carried no light and that, as a result of the collision, the boat was damaged and one of its passengers injured. The petition avers that the collision was due to the fault and negligence of the Crown's officers and servants acting within the scope of their duties and employment in that they neglected to see that the buoy carried a light. The petition further adds that the buoy had been, to the knowledge of the Crown's officers and servants, defective previous to the 14th day of August, 1931.

The statement of defence, after denying the material allegations of the petition, says

- (a) that the petition does not disclose any cause of action against His Majesty;
- (b) that the person or persons responsible for maintaining the buoy in question were not officers or servants of the Crown;
- (c) that the said buoy was not a public work within the meaning of paragraph (c) of section 19 of the Exchequer Court Act.

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

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

(a)

(b)

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

To bring this case within the provisions of subsection (c) of section 19 of the statute, the injury or damage to the suppliant's motorboat must result from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment upon a public work. Three conditions are therefore required, namely: (a) a public work; (b) negligence of the officer or servant of the Crown upon such work; (c) an injury resulting from such negligence.

When the case came up for trial, it was, on the suggestion of the parties, decided that, before adducing any evidence to establish the cause of the accident and the amount of the damages, the two following questions should be submitted for the consideration and decision of the Court, to wit:

1. Was the buoy a public work within the meaning of subsection (c) of section 19 of the Exchequer Court Act?
2. Was the person responsible for maintaining the buoy in good condition an officer or servant of the Crown?

After carefully perusing the memoranda of argument filed by counsel and making a review of the decisions having some bearing on the interpretation of the words "public work" in subsection (c) of section 19 of the Exchequer Court Act, I have reached the conclusion that there is no public work in the present case.

See: *Manseau v. The King* (1) and the cases therein cited, particularly *Paul v. The King* (2); *Hamburg American Packet Co. v. The King* (3); *Desmarcais v. The King* (4); *Macdonald v. The King* (5); *Montgomery v. The King* (6).

See also: *Despins v. The King* (7); *Piggot v. The King* (before the amendment 7-8 Geo. V, ch. 23, s. 2) (8); *Wolfe Co. v. The King* (9).

In the case of *Paul v. The King, ubi supra*, Sir Louis Davies J., commenting upon the expression "public work" said (p. 131):—

This court has already held in the case of *The Hamburg American Packet Co. v. The King*, confirming the judgment of the Court of Exchequer, that the channel of the St. Lawrence River after it had been deepened by the Department of Public Works did not, in consequence of such improvement, become a public work within the meaning of the section under consideration. An appeal taken from this judgment to the Privy Council was afterwards abandoned. This judgment is, of course, binding upon us and somewhat narrows the point now before us.

To hold the Crown liable in this case of collision for injuries to the suppliant's steamer arising out of the collision we would be obliged to construe the words of the section so as to embrace injuries caused by the negligence of the Crown's officials not as limited by the statute "on any public work," but in the carrying on of any operations for the improvement of the navigation of public harbours or rivers. In other words, we would be obliged to hold that all operations for the dredging of these harbours or rivers or the improvement of navigation, and all analogous operations carried on by the Government were either in themselves public works, which needs, I think, only to be stated to refute the argument, or to hold that the instruments by or through which the operations were carried on were such public works.

I think a careful and reasonable construction of the clause 16 (c) must lead to the conclusion that the public works mentioned in it and "on" which the injuries complained of must happen are public works of some definite area, as distinct from those operations undertaken by the Government for the improvement of navigation or analogous purposes; not confined to any definite area of physical work or structure.

In his memorandum of argument, counsel for suppliant submits that section 19 of the Exchequer Court Act includes all "public works mentioned under the Public Works Act and other Acts, in which such expression is defined." I must say that I cannot agree with this proposition.

(1) (1923) Ex. C.R., 21 at p. 24.

(2) (1906) 38 S.C.R., 126.

(3) (1901) 7 Ex. C.R., 150 and
(1902) 33 S.C.R., 252.

(4) (1918) 18 Ex. C.R., 289.

(5) (1906) 10 Ex. C.R., 394.

(6) (1915) 15 Ex. C.R., 374.

(7) (1916) 16 Ex. C.R., 256.

(8) (1915) 19 Ex. C.R., 485.

(9) (1921) 20 Ex. C.R., 307, and
(1921) 63 S.C.R., 141.

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In the case of *Wolfe Co. v. The King, ubi supra*, the Honourable Mr. Justice Audette, at page 316, said:

The words "public work" mentioned in sec. 20 of the Exchequer Court Act must be taken to be used as verily contemplating a public work in truth and in reality, and not that which is mentioned in the Public Works Act or in the Expropriation Act for the purposes of each Act. Moreover, each definition given in these two Acts is prefaced by the words "In this Act, unless the context otherwise requires," that is to say it is limited to each Act. Indeed for the purposes of each Act that definition is obviously acceptable, because it is used, so to speak, as a key to what comes within the ambit or provision of each Act. However, it does not follow that it can be accepted as a general definition in all cases. It is not because a desk and chair belong to and are used in the Department of Public Works that it must therefore be construed as a public work, any more than the same furniture, the property of the Department of Militia, can be called military works, military engines.

The Crown's liability cannot be enlarged except by express words or necessary implication—*City of Quebec v. The Queen* (2 Ex. C.R. 270)—and all properties belonging to the Crown are not necessarily public works. (Idem. 24, S.C.R. 448.)

I think that the remarks of the learned judge are exactly to the point.

In his memorandum of argument, counsel for suppliant, much to my surprise, suggests that "the question of whether this particular buoy was a public work could not be determined unless evidence were taken to show why it was not, in view of the fact that it clearly comes within the definition of a public work." The situation is exactly the same as it was when the parties agreed to submit the case on the questions of law; the change of attitude of counsel for suppliant is rather tardy. However, notwithstanding the delay, I would not hesitate a moment to order that the case be reopened and fixed anew for trial, if I thought that anything could be gained by so doing. But for the purpose of my decision, I have taken for granted that the facts alleged in paragraphs 4 and 5 of the petition of right are true; surely the suppliant could not expect to be allowed to make proof beyond the allegations of his petition. I accordingly see no reason to adopt the suggestion made by counsel for suppliant in his memorandum of argument.

Having come to the conclusion that the buoy, with which the suppliant's motorboat is alleged to have collided, is not a public work within the meaning of subsection (c) of section 19 of the Exchequer Court Act, I need not discuss the second question submitted by counsel, viz., whether the per-

son responsible for keeping the buoy lighted was an officer or servant of the Crown or not.

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No right of action has accrued to the suppliant and his petition must accordingly be dismissed.

There will be judgment finding that the suppliant is not entitled to the relief sought by his petition of right and dismissing the said petition with costs.

Judgment accordingly.

BETWEEN:

VANDEWEGHE LIMITED ET AL.....SUPPLIANTS;

1931
Nov. 17.

AND

HIS MAJESTY THE KING.....RESPONDENT.

1932
Dec. 28.

Revenue—Sales Tax—Special War Revenue Act, 1915, Sec. 86—Regulations

The following regulation was enacted under the Special War Revenue Act, 1915:

Furriers are not to be granted a consumption or sales tax licence on and after the 1st September, 1924. Licences issued to furriers prior to that date are to be cancelled. Dressers and dyers of furs, however, are required to take out a sales tax licence and account to the Collector of Customs and Excise for consumption or sales tax on furs dressed or dyed by them. Such tax is to be computed on the current market value of the dressed furs whether the dresser is the owner of the furs or not.

Suppliant paid the tax computed on the actual selling price and now claims that it should have been computed on the current market value of the dressed furs, under the regulation, and sued to recover the amount alleged to be overpaid. The Crown contends that the tax was properly payable under section 19BBB of the then Act. The validity of the regulation was not raised.

Held, that as the validity of the regulation was not in question, it must, for the purposes of this case, be considered as valid, and that the tax payable by the Suppliant should have been computed on the current market value of the dressed furs and not on the actual selling price, and the Suppliant was entitled to the relief sought, but without interest.

PETITION OF RIGHT by Suppliants herein asking that the amount alleged to have been overpaid to the Crown in connection with certain sales tax, be refunded.

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

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L. A. Forsyth, K.C., for the suppliants.

J. A. Mann, K.C., for the respondent.

The questions of fact and parts of the Act relevant to this case are stated in the reasons for judgment.

THE PRESIDENT, now (December 28, 1932), delivered the following judgment:

The suppliant carries on business at Montreal, Quebec, as a wholesale dealer or jobber in dressed or dyed furs, and as a dresser and dyer of furs, and in the period here in question, that is, between September 1, 1924, and December 31, 1929, it dressed and dyed almost exclusively raw furs which it had purchased and owned. The raw furs thus dressed or dyed were sold to manufacturing furriers. The process of dressing raw furs means that the hair of the fur is washed and combed and the hide is in some way made soft and pliable; dressing does not imply cutting or trimming of the skin with a knife. Dyeing, simply means that the skins are dyed the colour desired. Under the provisions of The Special War Revenue Act, 1915, as amended and in force on September 1, 1924, the Minister of Customs and Excise was empowered to make such regulations as he deemed necessary or advisable for carrying out the provisions of Part IV of the Act, and in pursuance thereof there was enacted the following regulation applicable to furriers, dressers and dyers of furs.

Furriers are not to be granted a consumption or sales tax licence on and after the 1st September, 1924. Licences issued to furriers prior to that date are to be cancelled.

Dressers and dyers of furs, however, are required to take out a sales tax licence and account to the Collector of Customs and Excise for consumption or sales tax on furs dressed or dyed by them.

Such tax is to be computed on the current market value of the dressed furs whether the dresser is the owner of the furs or not.

Prior to this regulation suppliant dealt largely with licensed furriers, and cloak and suit manufacturers, and it was not required to account for the sales tax in respect of such sales, but it was required to account for the tax in respect of sales to unlicensed persons and the tax was included in the invoiced price to customers. Prior to September 1, 1924, the suppliant was licensed as a manufacturer of furs, and this licence seems to have been continued during the period here in question, which is some-

what difficult to understand, but it is not, I think, of importance.

It is agreed that all dressers and dyers of furs in Canada, between September 1, 1924, and December 31, 1929, with the sole exception, I think, of the suppliant, accounted for the tax prescribed by the regulation, upon furs dressed or dyed by them for customers owning furs, computed upon the current market value of the raw furs to which valuation was added the charges for dressing or dyeing the same. These dressers and dyers appear to have paid the tax on the charges made for both the dressing and the dyeing of furs, though the last clause of the regulation would seem to state that the tax was to be computed on the current market value of dressed furs only. However, that is here purely an academic question and the point need not be considered as it was not raised at the trial.

The suppliant it appears accounted for the tax in respect of furs dyed or dressed by it within the period mentioned, computed not upon the current market value of such furs as provided by the regulation and as in the case of all other dressers and dyers of furs, but upon the actual selling price of the same. It was suggested that the suppliant collected the tax from the customers, but even if that were true it does not make law or alter the law. The suppliant claims that through error of law and fact it thus paid to the respondent at Montreal, in the province of Quebec, the sum of \$23,551.65 in excess of the proper amount payable by it, and it claims in its petition repayment of this amount with interest. It was agreed by counsel for both parties that it was the provisions of the Civil Code of the Province of Quebec that were applicable in the circumstances, and two sections of the Civil Code were referred to and which are as follows:—

1047—He who receives what is not due to him, through error of law or of fact, is bound to restore it; or if it cannot be restored in kind, to give the value of it. If the person receiving be in good faith, he is not obliged to restore profits of the thing received.

1140—Every payment presupposes a debt; what has been paid where there is no debt may be recovered. There can be no recovery of what has been paid in voluntary discharge of a natural obligation.

The suppliant contends that it was liable only for the tax on furs dressed and dyed by it, computed on the cur-

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rent market value of the dressed or dyed furs, as prescribed by the regulation, and that it should have been taxed in the same manner that all other dressers or dyers of furs were taxed. The respondent contends the tax was payable upon the actual sale price of such furs, as prescribed by sec. 19BBB of the Act as it then stood, now sec. 86 of the Act, and that the suppliant having dressed and dyed its own furs it was a producer or manufacturer under the terms of the Act. So the question for decision is whether during the period in question, it was the regulation, or the statute, which was applicable to the suppliant. If the suppliant was taxable under the Act as a producer or manufacturer, on its sale price, then it would seem the suppliant must fail. On the other hand if the tax payable by the suppliant was that provided for by the regulation then it would appear that the suppliant should succeed. I may at once say that the matter of the validity of the regulation was not raised at the trial, and I need not therefore concern myself with that question.

It seems to me that the suppliant's view is the correct one. The regulation seems quite clear as to where the tax is to be levied. It states that dressers and dyers of furs must account for the tax on all furs dressed or dyed by them, whether they own the furs or not, and the tax is to be computed on the current market value of the dressed furs. The regulation expressly states that no distinction is to be drawn between those who dress or dye furs on their own account, and those who dress or dye furs for others. It would seem unreasonable and discriminatory if any distinction were made between these two classes when it is remembered that the tax is imposed upon all dressers and dyers of furs, regardless of ownership. The tax was not to be computed upon the "sale price" of the dressed or dyed furs, but upon the current market value of the furs as dressed or dyed in the hands of the dresser or dyer, and whether or not he was the owner of the furs. It could not well be otherwise because the tax was exigible under the regulation as and when the furs were dressed or dyed by the dresser or dyer, and before a sale was made by the owner of the dressed or dyed furs, whoever he was. There is no definition of "current market value" in the statute, and I think the only meaning that can be given to those

words is that given by the Department of Government making and administering the regulation in question. The statute as since amended, sec. 86 (4), states that the tax is to be levied "upon the current market value of all raw furs, dressed and/or dyed in Canada, payable by the dresser or dyer at the time of delivery to him." This differs slightly from the regulation. I might also here point out that by another amendment to the statute a "producer or manufacturer" is now made to include any "dresser or dyer of raw furs" and therefore put in the same category as printers, publishers and lithographers or engravers.

If the regulation is valid, and for the purposes of this case it is so to be considered, then it seems to me quite clear that it was intended that the regulation was to apply to the suppliant in precisely the same manner as it was to other dressers and dyers of furs. To treat the suppliant differently from other dressers and dyers of furs, because it owned the furs which it dressed or dyed, seems to me to be flatly against the express words of the regulation. The purpose of the regulation was to tax furs which were dressed or dyed no matter who owned them. It seems to me to be altogether unwarranted to make a distinction between one who dresses or dyes his own furs and one who dresses and dyes furs for others, and the regulation seems to me to say in very clear language that no such distinction should be made. If the respondent's view is correct the suppliant would be at a disadvantage with his competitors in the fur market. A dresser and dyer of furs is now by an amendment to the Act a "producer or manufacturer," but at the time with which we are here concerned I should very much doubt if such a person was a producer or manufacturer within the meaning of the statute. According to the evidence it is one who makes or manufactures a fur neck piece, or a fur garment, or something of that sort, who is regarded as a manufacturer. I am of the opinion that the suppliant was not taxable as a producer or manufacturer within the period in question, under the provisions of sec. 19BBB of the Act, but as a dresser or dyer of furs under the regulation, and that it should have been taxed in the same way as those who dressed and dyed furs for others.

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Sales tax was paid by the suppliant upon sales of dressed or dyed furs made to certain licensed persons within the period in question, particularly the Acme Manufacturing Company, and there seems to be some dispute as to whether the tax has been fully accounted for; the evidence seems confusing on the point, and I am not sure that I thoroughly understand it. If this matter cannot be agreed upon between counsel I may be spoken to later upon the point, and in the meanwhile it is reserved.

The suppliant is entitled to judgment for the principal amount herein claimed, subject to verification of the amount to the satisfaction of counsel for the respondent, and if counsel are unable to reach an agreement as to the correct amount, then I may be spoken to upon the point. I think it is the law that the suppliant is not entitled to its claim for interest. The suppliant will have its costs of this proceeding.

Judgment accordingly.

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 25 & 26
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THE KING, on the Information of the }
 Attorney-General of Canada } PLAINTIFF;
 AND
 NORTHEASTERN LUNCH COM- }
 PANY, LIMITED } DEFENDANT.

*Expropriation—Leasehold—Option by lessee to purchase the freehold—
 Elements of compensation*

The Information herein was filed to have the compensation to which the defendant was entitled, fixed by the Court. The defendant was lessee of the property expropriated and by the terms of his lease was given an option to purchase the freehold.

Held, that as a lessee is entitled to compensation for the loss of his lease and as the option to purchase was one of the covenants of the lease, the right to purchase the freehold is an element to be considered in computing the compensation to be allowed the defendant.

INFORMATION by the Crown to have the compensation for the leasehold of the defendant herein fixed by the Court.

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

Paul Lacoste, K.C., and Gregor Barclay, K.C., for the plaintiff.

L. A. Forsyth, K.C., and C. Sinclair, K.C., for the defendant.

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The facts are stated in the reasons for judgment.

THE PRESIDENT, now (February 6, 1933), delivered the following judgment:

The precise matter for determination here is the amount of compensation that should be paid to the defendant in consequence of the expropriation, by the plaintiff, of certain lands in which the defendant had a leasehold interest together with an option to purchase the freehold. The facts give rise to several problems which are not easy of solution.

In September, 1927, the plaintiff expropriated, under the provisions of The Expropriation Act, certain lands, with two buildings thereon, belonging to the Estate of Phillip Meehan, and situate at the northwest corner of St. Antoine street and St. Monique street in Montreal. The property was expropriated for the purpose of providing terminal facilities for the Canadian National Railway Company, at Montreal, and in the Information the railway is referred to as "the Government Railway."

In 1923 the defendant leased the lands taken for the period of twenty years, and the term would expire on April 30, 1943. The annual rental was \$3,900. The lessee was to make all repairs, whether the landlord's or the tenant's. One of the buildings, at the time of the expropriation, was sub-let by the lessee to tenants. The lease provided that the lessor would not during the term of the lease sell or otherwise dispose of the property, and the right was given the lessee to purchase the same at the expiration of the term for the sum of \$60,000. In order that the lessee might avail itself of this right, it was required to give the lessor notice in writing to that effect at any time before February 1, 1942. The defendant did in fact give such notice, in June, 1929, but subsequent to the date of the expropriation.

The defendant at the date of the expropriation carried on quite an extensive restaurant business, and operated twelve restaurants located at different points throughout

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the city of Montreal; the gross turnover of its business amounted annually to about \$1,000,000; that is about the time of the expropriation. The building which the defendant itself occupied was situate entirely on St. Monique street and was used as the head office of the defendant company, and as a depot or warehouse for the various supplies required by the different restaurants, and from which place such supplies were distributed as and when required. The defendant also operated a laundry in the same building, but only for the purposes of its own business. The building occupied by the defendant comprised four stories and a basement, and the combined floor area was 9,020 square feet. The building, originally constructed as a shoe factory, was a plain brick structure with wooden beams, and might properly be described as a factory building with four floors and a basement. One floor was occupied by the defendant for office purposes. Apparently the building was convenient and suitable for the business there carried on by the defendant. St. Monique street, apart from the corner of St. Antoine street, was not an important business thoroughfare, and while I do not recall any evidence on the point, I should say it was more of a factory and warehouse street than anything else, but in this I may be mistaken. Thus being about to be deprived of its leased property the defendant searched for new premises, and it claims that it was unable to obtain suitable premises comparable in size, location and general utility, with the St. Monique premises, and at something approximating the same rental and taxation charges. Apparently considerable effort was made to find such premises, but without success, it is claimed. The plaintiff tendered evidence to the effect that suitable premises might have been procured at a rate of rental somewhat corresponding to that paid for the whole of the expropriated property. While it is difficult to draw any satisfactory conclusion from the evidence on this point, yet it is difficult to avoid the impression that there must have been other equally suitable premises available in the city of Montreal, though perhaps not upon such favourable rental terms, at that date. This point is of importance because it is claimed that the defendant in the end leased premises that were unnecessarily expensive for the nature of the business it had carried on at St. Monique street.

In the end the defendant leased premises on St. Catherine street west, from the Guaranteed Pure Milk Company, and, as is well known, this street is in a very important and busy retail district. The building is a comparatively modern brick and steel structure, the front exterior is quite attractive and portions of the interior are appropriately finished. The leased premises, in reality only a part of a building, comprise four stories, the total floor area being 22,981 square feet inclusive of the basement floor. The annual taxes levied against the premises is about \$3,000 and the annual rental is \$6,000, altogether about \$9,000. The defendant installed in the new premises a bakery, a line of business not carried on in the vacated premises. Very substantial expenditures were made by the defendant on account of repairs and alterations to the building, before entering into occupation, and a claim is made by the defendant on account of such expenditures, and to which I shall be obliged to return later.

The plaintiff tendered the defendant \$20,000 in full satisfaction of any loss or damage resulting to it in consequence of the taking of the property in question; this the defendant declined to accept, and in its statement of defence claimed \$86,063.44, but at the trial it sought to establish a claim for compensation in the sum of \$58,000. The defendant's claim for compensation falls generally under the following heads: loss of the unexpired term of the lease and its right to purchase the property under the option clause; excess rent and taxes paid for the new premises over the old; cost of removing plant, machinery, furniture and restaurant supplies from the old to the new premises; depreciation and injury to property, furniture and goods, while being moved to St. Catherine street; damages suffered by delays in its business operations resulting from the railway terminal work which caused the blocking of traffic on St. Monique street; expenses incurred in washing and cleaning the interior of the premises and goods owing to dust and dirt entering the premises and arising from the railway terminal work in front of the defendant's premises; loss of tenants and rentals in the sub-let premises attributable to the railway terminal construction work; and the cost of necessary repairs, alterations and additions made in the St. Catherine street premises.

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Turning first to the claim for damages made in respect of the loss of the unexpired term of the lease and the option to purchase the fee-simple of the lands taken. The defendant claims under this head the sum of \$17,765.50 as the present value of the increased rent it will be obliged to pay during the residue of the term of the lease; \$13,988.05, the present value of the increased taxes payable upon the new premises during the same period; and \$14,289.51 for being deprived of the option to purchase the fee-simple of the lands taken. The defendant paid a rental of \$3,900 annually, for the whole of the expropriated property. In order to estimate the rental paid for the building which it occupied, the defendant makes a deduction, calculated on a basis that was not questioned, on account of rentals received from sub-tenants occupying the other building, amounting to \$2,040, and which leaves the net rental of the building which the defendant occupied, at \$2,285.90 per annum. The annual rental of the St. Catherine street property is \$6,000 and after making a deduction of 28 per cent for the floor area occupied by the bakery, a new branch in the defendant's business, the net annual rental is calculated at \$4,278, being a net annual increase of \$1,992.10, or about \$166 per month, for the new premises over the old premises, from October 1, 1931, to the end of the term of the lease. Mr. Ogilvie, an expert witness for the Crown, was of the opinion that the defendant should have been able to rent suitable premises for \$4,300 a year. The gross rent and taxes paid by the defendant for the whole of the property taken was \$4,929.05, and if from that is deducted the renewals paid by sub-tenants, the net amount paid for rent and taxes would be \$2,889.05. Assuming that premises might have been rented at \$4,300, this would amount to \$1,410 more annually than the rental and taxes for the whole of the property taken, and the present worth of that difference for the balance of the term of the lease was stated to be \$12,312. It must always be remembered that the expropriated property had two buildings thereon, one of which the defendant occupied, while the other was rented as I have explained, with the result that the actual net annual rent to the defendant for the building it occupied was approximately the amount I have mentioned. So if the rental of \$6,000 for the new premises

is disregarded altogether, and we assume that the defendant might have rented suitable premises elsewhere for \$4,300 annually, inclusive of taxes, even then the rent and taxes would be \$1,410 more annually, than was paid for the vacated premises. I think it is quite fair to treat the rental position of the defendant at the old premises in this way. I see no fallacy or error in it. The defendant was in an advantageous position under the old lease, and it was the result of leasing a larger property than it needed for its own purposes. The premises occupied by the defendant on St. Monique street was apparently suitable and convenient for its purposes, the terms of rental were favourable, and I do not think that equally suitable premises were available to the defendant upon the same terms, and accordingly I think it has suffered damages. I think, however, that the defendant's calculations are subject to some qualification. No deductions seem to have been made for depreciation, cost of upkeep, insurance, etc., and there was always the possibility of lack of tenants for the building that was sublet, and reduction in rentals, and all this must be considered. I have no doubt the defendant being obliged to secure new business premises wished for a better type of building, particularly as to office appointments. The enforced change of quarters probably suggested the inclusion of other activities at the head office premises. The St. Catherine street premises cannot safely be used to measure the defendant's damages or compensation. The street, the size and general character of the premises, the rent, the taxes, precludes a comparison of the St. Catherine street premises with that vacated by the defendant. I do not think it can fairly be said that the defendant's present premises are a reasonable substitute for the old premises, and the defendant is only to be placed back into premises comparable to where he was, so far as that can reasonably be done, that is, so far as the expropriating party is concerned. I should refer perhaps, with more particularity, to the taxes on the old premises, and that on the St. Catherine street premises. The annual realty tax on the expropriated property was \$1,209.05, and apportioning \$425.90 to the sub-let premises for taxes, the net annual taxes on the building occupied by the defendant was \$603.15. The annual realty tax on the St. Catherine street property is

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\$3,039.26. The net annual realty tax upon the new premises would therefore be \$1,564.11 in excess of that on the old premises. These figures are embodied in one of the defendant's exhibits and their accuracy was not questioned.

The defendant also claims compensation, as already mentioned, because it was deprived of the covenant of the lessor not to sell the freehold during the term and of the option to the lessee to purchase the freehold. The plaintiff was bound to have known, I think, the terms of the lease because he was bound to ascertain and demand from any one in occupation of the lands taken, the nature of the estate or interest therein claimed by the occupant, and the situation would have been much less complicated if the interest of the freeholder and lessee respectively in the lands taken had been determined by the Court, or by agreement, before the compensation money which was to stand in lieu of the lands taken, had been distributed. The exact words of the option clause in the lease is as follows:

The Lessor agrees and undertakes that he will not during the term of the present lease sell or otherwise dispose of the said property but the right is hereby given by the Lessor to the Lessee to purchase said property at the expiration of the term hereof for the sum of sixty thousand dollars (\$60,000) upon such conditions as may be agreed upon between the parties.

In order to avail itself of this right the Lessee will give to the Lessor notice in writing to that effect at any time before the first day of February, nineteen hundred and forty-two (1942).

The plaintiff paid the Estate of Meehan \$75,000 as compensation for the fee-simple of the lands taken, \$15,000 more than the option price to the defendant, and according to the evidence of one of the plaintiff's own witnesses, the market value of the lands taken at the date of expropriation, was \$75,000. It seems that a deed of conveyance passed from the legal representative of the late Philip Meehan, on November 11, 1930, to the Canadian National Railway Company, the reason alleged for this being that while the statutory plan and description was deposited of record at the Registry Office in Montreal, yet it was not in fact registered as against the lands taken, and therefore the passing of a deed of conveyance from the Meehan Estate to the railway company was deemed desirable, if not necessary. If that is really the correct position of affairs then clearly the Expropriation Act should be amended. But that

does not alter the fact that \$75,000 was paid as compensation for the fee-simple of the property taken. It does not appear that the leasehold interest of the defendant, or its option to purchase, was taken into consideration in determining the value of the interest of the Meehan Estate in the lands taken. The defendant now claims that the lessor's covenant not to sell the property during the term of the lease, and the option to the defendant to purchase the same was a valuable term or covenant of the lease binding on the legal representatives of Philip Meehan, and that the value of such right is represented by the apparent increase in the value of the property at the time of taking, over the option price fixed in the lease, when it was made in 1923. The defendant gave notice in writing of its intention to exercise the option, but this was after the date of the expropriation, though prior to the date of the deed to the Canadian National Railway Company, when, I assume, the consideration passed to the Meehan Estate. Now, the defendant is entitled to some compensation for the loss of its lease, and as the option to purchase is one of the covenants of the lease, that must be considered in reaching the amount of the compensation to be allowed the defendant. I must say that when this claim was first advanced by Mr. Forsyth, I was not disposed to attach weight to it, but upon further consideration I think the claim is one of substance. A simple option to purchase given after the lease was made, would be, I think, another matter, but with that we are not for the moment concerned. It is to be assumed, I think, that there was consideration for the covenant not to sell, and for the option to purchase, and that that consideration is reflected in the terms of the lease.

A case, almost identical in the facts with the one under consideration is the New Zealand case of *Compton v. Hawthorn and Crump* (1). The facts of this case are as follows: Compton was the owner of the fee-simple of certain lands which she leased to Hawthorn and Crump for twenty-one years, and the lease contained a clause by which the lessor agreed with the lessees that they or either of them might purchase the land upon three months' notice in writing, upon terms which need not be stated except to say that the purchase price advanced as the time for the exercise

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of the option was postponed, but if notice was given during the first seven years of the term the purchase money was to be £800. In November, 1901, the Wellington City Corporation, under the Public Works Act, published a notice of its intention to take the land for street widening purposes, and when all conditions had been performed and all times having elapsed entitled it to do so, it caused a Proclamation to be issued in May, 1902, taking the land and vesting it in the Corporation. On June 9, 1902, Compton, as owner in fee-simple made a claim against the Corporation for £1,800 as compensation for the taking of the land, but stated that the land was subject to the lease to Hawthorn & Crump. A Compensation Court was constituted under the Public Works Act for the hearing of Compton's claim, consisting of Stout C.J., as President, and of certain assessors. On August 6, 1902, Hawthorn and Crump gave formal notice to Compton of their desire to purchase the fee-simple of the land, and on September 19, 1902, Hawthorn and Crump made a claim against the Corporation for compensation payable to them. They claimed the sum of £2,000 for their leasehold interest with the right to purchase the fee-simple at £800 and they claimed that the sum of £800 only was payable to Compton, and that the whole value of the fee-simple less the £800 was payable to them; it was agreed that the value of the fee-simple exceeded the £800. Compton, on the other hand claimed that the right to purchase was at an end by the taking of the land before the giving of the notice by the lessees, and that she was entitled to the whole value of the fee-simple subject only to the leasehold term. A case was then stated for the decision of the Supreme Court and was argued before Stout C.J. I may usefully quote his decision in full, and it is short. He said:—

I do not agree with the contentions made on behalf of either the claimant or the tenants.

First, as to the claimant: It is true the lease has merged and was put an end to by the Proclamation, and with it went the option to purchase; but the tenant is entitled to obtain compensation for the lease, including one of its terms, the option to purchase. This option cannot be dissociated from the lease for non constat that such a rent as is provided therein would have been paid if there had been no such purchasing clause. The claimant is not, therefore, entitled to claim the full value of the freehold as if there was no such lease including the purchasing clauses.

2. As to the tenants: They have not an equitable estate in the land as purchasers, for they gave no notice, though they might have given

notice when the intention to take the land was advertised. They neglected to do so, and in my opinion it must be left to the Assessment Court to say what compensation they are entitled to. I cannot lay it down as a proposition of law that the exact sum the freeholder is entitled to is the amount at which they might have purchased, and that they are entitled to the balance if the value exceeds this sum. Many things have to be considered—the chances of property falling, of the lease being forfeited, etc. I do not express any opinion as to whether the freeholder should get any excess of the sum which she has agreed to take if the option of purchase were exercised. All I decide is that no exact rule can in this case be laid down, and the Assessment Court should consider all the circumstances in making the award.

The solicitors of Compton then filed a statement of claim and notice of motion in the Supreme Court claiming that Hawthorn and Crump, the defendants, might be restrained by injunction from further prosecuting their claim for compensation so far as it extended to the alleged interest in the demised land under the right of purchase given in the lease, and that it might be adjudged that the Compensation Court was not entitled, in considering the claim of the plaintiff Compton, to take into consideration the said option in order in any way to affect the amount of compensation to be awarded to Compton as the fee-simple owner of the land, and might be restrained by injunction from doing so. The motion for an injunction was removed into the Court of Appeal, consisting of three Judges, and there was complete agreement by the Court that the motion should be denied, because it was an attempt to regulate the proceedings of the Compensation Court. Williams J., after stating that the plaintiff should fail in her motion, referred to the merits of the case and he said:—

But the question of the merits has been discussed, and I must say that I entirely coincide in the opinion which the Chief Justice has already expressed. The plaintiff is entitled to compensation for the estate or interest which she had in the land at the time that the land was taken. She makes her claim as tenant in fee-simple subject to a lease. The value of her interest in the land is the total value of the land itself less the value of the leasehold interest. The lease contained an option to purchase. That option could have been exercised at any time during the twenty-one years of the lease. The effect of the taking of the land was not only to destroy the option of purchase, but to put an end to the lease altogether. The leaseholder, therefore, by the taking of the land has been deprived of the balance of the term, and also he has been deprived of his option, during the balance of the term, to purchase the fee-simple. The plaintiff has been deprived of her interest subject to the lease—that is to say, she has been deprived of an interest which was subject during the balance of the term, to the right of purchase of the lessee. It is quite true that, after the land has been taken, the covenant by the lessor that she will sell to the lessee if the lessee requires has been put an end to.

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But so have all the other covenants been put an end to. The lease itself has been put an end to. And it is because the covenants have been put an end to and the lease has been put an end to that the lessee is entitled to compensation. As I understand it, the meaning of the Chief Justice is that each person is entitled to the market value of his real interest in the land at the time it was taken. So far as the lessees are concerned, they are entitled to the market value of the residue of the term with the right of purchasing the fee-simple during the term at the price named in the lease. So far as the lessor is concerned, she is entitled to the market value of the fee-simple subject to a right of purchase by the lessees at that price exercisable during the term. I entirely concur in that view.

The reasoning of Stout C.J., and Williams J., seems to me to be sound. In the case under consideration the right to purchase the freehold is an element to be considered in computing the compensation to be allowed the defendant.

Now, taking together the claim for compensation based upon increased rental, increased taxes, and the loss of the option to purchase, arising from the termination of the lease, what compensation is to be allowed the defendant? That is a most difficult thing to determine. The defendant is entitled to compensation for having been deprived of the balance of the term of its lease, and the option to purchase the fee-simple was a term of the lease. The annual rental worth of the old premises may be tested by what it would cost the defendant to obtain similar premises elsewhere, at the date of the expropriation. Upon the evidence, I think, I am bound to hold that the defendant was unable to lease premises suitable for its business, except at an increase of rent and taxes. This appears clear even if we take the rate of rental at which the plaintiff suggests premises might have been secured, viz., \$4,300, although that is not a fact definitely established. This would indicate that the defendant had premises leased upon favourable terms, and that the residue of the term was therefore of substantial annual value to it; and the defendant must so far as is possible be restored to its former position in regard to premises wherein to carry on its usual business, during the balance of the term of the lease. Then other considerations must not be overlooked, some of which I have mentioned, that is to say, the maintenance of the leased property during the balance of the term, the possible loss of tenants, a fall in rents, and other matters. Then again the option to purchase would seem to have been of some value, along with the other terms of the lease, because the market value of the freehold had

increased some \$15,000 above the price at which Meehan agreed to sell it to the defendant, and this would, I think, have had the effect of enhancing the market value of the leasehold at the time of the expropriation, but I do not say that this enhancement is necessarily represented by the \$15,000. It is possible that at the end of the term the value of the leasehold including the option to purchase would not have the same value which it appeared to have at the date of the expropriation. As I have already stated, to determine the amount of compensation properly payable to the defendant because of the expropriation of the unexpired term of the lease, is extremely difficult. After anxious consideration, I have decided to allow the defendant the sum of \$20,000.

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[The learned judge here discusses numerous miscellaneous claims, and then concludes by allowing \$34,540 as the total compensation.]

Judgment accordingly.

BETWEEN:

BUNGE NORTH AMERICAN GRAIN CORPORATION AND FIRE ASSOCIATION OF PHILADELPHIA (PLAINTIFFS) } APPELLANTS;

1932
Dec. 20.
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AND

STEAMER "SKARP" AND OWNERS (DEFENDANTS) } RESPONDENTS.

Shipping—Contract of carriage—Law applicable thereto—Intention of Parties

The contract of carriage in question herein was made in the United States of America, both plaintiffs were United States corporations and the contract contained a clause valid and necessary according to such law, but not necessary under the Canadian or English law. Moreover, the insurance certificates issued by one of the plaintiffs contained an express reference to the Harter Act, a law of the United States which the plaintiffs now contend should not be applied.

Held, (affirming the judgment of the Local Judge in Admiralty for the Quebec Admiralty District) that, in the above circumstances, inasmuch as the intention of the parties is to govern, it must be presumed that the parties to the contract intended to be governed by the law of the United States (the Harter Act), and that such law applied.

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2. That the best criterion of what law is to be applied is to be found in the intention of the parties, and where such intention is not expressed it is to be gathered from the terms of the contract itself and from the surrounding circumstances.
3. That where a bill of lading contains special clauses, not necessary or valid under other laws, but necessary and valid under the laws of the country where the contract was made, the parties are presumed to have contracted subject to the law which gives effect to such clauses.

APPEAL by the plaintiffs herein from the decision of the Local Judge in Admiralty for the Quebec Admiralty District (1).

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

Errol Languedoc, K.C., for plaintiffs.

R. S. Holden, K.C., for defendants.

The facts of this case and questions of law raised by the pleadings are stated in the reasons for judgment hereafter printed and also in the report of this case in (1932) Ex. C.R. at p. 213.

THE PRESIDENT, now (February 7, 1933), delivered the following judgment:

This is an appeal from the decision of Demers L.J.A., Quebec Admiralty District, in an action for the recovery of damages in respect of alleged damage to a cargo of grain shipped from Buffalo, N.Y., to Montreal, in August, 1928, on the respondent ship *Skarp*, of Norwegian registry. The judgment appealed from is reported in 1932 Ex. C.R. at page 213, and as all the facts are there to be found, I need not restate them.

The chief question for decision is whether it is the statute law of the United States, known as the Harter Act, or the Canadian Carriage of Goods by Sea Act, or the law of the flag of the ship *Skarp*, that applied to the contract for the carriage of the cargo of grain from Buffalo to Montreal. The learned trial judge found that it was the Harter Act that here applied.

Prima facie, the law of the country where the contract is made will govern it and decide what law was contemplated by the parties as applicable. The best criterion of

what law is to be applied is to be found in the intention of the parties. If that intention is not expressed it is to be gathered from the terms of the contract itself and from all the surrounding circumstances. Where the bill of lading is exclusively a form of contract used in one country, it is strong indication that the parties intended the law of that country to apply. The authorities are also to the effect that if a bill of lading contains special clauses not necessary or valid under other laws, but necessary and valid under the laws of the country where the contract is made, the parties are presumed to have contracted subject to the law which gives effect to such clauses. *Lloyd v. Guibert* (1); *James Richardson & Sons Ltd. v. SS. Burlington* (2); *The Adriatic* (3); Leake on Contracts, 7th Ed., p. 140; *The Industrie* (4); *The Chartered Mercantile Bank of India v. The Netherlands India Steam Navigation Co.* (5); *The Missouri Steamship Co.* (6). And there are numerous other authorities to the same effect. In *Lloyd v. Guibert* (*supra*) the law of the flag prevailed, but the intention of the parties was admitted to be the crucial test.

The bill of lading in this case does not incorporate in any way the Harter Act, and it was not necessary that it should, but it is rather obvious from all the surrounding circumstances that it was intended by the parties that the contract was subject to the terms of the Harter Act. In the first place the contract of carriage was made in the United States. Both of the appellants are United States Corporations, one was the owner of the cargo, the other was the insurer of the cargo, and each is presumed to know its own law. The bill of lading contains a clause which is valid and necessary in the United States, but not necessary under Canadian or English law, or, so far as I know, by the law of the flag of the ship in question, and that is what is known as the Jason clause and which relates to General Average. The insurance certificates issued by the plaintiff, Fire Insurance Association of Philadelphia, contain an express reference to the Harter Act. These facts indubitably

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| (1) (1865) L.R. 1 Q.B. 115, at p. 123. | (3) (1931) P. 241; (L.R.). |
| (2) (1929) Ex. C.R. 186; (1931) S.C.R. 76. | (4) (1894) P. 58. |
| | (5) (1883) 10 Q.B.D. 521, at pp. 528, 529 and 540. |
| | (6) (1889) 58 L.J. Ch. 721. |

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point to the conclusion that it was intended by the parties that it was the United States law that was to apply to the contract of carriage. Any other conclusion would not appear to be supported by the facts. There is nothing that suggests that it was intended that the law of the flag was to apply.

I think the owners of the ship in question exercised due diligence in making the ship in all respects "seaworthy and properly manned and equipped and supplied"; and the learned trial judge so held, and he found that the standing was due "to some fault or error of the pilot." It is not necessary I think to discuss at length this phase of the case. The reasons assigned by the learned trial judge, in his reasons for judgment, for his conclusion on this point, are I think amply sustained by the facts. The defendants are therefore, in my opinion, subject to the exemptions from liability contained in the provisions of the Harter Act.

The appeal is therefore dismissed with costs to the respondents.

Judgment accordingly.

1932
 Sept. 13.
 1933
 Feb. 28.

BETWEEN:
 JOHN SANDNESS CLAIMANT;
 AND
 HIS MAJESTY THE KING RESPONDENT.

Seizure—Forfeiture—Customs Act—Burden of proof—Innocence of owner

Held, there is no material dissimilarity in the essential provisions of the Excise Act (R.S.C., 1927, c. 60) and the Customs Act (R.S.C., 1927, c. 42) pertaining to seizure and forfeiture; claimant having failed to prove that his boat had been illegally seized and forfeited, the forfeiture was held good and valid, the Customs Act attaching to the vehicle unlawfully used the penalty of forfeiture, independently of the guilt or innocence of the owner. *The King v. Krakowec* (1932) S.C.R., 134 followed.

REFERENCE by the Crown under section 176 of the Customs Act.

The action was heard before the Honourable Mr. Justice Angers, at Vancouver.

J. W. DeB. Farris, K.C., for claimant.

Clarence O'Brian, K.C., for respondent.

The facts are stated in the reasons for judgment.

ANGERS J., now (February 28, 1933), delivered the following judgment:

The plaintiff is a deep-sea fisherman of the city of Bellingham, in the State of Washington, one of the United States of America.

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In April, 1932, plaintiff was the owner of a motor boat named the *Advance*; he had had this boat since 1929 and had always used it for fishing purposes. The *Advance* was registered in the name of plaintiff at the port of Seattle, in the State of Washington.

On the 7th day of April, 1932, plaintiff chartered his boat to one Jack Farley, also known as A. J. Harris, for two days in consideration of the sum of \$100 cash. This sum included food, fuel and the services of plaintiff's son, Adolph, who was to attend to the engine. According to plaintiff's contention the boat was chartered for the purpose of transporting gasoline from the city of Seattle to San Juan Island.

Ninety cans, supposed to contain gasoline, were loaded on the boat on the evening of the 7th of April or the morning of the 8th.

The boat left Seattle between four and five o'clock on the morning of the 8th with on board Farley alias Harris, one Hardy and Adolph Sandness.

Late in the afternoon of the 8th of April the *Advance* was sighted by a Customs Patrol boat in Trincomali Channel near Victoria Rock, a short distance from Salt Spring Island.

The customs officers, after observing the *Advance* for a certain time, boarded her. They were met by Hardy and young Sandness, who both stated that they were the only persons on board and that there was nothing to report to customs. Apparently not satisfied with this answer, the customs officers searched the boat and found 90 five gallon tins of alcohol in the forward part of the hold, which was bulkheaded off with shifting boards. Continuing their search, they found Farley alias Harris covered up in blankets in the starboard forehead bunk.

The boat was seized, taken to Victoria and forfeited; the decision of the Minister of National Revenue, dated the 28th day of June, 1932, was to the effect "that the vessel be and remain forfeited and be dealt with accordingly."

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On the 4th day of July, 1932, plaintiff's solicitors gave notice that the above decision would not be accepted, and the Minister, acting under authority of section 176 of the Customs Act, referred the matter to this Court for adjudication.

[The learned Judge here referred to the allegations set forth in the Claimant's Statement of Claim, and in the Respondent's Statement of Defence.]

The plaintiff was examined on discovery. Counsel for the defendant, at the trial, declared that he intended to use in evidence a part of the examination for discovery, to wit questions and answers 1 to 5, 52 to 88, 100 to 104, 112 to 115, 119 to 128, 147 and 148, 178 to 192, 195 to 198, 207 to 209, 216, 218, 224, 225 and 228 to 233, all inclusive.

The plaintiff was examined anew at the trial. Counsel for plaintiff refrained from examining plaintiff's son, Adolph Sandness, but the latter was called by counsel for defendant for cross-examination. Neither Farley alias Harris nor Hardy were heard as witnesses. I may say that counsel for plaintiff stated that he had been informed that Farley had been drowned.

It was urged on behalf of the Crown that there were contradictions in the deposition of plaintiff for discovery and his testimony at trial and that there were discrepancies between plaintiff's version and that of his son. It was also urged that there are contradictions in the boy's testimony and an affidavit dated the 2nd of June, 1932, which forms part of file (No. 171999) of the Department of National Revenue in connection with the seizure of the *Advance*. A careful perusal of the father's two depositions, of the son's deposition and of the latter's said affidavit has convinced me that there are contradictions and discrepancies, some of which bear on material points. On the other hand I must say that four witnesses have been called to testify as to plaintiff's character, one being the mayor of the city of Bellingham and an ex-judge of the Superior Court of the State of Washington. All said that plaintiff enjoyed a very good reputation. However I do not think that the good or bad faith of the plaintiff has any bearing on the issues herein and, for this reason, I do not intend spending any more time analysing the evidence concerning this particular aspect of the case.

To justify the seizure and forfeiture of the boat, the defendant had to prove two things:

1. that the liquid contained in the 90 cans seized was alcohol;
2. that the seizure was made within territorial waters of Canada.

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On the first point, viz., the nature of the liquid seized, Healey, the customs officer who made the seizure, filed as exhibit D a certificate of analysis. This certificate shows that the sample was analysed on the 18th day of April, 1932, and that the alcoholic content thereof was found to be 167·18 per cent of proof spirit. The certificate was accepted as evidence by counsel for plaintiff without the necessity of calling the analyst. The evidence on this point is peremptory.

On the second point, we have: (a) the Customs seizure report made by Sergeant John Healey on the 9th of April, 1932, which forms part of the file of the Department of National Revenue (No. 171,999) already referred to; (b) the evidence of Healey and Captain Gilmour; (c) the map filed as exhibit E showing the point (indicated by letter B) where the *Advance* was seized; (d) the map filed as exhibit 1 showing Trincomali Channel, between Salt Spring and Galiano Islands, in Canadian territory. These two islands form part of the province of British Columbia. The evidence satisfies me that the seizure was made in territorial waters of Canada.

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* (1); *The King v. Doull* (2).

It has been argued on behalf of plaintiff that the boat was used for transporting alcohol without the knowledge, consent or connivance of the plaintiff; this, in my opinion, is absolutely immaterial. The statute attaches to the vehicle unlawfully used the penalty of forfeiture, independently of the guilt or innocence of the owner; see *The King v. Krakowec* (3); *The King v. The Sunrise and Others* (4);

(1) (1928) Ex. C.R., 106.

(2) (1931) Ex. C.R., 159.

(3) (1932) S.C.R., 134.

(4) 43 B.C.R., 494, and (1931) S.C.R., 387.

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also the report of Sir Walter Cassels, J., on a reference, *in re Nichol v. The King* (unreported), in which the learned judge says:

On the night of the 2nd of April, 1910, the goods seized and in question, viz: one team of horses, one wagon and one set of double harness, being the claimant's property, were wrongfully taken out of the custody of his agent at Abbotsford, by one A. T. Mercer (since deceased) and without the knowledge or consent of the plaintiff were used by the said Mercer on the night and early morning of the 2nd and 3rd of April, 1910, in an unlawful manner in the importation of goods into Canada contrary to the provisions of Sections 22, 23, 187, 192 and 193 of the Customs Act, cap. 48, R.S.C., whereby it is admitted that if the said horses, wagon and harness had been the property of said Mercer they would have become liable to seizure and forfeiture. But it is contended that since the claimant was as I find entirely innocent of the illegal use made of his property by said Mercer, the said property should not be held answerable for the unauthorized acts of a stranger over whom the claimant had no control.

Sections 19, 22, 23, 108, 177, 187, ss. (a) 189, 192, 193, 273 and 275 of the said Customs Act were referred to and also the following authorities: *Blewitt v. Hill* (1810) 13 East 13; *Campbell v. Campbell* (1846) 7 C. & F. 165; *The Queen v. Woodrow* (1846) 16 L.J.M.C. 122; *Cundy v. Le Cocq* (1884) 13 Q.B.D. 207; *Bond v. Evans* (1888) 21 Q.B.D. 249; *Roberts v. Woodward* (1890) 25 Q.B.D. 412; *Gregory v. United States*, 17 Blatch, 325; Bowstead on Agency, 4th Ed. 461-4, and Holmes on Common Law, 25.

After a consideration of the statutory provisions applicable to the case, in the light of the above authorities and others, I am clearly of the opinion that apart from all personal liabilities or penalties, the statute attaches to the *res*, unlawfully employed as here, the penalty of forfeiture, quite independent of the guilt or innocence of the owner as being "in any way connected with the unlawful importation" (secs. 192-3). The case of *Blewitt v. Hill* is an exact illustration of this principle wherein a ship was condemned for smuggling and became forfeited even though the act of smuggling was that of the captain and commander over whom the owner had no control because the ship had been chartered from him by the Lord Commissioners of the Admiralty who had placed their own officer in absolute command. The owner, nevertheless, after condemnation and forfeiture of his ship was obliged to pay a certain sum of money in order to procure the restoration of the same and thereupon brought and successfully maintained an action against the captain for £2,150 damages occasioned by his wrongful acts of smuggling. In the course of his judgment Lord Ellenborough C.J., said: "The thing itself is forfeited by whomsoever used."

There is nothing unusual in the legislation in question and similar provisions are, e.g., to be found in sec. 92 of the Fisheries Act, cap. 45, R.S.C. and sec. 10 of the Customs and Fisheries Protection Act, cap. 47, R.S.C. It would clearly be no answer to proceedings for condemnation and forfeiture under those acts that the boats and tackle which were unlawfully used had been employed in that manner without the owners' knowledge or consent. Even if they had been stolen from him the result would be the same and the proper recourse would be for the owner to appeal to the clemency of the Crown, for which application in prosecutions under the Customs Act special provision is made by sec. 273, or to

bring an action against the person who has caused the damage, as was done in *Blewitt v. Hill* and *Campbell v. Campbell*, *supra*.

See sections 193 and 207 of the Customs Act (R.S.C., 1927, ch. 42) and section 181 of the Excise Act (R.S.C., 1927, ch. 60).

I see no material dissimilarity in the essential provisions of the Excise Act and the Customs Act pertaining to seizure and forfeiture.

See also *Robertson v. Commission des Liqueurs de Québec* (1).

Counsel for plaintiff, at trial, argued that Farley alias Harris had obtained the boat by means of a larceny by trick and he cited in support of his contention the following cases: *Heap v. Motorists' Advisory Agency* (2) and *Cuff-Waldron Manufacturing Co. v. Heald* (3). He submitted that, in the circumstances, under Article III of the Convention between Canada and the United States for the suppression of smuggling, signed at Washington on June 6, 1924, plaintiff was entitled to the return of his boat. Article III reads as follows:

Each of the high contracting parties agrees with the other that property of all kinds in its possession which, having been stolen and brought into the territory of the United States or of Canada, is seized by its customs authorities shall, when the owners are nationals of the other country, be returned to such owners, subject to satisfactory proof of such ownership and the absence of any collusion, and subject moreover to payment of the expenses of the seizure and detention and to the abandonment of any claims by the owners against the customs, or the customs officers, warehousemen or agents, for compensation or damages for the seizure, detention, warehousing or keeping of the property.

I regret to say that I cannot agree with the learned counsel's contention; I fail to see any theft or larceny by trick in the present case; an essential element, viz., the *animus furandi*, is missing. There is no doubt that Farley alias Harris never intended misappropriating and converting to his own use the boat and that, if he had succeeded in disposing of his alcohol, he would have returned the boat to the plaintiff in accordance with his agreement.

See 36 Corpus Juris, p. 761, No. 101, p. 767, No. 112, p. 770, No. 124; also p. 760, No. 93.

There will be judgment declaring the forfeiture of the boat good and valid and dismissing the action with costs against plaintiff.

Judgment accordingly.

(1) (1932) R.J.Q. 54 K.B. at 10.

(2) (1923) 92 L.J. K.B. 553.

(3) (1930) 2 W.W.R. 135.

1933
Jan. 19,
20 & 21.
Mar. 2.

BETWEEN :

FREDERICK W. KANTEL..... PLAINTIFF;

AND

FRANK E. GRANT, NISBET & AULD }
LIMITED, GILBERT WATSON AND } DEFENDANTS.
DOMINION BATTERY COMPANY }
LIMITED

*Copyright—Radio sketch—Authorship—Dramatic work—Infringement—
Injunction—Damages*

The defendant company employed the plaintiff, a dramatic author and producer, to prepare a radio sketch for use in advertising defendant's business, defendant suggesting the general outline of the work. The plaintiff prepared and procured production of the sketch through the defendant Grant. The plaintiff and defendant company entered into a written agreement covering production of the sketch, the agreement containing *inter alia*, the following clause: "The feature is only to be used as arranged through Fred W. Kantel." Subsequently the defendant company purported to cancel the agreement and continued to broadcast the sketch under the defendant Grant's direction. Later the defendant Grant broadcasted the sketch on his own account, for a short time, without plaintiff's consent. In an action for infringement of copyright and for damages.

Held, that the plaintiff was the sole author of the sketch, he having given it form and expression although certain ideas had been suggested by the defendant.

- 2. That the sketch was a dramatic work within the meaning of copyright law which does not require that the expression must be in an original or novel form, but that the work must not be copied from another work. Nor did it matter that the original manuscript was departed from in each broadcast as, in the presentation of a dramatic work in whatever form, it is open to the performer to depart from the literal text of the work.
- 3. That there was infringement of plaintiff's copyright since defendant company for several months caused to be performed or broadcasted through defendant Grant the sketch originally prepared and broadcasted by direction of the plaintiff without his consent.

ACTION by plaintiff for an injunction restraining defendants from presenting a dramatic sketch prepared by the plaintiff, and for damages suffered by the plaintiff by the defendant's presentation of the sketch.

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

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

G. M. Kelly, K.C., and *D. Guthrie* for defendant Nisbet & Auld Limited.

W. A. Stillwell for defendant, Frank E. Grant.

W. M. Magwood for defendant Gilbert Watson.

The Dominion Battery Company Limited was not represented by counsel, and the defendant Watson, having undertaken to abide by any order of the Court that might be made.

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

THE PRESIDENT, now (March 2, 1933) delivered the following judgment:

This is an action for infringement, by the defendants, of a copyright alleged to subsist in a dramatic sketch, a work of which the plaintiff claims to be the author. Throughout the trial the work in question was referred to as a "sketch," and it will be convenient to continue the use of that term in designating the subject matter in which copyright is said to subsist. It would appear desirable first to state the facts as appearing from the evidence.

In the early part of October, 1931, Mr. A. S. Auld, Vice-President of the defendant company, Nisbet & Auld Ltd., while on a business visit to New York, learned of a special advertising broadcast sponsored by the firm of Glass & Co., with whom Auld had business relations, and through this connection Auld came in contact with one Don Carney, who broadcasted this advertising feature daily under the mythical name of Uncle Don. He visited the studio of WOR where he heard Uncle Don broadcast this feature which essentially was one for young children. Uncle Don supposedly entered the studio in an aeroplane, his arrival being duly announced; the aeroplane landing effect was mechanically produced. Having arrived, Uncle Don enquired of the well being of his young listeners that day, and then after singing a children's song the meeting was brought to order by three knocks of a gavel on a piano, and then the club meeting, known as Peter Pan Club, was open. The name of the club had its origin in the fact that Glass & Co. were selling certain cotton fabrics known to the trade as Peter Pan Wash Fabrics. Uncle Don would then sing a song for sick children; he would sing a birthday song for the children whose birthday happened to fall on that day;

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and he would then talk to the children on such topics as the correction of bad habits or manners, the matter of the health of children, and the exercise of care on the public streets. The purpose of the club idea was to enlist the personal interest of children so that they would write to Uncle Don at the studio and become members of the club; after joining they would receive a special button and a certificate of membership. Auld was impressed with the merchandising advantages of this radio feature and immediately considered doing a similar thing in connection with his own business at Toronto, which included the sale of children's clothing. Upon his return to Toronto, Auld conferred with Mr. Pogue of the E. W. Reynolds Company, an advertising concern, and both agreed that Kantel, the plaintiff, should be interviewed regarding the proposal. An interview with the plaintiff soon followed when Auld outlined the general features of Uncle Don's Peter Pan Club broadcast, which he had heard in New York. Auld and Pogue thought it desirable to learn more of Uncle Don's broadcast, so on October 24, of the same year, they went to Philadelphia, where Uncle Don was to present his program to children in a large departmental store. This presentation was practically the same as Auld had previously heard in New York, except that a ventriloquist doll was introduced. Auld and Pogue then continued to New York where they further discussed with Carney, his radio presentation. Auld stated in evidence, that Carney never objected to the use of any idea which he had gained from his observance of the Peter Pan Club presentation, in New York or Philadelphia. On the return of Auld and Pogue to Toronto another interview took place with Kantel, and there was soon developed the sketch much as set forth in the plaintiff's statement of claim. Auld claims that he insisted upon the use of the word "Uncle" in connection with the name of one of the characters in the proposed sketch against the view of Kantel who thought something more novel might be employed; that he suggested the name of Sunshine Club because his firm was then making a line of children's frocks bearing the trade name of Sunshine; and that the Land of Happiness developed out of the general discussions with Kantel. Auld testified that he brought back from New York some printed matter in which was mentioned the names of some twenty odd child-

ren's features being broadcasted at different points in the United States, among which was one named Uncle Bob, and another Old Man Sunshine. Within three days after the return of Auld and Pogue from New York an audition performance of a sketch, which Kantel claims to have composed, was given at the studio of CKNC, Toronto, which means that a microphone was connected to a loud speaker and the presentation was given to the microphone in the studio, and was heard in the reception room by those present to hear it, but it was not broadcasted on the air. In this instance Auld and Pogue were present in the reception room, while Kantel, and one Grant, whom I shall later mention, were in the studio.

The plaintiff's statement of claim purports to set forth an outline of the sketch prepared by Kantel, and perhaps reference should be made to this. The title of the sketch is Uncle Bob's Sunshine Club. First, there is reproduced a phonograph record suggesting a train in motion, and there is announced the arrival of what is described as the Sunshine Special, from the Land of Happiness, having as passengers Uncle Bob and Happy Harry who will entertain the members of Uncle Bob's Sunshine Club. Happy Harry, a dummy, is described as a child who lives in the Land of Happiness and is brought thence by Uncle Bob in a little black bag. Uncle Bob, who says Hello to the children tuned in, sings a greeting song set to the tune of "Heigho Everybody Heigho," the words of which song Kantel claims to have composed. A conversation then follows between Uncle Bob—who is the person broadcasting—and Happy Harry, the former speaking in his ordinary voice, and the latter supposedly in a thin falsetto; the subject of the conversation relates to personal events in the lives of individual children, either fictitious, or derived from letters received by Uncle Bob from children who have already actually listened to the presentation of the sketch. Then a simple nursery song is sung by Uncle Bob or Happy Harry, followed by further conversation between Uncle Bob and Happy Harry and somewhat similar to that just mentioned, and then follows another nursery song. Conversation then ensues between Uncle Bob and Happy Harry in reference to individual children whose birthday falls, or is supposed to fall on that day, and a birthday song prepared by Kantel is sung by Uncle Bob to the tune of "Good

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Morning Merry Sunshine," followed by another selected nursery song which is sung by either Uncle Bob or Happy Harry. There then follows a conversation between Uncle Bob and Happy Harry, on the subject of the conduct of children, Happy Harry being presented as a model of what a good child should be, and this is followed by another nursery song. Then follows a conversation relating to named children who are ill, and a special song, prepared by Kantel, is sung for sick children to the tune of "The Old Oaken Bucket," or "Yankee Doodle," and another nursery song follows. An appeal is then made by Uncle Bob and Happy Harry to the children listening to the broadcast to become members of the Sunshine Club. Uncle Bob then sings a parting song, prepared by Kantel, and set to the same tune as the opening song. Uncle Bob and Happy Harry then say good-bye and indicate they are about to entrain on the Sunshine Special to travel back to the Land of Happiness; the announcer calls "All Aboard for the Sunshine Special," and the same train phonograph record as in the opening is reproduced. It is then announced that Uncle Bob and Happy Harry will return to-morrow at the same hour.

There was put in evidence as Exhibit A, a typewritten summary of the sketch as prepared for broadcasting on November 5, 6 and 7, 1931, which is in effect much the same as that outlined in the statement of claim,—though not so complete—and which was prepared by or under the direction of Kantel, and, I understand, was actually used by Grant in broadcasting the sketch; Grant had in the meanwhile been employed by Kantel to broadcast the sketch. The words of the songs do not appear in full on the summarized program, but the words "Opening parody," "Tunes," or "Birthday song" indicate the sequence in which the songs were to be sung; the songs having been selected and rehearsed one would hardly expect to find them extended in full on the program. The material selected from the letters received from members of the Sunshine Club were typewritten daily and handed to Grant, a sample of which is to be found in Exhibit A. The original manuscript of the sketch which Kantel states he prepared and delivered to Grant was not put in evidence, Kantel stating it was not returned to him by Grant and was not therefore in his possession.

As there is some conflict between Auld and Kantel as to the facts relating to the preparation and authorship of the sketch it is perhaps desirable to review briefly the evidence of Kantel relative thereto. Kantel, describing himself as a dramatic author and actor, testified that in 1927 his interest went in the direction of radio broadcasts, and that since that time his occupation has been entirely that of a dramatic author and producer. In October, 1929, he produced a radio sketch sponsored by Weston Bread Company, of Toronto, which embraced the idea of a juvenile club, the membership of which was composed of children, and he broadcasted for a time this children's feature, he himself taking the characters of Uncle Bill and Uncle Bob; this sketch I understand is still being continued. He produced also, for the W. Wrigley Chewing Gum Company, a sketch featuring Capt. Kidd and other pirates supposedly in charge of a pirate ship, the members of the crew being juvenile members of the Wrigley Club, and this feature was presented from February to June in 1931, and during the fall of that year. In March or April, 1931, he produced the written outlines of a sketch for the Paterson Chocolate Company, of Toronto, and in this sketch he first used Sunshine Special, and the name of the club in this instance was Uncle Bob's Sunshine Club, but in the end this sketch was not accepted by the company. In October, 1931, when he came in contact with Auld as already mentioned, he states that Auld asked him to prepare a sketch to be broadcasted, the general outlines of which I have no doubt were discussed, and he states that he suggested that the best way of judging of the merits of any sketch that might be prepared would be by having an audition, and he explained how this was done. It had been explained to Kantel that the product chiefly to be advertised was children's clothing and that it was young children that were to be interested. Accordingly, he states, he prepared the sketch outlined in the statement of claim. He arranged with Grant, one of the defendants, to do the broadcasting, if arrangements were completed with Auld, as they were eventually. He had several rehearsals of the sketch with Grant and went over the material many times. Arrangements were made for an audition about a week prior to the commencement of broadcasting, and mention of this has

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already been made. Grant, I understand, did a portion of the audition, the complete sketch having been committed to paper by Kantel, and the manuscript was before both Kantel and Grant in the studio, during the audition. The audition comprised everything outlined in the statement of claim, except that portion mentioned in paragraph 5, a song for sick children. Auld and Pogue heard the audition and must have approved of it. Broadcasting began on November 2, 1931, by Grant, and for the first three days, the broadcast, Kantel states, was literally from the manuscript, but after that there might have been abbreviations; there was shortly a sufficient mail response from which to prepare daily material gathered therefrom. Kantel prepared the material arising from the mail until he went to Vancouver, which is another phase of the controversy.

Early in December, 1931, Kantel decided to go to Vancouver on business, leaving Grant in charge of the broadcasting, and his wife in charge of the preparation of the broadcasting material to be compiled from the mail. Before leaving, Kantel states that Auld requested an agreement in writing covering the arrangements reached in reference to the broadcast, and he states that he prepared a draft agreement at Pogue's office, where it was discussed paragraph by paragraph, and on the afternoon of November 14, Pogue brought the agreement to Kantel's house, where Kantel read it; and he states that finding it contained no protection for himself as author of the sketch, he suggested it be rewritten, with the result that a fresh agreement was typed by Kantel, in triplicate. As I understand it the principal change made in the drafted agreement was the insertion of the words: "The feature is only to be used as arranged through Fred W. Kantel." Thereupon Kantel signed three copies of the agreement all of which Pogue took away with him, and on December 8, Pogue forwarded to Kantel, at Vancouver, his copy of the agreement.

The agreement which had better be quoted in full, is as follows:—

We, the undersigned; namely, A. S. Auld, Frank L. Pogue and Fred W. Kantel, agree to develop a publicity feature through the means of radio broadcasting—and to include any other advertising needed—a feature to be known as "Uncle Bob" and a character known as "Happy Harry." These two characters to be incorporated in the "Sunshine Club."

The following paragraphs confirm our understanding of the members governing the developing of this feature.

1. (a) It is proposed through Fred W. Kantel and with the co-operation of a radio station which will give satisfactory service to all concerned, to immediately commence broadcasting six days weekly at a time deemed mutually suitable. The broadcast takes the aspect of a radio studio feature until such time as it appears to have reached the stage where it has sufficient commercial value to be sponsored as a commercial feature by a number of radio advertisers. Up to that time Nisbet & Auld will pay for two of the six broadcasts at a cost of \$55 per broadcast. It is understood that Nisbet & Auld may arrange a contest among the Sunshine members and offer suitable prizes by way of gaining some publicity during the early stages of developing the broadcast.

(b) It is understood that there will be six "Sunshine Club" broadcasts weekly until Christmas. Four broadcasts each week are to be given free by the radio station and Nisbet & Auld are to pay for the remaining two broadcasts. When Fred W. Kantel and Edward W. Reynolds & Company sell four of these broadcasts to advertisers, Nisbet & Auld will pay nothing for their two broadcasts weekly. After Christmas, when there are five broadcasting days to be sold, Nisbet & Auld will have the option of having three broadcasts per week, and paying only for one, or continuing only with their two free broadcasts as mentioned above.

2. (a) It is understood that this radio and advertising feature with the above mentioned titles and outline, although the characters of "Uncle Bob," "Happy Harry," "Sunshine Club," etc., were conceived by Fred W. Kantel, they are under the control of Messrs. Nisbet & Auld as long as the feature in its entirety appears to have any commercial value to Nisbet & Auld. The feature is only to be used as arranged through Fred W. Kantel.

(b) Any expansion of the idea which may be undertaken in this or any other territory comes under the same category as the original idea, and is governed by the preceding paragraphs.

(c) When the Nisbet & Auld Company prepares a book on Etiquette, and other items of interest for children, to be used in connection with this radio feature, it is hereby agreed that Nisbet & Auld Company will possess the sole rights of ownership and will control the publication and sale of such books.

(d) When the status of the feature outlined is changed from "studio" to a commercial advertising feature—Fred W. Kantel will be paid \$275 weekly for the seven broadcasts weekly. This sum covers all disbursements in connection with talent and presentation of the program.

This controversy seems to have had its origin in Kantel's absence in Vancouver, and possibly the remainder of the facts should be briefly stated, although, I think, they are hardly relevant. Kantel's business in Vancouver was to secure sponsors for the broadcasting of children's features, similar to the sketch being broadcasted at Toronto, and he apparently intended that Auld was ultimately to derive some benefit therefrom. Auld, though he was aware of Kantel going to Vancouver, and that Grant was employed by Kantel to do the broadcasting of the sketch at Toronto,

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became of the opinion that Kantel should under the terms of the agreement be in Toronto arranging for the continuance and direction of the broadcast, and seeking other sponsors for the broadcast; Kantel appears to have thought that the broadcast of the sketch was being conducted successfully at Toronto in his absence, and he would not appear to have been acting in bad faith. On January 9, 1932, Nisbet & Auld Ltd. wired Kantel at Vancouver cancelling "our agreement Uncle Bob program," the reason assigned being, "your non-fulfilment of contract in securing business and refusal of station to agree to credit. We are continuing ourselves under our attorney's advice." To this Kantel replied "Cannot accept cancellation of our agreement. Continuance of Uncle Bob feature must be governed by terms of agreement." The causes leading to the cancellation of the agreement, and the conflicting views as to whether this should have been done or not, are hardly relevant to the precise issue before me, but I should say that Auld continued the program under Grant's direction from the date of the cancellation of the agreement, till June 30, 1932; the mail was refused to Mrs. Kantel who was left in charge of the preparation of material arising from the mail; and during that period the broadcast of the feature was that of Auld who had made arrangements with Grant and radio station CKNC.

The first question that falls for determination is as to the authorship of the sketch. I think Kantel was the author. His services were undoubtedly sought for the purpose of preparing a sketch of the nature in question, and he apparently was recognized as possessing the qualifications and experience to produce a work of this kind; it was for Auld to say whether or not the sketch as prepared was acceptable, and in the end it must have proved acceptable to Auld. Kantel wrote the original manuscript of the sketch,—there is no evidence that any one else did it— and he thus gave it form and expression which required some labour and effort on his part; he rehearsed it with Grant several times before the audition, and the audition and early broadcasts were, I think, presented from this manuscript, though possibly with slight variations. The preparation of the work for the audition must have been Kantel's work and upon the evidence I do not see how it



could be attributed to any other person; it was work that Kantel undertook to do. It may be quite true that Auld made suggestions as to the names of characters, and other features of the sketch, one or more of which may have been adopted by Kantel. Because another makes suggestions to a dramatic producer, or to the author of a radio sketch of the nature of the one in question, it does not follow that the person to whom the suggestions were made is not the author of the work produced, or that it is not a work in which copyright may subsist. The evidence, I think, all tends to show that the sketch as a whole was Kantel's and not that of anyone else. Auld and Pogue, it seems to me, relied on Kantel to produce the sketch, and it is not of importance that they or either of them suggested the general outline of what was required; the suggestions had to be developed in a practical and attractive form so that the talent employed to broadcast it might meet with a favourable reception from the Juvenile radio audience. The agreement, in its broad sense, seems to concede that Kantel was to be treated as the author of the sketch. The words, "although the characters of 'Uncle Bob,' 'Happy Harry,' 'Sunshine Club,' etc., were conceived by Fred W. Kantel," in paragraph 2 (a) of the agreement, must have been intended by the parties to the arrangement to mean that Kantel was to be recognized as the author of the sketch no matter what suggestions the others may have contributed towards its production; the abbreviation "etc.," concluding this quotation, was probably intended to convey more than perhaps it actually expresses. Then, the same paragraph states that "the feature is only to be used as arranged through Fred W. Kantel." All this appears to me to express or imply an admission by Auld and Pogue, that the sketch was the work of Kantel, and could only be used as and when arranged through him. Then again the fact that the rights of the Nisbet & Auld Company are expressly reserved in any book on Etiquette, which that company might prepare for use in connection with the broadcasting of the sketch, would seem to indicate to me that it was understood between the parties to the agreement that the sketch in its substantial outlines was the work of Kantel, and if any copyright subsisted therein it was in Kantel, but that was not to extend to the proposed book on Etiquette. All

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the circumstances relating to the issue of the authorship of the sketch raise a strong presumption that Kantel was its author. In fact, as I have already stated, I do not quite see how authorship can be attributed to any other person.

And I think Kantel was the sole author. Any suggestions as to the general scheme of the sketch contributed by Auld or Pogue do not, in my opinion, suffice to give them a share in the copyright as joint authors with Kantel. It clearly was not a collective work. There is no evidence that any word or line of the sketch was produced by anyone other than Kantel. A person who merely suggests certain ideas without contributing anything to the literary or dramatic form of the copyright is not a joint author. A lessee of a theatre employed an author to write a play and afterwards altered it, inserting an additional scene. A receipt of the author read thus: "Received of—the sum of £4 15s., on account of 15 guineas for my share as co-author, etc." The balance was never paid and it was held that there was no evidence that the lessee was a joint author. *Levy v. Rutley* (1). Where an advertisement agent prepares an advertisement, on instructions and information given to him by the advertiser, the Court will in the absence of evidence to the contrary, draw the inference that it was the intention of both parties that the copyright in the advertisement should belong to the advertiser. *Harold Drabble Ltd. v. Hycolite Manf. Co.* (2). This case was cited by the defendants, but, I think, it is an entirely different one from that under consideration. There was inferred in that case a plain consent that the advertisement should remain the property of the advertiser to insert whenever he chose; that inference cannot fairly be made in this case. The agreement would appear to leave the inference that the property in the sketch was solely in Kantel.

Copyright subsists "in every original literary, dramatic, musical and artistic work," and, I think, the sketch in question must be held to constitute a dramatic work within the meaning of copyright law, and was, I think, fixed in writing sufficiently to say it was a dramatic composition capable of being published or performed and in which the dramatic element was present. The original manuscript, and even Exhibit A, grouped a series of predetermined incidents,

(1) (1871) 24 L.T. 621.

(2) (1928) 44 T.L.R. 264.

songs, dialogues, and for want of a better name what I would call talks, in a fixed sequence, which gave to the sketch in its entirety the elements and characteristics of a dramatic composition. Had the performance of the sketch, as in the case of Uncle Don's performance in a shop in Philadelphia, been on the stage, the dramatic element would be more clearly realized than when communicated by radio. "The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with ideas or the originality of ideas—in which there is no copyright; it is the language in which the idea is expressed which is the only thing protected, and it is that to which 'original' in the Act relates; the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author." See *University of London v. University Tutorial Press* (1), in which case, I might observe, it was held that copyright subsisted even in examination papers. In *British Broad-Casting Co. v. Wireless League Gazette Publishing Co.* (2), it was held that there was copyright in the compilation of advance daily radio programs published for the ensuing week, on the ground that the compilation required very considerable work and was not a mere collection of what had already been prepared. Literary skill or originality is not necessary for a copyright, and does not depend on whether the material collected consists of matters which are *publici juris*, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. *Jewellers Circular Pub. Co. v. Keystone Pub. Co.* (3). The Courts appear to be extremely liberal in their construction of what constitutes copyright, and also as to what constitutes a dramatic work. The sketch may have contained some ideas that were not quite original with Kantel, it may have embodied some ideas of Auld and Pogue, but the complete sketch is, I think, original in the sense that it gave expression to ideas in language and form which no one else, so far as I know, had done before. The fact that the original manuscript was

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(1) (1916) 2 Ch. 601, 608.

(2) (1926) 1 Ch. 433.

(3) (1922) 281 Fed. R. 83.

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departed from daily is not, I think, fatal to the plaintiff. In the presentation of a dramatic work, in whatever form, it is open to the performer to depart from the literal text of the work. Whatever the merits of the sketch, and it is not claimed to be of a high dramatic or literary order, it interested a section of the juvenile public for some months, and the work involved some labour, talent and judgment. From a perusal of decided cases wherein copyright in works has been upheld, I am led to the conclusion that there is enough of original literary and dramatic work in the sketch to support the plaintiff's claim to copyright, though, I must confess, I was inclined in the other direction during the progress of the trial.

What constitutes infringement is defined fully by the Act. Copyright in a work is infringed by any person "who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright." There is no infringement unless the matter copied constitutes a substantial part of the copyright. It is not debatable that A. S. Auld, on behalf of Nisbet & Auld Ltd., for several months caused to be performed or broadcasted, through Grant, the sketch of Kantel, the sketch originally prepared and broadcasted by direction of Kantel, and if I am correct in holding that Kantel was the author of the sketch, and that copyright subsisted in the sketch, then infringement, I think, inevitably follows, because Nisbet & Auld Ltd., reproduced the sketch by radio communication to others, without the consent of the copyright owner. This action proceeds on the footing that the sketch was reproduced without the consent of Kantel. The words: "The feature is only to be used as arranged through Fred W. Kantel," must have been intended for the protection of Kantel's copyright in the sketch, and an arrangement for its use was made, but such arrangement was terminated on the cancellation of the agreement. To say that because Kantel stated, in his telegram of January 13, 1932, that he could not accept cancellation of the agreement, and that "the continuance of Uncle Bob radio feature must be governed by terms of agreement," that therefore the agreement was not cancelled, seems to me altogether without substance; this telegram was rather an intimation that the sketch could be

used under the terms of the agreement, or not at all. There was a very decisive cancellation of the agreement, and thereafter there was no arrangement of its use through Kantel. The plaintiff must therefore in my opinion succeed against the defendant Nisbet & Auld Ltd.

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The action against the defendants, Dominion Battery Company Ltd., and Gilbert Watson, was abandoned, these two defendants agreeing that they would abide by any order of the Court that might be made in respect of copyright in the sketch. The defendant Grant registered in July, 1932, a copyright in "Uncle Bob's Sunshine Club," as a dramatic-musical work. In the autumn of 1932 he broadcasted the sketch, on his own account, for a short time, without licence from Kantel. When Grant registered his copyright he states it was intended for the benefit of himself and Kantel, a position difficult to reconcile with his attitude as a defendant in this action. If I am correct in my opinion that Kantel was the author of the sketch, and that copyright subsisted therein, then of course Grant infringed the copyright by performing it in public. Any alterations Grant made in his broadcast of the plaintiff's sketch was a colourable and evasive imitation of the plaintiff's work, which he had broadcasted for some time on behalf of the plaintiff, and later for Nisbet & Auld Ltd. Judgment must therefore be against Grant with costs.

The plaintiff is therefore entitled to the relief claimed against the two defendants, Nisbet & Auld Ltd., and Frank E. Grant, together with his costs of the action.

*Judgment accordingly.*

BETWEEN:

DONALD MARGACH ..... SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

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*Petition of Right—Jurisdiction—Exchequer Court Act—Soldier Settlement Act*

*Held*, that as the Soldier Settlement Act (R.S.C., 1927, c. 188) specifies the matters in which jurisdiction is given the Exchequer Court, the powers of the Court are restricted to those matters, and the Court has no jurisdiction under ss. "d," section 19, of the Exchequer Court Act (R.S.C., 1927, c. 34) in any matter not so specified, the maxim *expressio unius est exclusio alterius*, applying.

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PETITION OF RIGHT to have suppliant granted a credit under the Soldier Settlement Act (R.S.C., 1927, c. 188) as amended by 20-21 Geo. V, c. 42.

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

*S. R. Vallance* for Suppliant.

*J. W. Crawford* for Respondent.

The facts are stated in the reasons for judgment.

ANGERS J., now (March 14, 1933) delivered the following judgment:

By an agreement in writing dated the 24th day of June, 1921, a duplicate whereof was filed as exhibit 1, the suppliant agreed to purchase from the Soldier Settlement Board of Canada the southeast quarter of section nineteen (19), in Township Twenty-nine (29), Range Twenty-one (21), West of the Fourth Meridian, in the province of Alberta, for the sum of \$3,700, payable \$320 at the time of execution of the agreement and the balance with interest by yearly instalments as therein set forth.

By clause 3 of the deed, the purchaser agreed within two months from the date of execution of the agreement to enter into occupation of the said land and to reside with his family during the continuance of said agreement on the said land.

Clause 4 of the deed stipulates that the purchaser will in each farming season during the continuance of the agreement break and cultivate the said land or such portion thereof as may from time to time be expedient in good farming operation of the said land.

By an agreement bearing date the 27th day of June, 1929, a duplicate whereof was filed as exhibit 2, the suppliant agreed to sell to Hilda Ann Walker, wife of William Edwin Walker, all his right and interest in the land hereinabove described for the price or sum of \$7,920, payable \$1,500 on the execution of the agreement and the balance by the delivery to the vendor of one-half share of all crops grown upon the said land in each year during the currency of the agreement until the whole of the purchase price and interest thereon at 7 per cent per annum has been fully paid, provided that if in any year such one-half share shall be insufficient to realize the sum of \$458.63, being the amount of the annual payment due by the vendor to the Soldier

Settlement Board under his title deed, then the purchaser will pay any such deficiency in cash.

It is agreed that the purchaser, on and after the date of the agreement, shall have the right to the possession of said land and premises.

The agreement exhibit 2 contains the following provision:

IT IS DECLARED agreed and understood by and between the parties hereto that notwithstanding anything herein contained the share of crops to be delivered to the Vendor as aforesaid and any cash deficiency to be paid to the Vendor as hereinbefore provided shall be delivered or paid by the Purchaser to the Soldier Settlement Board of Canada at its office in the City of Calgary or as the Board may demand, until the whole of the indebtedness of the Vendor to the Board hereinbefore recited has been fully paid and satisfied, and all payments made to the said Board hereunder by the Purchaser shall be credited on the said Purchase price.

By an agreement made in triplicate on the 9th day of September, 1929, filed as exhibit 3, the suppliant leased to the said Hilda Ann Walker the parcel of land hereinabove described, from the date of said agreement "as long as the lessee shall perform the provisions" therein contained, for and in consideration of the following rent, namely:

The full one-half share or portion of the whole of the crops of the different kinds and qualities which shall be grown upon the said demised premises during the said term without any deduction, defalcation or abatement whatsoever, such share of grain to be delivered in the name of the Board immediately after the threshing thereof in the elevator nearest the said land, or as may otherwise be designated by the Board at the time of or prior to the date of delivery; and the said threshing shall be on or before the first of November in each and every year. The whole of the crop of hay and green feed to be properly stacked upon the said land for inspection and measurement by the Board's Field Representative, and the tonnage as estimated by the said Representative shall be accepted as final and conclusive, and the Board's share of such crop of hay and green feed shall be delivered immediately after such inspection and measurement.

The deed exhibit 3 contains the following clause:

3. And the Lessee Covenants and Agrees that he will at his own cost and expense in a good workmanlike and proper manner during the proper season of each and every year put into crop, harvest and thresh to the satisfaction of the Board's Field Representative all of the said land suitable for crop.

The Soldier Settlement Board of Canada is a party to the agreement exhibit 3; clause (13c) contains the following provision:

(13c) The Board joins in the making of this Agreement solely for the purpose of concurring in the Lease of the said lands to and the occupation of same by the Party of the Second Part, and do not undertake

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to approve of any assignment of the said Agreement, but the Board shall have the right at any time to accept this instrument as an assignment of the interest of the Party of the First Part in and to the said lands to the Party of the Second Part, and for this purpose the Party of the First Part assigns, transfers, sets over and quit claims unto the Board all his right, title and interest in and to the said land and in the Agreement for Sale of the said lands from the Board to himself hereinbefore referred to, subject however to the payment of his equity as provided in the said agreement.

In his petition of right the suppliant alleges that by the agreement of June 24, 1921 (exhibit 1) he purchased from the Soldier Settlement Board the tract of land hereinbefore described; that in or about the month of July, 1929, he made application to the Board for leave to assign his agreement to one Walker, but that permission was refused; that an agreement for sale covering the said land was entered into between suppliant and said Walker and that a lease was entered into between suppliant, said Walker and the Board; that suppliant is a settler qualified and established upon the said land in accordance with the provisions of the Soldier Settlement Act; that he has not abandoned his land; that his agreement with the Board has not been terminated, rescinded or assigned; that on December 15, 1930, he made an application to the Board for a credit of 30 per cent of the amount of his indebtedness to the Board, pursuant to the amendment to the Soldier Settlement Act assented to on May 30, 1930; that the Board has refused to credit suppliant with the sum of 30 per cent of his indebtedness.

Suppliant accordingly prays that an order be granted directing that his account with the Soldier Settlement Board of Canada be credited with the sum of 30 per cent of his indebtedness as provided in the aforesaid amendment to the Soldier Settlement Act.

In his statement of defence the respondent denies the allegations of the petition of right, admitting however that suppliant made an application to the Board for a credit of 30 per cent and that said application was refused, and, referring to the several agreements of record, which after all speak for themselves, pleads: that during 1921 consonant with the agreement exhibit 1 the Board placed the suppliant in possession of the land hereinabove described with the purpose of assisting him to become there established; that the suppliant, late in 1926 or early in 1927, ceased to



possess or occupy the said land and permitted one W. G. Walker, husband of Hilda Ann Walker, to possess and occupy the same and that said Walkers, husband and wife, have since remained and are now in possession and occupation thereof; that the provisions of section 70 of the Soldier Settlement Act do not apply to suppliant because he is not and was not, upon the coming into force of said section or at any time, a settler established upon the land in accordance with the provisions of said Act, because he abandoned the said land and because he assigned his agreement with the Board; that moreover the prayer of the suppliant is not within the jurisdiction of this Court to grant upon petition of right.

The suppliant was the only witness examined. He stated *inter alia* that he resided on the land until February, 1927. In the fall of 1926, he had been approached by Walker, who wanted to rent his farm. As suppliant was in arrears with the Board, he thought that this was the best thing to do to get rid of his indebtedness to the Board and he accordingly decided to lease the farm to Mrs. Walker.

The first question for me to determine is whether the Exchequer Court has jurisdiction to entertain the present petition.

Section 70 of the Soldier Settlement Act, as amended by 20-21 Geo. V, chap. 42, upon which the suppliant's claim for a credit of 30 per cent is based, reads as follows:

70. Notwithstanding anything in this Act, in the case of any settler qualified and established upon the land in accordance with the provisions of this Act and regulations thereunder, who has not abandoned his land and whose agreement with the Board has not been terminated, rescinded or assigned, the Board shall credit the settler's account as on the standard date in 1929 with an amount equal to thirty per cent of the settler's indebtedness to the Board as on that date; provided that in the case of any such settler whose application for revaluation under section sixty-eight of this Act has not been finally disposed of, the settler's indebtedness as on the said standard date shall for the purposes of this section be deemed to be the amount owing by him to the Board as on the said standard date less the amount of the depreciation in the value of the land, if any, determined as provided by section sixty-eight of this Act; provided further that the maximum amount which may be so credited to any settler in accordance with the provisions of this section shall in no case exceed the settler's total indebtedness to the Board.

The Board declined to allow the credit of 30 per cent apparently for the reason that, at the time section 70 came into force, namely on May 30, 1930, the suppliant was not a settler qualified and established upon the land, having

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abandoned it and having assigned his agreement with the Board.

It was submitted on behalf of suppliant that the claim herein is one of the class of claims defined in clause (d) of section 19 of the Exchequer Court Act (R.S.C., 1927, chap. 34); this clause is as follows:

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

(d) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council.

This subsection is very broad. It lays down a general rule applicable in all cases where there is no limit or exception, either express or implicit.

The Soldier Settlement Act contains no general clause conferring jurisdiction on the Exchequer Court. There are however matters, under the Act, which are expressly referred to the Court: section 13 (parag. 2 and 3) empowering the Court to appoint a guardian to represent for the purposes of the Act a person under disability and to give directions as to the disposal, application or investment of the compensation money; section 41 authorizing the Board, in cases of compulsory purchase by the Board where the owner claims that the compensation tendered is inadequate, to lay an information before the Court and determining the procedure to be followed in such cases; section 45 dealing with the discretion of the Court regarding the costs incidental to any compulsory purchase; section 47 regarding interest and the refusal of interest by the Court in certain cases; section 48, giving authority to a judge of the Exchequer Court or to a judge of any superior court to issue a warrant to a sheriff to put the Board in possession of any land, in case of opposition being made by the owner; section 58 authorizing the appointment by the Governor in Council, at the request of a judge of the Exchequer Court, of duly qualified persons to be judges *ad hoc* of said Court for the purpose of assisting in the performance of the duties imposed by the act; section 68 giving power to the Court to hear an appeal from a decision of the Board in a case of revaluation of land.

The Soldier Settlement Act, as we have seen, was amended by 20-21 Geo. V, chap. 42, which added sections 69, 70 and 71 thereto.

Section 69 enacts that, on and after July 1, 1930, in any case where the Board, before exercising as against the land the right of rescission of the agreement with any settler in default, gives to the settler the statutory notice of its intention so to do, no rescission shall take place where the settler advises the Board in writing of his opposition to the proposed action or where the Board has otherwise reasons to believe that a dispute may arise, unless an order of a County or District Court Judge is issued declaring the rescission of the agreement warranted. The section adds that the Governor in Council may make such regulations as he deems fit for the procedure in applications to a District or County Court Judge for an order under this section.

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Section 70, in virtue whereof the suppliant claims a credit of 30 per cent, bestows no power upon the Court. Had the legislators intended to empower a judge of this or any other Court to deal with this question of credit, it seems to me that they would have mentioned it, as they did in other matters, for instance in connection with the rescission of an agreement, as provided for in the immediately preceding section, namely section 69.

The legislators have deemed it expedient, notwithstanding subsection (d) of section 19 of the Exchequer Court Act, to specify in the Soldier Settlement Act the matters in which they intended to give jurisdiction to the Court. In so doing it seems to me that they restricted the powers of the Court to the matters specifically indicated in the statute. The intention of the legislators appears to me to have been to give to the Board exclusive and final jurisdiction on all questions which are not expressly referred to the Court or a judge thereof for adjudication. This is a case, in my opinion, in which the maxim *Expressio unius est exclusio alterius* would apply.

On this ground I believe that the action must fail.

I may say that I feel all the more at ease to arrive at this conclusion as I would not have felt disposed to grant the suppliant's prayer, had I reached the conclusion that I had jurisdiction to take cognizance of the case. I do not think that the suppliant at the time chapter 42 of 20-21 Geo. V came into force was, or that at any time thereafter he has ever been, in the words of the statute, a settler estab-

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lished upon land, he having abandoned it in or about the month of February, 1927, and assigned his agreement.

There will be judgment declaring that the suppliant is not entitled to the relief sought by his petition of right and dismissing said petition with costs.

*Judgment accordingly.*

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BETWEEN:

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

AND

CANADIAN TUG BOAT CO. LTD. . . . . DEFENDANT.

*Negligence—Evidence—Res ipsa loquitur—Damages*

Defendant's servants having sole control of certain boom sticks, made them fast to the shore of Kirkland's Island in the Fraser River, in an improper and insecure manner, and then left them unattended. The sticks escaped and caused damage to plaintiff's property.

*Held*, that defendant not having rebutted the presumption of negligence raised against it by the pleadings, the evidence and the admissions made at the trial, by showing the cause of the accident and that it was inevitable, the doctrine of *res ipsa loquitur* was applicable and defendant must be held liable in damages to the plaintiff.

INFORMATION exhibited by the Attorney-General of Canada to recover from the defendant damages for negligently causing injury to plaintiff's property.

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

*W. G. McQuarrie, K.C.*, for plaintiff.

*E. A. Lucas* for defendant.

The facts are fully stated in the reasons for judgment.

ANGERS J., now (January 10, 1933), delivered the following judgment:

By the information herein the plaintiff claims from the defendant the sum of \$469.30 as damages, with interest at 5 per cent on \$419.30 from October 26, 1929, and his costs of action.

The information sets forth that the defendant is and was at the time the cause of action arose the owner of the

tug *John Davidson*; this fact is admitted in the statement in defence.

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The information goes on to say that the plaintiff suffered damage from the negligence of defendant's servants in leaving in the course of their employment certain boom sticks at or near Kirkland's Island on the Fraser River, a navigable stream, on or about October 11, 1929, unattended and inadequately secured whereby the said boom sticks escaped and came into contact with certain aids to navigation the property of the plaintiff then and there being lawfully in place in the channel of the river, thereby damaging and displacing them in the following manner to wit:

- (a) the King Edward Cut buoy was moved down river about one thousand feet;
- (b) No. 26 buoy was dragged down to No. 12 buoy;
- (c) No. 24 buoy had lantern torn off and lost and buoy was moved about 200 feet;
- (d) No. 22 buoy was taken down stream to No. 12 buoy.

The damages are particularized as follows:

|                                     |          |
|-------------------------------------|----------|
| Cost of 200 m/m Aga lantern.....    | \$401 60 |
| Tubing, etc. ....                   | 8 00     |
| Lantern table .....                 | 9 70     |
| Steamer's time replacing buoys..... | 50 00    |
|                                     | \$469 30 |

In its statement of defence, the defendant denies responsibility and says that the boom sticks were adequately secured as follows:

The said boom sticks were made fast to a dolphin at the bank of Kirkland's Island by a new three-quarter inch wire rope; the spliced eyes at both ends of the wire rope were shackled by seven-eighth inch shackles to the boom chain bolted to the head ends of the foremost boom sticks; the pins of the shackles were properly screwed home with a spike.

The defendant adds that the escape of the boom sticks from their mooring was caused by the action of some person or persons unknown to the defendant, who unshackled the wire rope from the boom chain and placed one of the unpinned shackles upon the foremost boom stick and cast away the other shackle and the wire rope.

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Admissions were made on behalf of the defendant in a letter from the latter's solicitors to the plaintiff's solicitors, dated the 8th of September, 1932, filed as exhibit 1; it reads as follows:

We hereby give you notice under Rule 145 of the Exchequer Court Rules that we admit on behalf of the Defendants, that the Defendants' servants moored certain boomsticks to the shore of Kirkland Island as described in Paragraph 4 of the Statement of Defence; that the said boomsticks came adrift and went down the Fraser River, a navigable stream in British Columbia, and did the damage set out in Paragraphs 3a, 3b, 3c and 3d of the Information.

We further admit on behalf of the Defendants that the quantum of damages as set out in the particulars of the Information is correct and that such damages were caused by the said boomsticks carrying away the buoys referred to in the Information.

This should obviate the necessity of calling witnesses to prove that our boomsticks went down the river and carried away these buoys and witnesses to prove the costs, etc., of the lanterns, etc., and of the expenses gone to in replacing the buoys.

The evidence discloses the following facts:

On the 9th of October, 1929, the tug *John Davidson* belonging to the defendant, in charge of Captain Hagen, was towing some 395 boom sticks down the Fraser River, bound for Comox. The voyage was interrupted at Woodward's Landing, shown on the map of the Fraser River filed as exhibit 3, the reason of such interruption being that the dynamo had burned out. According to Hagen's testimony, the dynamo was required to operate the searchlight, without which it was impossible to tow a string of boom sticks during the night (dep. Hagen, p. 11). The string of boom sticks was approximately 900 feet long. The log, produced as exhibit 2, shows that the tug tied up at Woodward's Landing around 7 o'clock on the night of the 9th of October and that the next morning, at half-past five o'clock, the tug towed the sticks across the river and fastened them to the shore of Kirkland's Island. According to Hagen's version, the tide was ebbing and it was about low water. Hagen says that he tied the boom sticks to a three-pile dolphin; he describes this so-called dolphin as follows (dep. Hagen, p. 11, in fine, and p. 12): . . .

Asked as to who made the head end of the boom sticks fast to the dolphin, Hagen replies that it was the mate, Elmer Stewart, at the time of the trial in Prince Edward Island. Stewart was not heard as a witness, but Hagen says that he saw him do the work. He explains what Stewart did as follows (dep. Hagen, pp. 12 *et seq.*): . . .

The tug then left light for the mill at Comox. Hagen says that on the night of the 9th of October, whilst at Woodward's Landing, he telephoned to one Simpson, Commodore of the defendant, and reported the trouble he had with the dynamo.

After he left Kirkland's Island on the morning of the 10th of October, Hagen never saw the boom sticks again.

No one was left in charge of the string of boom sticks at Kirkland's Island. Hagen and other witnesses heard on behalf of the defendant contend that it would have been useless, nay even dangerous. I shall deal with this point more at length in a moment.

Hagen, who has been a tug captain on the Fraser River since 1914, states that he could not have done anything more than what was done to make the boom sticks reasonably secure and fast to the shore. He adds that he would fasten a boom of logs in exactly the same way as the mate tied up the boom sticks on the morning of the 10th of October. That is what he has always done and, during his experience on the Fraser River, no booms of logs ever went adrift.

An undisputed fact is that the string of boom sticks left their mooring and caused the damage whereof the plaintiff is now complaining. There is no definite evidence as to when the boom sticks escaped but it seems as if it were sometime during the night of the 10th to the 11th of October. Worsfold, district engineer for the lower part of the mainland of British Columbia, examined as witness on behalf of plaintiff, tells us that he first noticed the damage to the buoys on the 12th of October.

The question I have to determine is whether the escape of the boom sticks is imputable to the negligence of the defendant's servants.

As I have already stated, the defence is that the boom sticks were adequately secured and that their escape from their mooring was caused by the action of some person unknown to the defendant. Even assuming that the boom sticks were sent adrift by the intervention of a third party, am I to conclude that this relieves the defendant of all responsibility? This is a question which I shall examine later.

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As previously noted, Captain Hagen pretends that the boom sticks were tied up to a dolphin on the shore of Kirkland's Island, in such a manner that they could not possibly escape. His evidence is uncorroborated; the mate of the tug who tied up the string of boom sticks was not called as witness; he was alleged to be in Prince Edward Island at the time of the trial. Nothing was said as to why he was not examined on a commission; perhaps the defendant was not aware of his whereabouts; in any event nothing was said about it at the hearing. His evidence might possibly have shed some light on the subject.

In his examination in chief Hagen said that the string of boom sticks was made fast to a dolphin. When asked to describe what this so-called dolphin was, Hagen is not very positive; he says that it is a long time ago and that, *as far as he can remember*, "it was good, big piles, three of them." Then he is asked how high above the water these piles were; he does not reply to the question directly but states that "*a dolphin* is anywhere between 10 or 15 feet above water." Later on he says he is positive the piles were at least 10 feet above the water (p. 24).

In cross-examination, the witness repeats that it was a three-pile dolphin (dep. Hagen, p. 22), but when asked if it could not have been the remains of an old tower of the B.C. Electric Company, he says that he cannot deny it. The memory of the witness was obviously not very retentive; this is easily conceivable when one considers that the accident occurred approximately three years ago and that the witness had no particular reason to notice the nature, the size, the solidity or the condition of the object to which the string of boom sticks was made fast.

This is an important feature of the case and I think it is only fair to the witness that I should quote verbatim what he said (pp. 22 and 23):

Q. You call it a dolphin. Was it in fact a dolphin at all, or was it the remains of an old British Columbia Electric tower which was put in the river there?—A. It was a dolphin.

Q. Not a Government dolphin?—A. Well, of course, I can't tell you who put it there.

Q. No, but not a Government dolphin. You heard Mr. Worsfold's evidence. It was not a Government dolphin. Whose dolphin do you suggest it was?—A. I couldn't tell you that.

Q. You don't know anything about it?—A. Not a thing.

Q. Is that dolphin still there?—A. I don't know.



Q. You don't know. Well, then I will tell you that that dolphin is not there. They are not going to produce it as evidence. The dolphin isn't there at all; it has completely disappeared now. What do you say about that? You don't say anything? All right. Now, that dolphin was not kept there for the purpose of anybody, for the purpose of tying up logs to, was it?—A. It was put there for tying up to, I suppose.

Q. You suppose that. I will put this to you, that it was not put there for that purpose at all; that it was put there years ago by the B.C. Electric Railway Company, when they were putting their high-tension wires across the river, and that these piles that you speak of were only the remains of that old tower. What do you say about that?—A. I don't know where you got that information.

Q. You can't contradict me either, can you?—A. No, I can't.

The witness concludes his deposition on this point by saying that he found the dolphin in a very first class condition. I must say that this answer appears to me very categorical and explicit as compared with the previous answers of the witness relating to the so-called dolphin.

Worsfold, on the other hand, called as witness by the plaintiff, made the following statements concerning the alleged dolphin on Kirkland's Island (dep. Worsfold, p. 6):

Mr. McQUARRIE: Q. Now, do you know anything about a dolphin there on Kirkland's Island?—A. No.

Q. Do you remember a dolphin put in by your Department, or any department?—A. No, I never remember any department putting in a dolphin there. At one time, somewhere possibly just below Woodward's, the B.C. Electric had two high towers to carry the wires, and there might have been something left from that.

Q. Some of the remains of those towers?—A. Yes, but I have no idea of whether they were there at the time.

Q. In 1929?—A. No.

Q. And there was no proper dolphin for tying logs?

Mr. LUCAS: I wish my friend would not lead. That is rather a leading question.

Mr. McQUARRIE: Q. Were there any proper dolphins there used for the purpose of tying logs or boomsticks, or anything of that kind, so far as you are aware?

Mr. LUCAS: I object. Mr. Worsfold says he doesn't know.

The WITNESS: I don't know whether there is any. I don't know whether there was any there at that time.

Mr. McQUARRIE: Q. You don't know?—A. No. There was certainly none put in by the Government, anyway. There may have been some old dolphin there that somebody else had driven, but there certainly was none driven by the Government.

Q. You are referring to the B.C. Electric?—A. That is the only thing for certain that was there, but I don't know if it was there then.

Powys, a master mariner of some 45 years' experience on the Fraser river, says that he does not remember having seen any dolphin at the place where the boom sticks were left by Hagen, for at least the last twelve years. Accord-

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ing to him there was a tower built by the B.C. Electric Company of sawn timber to carry its high tension wires. The witness says that he did not take any particular notice of whether there remained anything of this tower in October, 1929, but adds that there was bound to be left a few piles. He declares however that there were no piles left at the time of the trial, i.e., in September, 1932. But a delay of three years had elapsed since the date of the accident.

Summing up, the witness says, notwithstanding Captain Hagen's testimony to the contrary, that he does not remember the existence of any dolphin in October, 1929, at the spot where the boom sticks were tied up (p. 58). . . .

The evidence on this point is not very convincing and the existence of the so-called dolphin is, I must say, rather problematical and uncertain.

Hopkins, a tug captain, called as witness on behalf of the defendant, said that on the 10th of October he was in Vancouver and he received instructions from Simpson of the Canadian Western Lumber Co. to pick up the string of boom sticks. He proceeded up the Fraser River and found the boom sticks entangled around buoy 17 with other buoys. I may note here incidentally that he is the only one to speak of buoy 17, which, besides, is not indicated on the plan exhibit 3; furthermore his version is not in accord with the admission by defendant of sub-paragraphs (a), (b), (c) and (d) of paragraph 3 of the information, which do not mention buoy 17. Hopkins adds that he then went to Woodward's Landing and telephoned Simpson to ask him to send a small shallow draught tug. He then returned to the boom sticks and he says that he—with others apparently as he uses the pronoun "we"—got them straightened and carried on to Comox.

There is evidently an error in the date. The tug *John Davidson* tied up at Woodward's Landing during the evening of the 9th; she towed the boom sticks across the river on the following morning and Captain Hagen and his men fastened them to the shore of Kirkland's Island. The tug then left light for the mill at 7.15 a.m. All this appears from the log (exhibit 2). Now the boom sticks went adrift sometime during the night of the 10th to the 11th, most likely on the morning of the 11th. It was therefore impossible for Hopkins to disentangle the sticks on the 10th.

According to Worsfold's evidence, it was on Saturday the 12th that he first knew of the damage done to the buoys and that the boom sticks were cleared and the buoys put back in position (dep. Worsfold, p. 8) . . .

The discrepancy between the versions of Hopkins and Worsfold as to the time when the boom sticks were cleared from the buoys may not be very material, save that, if credit is given to Worsfold's testimony, we must draw one of two conclusions: either that the sticks went adrift later than the morning of the 11th or else that the Canadian Western Lumber Company, advised by Hopkins that the sticks had gone adrift and displaced some of the buoys, did not deem it advisable to notify the Department of Marine of this fact, notwithstanding the danger to navigation arising from such displacement.

Another point on which Hopkins and Worsfold disagree is in connection with the clearing of the sticks: as I have already said, Hopkins swears (p. 34) that "we"—meaning apparently he and his men—"got them straightened and carried on to Comox."

Worsfold, on the other hand, declares that he called up the mill of the Canadian Western Lumber Company and notified them about the boom sticks going down the river and removing certain buoys, and told them (p. 8) that "we had been down there and cleared the sticks of the buoys and put the buoys back."

Perhaps the only way to reconcile the two versions is to conclude that Hopkins straightened out the boom sticks on the 11th—not on the 10th as he says—and that Worsfold and his men replaced the buoys on the 12th. There is no doubt that Hopkins had nothing to do with the replacement of the buoys; in fact he does not mention it. If such is the case, the least I can say is that neither Hopkins nor Simpson were very diligent in notifying the Department of Marine that its buoys had been removed. This, however, is immaterial: the negligence or carelessness of the defendant's servants in that respect cannot have any bearing on the issues herein.

I do not wish to attach too much importance to these differences, but they may indicate that Hopkins' memory was not as good as it could be and, to some extent, they may affect the reliability that one can place on the witness'

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testimony. I wish to add that, in saying this, my remarks must not be interpreted as casting any doubt on the good faith of the witness.

Hopkins was examined regarding the condition in which he found the head end of the strings; we have his version on this point at pp. 34 and 35 of his deposition: . . .

Continuing his deposition, the witness says that the shackle could only become unpinned through someone unscrewing the pin and pulling it out (dep. p. 36).

Further on however the witness is not quite so positive (p. 37): . . .

Hopkins and two other tug captains, namely Cosulich and Carlson, declared that the manner in which Hagen had made his string of boom sticks fast to the shore was the proper manner and that nothing else could be done (dep. Hopkins, p. 35; dep. Cosulich, p. 44 and dep. Carlson, p. 49).

All this evidence of course is essentially hypothetical and based on the assumption that the dolphin was solid and that the string of boom sticks was made fast to it in the manner described by Hagen.

The witnesses agree on one point, viz., that the string of boom sticks left their mooring because the pin was removed from the shackle. The question is whether it was removed deliberately or whether it dropped out because it had not been screwed on securely. Two master mariners of experience, Powys and Garvie, called as witnesses on behalf of the plaintiff, say that the motion of the sea may have caused the pin to fall out if not tightly screwed: See deposition Powys at p. 61 and deposition Garvie at p. 73.

It was suggested that possibly the pin was wilfully removed by a fisherman anxious to get rid of the boom sticks, either because they interfered with his fishing or because he had a grudge against Captain Hagen (p. 38): . . .

Asked as to whether it would not have been advisable to leave a man in charge of the boom sticks, Hagen, Hopkins, Cosulich and Carlson, for various reasons, say that it would not.

Captain Hagen (at p. 15) answers the question as follows:

Q. Would it have made the situation safer had you left a man in charge of the boomsticks?—A. A man could not do anything there if he was there.

Q. In case the boomsticks had come adrift, you say a man could not have done anything anyhow?—A. No.

In cross-examination, the witness emphasizes his opinion in a rather singular manner (p. 27, in fine, and page 28):

. . .  
 If, as Hagen pretends, the boom sticks were made fast to the shore in such a manner that they could not escape without the intervention of someone deliberately sending them adrift, the object of leaving a man in charge would obviously not have been to save the boom sticks in case they left their mooring, but to prevent anyone unshackling them or otherwise interfering with them.

Hopkins (dep. p. 39) expresses the opinion that it would not have been safe to leave a man in charge of the boom sticks: . . .

Hopkins apparently takes for granted that the boom sticks could have gone adrift, notwithstanding his opinion that they were securely fastened to a dolphin.

Hagen's and Hopkins' statements on this point are preposterous.

Carlson says that it was not customary nor feasible to leave a man in charge; see his deposition, at p. 50: . . .

Cosulich says that, if the tide were ebbing, a man in charge of the boom sticks could not have prevented the boom sticks from going adrift, but that if the water were slack, he might possibly have saved them. He admits however that a man could have prevented a fisherman from letting the sticks go adrift (dep. p. 46). I have no doubt that he is right on this last point.

After hearing the witnesses, reading over the depositions carefully and weighing the evidence, I have come to the conclusion that the string of boom sticks was not made fast to the shore of Kirkland's Island in an adequate and secure manner. I doubt very much whether there were any dolphin or even suitable piles at the spot where the boom sticks were moored; and if there were, I am not at all convinced that the string of boom sticks was properly fastened.

In view of the admissions made in the statement of defence as well as at the trial (see exhibit 1), there exists a presumption that the damage was caused by the negligence of defendant's servants; in the circumstances, it was incumbent upon the defendant to rebut that presumption; the

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burden of proof was shifted upon the defendant; the doctrine of *res ipsa loquitur* applies.

In Halsbury's Laws of England, vol. 21, p. 439, No. 751, the question of presumption of negligence is concisely and clearly laid down as follows:

751. An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence. To these cases the maxim *res ipsa loquitur* applies. Where, therefore, there is a duty upon the defendant to exercise care, and the circumstances in which the injury complained of happened are such that with the exercise of the requisite care no risk would in the ordinary course of events ensue, the burden is in the first instance upon the defendant to disprove his liability. In such a case, if the injurious agency itself and the surrounding circumstances are all entirely within the defendant's control, the inference is that the defendant is liable, and this inference is strengthened if the injurious agency is inanimate.

The injurious agency was within the defendant's control and it could and should have remained within its control, had the defendant's servants acted prudently and taken the necessary precautions.

Beven, on Negligence, 4th Ed., at p. 126, says:

There must be *reasonable evidence* of negligence; and the mere occurrence of an injury is sufficient to raise a *prima facie* case;

- (a) When the injurious agency is under the management of the defendant;
- (b) When the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care.

Over inanimate things this duty of care is absolute; over animate beings it only goes to guard against injury from their customary habits.

In *Britannia Hygienic Laundry Co. v. Thornycroft & Co.* (1), Scrutton, L.J., at p. 241, explained the doctrine of *res ipsa loquitur* as follows:

The doctrine of *res ipsa loquitur*, as I understand it, is this: where you have a subject-matter entirely under the control of one party and something happens while it is under the control of that party, which would not in the ordinary course of things happen without negligence you may presume negligence from the mere fact that it happens, because such a thing could not happen without negligence. There is the case where a cask tumbled out of the door of a warehouse on to a passer-by, and it was said against the defendant: you are in sole control of this warehouse, and in the ordinary course of things casks do not tumble out of warehouses on to the heads of passers-by unless somebody has been careless. If nothing else is proved about how this cask tumbled out, *res ipsa loquitur*, the jury are entitled to find that it tumbled out by negligence, that being the more probable way in which it happened.

In *Scott v. London & St. Katherine Docks Co.* (1), Erle, C.J., says (p. 601):

There must be reasonable evidence of negligence.

But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

The same principle was adopted in *Byrne v. Boadle* (2); Pollock, C.B., at page 727, says:

The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are *prima facie* responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them.

See also *Kearney v. London & Brighton Railway Co.* (3), particularly the notes of Kelly, C.B., at pp. 761 and 762; *The Merchant Prince* (4); *Rylands v. Fletcher* (5).

In the case of *The Merchant Prince (ubi supra)* Fry, L.J., speaking of the burden which rests on the defendant to show that the accident was inevitable, says (p. 189):

It is a case in which a ship in motion has run into a ship at anchor. The law appertaining to that class of case appears to be clear. In the case of *The Annot Lyle* (11 P.D. 114), it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this they are liable for damages. The burden rests on the defendants to shew inevitable accident. To sustain that the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further

(1) (1865) Ex. Rep., 3 H. & C. 596.

(2) (1863) Ex. Rep., 2 H. & C. 722.

(3) (1871) L.R., 6 Q.B. 759.

(4) (1892) L.R. Pr. Div. 170 at pp. 189 and 190.

(5) (1868) L.R., 3 E. & I. App. 330.

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shew with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shewn inevitable accident.

I may further cite the following decisions dealing with the burden of proof: *The Indus* (1); *The Annot Lyle* (2); *The Schwan* (3); *Tarry v. Ashton* (4); *Briggs v. Oliver* (5), particularly the notes of Bramwell, B., at p. 164; *The Marpesia* (6); Pollock on Torts, pp. 467 and 540 *et seq.*; Salmond on the Law of Torts, pp. 33 and 34.

I do not think that the defendant has succeeded in showing what was the cause of the accident. The defendant has suggested that it was likely that the boom sticks were sent adrift by a fisherman or someone having a grudge against Captain Hagen. It was submitted however that the pin in the shackle, if there was one, might have fallen out by the movement of the sea, if it had not been properly screwed in. The evidence leaves us in a field of hypotheses and conjectures. It was the duty of the defendant to show what had been the cause of the accident and that such cause was inevitable. As Fry, L.J., said in *The Merchant Prince (ubi supra)*, "the burden rests on the defendants to shew inevitable accident. . . . They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided."

This the defendant has not done.

But there is more. I believe that the evidence discloses negligence on the part of the defendant's servants; it arises from the following acts or omissions; tying up the string of boom sticks at a place where the current was very swift and dangerous; leaving the boomsticks unattended; not sending another tug at once to take charge of these boom sticks.

Regarding the danger of leaving the boom sticks on the shore of Kirkland's Island, we have the evidence of Powys,

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|-----------------------------------------|------------------------------|
| (1) (1887) L.R., 12 Pr. Div. 46.        | (4) (1876) 1 Q.B.D. 314.     |
| (2) (1886) L.R., 11 Pr. Div. 114.       | (5) (1866) L.J. Ex. 163.     |
| (3) (1892) L.R., Pr. Div., 419, at 431. | (6) (1872) L.R., 4 P.C. 212. |



who is a disinterested witness; his testimony on this point is as follows (p. 59):

Q. You say on that side of the river it was unsafe?—A. Unsafe in my idea.

Q. To leave it. What about the other side of the river?—A. The other side of the river there is slacker water and there is quite a number of piles there that he could have tied it up to.

Q. You are suggesting that he should have left that boom on the other side of the river at Woodward's?—A. Decidedly.

Q. Where it was first?—A. Yes.

Q. And in that view it would be much safer than leaving it where he did leave it?—A. Oh, decidedly.

Q. On account of the current?—A. Certainly.

Captain Hagen was negligent in leaving the boom sticks unattended. The majority of the witnesses heard on behalf of the defendant, particularly Hagen and Hopkins, stated that a man, left in charge of the boom sticks, could not have prevented them from going adrift. I doubt very much whether that contention is at all founded; I am inclined to believe the contrary. But the object of leaving a man in charge was not so much to prevent the boom sticks from escaping as to preclude a stranger from unfastening them and sending them adrift. Indeed, if really the boom sticks were tied up securely, as Captain Hagen pretends they were, they could not leave their mooring and there was no reason to leave a guardian in attendance to prevent their escape.

As already stated, the main purpose of leaving a man in charge—on the shore or in a boat—would have been to prevent a stranger interfering with the boom sticks. And this, in my opinion, was quite feasible.

Captain Hagen tied up at Woodward's Landing at 7 o'clock on the night of the 9th; the boom sticks left their mooring at Kirkland's Island during the night of the 10th to the 11th, most likely on the morning of the 11th and even perhaps later. The sticks were left unattended for a period of more than a day, possibly 36 hours and more. The defendant could and should in my opinion have sent another tug to take charge of the boom sticks. There was obviously extreme heedlessness and lack of foresight on the part of Hagen and Simpson in leaving these boom sticks unattended and a danger to navigation in the channel of the river.

Counsel for defendant submitted that the defendant cannot be held responsible for the act of a stranger in unfast-

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ening the boom sticks and letting them escape and that the emission of leaving a guardian in charge of the sticks to prevent such an occurrence does not constitute negligence. I must say that this contention is, in my mind, unsound. In support of this opinion, I may cite the following authorities: Halsbury's Laws of England, vol. 21, p. 380, No. 649, where it is said:

649. So long as there is a direct chain of causation between a negligent act and an injury, *primâ facie* he who is guilty of the negligent act is responsible, and he cannot shelter himself behind the negligence of a third party; but such an intervention may in some circumstances remove from an act of negligence its responsibility for a consequent injury. What has been called the conscious act of another volition may remove liability from one who has been previously negligent if it is proved that in fact that conscious act was the real cause which brought the injury about, but not if it is left in doubt whether such conscious act was the real cause or not, nor if such a conscious act was one of the possible events which there was a duty on the part of the negligent person to guard against. The intervention of another does not avoid the liability for a negligent act when the negligent act has placed that other in such a position that he could only reasonably have acted in the way in which he did act; and, so long as the consequence complained of is the natural and direct outcome of the original negligence, the interference of another, however wrongfully, or even criminally, the latter may have acted, does not affect the liability.

*Martin v. Stanborough* (1); *Illidge v. Goodwin* (2); *Evans v. Manchester, Sheffield and Lincolnshire Ry.* (3); *Zeidel v. Winnipeg Electric Co.* (4); *Collins v. Middle Level Commissioners* (5); *Paterson v. The Mayor, etc., of Blackburn* (6); *Clark v. Chambers* (7); *Marshall v. Caledonian Railway Co.* (8); *Harrison v. Great Northern Railway Co.* (9).

Counsel for defendant, at the hearing, relied on the decision *in re The Western Belle* (10) to contend that there is no negligence in leaving a string of boom sticks unattended and that the fact that if a man had been left in attendance he might have prevented them from breaking adrift is no evidence of negligence. As the President of the Court said, in that case, the question of whether it was negligent to leave a barge unattended was a question of fact. Circumstances vary with each case. In the case of the *Western*

(1) (1924) 41 T.L.R. 1.

(2) (1831) 5 C. & P. 190.

(3) (1888) L.J.R., 57 Ch., 153.

(4) (1928) 2 W.W.R., 601.

(5) (1869) L.R., 4 C.P., 279.

(6) (1892) 9 T.L.R., 55.

(7) (1878) L.R., 3 Q.B.D., 327.

(8) (1899) 36 Sc.L.R., 845.

(9) (1864) Ex. Rep., 3 H. & C., 231.

(10) (1906) 95 L.T.R., 364.

*Belle* the barge *Gratitude* was lying securely moored to the barges lying in Ward's Roads, in the River Thames. It is useless for the purposes herein to relate at length the facts and it will be sufficient to state that the *Western Belle* having been cast off from a tug came down athwart the river towards the craft at Ward's Roads, fouling the mooring chains. At ebbing tide the *Western Belle* grounded upon the moorings, broke them and thus caused the *Gratitude* to break adrift. As a result, part of the cargo of the *Gratitude* was lost and part damaged. Hence the action in damages by the owners of the cargo against the owners of the *Western Belle*. The latter pleaded, *inter alia*, that the owners of the *Gratitude* had been negligent in leaving her unattended.

The notes of the President of the Court on this question of negligence resulting from the act of leaving the barge unattended are interesting; they are to be found at p. 366 of the report, at the bottom of the first column and in the second column. It will suffice to quote an extract to show the view adopted by the Court and convince oneself that the question of negligence in that case rested mainly on a question of fact. I find on page 366, 2nd column, the following remarks:

One can hardly believe that nothing could be done if a man had been there to avert the drifting of the barges unattended up the river. Then the question comes to be whether there was in the circumstances of the case any negligence in not having a man there. Upon that there are some cases, and I think those cases depend upon pure questions of fact—namely, whether it is usual to have a man in charge—and the question whether it is so really depends upon whether there was anything that it is necessary to anticipate that you ought to have done to avert the accident. In the docks there are several cases, and it does not seem the rule to have a man in charge in the dock. One says to one's self why is that? Because there is no necessity to anticipate danger. Others are cases in which even in a dock it has been held or indicated that it might be negligence, or would be negligence, if there was no one in charge, but that has been where there has been some dangers which have been brought to their attention, and which were so obvious that they ought to have been prevented. The same principle must apply wherever the barge is situated, if it is necessary, because of the run of the river or exposure in any way, that someone should be there—it would be negligence, but then one finds it is not usual to have people in such a case as this. On the other hand, if the barges are in the roads, and are protected as these barges were and out of the track altogether, the only evidence before me is that it is not usual to have a man in charge of these barges placed in this position.

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The fact that it was not customary to leave a man in charge of a string of boom sticks or booms of logs moored to the shore of the river does not relieve the defendant of its responsibility. There are customs that are bad and unjustifiable. The proof shows that damage to buoys on the Fraser River by boom sticks and logs was not an unusual occurrence: Hagen, in cross-examination (pp. 18 and 19), very reluctantly admitted his knowledge of this fact.

See in this respect the following cases: *The Scotia* (1); *The Hornet* (2); *The Dunstanborough* (3) commented on by Counsel *in re The Western Belle*.

Taking into consideration all the circumstances of the case I have no hesitation in arriving at the conclusion that the defendant has not succeeded in rebutting the presumption of negligence and even more that the evidence discloses negligence on the part of the defendant's servants; I must therefore hold the defendant responsible for the injury caused to the property of the plaintiff.

The amount of the damages is admitted.

There will be judgment against defendant in favour of plaintiff for \$469.30, with interest as prayed for, and costs.

*Judgment accordingly.*

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Jan. 17.  
Apr. 3.

BETWEEN:

VICTOR MAUCK..... PLAINTIFF;

AND

DOMINION CHAIN COMPANY, LIM-  
ITED ..... } DEFENDANT.

*Patents—Infringement—Invention*

The invention claimed is for a radiator for heating purposes. The Court found that, at best, if plaintiff had added to the prior art it was merely the product of that mechanical skill which normally results from habitual and intelligent practice, and was not invention.

*Held*, that it is not enough that a thing should be new in the sense that in the shape or form in which it is produced it shall not have been known before, and that it shall be useful, but it must, under the Patent Act, amount to an invention or discovery.

2. A change of form within the domain of mere construction is not invention.

(1) (1890) 63 L.T.R. 324. (2) (1893) 68 L.T.R. 236.  
(3) (1892) P., 363.

ACTION by the plaintiff claiming an injunction restraining defendant from making, using and vending apparatus made in infringement of plaintiff's patent, and for damages and costs.

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

*A. J. Thompson, K.C.*, for plaintiff.

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

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (April 3, 1933), delivered the following judgment:

This is an action for infringement of patent No. 297,419 granted to the plaintiff, Victor Mauck, on February 11, 1930, upon an application filed on April 23, 1928. The title or name of the alleged invention is, in obedience to the requirements of the Patent Act, stated to be an "Apparatus for Exchange of Heat", which, I think, is accurately descriptive of the patented apparatus. In the description of the apparatus in the specification, the patentee refers to it as a "radiator", and probably that is the more popular though perhaps less exact designation of an apparatus or device of that kind.

The description of the invention in the specification, regardless of the numerals which have reference to the drawings, or the drawings themselves, will convey readily the essentials of the patented apparatus, and that is for material purposes as follows:—

My invention is adapted for inclusion in a house heating system wherein a gas consuming heater unit is connected by pipes with a distant radiating unit or units for heating respective rooms or any inclosure in which such a radiator may be located; both heating and radiating units being preferably of what is known as "honeycomb" or similar cellular construction, and said system including means for maintaining a forced circulation of both water within the heating system and the air heated by the radiator; such circulations being respectively effected by a pump and fans; both preferably operated by electric motors, with thermostatically operative controlling means.

\* \* \* \* \*

In said figures; the radiator cellular structure 1 includes a congeries of primarily cylindrical flue tubes 2, preferably made of thin sheet copper, and having their opposite ends 3 expanded to hexagonal form so as to fit tightly together with their intermediate cylindrical portions in proper spaced relation to afford passageways 5 between them for hot water or steam. Said flue tubes 2 are assembled within the cylindrical circumfer-

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ential casing 6 conveniently with circular series of six filling pieces 8 at each of the axially opposite ends thereof. Said radiator structure is provided with opposite side conduits 9 and 10. Said conduits are respectively provided with couplings 11, adapted for attachable connection with the respective pipes 12 and 13 through which the heating fluid is circulated in the passageways 5, in connection with the heater of the system above contemplated.

Said radiator structure is provided with the fan 14 and the motor 15; the latter being preferably mounted within the circular inner casing 16 of the radiator structure in concentric relation with said casing 6, and within a soft rubber band 17 which minimizes the transmission of vibrations from the fan and the motor. Said casing 6 is, preferably detachably, rigidly connected with the face plate 18 which is, preferably detachably, rigidly connected with the outer casing 19 which is adapted to fit in a recess 20 of a ceiling 21, but may be set in any wall substantially flush therewith.

The zone 23 of said face plate 18 is perforated or otherwise made foraminous so as to admit air to the inner side of the radiator structure through the space between the latter and said outer casing 19; which air is driven outwardly by the rotation of said fan 14 through the tubes 2, wherein the air absorbs heat from the hot water or other heating fluid in the passageways 5.

The construction and arrangement of the radiator and its appurtenances above described are such that they may be readily installed; the pipes 12 and 13 being conveniently formed of soft copper tubing and the couplings 11 being conveniently of what is known as the "pinch" type; the joints between them and said pipes being sealed by soft metal bands encircling the pipes, which are pinched between axially opposite complementary conical seats respectively in said couplings and the conduits with which they are in screw threaded engagement.

Although I referred to the apparatus aforesaid as included in a water heating system; it is to be understood that the heated water may be discharged from the heater and presented at the radiators in the form of steam; with the advantage that a greater efficiency per unit of apparatus is thereby attained, as compared with apparatus in which the water is continually maintained below its boiling point.

The plaintiff alleges infringement of claim 2, which is as follows:

In a heating system, a radiator of cellular structure, formed of thin sheet metal walls, forming passageways for air, of a casing exterior to said radiator, in spaced relation therewith; and means arranged to effect the forced circulation of air between said casing and radiator in one direction, and through the radiator in the opposite direction.

Simply stated, the plaintiff's heat exchange apparatus or radiator, is composed of a plurality of small cylindrical tubes, preferably made of thin sheet metal, through which air is to circulate, and so constructed and spaced as to form independent conduits or passageways between the walls of the tubes for the circulation of a heating medium, hot water or steam as the case may be, which flows from a heating unit to the radiating unit, it being intended that

the heating medium shall heat the air to be circulated through the tubes. This type of radiator is known as of "cellular" or "honeycomb" construction, and to this I shall refer later. The hot water, the heating medium, enters the spaces between what the patentee calls the flue tubes in the radiator, through a pipe at one side of the radiator and flows out through another pipe on the opposite side; by means of a fan, the air is drawn into the back of the radiator between a casing exterior to the radiator and the radiator itself, and from the back of the radiator the air is blown or driven outwardly through the flue tubes into the space or inclosure to be heated; in other words, the air introduced between the radiator and the outer casing is forced to circulate through the tubes, and while this is taking place the heating medium gives up some of its heat to the air passing through the tubes of the radiator.

The plaintiff has made but four installations of his heat exchange apparatus in buildings, in the United States, and none elsewhere. These installations were, I think, largely experimental. He never manufactured or commenced to manufacture, any radiators for motor cars, either in Canada or the United States but he granted an exclusive licence to Tropic-Aire Inc., an American corporation, to manufacture his alleged invention in the United States, but to be confined to heaters for automotive vehicles of every description; however, no deduction is, I think, to be made from this fact either for or against the validity of the patent in suit.

The alleged infringing article is a radiator designed to heat the interior of an automobile. There was put in evidence two automobile radiators representative of those made and sold by the defendant; one of these radiators is known as a front seat heater, and is usually installed underneath the instrument board and against or close to the front body of the car, and is without any complete outer casing, but it is claimed by the plaintiff that the body of the car functions as an outer casing to the back of this radiator and ensures the circulation of air around and through the radiator; the other heater is known as a back seat heater, and is larger and comprises really two radiators connected together by a pipe, with a fan and motor between the two radiators; there is an outer casing surrounding the

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sides and back of this radiator, but the air does not enter the radiator through an opening between the casing and the radiator. I might here state that one of the earliest methods of heating an automobile was accomplished by utilizing the hot exhaust gas from the engine to heat air which was discharged through a register fitted in the floor or elsewhere, in the passenger carrying part of the car. But this form of heating a car has, it was said, disadvantages in construction and arrangement by reason of the fact that the products of combustion of the gas driven engine are corrosive, and the wall of the exhaust pipe or outlet must be correspondingly heavy and durable, and the capacity of that outlet must be adequate to permit the engine to function freely. In this method of heating the practice is, as I understand it, to take the air directly from the atmosphere underneath the hood of the automobile through a pipe surrounding the exhaust pipe, the former being larger in diameter than the exhaust pipe through which the heated products of combustion are conducted from the engine; the incoming air surrounding the exhaust pipe is thus heated and by appropriate means is then conducted through an opening in the outer pipe into the motor vehicle. This method of heating an automobile is still in use I understand, and was in use at the time of the plaintiff's alleged invention. The other method, and probably now the most approved method, of heating an automobile is to heat the air by utilizing the water which is heated by the engine, but which water was primarily intended to cool the engine; the hot water is led from the jacket of the engine through the several tubes of a radiator which is positioned in the automobile, and thence back to the jacket of the engine, and the air, which is introduced and forced to circulate by means of a motor driven fan around the tubes wherein the hot water circulates, becomes heated and is then blown into the automobile; that generally describes the manner in which the defendant's radiators function. In addition to the numerous thin flat tubes in the defendant's radiators wherein circulates the heating medium there is transversely placed a series of thin continuous pieces or strips of corrugated or irregular shaped metal, in contact with and surrounding the tubes, for the purpose of increasing the heating surfaces which heat the circulating air eventually to be



blown into the car; these strips of metal are not enclosed conduits or spaces such as the flue tubes in the patent in suit and through which air circulates, they are simply thin pieces of metal employed primarily for the purpose of increasing the heating surfaces which heat the circulating air; in one sense the strips form transverse channels for the air but, as I understand it, not quite in the sense in which the flue tubes in the patent in question function. In what has been called the back seat heater, I should perhaps say, the air is drawn by means of a fan from the front and forced through and around the heating surfaces; the air may be drawn into the car through the centre of the radiator where the fan is located and out through the radiating surfaces into the car, or this may be reversed, and the air may be taken through and around the radiating surfaces in the first instance and then blown out through the centre where the fan is positioned, all depending upon the manner in which the fan is revolved.

The case is in some respects a peculiar one. Mauck first applied for a patent in the United States and his specification described a complete house heating system, that is to say, it included what the patentee calls a gas consuming heater unit, preferably to be in the cellar of the house or other building, and a radiating unit, connected by pipes in the customary way with the heater unit. The United States Patent Office directed a division of the application, one of which was to relate to the radiating unit and corresponding precisely to the patent here in suit, and the other division was to relate to the heater unit. The latter division of the application states that the object and effect of the invention was to provide a house heating system including a gas consuming heater unit, connected by pipes with a distant radiating unit or units, for heating respective rooms or any inclosure in which such a radiator may be located. As already stated the radiator unit was subsequently patented in Canada, and that is the patent here in suit, but it appears that the heater unit was not patented here. I find it difficult to believe that the plaintiff ever had in mind at the date of his alleged invention the use of the hot water in the jacket of an automobile engine as a heating medium to circulate in a heat exchange apparatus for the purpose of heating an automobile, and never having

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thought of it, he did not describe a heating medium available from that source, or how that method or system of heating an automobile was to be operated. However, while the patent states that the radiator is adapted for inclusion in a house heating system and was to be mounted on a ceiling or wall, and no other use or mode of operation is suggested or described, it is now claimed, that it is adapted for use in an automobile, the heating medium being the water heated in the jacket of the engine. It is quite true that the claim relied upon does not limit the use of the radiator described to a house or building and it is stated broadly enough to include its adaptation for heating an automobile. In the state of facts which I have mentioned it does seem strange to say that the patentee has invented something new and useful for a certain purpose unmentioned in the specifications, while its utility and success for the purpose mentioned in the specification is apparently doubtful. However, I prefer to dispose of the case as if the specification sufficiently described a radiator that might be used for heating the passenger body of a motor car.

Assuming then that the patent is to be construed as describing a radiator adapted for inclusion in a motor vehicle, or any other suitable place, and that its mode of operation for such a purpose is sufficiently described as required by the statute. The real matter for consideration then is whether there is invention in the plaintiff's radiator. It is not a complete heating system we are to consider, it is simply a radiator unit, or a heat exchange apparatus, wherein or through which a heating medium, and air, are intended to circulate with the object of producing warm air for heating the interior of a motor vehicle. I have not been convinced that there is invention in the radiator described in the patent. The principle involved in heat exchange devices is admittedly old, the so-called cellular structure of the radiator is admitted not to be new, the principle of forcing the circulation of the air by means of a motor-driven fan is not new or so claimed to be. The use of a casing or housing around a radiator is not new, although I am not sure this is so clearly admitted, but I think it is. The necessity of an outer casing of some sort, where a forced circulation of air is employed by means of a motor-driven fan, would appear to me quite obvious, at least in most

cases. The claim to invention is in the particular construction and arrangement of parts as described in the patent.

Plaintiff's counsel urged at the trial that when the inventor suggested hot water as a heating medium in his alleged invention, it disclosed and made possible the use of, in an automobile, a compact and light radiator constructed of a nest of small thin tubes, and spaces or conduits, through which air and hot water respectively would circulate, the air thus heated by the hot water being used to heat the automobile; and it is claimed that the use of such a radiator would not have been possible with the use of exhaust gas as a heating medium instead of the hot water. There does not appear to me to be any substance whatever in this contention. The use of the hot water in the jacket of an automobile engine as a heating medium, in an automobile heating radiator, was suggested in the prior art, and once the idea was suggested, I have no doubt competent workmen could readily devise numerous ways of putting it into operation. Besides, the idea of using hot water as a heating medium in a heat exchange apparatus was of course quite old.

Much stress was laid by the plaintiff upon the so-called honeycomb or cellular construction of the radiator, which simply means a multiplicity of tubes or passageways for the circulation of a heating medium, and the air to be heated, respectively. This type of radiator is used chiefly in motor cars and for engine cooling. The *Journal of the Society of Automotive Engineers*, of March, 1926, gives a definition of an Air Tube Cellular Core as follows: "An assemblage of air tubes nested in such a way as to form fluid passages between the tubes, the passages being sealed at the ends of the tubes. In this type the fluid may flow transversely as well as vertically around the tubes". It appears this definition had been submitted by a Division of the Society in June, 1923, but was not finally adopted till January, 1926. Shurtleff (U.S. 1923) describes his radiator as of cellular, tubular, or honeycomb structure, and the construction preferred is either in the form of thin tubes or sheets so assembled or fabricated as to provide a multitude of transverse air ducts, surrounded by passages through which the steam or heating fluid is circulated. It matters not, I think, what name is applied to radiators of this

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general construction. The question of invention or infringement cannot well be determined on the trade nomenclature applied to any article. The name under discussion would seem generally to imply a heat exchange apparatus wherein a multiplicity of light thin heat radiating surfaces are arranged in juxtaposition to air channels of one kind or another, so as to effect an exchange of heat. If any distinction is to be made between the patented apparatus, and the infringing ones, it is to be determined on a construction of the patent, or on the particular construction of each, and not on the name which may be arbitrarily given to them.

Turning now to a brief consideration of the state of the prior art. One construction of a radiator suggested in the patent to Moreau, 1911, for effecting a change of heat, is of the honeycomb type such as found in the front of automobiles, and which we know is composed of numerous small conduits wherein water circulates for the cooling of the engine, and which radiator is constructed of thin light material. Moreau in this construction of a radiator provides for the exchange of heat "by the juxtaposition of vertical tubes or by the assembling of bent plates, leaving between them the circulating passages for the water and the vertical ascension conduits for the air". Other forms of construction and arrangement are suggested. The specification states that a fan may be used to secure a forced, or energetic artificial circulation, obliging the air to traverse the heat exchanging surfaces. The specification also states that the radiating surfaces may be sheltered in a casing, which is provided with openings, both above and below, allowing free circulation of the air to be heated. The patent to Shurtleff, applied for in the United States in 1923, describes a heat exchange apparatus which closely resembles Mauck's apparatus. The patent states:—

The novel features herein mentioned are principally the result of the utilization of a highly efficient type of heating element or radiator, heretofore limited in its use to the field of automobile cooling systems, but readily adaptable to heating purposes as an element of the type of heating apparatus herein disclosed. The type of radiator contemplated is of the so-called cellular, tubular, or honeycomb structure, as they are variously termed, depending on the structure. This type of radiator, regardless of its name, is characterized chiefly by its extreme lightness in weight in proportion to the radiator area, copper being the most satisfactory material used, either in the form of thin tubes or sheets, so assembled or fabricated as to provide a multitude of transverse air ducts, surrounded

by passages through which the steam or heating fluid is circulated. While the particular type of radiator is not essential, the so-called cellular or honeycomb type affords a desirable structure, due principally to the small resistance offered to the passage of air therethrough and the extensive radiator area available.

Elsewhere he states that "the radiator consists of a cellular body of copper sheeting so fabricated as to provide a multitude of small transverse passages or flues extending therethrough and separated by thin double wall partitions forming passages for the steam". In general the described radiator unit embodies a housing or cabinet preferably fabricated of sheet metal, adapted to be secured against the outside wall of a room, having an air or inlet passage near its bottom, a radiator of the so-called cellular type in the upper portion of the cabinet, and in the top wall of the cabinet a discharge opening; within the cabinet is a compartment in which is mounted a suction fan which draws a predetermined volume of air into the cabinet to circulate through the radiator. The heat exchange apparatus described by Shurtleff is in principle practically the same as Mauck; there are of course structural variations and differences in the arrangement of the parts, but such differences are of detail and not of principle. Modine, applied for in the United States in 1923, had for its object the production of a compact and light weight radiator, composed of any number of pipes or tubes through which the heating medium circulated, and radially extending from and secured to the pipes or tubes are what are called "fins" for radiating the heat from the pipes or tubes, but the adjacent fins are spaced apart so as to provide air spaces between which the air may circulate and become heated by the heating surfaces of the pipes or tubes and the fins. Essentially this radiator is one of the honeycomb type, of any size, constructed of light material, with any number of pipes or tubes for carrying the heating medium, with radiating fins radially extending from the pipes or tubes so spaced as to provide air spaces through which the air may pass and become heated; a casing or shell, the patent states, may be so arranged about and enclosing the discharge end of the heating unit that the air is drawn to and through the unit, heated, and discharged through the outlet end; and to increase the heating capacity of the unit the patentee suggests the use of a circulator, such as a motor driven fan.

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It is true that the construction of the casing is different from Mauck but its purpose obviously is to give direction to the air to be passed into and through the heating unit or radiator.

The prior art discloses completely the idea of a small, light and compact heat exchange apparatus of the honeycomb type, it also discloses the idea of forced and controlled circulation of air into and through such a heat exchange apparatus, by means of a motor driven fan and the use of a casing or cabinet surrounding the device; and several methods of applying the idea are disclosed. As I have already remarked, some form of casing would seem to me a most obvious and necessary thing to employ where there was a forced circulation of air through the heat exchange apparatus. There being no invention in the idea, can it be said that there is invention in Mauck's method of applying the idea? I think not. Any new arrangement of the elements of a heat exchange apparatus of this nature, or any change in the form of construction of such elements, would rarely afford subject matter for a patent if they substantially functioned in the manner and for the purpose already disclosed in the art, and I do not think there is subject matter in this case. It is not enough that a thing should be new in the sense that in the shape or form in which it is produced it shall not have been known before, and that it shall be useful, but it must, under the Patent Act, amount to an invention or discovery. If Mauck has added to the prior art it is merely the product of that mechanical skill which normally results from habitual and intelligent practice, and is not invention; at most Mauck suggests a change in form within the domain of mere construction which is not invention. Anything that Mauck suggests was not, I think, so far outside the track of what had been done before as to call for the exercise of the inventive faculty, or to fairly entitle him to a monopoly. Further, when a combination differs only from a previous combination in that there is substituted an equivalent part in the place of some part found in the prior combination, and the substituted part is obviously the equivalent of the old part though somewhat different, and there is not any essential change in its working, it is clear, I think, there can be no subject matter. Upon this principle, it appears to me, the field of

invention was closed to such an apparatus as Mauck describes; every element in Mauck is but the equivalent of elements found in prior combinations intended to effect the same result. This is not a case where it is pretended that the invention consists in the discovery of the method of the application of a new principle. The most that is contended for on behalf of the plaintiff is a particular construction and arrangement of old parts which required invention. I do not think that the construction and arrangement here required invention. There being then, in my opinion, no invention in Mauck it follows that the action for infringement fails. The defendant will have its costs of the action.

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*Judgment Accordingly.*

BETWEEN:

LESLIE WILLIAM WARREN..... PETITIONER;

AND

EXCEL PETROLEUM LIMITED..... RESPONDENT.

1932  
Nov. 23.  
 1933  
Apr. 11.

*Trade-mark—Expunging—Calculated to deceive—Prior adoption—Registration without sufficient cause—Person aggrieved.*

Petitioner has carried on business since May, 1917, as a manufacturer of, and dealer in, lubricating and other oils, greases and similar goods, including on a small scale, gasoline, under the firm name of "Atlas Oil Company." Respondent company in January, 1932, was granted a specific trade-mark consisting of the word "Atlas" to serve in connection with the sale of gasoline. The Court found not only that there was a likelihood of confusion but that there had been actual confusion in the minds of the public to the prejudice and detriment of the petitioner.

*Held*, that a trade-mark may be acquired by user and that the prior user of an unregistered trade-mark, the use of which by another is calculated to deceive, is entitled to protection, whether such use by another be made fraudulently and with deliberate intent to deceive or not.

2. That the registration of the trade-mark "Atlas" in the name of respondent was made, in the terms of sec. 45 of the Trade Mark and Design Act (R.S.C., 1927, c. 201), without sufficient cause.
3. That a specific trade-mark applies to all goods of the same class or description.

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

The petition was heard before the Honourable Mr. Justice Angers, at Montreal.

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*John Kerry, K.C., and A. R. McMaster, K.C., for petitioner.*

*Antonio Perrault, K.C., for respondent.*

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

ANGERS J., now (April 11, 1933), delivered the following judgment:

This is a petition asking that the specific trade mark *Atlas* registered in the name of the respondent on the 2nd day of February, 1932, in connection with the sale of gasoline, be expunged.

The petition alleges that, prior to May 21, 1917, the petitioner was carrying on business as manufacturer of and dealer in lubricating and other oils, greases and similar goods at the City of Montreal in co-partnership with one Robert Brennan under the firm name of Atlas Oil Company.

The petition further states that on or about February 1, 1921, said Brennan retired from the partnership and the business was continued and is still carried on by the petitioner alone.

The petition goes on to say that Atlas Oil Company, since it commenced business, has used as its trade mark the word *Atlas* on its containers and in its signs and advertisements so that the products manufactured by petitioner, namely, lubricating and other oils, greases and petroleum products in general, have become widely and favourably known under the name *Atlas*.

The petition moreover alleges that the respondent company, incorporated by letters patent of the Province of Quebec bearing date the 15th of April, 1931, on or about January 9, 1932, applied for and obtained a specific trade mark to serve in connection with the sale of gasoline, consisting of the word *Atlas*; that the petitioner, aggrieved by the registration of this mark, protested against it as soon as it came to his attention; that the declaration in respect to the respondent having first used the word *Atlas* in connection with the sale of gasoline was inaccurate and that the trade mark should not have been registered in the name of respondent; that gasoline is a petroleum product and petitioner has dealt in petroleum products for the past fifteen years under the name of *Atlas* and has made sales



of gasoline under that name; that the oils, greases and similar products dealt in by petitioner are sold by the same distributors as distribute gasoline and that confusion is likely to arise and does arise in the public mind concerning the origin of the products handled by the respondent and those handled by the petitioner, especially due to the fact that the respondent uses the trade-mark *Atlas* on signs bearing its name, the respondent handling not only gasoline under the name *Atlas* but also oils, greases and lubricants and that the said trade mark is calculated to deceive or mislead the public.

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The petition is dated the 11th of July, 1932, and it was filed the following day.

In its statement of defence the respondent denies the material allegations of the petition and pleads especially that the trade mark obtained by the respondent is only in connection with the sale of gasoline, that the respondent, in conformity with said trade mark, is using the word *Atlas* solely in connection with the sale of gasoline, that the petitioner does not sell gasoline and that the use of the word *Atlas* by the respondent cannot mislead the public.

The issues were joined by a replication denying the affirmative allegations of the respondent's statement of defence.

On the 22nd of May, 1917, a declaration was deposited with the prothonotary of the Superior Court for the district of Montreal, in compliance with article 1834 of the Civil Code of the Province of Quebec, stating that the petitioner and one Robert Brennan, both of Montreal, have carried on and intend to carry on the business of manufacturers of and dealers in lubricating and other oils, greases and similar substances at the City of Montreal in co-partnership under the firm name and style of The Atlas Oil Company; a duly certified copy of this declaration has been filed as exhibit 1.

On the 2nd of February, 1921, another declaration was deposited with said prothonotary stating that the petitioner has carried on and intends to carry on the business of manufacturer at the city of Montreal under the firm name and style of Atlas Oil Company.

It appears that Brennan had withdrawn from the partnership and that the petitioner was continuing alone to

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carry on the business under the name of Atlas Oil Company.

Warren was called as witness in his own behalf. He declares that he is the Leslie William Warren mentioned in exhibits 1 and 2, that since 1917 he has always carried on business under the name of Atlas Oil Company, that the name and address of the firm appeared in the telephone index and the city directory, as doing business and having a warehouse at 171 (now number 437) McGill street and that for the past ten years he has had an office in the Beardmore building, 417 St. Peter street; the firm name appears on the building directory and on the office door.

Warren says that he has always had a sign on the warehouse on McGill street with the name Atlas Oil Co. on it: see the photograph filed as exhibit 23.

Previous to 1920 Warren, then associated with Brennan, carried on business under the name of Atlas Oil Company on de Chateaubriand avenue, in Montreal.

Warren says that he sold gasoline in a small way since 1917. He brought his books to Court at the request of counsel for the respondent, books dating back to 1922, and he had them during the trial at the disposal of counsel for respondent.

He filed six copies of invoices, covering sales of gasoline, as exhibits 4 to 9 inclusively; they are as follows:

Exhibit 4—Invoice dated September 14, 1921, for one drum Atlas gasoline (44.3 gallons).

“ 5—Invoice dated February 18, 1922, for one drum Atlas gasoline (44 gallons) and 5 gallons Bulk Veedol Medium motor oil.

“ 6—Invoice dated February 20, 1928, for 50 gallons Bulk Atlas gasoline and  $\frac{1}{2}$  barrel black paint.

“ 7—Invoice dated March 30, 1928, for 2 barrels Atlas gasoline (82 gallons).

“ 8—Invoice dated April 9, 1929, for one barrel Atlas gasoline (44 gallons) and 1 drum black paint.

“ 9—Invoice dated May 13, 1932, for 5 gallons Bulk Atlas gasoline.

Warren says he sold his gasoline under the name *Atlas* (dep. p. 9).

Asked if the containers were marked in any way in order to identify them, Warren answered as follows (p. 9, question 37):

A. Yes, stencilled on the drums and 5 gallon cans “Atlas Gasoline” under “Atlas Oil Company, Montreal”; sometimes we sold the product in milk cans tagged with our own tag and marked “Atlas Gasoline.”

The witness exhibited a drum bearing the words *Atlas Gasoline* and underneath *Atlas Oil Company, Montreal* stencilled. He said this was the kind of container he used whenever he sold gasoline in five gallon lots. Petitioner also sold gasoline in 45 gallon drums (dep. p. 9): . . .

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Instead of filing the five gallon drum, which was rather cumbersome, the witness produced seven stencil impressions as exhibits 10 to 16 inclusive; they all have the name of the company with the word *Montreal*; each of them indicates a different product, motor oil, water oil, dressing grease and so on; exhibit 10, with which we are particularly concerned, bears the indication *Atlas gasoline*, above the name and address of the company.

The petitioner has used a special container since 1923 for the sale of Lion oil, Atlas brand. He had a plate and stone made to order to have the can lithographed with the word *Atlas* and the other literature thereon. He says he paid \$150 for this plate and stone.

In cross-examination Warren admitted that since 1917 he had dealt mostly in lubricating oils for industrial plants. At the time of the trial he was dealing chiefly in lubricating oils for industrial plants and the automobile trade. A large proportion of his business is with industrial companies. He has however sold oil and gasoline to individual automobile dealers ever since he started in business (dep. p. 14). He has not sold extensively to the garage trade (dep. p. 15).

Victor L. Good, an employee of Canadian Industries Limited, says that he has known the petitioner for at least ten years. The firm with which the witness was formerly connected, i.e., the Grisella Chemical, and which was taken over by Canadian Industries Limited, had done business with petitioner under the name of *Atlas Oil Company* for a number of years (dep. Good p. 22).

William G. Henderson, purchasing agent for the Steel Company of Canada, has been acquainted with petitioner since 1919. He bought lubricating oils, motor oils, greases, etc., from petitioner, who was carrying on business under the name *Atlas Oil Company* (dep. Henderson, p. 23).

Three witnesses were heard on behalf of respondent, namely Riendeau, Lafontaine and Bachand, for the purpose of establishing that *Atlas Oil Company* was not known to the trade, particularly as a dealer in gasoline.

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Riendeau, who owns a garage and service station, stated that he has been selling gasoline in Montreal since 1916. Up to three years ago he had been manager for divers companies. During the last three years he has had a business of his own. He said that he had never heard of Atlas Oil Company, had never met petitioner as a competitor and had never been offered any of his products. In cross-examination Riendeau admitted that for the last 15 or 18 months he has been buying respondent's products.

Lafontaine has been a distributor for British-American Oil Company for approximately 13 years, selling oils and gasoline. He saw the name of Atlas Oil Company on its warehouse on McGill street. He has not, during these thirteen years, known the petitioner as a dealer in gasoline and he has never been aware of any sales of gasoline by Atlas Oil Company.

Bachand, who travels for the respondent, swore that he had never heard of Atlas Oil Company before his employer received a letter from petitioner's solicitors; this would be sometime in May, 1932.

The evidence of these three witnesses does not prove much. Bachand and British-American Oil Company, represented by Lafontaine, sell chiefly, if not exclusively, to garages and gasoline stations and Warren declared that he did not cater to that trade; most of his dealings were with industrial plants, the automobile trade and private automobile owners (dep. Warren, pp. 14 and 15, q. 73 to 80). As far as Riendeau is concerned, he sells to private automobile owners and is only concerned with the products he handles; and for approximately a year and a half he has been buying respondent's products exclusively. But even if petitioner had dealt with the garage and gasoline station owners, I do not think that the testimonies of these three witnesses, selected, quite legitimately I may say, because of their ignorance of the existence of Atlas Oil Company or at least of its dealings in gasoline, can offset the evidence adduced by petitioner. It has been proven beyond doubt that Atlas Oil Company has been in existence since 1917 or 1918, that it has chiefly sold oils, but that it has also dealt on a small scale in gasoline since its inception to the date of the trial.

Now even if petitioner had used his trade-mark *Atlas* solely in connection with motor oils, I am inclined to be-

lieve that he would still be entitled to use it in connection with gasoline, to the exclusion of others, in as much as gasoline and motor oils are goods of a same class or description; both are distillates of crude oil: see deposition Warren, p. 6, question 15.

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The respondent company was incorporated by letters patent of the province of Quebec dated the 27th of May, 1931, a copy whereof was filed as exhibit 21. On the 2nd of February, 1932, the respondent obtained a specific trade-mark consisting of the word *Atlas* to be used in connection with the sale of gasoline, upon the allegation that the said trade-mark was not in use by any other person; this appears on reference to a certified copy of the said trade-mark and of the application relating thereto filed as exhibit 3.

Asked as to when he first noticed that the respondent was putting gasoline on the market under the name *Atlas*, Warren says it was sometime in May, 1932; at page 12 of his deposition we find the following questions and answers:

. . . .

As I have already said, the petitioner filed his petition on the 12th of July, 1932. On his instructions his solicitors had written to the respondent sometime in May. Surely the petitioner cannot be blamed of having been remiss.

It seems obvious to me that the respondent appropriated a name or mark which the petitioner had adopted as far back as 1917 and had constantly used in connection with the sale of motor oils and also, though to a lesser extent, with the sale of gasoline, a cognate product. The petitioner does not suggest that the respondent acted in bad faith; in fact the evidence does not disclose any fraudulent intent. It may well be that the respondent, when it adopted the name *Atlas* for its gasoline, was totally ignorant of the activities of petitioner in the gasoline trade. This however is immaterial. When respondent became aware of the fact that *Atlas Oil Company* was and had for over fourteen years been using the trade mark *Atlas* for its oils and its gasoline it should have, in my opinion, given up the name *Atlas* and adopted another mark.

Even though the respondent has put the name *Excel Petroleum* below the words *Atlas gasoline* on its tank waggons and around the word *Atlas* on the globes of its gasoline pumps and on its signs there has been confusion

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and deception, as the evidence discloses. On this point I may refer to the depositions of Warren, Good, Henderson and Cotnam. . . .

Good, of the Canadian Industries Limited, when in the spring of 1932 he noticed a gasoline on the market known as *Atlas* gasoline, thought it was a product of Atlas Oil Company (dep. p. 22). . . .

The same notion occurred to Henderson, purchasing agent for Steel Company of Canada, when he happened to notice that there was on the market a gasoline called *Atlas* (dep. p. 23). . . .

John Cotnam, an employee of petitioner, stated that he answered several telephone calls, particularly one from a Mr. Mayotte, with whom he had never dealt, said Mayotte complaining about the quality of Pennsylvania Motor Oil which apparently he thought he had bought from Atlas Oil Company (dep. p. 24).

This evidence is sufficient to satisfy me that there was confusion to the prejudice and detriment of the petitioner. If that proof had not been made I would without hesitating have reached the conclusion that the use of the trade mark *Atlas* by the respondent in connection with the sale of gasoline was calculated to deceive and bound to induce the public to believe that it was getting the petitioner's product when buying the respondent's *Atlas* gasoline.

It is well settled law that a trade mark may be acquired by user; and such a trade mark is entitled to protection by the courts. If the use by a newcomer upon his goods of an unregistered trade mark belonging to a prior user is calculated to deceive, such use may be restrained and if the mark has been registered by the newcomer, the registration may be expunged and this whether such use be made fraudulently and with a deliberate intent to deceive or not: see *Millington v. Fox* (1); *Singer Machine Manufacturers v. Wilson* (2); *Reddaway v. Bentham Hemp-Spinning Co.* (3); *Johnston v. Orr-Ewing* (4); *Saxlehner v. Apollinaris Co.* (5).

Under section 11 of the Trade Mark and Design Act (R.S.C., 1927, ch. 201) the Minister may refuse to register any trade mark:

(1) (1838) 3 My. & Cr., 338.

(3) (1892) 2 Q.B.D. 639.

(2) (1877) L.R. 3 App. Cas., 376.

(4) (1882) 7 App. Cas., 219.

(5) (1897) 1 Ch., 893.

11. The Minister may refuse to register any trade-mark or union label.

(a) if he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark or union label;

(b) if the trade-mark or union label proposed for registration is identical with or resembles a trade-mark or union label already registered;

(c) if it appears that the trade-mark or union label is calculated to deceive or mislead the public.

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I am convinced that if all the facts had been put before the registrar, particularly the fact that the petitioner, Atlas Oil Company, had used the name or mark *Atlas* in connection with the sale of lubricating and other oils and also of gasoline, though to a smaller extent, he would have refused to register the respondent's trade mark *Atlas*.

Section 45 of the Act says:

45. 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.

I am of opinion in the circumstances disclosed that the trade mark *Atlas* registered in the name of the respondent on the 2nd of February, 1932, in register no. 250, folio 53825, ought to be expunged from the register as having been made, in the terms of the statute, without sufficient cause.

There is no doubt in my mind that the use by the respondent of the word *Atlas*, even with the words "Excel Petroleum" around it, is apt to create confusion in the public; in fact the proof shows that there has been confusion on a few occasions. If there was a doubt as to whether or not the use of the mark by the respondent would cause confusion, it should not be allowed: *Eno v. Dunn* (1); *E. Z. Waist Co. v. Reliance Mfg. Co.* (2); *McDowell v. Standard Oil Co.* (3). *In re John Dewhurst & Son's Tm.* (4); *Melchers v. DeKuyper* (5).

The respondent produced as exhibit A a photograph of a sign bearing the words *Atlas Manufacturing Company Limited* and underneath *Paints and Varnishes*. The respondent also filed as exhibit B a letter from *Atlas Manufacturing Company Limited* to respondent, dated Novem-

(1) (1890) 15 App. Cas., 252.

(3) (1927) L.R. App. Cas., 632.

(2) (1923) 286 Fed. Rep., 461.

(4) (1896) L.R. 2 Ch. 137.

(5) (1898) 6 Ex. C.R., 82.

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ber 21, 1932. The apparent purpose of these two exhibits was to show that the name *Atlas* was used by different firms. This, in my opinion, is immaterial; as counsel for petitioner said, his client does not pretend to claim the exclusive use of the word *Atlas* in connection with any kind of trade or business; his contention is merely that he is entitled to the exclusive use of it in respect to the sale of motor oils and gasoline.

It has been urged on behalf of respondent that the Court must go back to the time of the registration of the trade-mark to determine whether the entry was made without cause: I quite agree with the learned counsel for respondent on this point and that is what I have done.

A specific trade-mark applies to all goods of the same class or description; this principle has been laid down expressly or implicitly in, among others, the following cases: *Pugsley, Dingman & Co. v. Proctor & Gamble Co.* (1); *Continental Oil Co. v. Consumers Oil Co.* (2); *Collins Co. v. Oliver Ames & Sons* (3); *Omega Oil Co. v. Weschler* (4); *Warwick Tyre Co. v. New Motor & General Rubber Co.* (5).

Under section 45 of the Act a person seeking to expunge an entry in the register of trade-marks must be aggrieved thereby; it seems to me that there cannot be the shade of a doubt that the petitioner is a person aggrieved, within the meaning of said section, assuming of course that the entry was made without sufficient cause: see Kerly on Trade Marks, pp. 324 and 325; *In the matter of Powell's Tm.* (6); *W. J. Crothers Co. v. Williamson Candy Co.* (7); *In the matter of the Trade-Mark Zonophone* (8); *In re Apollinaris Co.'s Tm.* (9); *Jones v. Horton* (10). *In re Talbot's Tm.* (11).

The president of the respondent company, Paradis, says that he was unaware of the existence of Atlas Oil Company previous to January, 1932, when he made his application for the trade-mark *Atlas* in connection with the sale of gasoline. As I have said, I believe he was and that he acted in good faith. But what I cannot understand is why he

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|----------------------------------|-------------------------------|
| (1) (1929) S.C.R., 442.          | (6) (1893) 2 Ch., 388.        |
| (2) (1932) Ex. C.R., 136.        | (7) (1925) S.C.R., 377.       |
| (3) (1882) 18 Fed. Rep., 561.    | (8) (1903) 20 R.P.C., 450.    |
| (4) (1901) 35 Misc. (N.Y.), 441. | (9) (1891) 2 Ch. 186, at 229. |
| (5) (1910) L.R. 1 Ch., 248.      | (10) (1922) 21 Ex. C.R., 330. |
| (11) (1894) 11 R.P.C., 77.       |                               |



should have persisted in keeping this mark when he was notified in May, 1932, by petitioner's solicitors that this mark had been adopted and used by the petitioner for approximately fifteen years. He says that out of 30 or 40 names submitted to the Commissioner in Ottawa there were five or six which the latter was willing to accept. Why did not respondent drop the word *Atlas* and adopt one of these five or six names when it became known to it that Atlas Oil Company was using and had been using this name for a period of approximately fifteen years. This is a thing which is beyond my comprehension.

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Counsel for respondent suggested that, if the Court arrived at the conclusion that the petition ought not to be dismissed, an order might be given to rectify the entry so that the mark would read *Atlas Gasoline Excel Petroleum*. I cannot accept this suggestion; the word *Atlas* has been used by the respondent in conjunction with the words *Excel Petroleum* on its tank waggons and on the globes of its gasoline pumps and, as the proof shows, it has caused confusion.

There will be judgment ordering that the entry in the Registry of Trade Marks, register No. 250, folio 53825, of the specific trade mark of the respondent consisting of the word *Atlas* be expunged.

The petitioner will be entitled to his costs of the proceeding against the respondent.

*Judgment Accordingly.*

BETWEEN:

DOMINION MANUFACTURERS LTD..... PLAINTIFF;

AND

ELECTROLIER MANUFACTURING CO. } DEFENDANT.  
-LTD. .... }

1933  
Mar. 13.  
Apr. 8.

*Patent—Infringement—Simplicity of invention—Anticipation—Subject matter*

Plaintiff alleged infringement of a patent relating to handles for use on caskets and other receptacles. The Court found that there was invention in plaintiff's idea of the mode of construction of the two members of the handle which permitted the locking of the handle to be effected by merely lifting the grip after it was placed in the base; that there was no anticipation in the prior art; that defendant's handle differed from that of plaintiff only in the practice of locking the mem-

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bers by a machine operation, a means which produced the same handle and the same result.

*Held*, that infringement cannot be evaded because one chooses to adopt a slower and more expensive method of doing what a patent clearly states may be done in another and better way.

2. That invention should not be denied upon the ground of the mere simplicity of the thing invented and patented.

ACTION by plaintiff asking for a declaration that plaintiff's Letters Patent are valid and for an injunction restraining defendant from infringing same.

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

*W. L. Scott, K.C.*, for plaintiff.

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

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

THE PRESIDENT, now (April 8, 1933), delivered the following judgment:

This is an action for alleged infringement of patent no. 194,209, granted to one Pahlow on November 25, 1919, upon an application dated April 15, 1919, and by him assigned to the plaintiff; the corresponding patent in the United States issued to the same patentee on April 29, 1919, upon an application filed in February, 1919. The invention is said to relate to new and useful improvements in a handle that is adaptable for use on caskets and other receptacles.

The handle described in the patent consists essentially of two members, the plate or base which is attached to the side of the casket, by means of screws, and what is referred to in the patent as the "grip," that is the portion of the handle grasped by the hand in lifting the casket or other receptacle. The two members when assembled together are referred to in the patent as the handle, and from this designation I shall not depart. In the plate is a hole or opening, in the form of a half circle, and associated with this opening is a means for pivoting the grip, and this is a bar extending across the lower part of the opening. The boundaries of the opening, at the top and bottom, provide surfaces for the grip; the upper end of the grip is bent to form an elbow and in the sides of that elbow are slots; the

grip is trough shaped so that the slot is only in the side walls of that trough shaped member, and the slot forms tongues at the lower side of the grip, and these tongues are bendable. In assembling the two members together, the plate and the grip, the pivot enters the slot and when the grip is raised the tongues bend to close the outer opening of the slot, and the grip is then permanently locked with the plate member and is fixed in position with respect to the plate. That is a brief description of the alleged invention, and much as given, correctly I think, by one of the plaintiff's witnesses, and I could not possibly make it any clearer if I attempted to do so. In 1925, I might observe, the patentee in the manufacture of the plate member abandoned the pivot bar construction and instead adopted the construction of two holes or perforations in the lower wall of the plate for pivoting the grip.

The infringing handle is practically the same as that described in the patent in suit, except that the pivoting means in the defendant's handle is not a continuous bar extending fully across the plate opening but consists of two holes in and about which the tongues in the sides of the grip rotate when they are closed, that is to say, the pivoting means for the grip, is or are formed by punching a hole, or holes, in the lower wall of the plate, rather than cutting a slot continuously across the opening as shown in the patent drawings. The defendant's construction of the pivoting means is that adopted by the patentee in 1925, and that construction, the plaintiff claims, is the equivalent of the construction described by the patentee, and in that I concur. If there is invention in Pahlow, then the defendant's structure, I think, infringes the patent notwithstanding the pivoting means described in the patent is slightly different from that found in the infringing handle, and in the practice of the patentee, or his assignee, since 1925.

The principal defences raised on behalf of the defendant are lack of subject matter, anticipation, and that there is no infringement because in the infringing handle the plate and grip are locked by a die and press operation, and not automatically by lifting the grip with the hand. I shall first discuss the question of invention.

The plaintiff's handle is stamped out from sheet steel in two pieces, the plate and the grip, and are so con-

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structed or formed that these two members are readily and effectually locked together in one operation, as I have already mentioned. These two members may be permanently locked together at the rate of 1,000 to 1,200 per hour by workmen, and without any tool or machine operation. The utility of Pahlow is not questioned, and it has gone widely into use in Canada, and in the United States. Prior to Pahlow's handle for caskets, and by handle I mean the combined plate and grip members when locked together, the grip member was inserted in the opening provided in the plate member and there fastened with a pin. These handles were at first made of cast metal, but later were stamped out from sheet steel. Pahlow seems quite a simple affair when once revealed to the eye, but invention, if such there be, should not be denied upon the ground of the mere simplicity of the thing invented, and patented. That is well settled patent law. Pahlow's method of constructing the plate and grip members, so that with the mere upward lift of the grip they become permanently locked, appears to me as being quite novel and ingenious indeed. It reduces the number of elements or members in the handle and consequently requires less material; fewer operations and less time is required in assembling the two members together as compared with construction which required the use of a pin in the locking means. However simple this may appear now, when it is once done, I think there is invention in Pahlow, providing there has been no anticipation. The case is rendered somewhat difficult because the invention seems such a simple one. There was, I think, invention in the idea of the mode of construction or formation of the two members of the handle, which involve the idea of the locking means which Pahlow points out in his patent. The patent may be thought a narrow one, but yet I think it contains subject matter. I think it called for that amount of original work which is so often the badge of invention as understood in the law of patents.

Two patents in the prior art were referred to, Fletcher, United States patent no. 438,349, and Raymond, United States patent no. 1,027,067. A patent to one Christian was also mentioned but it is conceded that this patent was not prior to Pahlow. In Fletcher the base and grip are united by a pin; it is an old construction and not at all an antici-

pation of Pahlow. In Raymond, the base and grip are of the general construction of Pahlow; the prongs or fingers of the grip are inserted through the opening in the base past the inner side of the face of the base, and these prongs or fingers are then tapped outwardly from the back of the plate through the holes below the opening, and out to the front of the plate. Now Raymond requires more operations than Pahlow in that the prongs or fingers have to be tapped back manually through the holes below the opening wherein the grip is inserted, and out to the face of the base. Raymond does not comprehend the idea which, I think, conspicuously marks Pahlow, and that is, that the construction permits the locking to be effected by merely lifting the grip after it is placed in the base. I do not think Raymond is an anticipation of the idea or principle which, in my opinion, constitutes invention in Pahlow. It was said by a witness for the defence that the fingers in Raymond could be bent by lifting the handle, and that there was no mechanical difficulty in having the fingers go through the base from the front instead of the back. It is easy to suggest a reconstruction of Raymond to make it correspond to Pahlow, when once it is known how the members of Pahlow are constructed and formed, and how they are locked. Raymond did not envisage or suggest Pahlow at all, and he clearly had in mind a different construction and formation, and a different principle altogether in locking the grip to the base member. This is a case where the invention resides largely in the idea, and I do not think it can be successfully claimed that Raymond had any vision of the dominant idea found in Pahlow. I do not think there is anticipation in the patent to Raymond.

Now, as to the contention that there is no infringement in the defendant's handle because the locking of the base and grip is not done by the hand as described by Pahlow. The infringing device is locked by a die and press, a mechanical operation. It was stated that this manner of locking the plate and grip ensures uniformity of production, but that fact of itself is never relevant to the issue of patentability or infringement. It was also stated that the defendant's method of assembling the members of the handle was expeditious, and was no more expensive—perhaps less expensive—than Pahlow's method of assembling the same

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members, the grip and the base, but I doubt the accuracy of either statement. I do not believe, as was suggested by one of the defendant's witnesses, and denied by Pahlow, that as many handles could be assembled by the defendant's method, per hour, or at the same cost, as could be done by Pahlow's method. Is infringement avoided by the defendant because of the practice of locking the members by a machine operation? Claim 2 of the patent is as follows:—

A handle comprising a base member having an opening and provided with a pivot bar extended across the opening; and a grip insertible into the opening and having a slot receiving the pivot bar, the slot defining a bendable finger in the grip, the finger having a lug adapted to engage the base member at the lower edge of the opening, the finger and the lug co-operating with the base member, when the grip is raised, to secure a bending of the finger, a partial closing of the slot, and a permanent pivotal mounting of the grip on the bar.

The point raised by the defendant is rather an unusual one, and I was referred to no authority bearing on the point. It would appear to me unreasonable if the defendant's contention should prevail. I do not think that the patentee in his claims restricts himself to one method of locking the base member and the grip member, though he does mention only one method of doing it. It is a handle composed of two members of a described construction or formation that is claimed, and one rapid and cheap method of locking the two members together is mentioned. If one chooses to adopt a slower and more expensive method of doing what the patent clearly states may be done in another and easier way, surely infringement cannot be evaded in that manner, nor should the sole right of manufacture be lost to a patentee by such a circumstance. I think this is a case where the law of equivalents applies because Pahlow disclosed an entirely new way of locking the two members of the handle. The two members of the defendant's handle, the base and grip, are clearly the same as the corresponding members in the plaintiff's handle, and when the two members are united the defendant's handle is the same as the plaintiff's patented handle, but the locking of the members was done in a different way, that is to say, the defendant bends the prongs or fingers by a mechanical operation, while Pahlow does the same thing by a slight movement of the hand. If the defendant adopts a means of locking the members which is not so advantageous or convenient as the

means or method pointed out in the patent, is the patentee to lose the benefit of his invention by reason of this? I do not think that in reason or sense this should relieve the defendant of the charge of infringing the patent. The defendant may have adopted another way of bending the fingers of the grip, but that does not grant it the privilege of making the plaintiff's handle, that is to say, a construction or formation of the two members in such a way, that they may be readily locked together without the use of a pin, a tool operation, or a machine operation. The fact that the defendant locks the two members by a machine instead of by hand, a means which produces the same handle and the same result, is not, in my opinion, sufficient to avoid infringement. I think there is infringement and that the plaintiff must succeed; and it shall have its costs of the action.

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*Judgment accordingly.*

QUEBEC ADMIRALTY DISTRICT

BETWEEN:

CANADA STEAMSHIP LINES LIMITED.. PLAINTIFF;

v.

EMILE CHARLAND LIMITED ET AL. . . . DEFENDANTS.

*Shipping—Collision—Limitation of liability—Merchant Shipping Act—Canada Shipping Act*

1933  
 Jan. 17.

Plaintiff's vessel collided with the lock gates of the Lachine Canal permitting the water to rush through and damage property. Four actions were instituted against Plaintiff and it feared other actions. Plaintiff sued for limitation of liability under the Merchant Shipping Act, 57 & 58 Vict. Ch. 60. The Court found that the accident which occurred was due to the engineer misunderstanding a signal given from the bridge, and held, that the error of the engineer was a case of improper navigation, that the owners could not provide for such an event and that as the collision occurred without actual fault or privity of the owners they were entitled to judgment limiting their liability.

2. That as the Crown was not expressly mentioned in the Act, nor was the Act expressly made applicable to it, the responsibility to the Crown could not be limited by the Court.
3. That the question of limitation of liability was governed by the Merchant Shipping Act, 57 & 58 Vict., Ch. 60, and not by the Canada Shipping Act, since the Colonial Laws Validity Act, 28 & 29 Vict., Ch. 63, had not been abrogated by the British North America Act and the Statute of Westminster, 22 Geo. V, Ch. 4 has no retroactive effect.

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ACTION by plaintiff seeking limitation of its liability to several defendants resulting from a collision of plaintiff's steamship with lock gates of the Lachine Canal.

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

*R. C. Holden, K.C.*, for plaintiff.

*J. Arthur Mathewson, K.C.*, and *A. L. Smith* for defendant Emile Charland Limited.

*C. Gordon MacKinnon, K.C.*, for His Majesty the King.

The facts are stated in the reasons for judgment.

DEMERS L.J.A., now (January 17, 1933), delivered the following judgment:

Plaintiff is the registered owner of the *Rapids Prince*, a British vessel registered at Montreal. On the 2nd of August, 1931, the said vessel, while passing up through the Lachine Canal, collided with the upper gates of Lock No. 2; the said gates were broken away, and the water was so permitted to rush down, and damage to the locks and to property resulted therefrom.

Plaintiff alleges that said collision occurred without actual fault or privity of her owners, and that said losses were caused by reason of the improper navigation of the ship, and it prays that its liabilities should be limited, according to the Merchant Shipping Act of 1894, as extended by the Act of 1900, the latter statute including damages on land.

The contestation has raised one question of fact, two constitutional questions, and two questions of interpretation of statute.

## I

The question of fact is this—it is proved that this accident occurred because the engineer misunderstood the signal of the Captain.

It is then a clear case of improper navigation of the ship. The owners could not evidently have provided for such an event.

The Court, having a clear and efficient cause, is not inclined to make conjectures, what would have happened if there had been on deck the lines required by the Canal Regulations. They would not probably have been



employed, seeing the admitted practice, and if employed, would they have prevented the accident? I do not believe it.

Lines are not intended to combat the engine but to keep the ship still. The accident occurred because of improper navigation. This is sure. The rest is conjecture which I consider proper to disregard. (*Canadian Pacific Railway Co. v. SS. Storstad et al*, 14 Aspinal M.C. 530.)

I may add that there were ample lines on the boat which could have been used if the canal authorities had enforced their by-laws.

I, therefore, arrive at the conclusion that the limitation should be allowed.

## II

The next question we have to consider is the following: Is the Crown bound by these statutes of limitation, the Crown being not mentioned in any of them?

After looking at the authorities quoted by the Crown, I have come to the conclusion that the Crown is not bound. When the Crown comes in, it is a matter of grace.

I may add to those authorities, the following: (*Attorney-General for New South Wales v. Curator of Intestate Estates*) (1907) A.C. 519; *The Loredano* 1922, P. 209.

The Bankruptcy Acts are similarly for public good; they were on the same footing before 1883 *Rex v. Pixley* (Bunbury Reports, 202); since then, see *In re The Oriental Bank Corporation (No. 2)* 54 L.J. Ch. 327; here our Interpretation Act requires that the Crown should be *expressly* mentioned in the Statute.

Therefore, the responsibility to the Crown cannot be limited by the Court; if it comes to contribution, it is a matter of grace on its part.

Its plea should, therefore, be maintained, with costs, and its rights reserved.

## III

Was this question of limitation governed by the Merchant Shipping Act or by the Canada Shipping Act?

The British North America Act of 1867 was a pact between the provinces sanctioned by the Imperial Government; it was never intended to limit the supreme power of the Imperial Government. (Todd, *Parliamentary Govern-*

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*ment in the British Colonies*, 2nd Ed., p. 240, 242, 243, 244; Lefroy, *Canada's Federal System*, p. 208, 214, 230.)

Up to the Statute of Westminster, 1931, such was the status of Canada. The Statute of Westminster is itself the best evidence of it.

The Colonial Laws Validity Act of 1865, 28 & 29 Vict., Ch. 63, has not been abrogated by the British North America Act. Whatever might have been our laws at the time of Confederation, there seems to be no doubt that the Imperial Government could legislate on similar matters for the Dominions, and that is what it did by the Merchant Shipping Act of 1894.

The Statute of 1865 is very formal:

Any Colonial law which is or shall be in any respect repugnant to the provision of any Act of Parliament extending to the colony to which such law may relate. . . . or having in the colony the force and effect of such Act, shall be read subject to such Act and shall, to the extent of such repugnancy but not otherwise, be and remain absolutely void and inoperative.

By Section 735, our Parliament could modify the Merchant Shipping Act 57 & 58 Vict., Ch. 60 (except as to the third part) in relation to ships registered in Canada, but "any such act or ordinance shall" not take effect until confirmed "by Her Majesty in Council, and after the approval of Her Majesty has been proclaimed."

These conditions never having been fulfilled, it seems to me that the conclusion is that our Statutes were of no effect.

It has been contended that the Statute of Westminster, 22 Geo. V, Ch. 4, has a retroactive effect in this case because it is a declaratory Act. This Statute has not that character.

Craies, *On Statute Law*, 3rd Edition, p. 59 and 90.

The Statute of Westminster has changed the status of the Dominions. It is a new law and it is a law for the future and a Statute has no retroactive effect as to existing rights where it can otherwise be given a reasonable interpretation. The doubt should always be in favour of the then existing rights.

Maxwell's *Interpretation of Statutes*, 6th Edition, p. 381 and 391.

The effect of Section 5 of that Statute in my opinion is that our shipping laws do not need now the approbation of His Majesty to be in force. If we had had only Sections 2 and 3 of the Statute of 1931, our Parliament would have

been obliged to re-adopt the Shipping Act of Canada as to the disposition repugnant to the Laws of England.

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## IV

At first sight, it seemed to me that it was not, therefore, importance to decide if the Merchant Shipping Act, as amended in 1900, should be applied, instead of the Canada Shipping Act, since it has been represented to me that the Crown could elect to come in and take its part in the amount to be distributed if it so elected to do, and the question of the applicability of the Merchant Shipping Act, as amended in 1900, instead of our Canada Shipping Act being raised by all parties who did not want the Crown to be collocated on the amount of limitation, I should decide it.

Section 5 stating that the Statute of 1900 should be construed as one with the Merchant Shipping Act, 1894, it must then be construed as one Act. Craies, 3rd Edition, p. 126.

It is alleged that the Imperial Statute of 1900 has not been reproduced in our Statutes. I do not see that it was necessary.

## V

Judgment will, therefore, be entered as follows:

That the Plaintiff is entitled to limit its liability to the sum of £8748/16.0 in respect of any loss and damage caused to property, whether on land or on water, whether fixed or movable, by reason of the collision of the *Rapids Prince* with the said lock No. 2 of Lachine Canal of the 2nd of August, 1931, reserving, however, the rights of His Majesty which cannot be effected without his consent, this being a matter of grace in its discretion.

The plaintiff shall give security in the form of valid surety bonds for the amount of the limited liability of £8748/16.0, together with interest from the date of the collision and the taxable costs incurred to date in the actions which have been instituted against the plaintiff in respect of this accident;

That the actions referred to in the Statement of Claim and any other action instituted or pending in this connection, shall be stayed and all other persons having claims

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are restrained from instituting or continuing proceedings against the plaintiff or against the *Rapids Prince*;

That three advertisements (as mentioned in paragraph (c) of the conclusions of the Statement of Claim) shall be published at intervals of not less than one week, in one English and one French newspaper published in Montreal, requiring all persons who have any just claims for loss or damage arising out of the said collision of the *Rapids Prince* with the lock gates, to appear and file them, in this action, within a delay of three months from the last publication of the advertisement, and that any claimants who do not file their claims within the said delay shall be excluded from sharing in the amount of the plaintiff's limited liability;

That the claims filed shall be referred to the Deputy District Registrar for assessment in accordance with paragraph (d) of the conclusions;

That plaintiff shall pay the costs of all contestations (except the costs of enquete).

*Judgment accordingly.*

BETWEEN:

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 Nov. 21.  
 1933  
 Apr. 1.

AUTOGRAPHIC REGISTER SYSTEMS, } PLAINTIFF;  
 LTD. .... }

AND

CANADIAN NATIONAL RAILWAY } DEFENDANT.  
 COMPANY .... }

*Expropriation Act—Canadian National Railways Act—Injurious Affection to Property—Compensation*

Plaintiff owns lands in the city of Montreal and sought damages for injury to its property resulting from the construction of a subway by defendant company under its railway lines near plaintiff's property. No land belonging to plaintiff had been taken by defendant for its work. The Court found that plaintiff's property had been injuriously affected and awarded it compensation.

*Held*, that the Canadian National Railways Act (R.S.C., 1927, Ch. 172) does not deprive the owner of lands injuriously affected by the construction of a public work, of the compensation awarded by the Expropriation Act (R.S.C., 1927, Ch. 64).

2. That the damage must result from an act rendered lawful by statutory powers of the company.
3. That the damage must be such as would have been actionable under the common law, but for the statutory powers.
4. That the damage or loss must be to the property itself.

5. That personal injury, inconvenience, injury to trade or business are no grounds for compensation.
6. That the damage must be occasioned by the construction of the public work, not by its user.

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ACTION by plaintiff claiming compensation from defendant for injurious affection to plaintiff's property resulting from the construction of a public work.

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

*E. Masson, K.C.*, and *Auguste Boyer* for plaintiff.

*Gregor Barclay, K.C.*, for defendant.

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

ANGERS J., now (April 1, 1933), delivered the following judgment.

By its action the plaintiff seeks to recover from the defendant the sum of \$50,000 for injury and damages to its property, resulting from the construction of a subway on St. Remi street, in the city of Montreal, by the defendant under its railway lines, with the object of doing away with a level crossing.

[The learned Judge here referred to the allegations set forth in the plaintiff's statement of claim and in the defendant's statement of defence.]

The material facts disclosed by the evidence are the following.

On August 30, 1928, the plaintiff bought from C. D. Turcotte lots 1674—42 to 64, containing an area of 67,622 square feet, as shown on plan exhibit C, for the price of \$24,000, representing about 35 cents a foot; the emplacement was bounded to the southwest by St. Remi street, to the northwest by a lane (lot 1674—41), to the northeast by Walnut street and to the southeast by the right-of-way of the Canadian National Railways.

The plaintiff commenced the erection of its building in the spring of 1929 and moved into it in the latter part of December of the same year.

On March 10, 1930, an order was made by the Board of Railway Commissioners approving the plan submitted by the defendant showing the layout of the subway proposed

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to be constructed at St. Remi street; a copy of the order was filed as exhibit D.

The excavation work for the tunnel was started on April 12, 1930; the subway was opened to traffic on December 6, 1930.

On September 28, 1931, the plaintiff sold to Exide Batteries of Canada Limited lots 1674-48 to 51, pt. 52 and 57 to 64, containing a superficies of 44,042 square feet, for \$28,627, representing approximately 65 cents a square foot.

The width of St. Remi street was 66 feet when plaintiff bought from Turcotte. When the defendant decided to build a subway under its tracks, it expropriated a strip of land on the west side of St. Remi street and widened the street to 90 feet.

The defendant did not construct its subway alongside the building of the plaintiff; it left between the inner side of the retaining wall and the wall of plaintiff's building a stretch of street 30.4 feet wide the roadway having a width of 21.4 feet and the sidewalk of 9 feet. The depth of the subway opposite the northwest wall of the plaintiff's building, i.e., the wall facing on the lane, is 3.9 feet and the depth opposite the southeast wall is 7.9 feet. From the entrance of the subway, on the north side, to the plaintiff's building, the distance is about 65 feet. On the retaining wall, there is a fence about 4½ feet in height, as indicated on photographs exhibits 2 and 3.

No land, the property of plaintiff, was taken by the defendant; the claim is one for injurious affection resulting from the construction of a public work.

The case is governed by section 17 of the Canadian National Railways Act (R.S.C., 1927, chap. 172), as amended by 19-20 Geo. V, chap. 10; and by section 23 of the Expropriation Act; sections 47 and 50 of the Exchequer Court Act (R.S.C., 1927, chap. 34) also apply.

Section 23 of the Expropriation Act (R.S.C., 1927, chap. 64) reads as follows:

23. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property.

. . . .

Section 17 of the Canadian National Railways Act (R.S.C., 1927, chap. 172), as amended by 19-20 Geo. V, chap. 10, contains the following provision:

(2) (a) All the provisions of the Expropriation Act, except where inconsistent with the provisions of this Act, shall apply *mutatis mutandis* to the Company.

Paragraph (d) of subsection 2 of section 17, amended as aforesaid, says:

(d) The compensation payable in respect of any lands or interests therein taken by the Company under the provisions of the Expropriation Act as made applicable to the Company by this Act shall be ascertained in accordance with the provisions of the Expropriation Act, and for that purpose the Exchequer Court shall have jurisdiction in all cases relating to or arising out of any such expropriation or taking and may make rules and regulations governing the institution, by or against the Company, of judicial proceedings and the conduct thereof: Provided that such compensation may, in any case where the offer of the Company does not exceed two thousand five hundred dollars, be ascertained under the provisions of the Railway Act, beginning with notice of expropriation to the opposite party. The amount of any judgment shall be payable by the Company.

Paragraph (c) of subsection (2) of section 17, before the amendment, reads as follows:

(c) The compensation payable in respect of the taking of any lands so vested in the Company, or of interests therein, or injuriously affected by the construction of the undertaking or works shall be ascertained in accordance with the provisions of the Railway Act, beginning with notice of expropriation to the opposite party.

As one may see paragraph (d) of subsection (2) of section 17, as amended, does not mention the compensation payable in respect to land injuriously affected. Does it mean that the legislators intended to deprive the owner of land injuriously affected by the construction of a public work of the compensation awarded by the Expropriation Act? I do not think so for the reasons set forth in the case of *Renaud v. Canadian National Railway Company* (No. 13,952, October 31, 1932), which it is unnecessary to repeat here.

Four conditions are required to give rise to a claim for compensation for injurious affection to a property, when no land is taken:

(a) the damage must result from an act rendered lawful by statutory powers of the company;

(b) the damage must be such as would have been actionable under the common law, but for the statutory powers;

(c) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;

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(d) the damage must be occasioned by the construction of the public work, not by its user.

See: *Leblanc v. The King* (1); *The King v. Richards* (2); *The Queen v. Barry* (3); *McQuade v. The King* (4); *McPherson v. The Queen* (5); *Metropolitan Board of Works v. McCarthy* (6); *Caledonian Railway Co. v. Walker's Trustees* (7); *Beckett v. Midland Railway Co.* (8); *Chamberlain v. West end of London & Crystal Palace Railway Co.* (9); *Moore v. Great Southern & Western Railway* (10); *The King v. McArthur* (11); Nichols on Eminent Domain, p. 818, No. 308; Cripps on Compensation, 7th Ed., pp. 206 et seq.

There is no material difference, on the question of damage to lands resulting from the construction of a public work, between the various acts under which the decisions hereinabove cited were rendered: *McPherson v. The Queen* (12); *The King v. McArthur* (13); *Paradis v. The Queen* (14).

The first and second of the four conditions above mentioned are fulfilled: under its statutory powers the defendant had the right to construct a subway on St. Remi street, in accordance with the order issued by the Board of Railway Commissioners; on the other hand, supposing that the construction of this subway had been unauthorized by statute and caused damage to plaintiff, an action would have lain under the common law.

As Nichols says (op. cit., 281), while common law liability is essential to establish a claim for compensation, the converse is not true; an injury that would be actionable at common law is not ground for compensation unless it complies with the third and fourth requirements. . . .

I must therefore endeavour now to determine whether the construction of the subway caused an injury to the property itself of the plaintiff, independently of whatever personal damage or damage to business or trade it may have occasioned. If I arrive at a negative conclusion, the action must be dismissed; if, on the contrary, I find that

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|-----------------------------------|---------------------------------------------|
| (1) (1917) 16 Ex. C.R., 219.      | (9) (1863) 2 B. & S., 617.                  |
| (2) (1912) 14 Ex. C.R., 365.      | (10) (1858) 10 Irish Com. Law. Rep., 46.    |
| (3) (1891) 2 Ex. C.R., 333.       | (11) (1904) 34 S.C.R., 570.                 |
| (4) (1902) 7 Ex. C.R., 318.       | (12) (1882) 1 Ex. C.R., 53, at 61, in fine. |
| (5) (1882) 1 Ex. C.R., 53.        | (13) (1904) 34 S.C.R., 570, at 577.         |
| (6) (1874) L.R., 7 H.L., 243.     | (14) (1887) 1 Ex. C.R., 191.                |
| (7) (1882) L.R., 7 App. Cas., 259 |                                             |
| (8) (1867) L.R., 3 C.P., 82.      |                                             |



the property has been injuriously affected, there will remain for me to fix the amount of the compensation.

The damage or loss must be to the property itself; its value must have been affected by the construction of the public work, whoever the owner might be and to whatever use the owner might think advisable to put it.

Personal injury, inconvenience, injury to trade or business are no grounds for a claim for compensation: *The King v. Richards* (1); *McPherson v. The King* (2); *Leblanc v. The King* (3); *The King v. London Docks Co.* (4); *Ricket v. Metropolitan Railway Co.* (5); *Beckett v. Midland Railway Co.* (6); *Martin v. London County Council* (7); *Bigg v. Corporation of London* (8); *The Queen v. Metropolitan Board of Works* (9); *Caledonian Railway Co. v. Ogilvy* (10); *Cowper Essex v. Local Board of Acton* (11); *Wood v. Stourbridge Railway Co.* (12); Cripps on Compensation, 7th Ed., pp. 217 and 218.

As stated by Cripps (p. 218), the principle is fully explained by Willes, J., in *re Beckett v. Midland Railway Co.* (*ubi supra*, at pp. 94, in fine, and 95):

The damage complained of must be one which is sustained in respect of the ownership of the property,—in respect of the property itself, and not in respect of any particular use to which it may from time to time be put; in other words, it must, as I read that judgment, be a damage which would be sustained by any person who was the owner, to whatever use he might think proper to put the property. Now that of course is to be taken with the limitation that a person who owns a house is not to be expected to pull it down in order to use the land for agricultural purposes. That would be pushing the judgment in *Ricket v. Metropolitan Rail Co.* to an absurd extent. The property is to be taken in statu quo, and to be considered with reference to the use to which any owner might put it, in its then condition, that is, as a house.

The whole case narrows down to a question of depreciation: has the plaintiff's property lost any value as the result of the construction of the subway?

As already stated, the plaintiff bought lots 1674-42 to 64 on August 30, 1928, for \$24,000; the superficies of the em-

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| (1) (1912) 14 Ex. C.R., 365, at 373.     | (6) (1867) L.R., 3 C.P., 82, at 92. |
| (2) (1882) 1 Ex. C.R., 53, at 66 and 67. | (7) (1899) 80 L.T., 866.            |
| (3) (1917) 16 Ex. C.R., 219, at 221.     | (8) (1873) L.R. 15 Eq., 376.        |
| (4) (1836) 5 Ad. & E., 163.              | (9) (1869) L.R., 4 Q.B., 358.       |
| (5) (1867) L.R., 2 H.L., 175.            | (10) (1856) 2 Macq. H.L. (Sc.) 229. |
|                                          | (11) (1839) 14 A.C., 153.           |
|                                          | (12) (1864) 16 C.B. (N.S.), 222.    |

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placement was 67,622 square feet and the price per foot 35 cents and a fraction.

The excavation work for the subway was commenced on April 12, 1930, and the subway was opened to traffic on December 6, 1930.

On September 28, 1931, over nine months after the opening of the subway, the plaintiff sold to Exide Batteries of Canada Limited lots 1674-48 to 51, pt. 52 and 57 to 64, containing an area of 44,042 square feet, for \$28,627, which represents a price of about 65 cents a foot.

Within three years from its purchase, the plaintiff succeeded in selling 44,042 square feet out of the 67,622 square feet it had bought, to wit nearly two-thirds of its property, at a profit of approximately 30 cents a foot, notwithstanding the general depression existing in 1931 and the existence of the subway.

The purchaser, Exide Batteries of Canada Limited, erected a factory on the emplacement for the purposes of its business, and put the façade of the building on Walnut street: see plan exhibit C.

With a profit of 30 cents a foot, equivalent to about 86 per cent, within three years, at a time when the real estate market was, like everything else, at a standstill, it is hard to believe that the property of the plaintiff was depreciated to a great extent, let alone a depreciation of 60 per cent as mentioned by Julien who was heard as expert on behalf of the plaintiff.

It was agreed at trial that the deposition on discovery of Hillenbrand, vice-president and managing-director of Auto-graphic Register Systems Limited, would form part of the evidence.

Hillenbrand swore that, at the time his company bought the land, it was unaware of the intention of the defendant to construct a subway at St. Remi street (dep. Hillenbrand, on discovery, p. 2). After some hesitation he admitted that he knew about it when the company commenced the erection of its plant (dep. Hillenbrand, on discovery, pp. 9 and 10): . . .

Later on however (p. 12) Hillenbrand declared that he understood the mouth of the tunnel would be approximately opposite the present dividing line between the Exide

Batteries' property and plaintiff's property; perhaps I had better quote the testimony verbatim:

Q. But actually at the time you put your building up and decided to put the front entrance on St. Remi street, you knew exactly what was going to happen there to St. Remi street?—A. We did, yes—I might modify that. Together with the engineer I travelled down to the Canadian National Railway office and inquired. When we first entered the office the engineer in the department—we were somewhat coolly received because he did not know what we were looking for but after we made him acquainted with what information we wanted to obtain, he warmed up nicely and told us I remember the plan or whatever it was he showed us indicated that the mouth or the entrance of that tunnel would be shall I say south of our building. In other words we were to be free of the tunnel directly where our building stands at the present time—we were given to understand that the mouth of the tunnel would be on St. Remi street approximately opposite the present dividing line between the Exide Battery property and our own property, instead of which the mouth is in the neighbourhood of sixty feet to the north of the building.

Unfortunately no witness was heard on behalf of the defendant on this point. It is very difficult for me to believe that the witness was told by an engineer in the office of the Canadian National Railway Company that the mouth of the subway would be opposite a point, which has since become the dividing line between the property of the Exide Batteries and that of plaintiff; the sale to Exide Batteries was only made on September 28, 1931, so that in the spring of 1929, when plaintiff started to build, there was no indication as to where that division line would be. Putting the mouth of the subway opposite what is now the division line between the two properties would have reduced the length of the slope of the subway on the north side by approximately 165 feet, viz., 100 feet the width of plaintiff's emplacement and 65 feet the distance between the northwest wall of the building and the entrance to the tunnel; this would have meant a much steeper declivity, a declivity such as an engineer would likely not have recommended.

In my opinion, the building was not depreciated to a very great extent, by the opening of the subway; it surely did not suffer a depreciation of 50 per cent, as claimed by Julien and Doyon in their report (exhibit 5).

Jenkins Bros. Limited have a plant situated in a similar position as that of plaintiff, on the same side of St. Remi street, but to the south of the railway tracks, with the difference however that the northwest wall of the Jenkins plant is somewhat nearer to the tracks than the southeast

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wall of plaintiff's building and that the Jenkins' property is bounded on the southeast side by a street, Acorn street as it is called, whilst plaintiff's property is bounded on the northwest side by a lane: see plan exhibit C.

J. H. Webb, vice-president and managing-director of Jenkins Bros. Limited, was called as witness by the defendant. He stated that the roadway in front of his company's building was practically the same as in front of plaintiff's building. Asked as to what the effect of the opening of the subway was on the value of the company's property, he answered as follows (dep. Webb, p. 20):

A. From my point of view it has not depreciated it at all. If anything, it has appreciated it on account of the lack of delays at that particular crossing.

The witness gave his reasons for adopting this view (pp. 19 and 20, questions 185 to 197). . . .

The evidence of Mr. Webb, an entirely disinterested witness, carries, in my opinion, considerable weight.

Desaulniers, called as expert on behalf of defendant, shares the same opinion as Webb regarding the appreciation of the property as a result of the facilitation of the traffic: see his report filed as exhibit E.

The report prepared by the witness Jones filed as exhibit F shows that the gates at the St. Remi street railway crossing were closed 40 per cent of the time; it is obvious that the opening of the subway must have brought considerable relief to traffic in the vicinity.

Neither party saw fit to call a director or officer of Exide Batteries of Canada Limited to explain to the Court why the company had in September, 1931, notwithstanding the existence of the tunnel, bought at 65 cents a foot an emplacement which its vendor had purchased in August, 1928, for 35 cents a foot and which had suffered, as a result of the construction of the tunnel, according to plaintiff's experts, Julien and Doyon, a depreciation of 60 per cent. This evidence might have been of considerable interest.

The sale by plaintiff of a large portion of its land, after the opening of the subway, at a profit of about 86 per cent and the evidence of the vice-president and managing-director of Jenkins Bros. Limited go a long way to show that the depreciation of the plaintiff's property does not by any means reach the fantastic figures stated by plaintiff's experts.

On the other side, apart from the testimonies of Julien and Doyon, there is the deposition of Hillenbrand, to which I have already referred and to which I shall revert briefly.

Examined as to how the amount of \$50,000 claimed is made up, Hillenbrand says that "it is just a guess" (dep. p. 13) and then explains that it is founded on loss of publicity and inconvenience (pp. 13, 14 and 15). . . .

To further questions put to him by counsel for defendant Hillenbrand persists in saying that there is no other cause of damage than the loss of publicity and the inconvenience (dep. p. 17): . . .

The want of publicity and the inconvenience may appear very serious to the witness, but I am afraid he is inclined to over-estimate both.

As regards the loss of publicity, I must say that the evidence on this point does not impress me very much. Hillenbrand, the only witness heard on this particular aspect of the case, says that the loss of publicity is due to the fact that passersby travelling through the tunnel in a northerly direction cannot see a sign on the plaintiff's building; at pp. 11 (in fine) and 12, . . .

The only business plaintiff carries on is printing for the retail trade. The plaintiff has no show rooms nor show windows; all its business is done by travellers (dep. Hillenbrand, p. 6). However I must consider this alleged loss of publicity in respect of any kind of trade or business for which the property might be used. The district where plaintiff's factory is situated is industrial. Advertising by means of signs and show windows is not so essential for industry as it is for trade, particularly a retail store, if it is at all necessary, nay even useful. There is no doubt that visibility of the defendant's premises is not quite as good as it was, previous to the construction of the subway for people coming from the south; on the other hand, it is somewhat better for people coming from the north; the one very likely compensates the other. Having had the opportunity of seeing the property and its surroundings, on the suggestion of counsel for both parties, I must say that I do not believe that this is such a serious disadvantage as to lessen to a great extent the value of plaintiff's property.

I shall now deal with what witness Hillenbrand has referred to as inconvenience and which is and can only be

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the lack of facilities of access to the plaintiff's property resulting from the construction of the tunnel.

The plaintiff's front door is exclusively an office entrance; it is not used for loading or unloading merchandise; all the goods are received and shipped by the side door opening on the lane. In the case of Jenkins Bros.' factory, the front door is used for truck shipping; yet Webb declares that they experience no inconvenience. Notwithstanding Webb's testimony, I am inclined to believe that there is a certain amount of inconvenience in having a business establishment fronting on a street only some twenty feet wide; it is difficult to turn automobiles in a street as narrow as the one lying opposite the plaintiff's property; this difficulty inevitably causes a loss of time. What is a mere inconvenience to-day may be to-morrow a real hardship for the owner of the premises who might wish to increase its shipping facilities and use the front of his building for that purpose. As I have said in respect to loss of publicity, one must not stop to look solely at the purpose for which the premises are presently used, but one must consider the different uses to which the property may be put by any owner. Mere inconvenience alone is no ground for a claim for compensation, especially so if the inconvenience is common to the public in general. On the other hand, if the access from a property to a public highway, on which the lands immediately abut, as in the case herein, is rendered less convenient and if as a result the value of the property is thereby decreased, the owner is entitled to compensation: Cripps on Compensation, p. 213, last paragraph and note (u) at foot of page. In view of the narrowness of the stretch of street on which its property is now fronting and in view of the turn which one has to make in order to proceed towards the south, the plaintiff is not only confronted with an inconvenience but it has not the same full enjoyment of its property, more particularly of its front entrance and it may not have the same facility in selling or even renting its premises, if it ever wishes to do so. This, in my opinion, constitutes a depreciation of the property for which the plaintiff ought to be compensated.

There is no doubt that the opening of the subway has considerably facilitated traffic on St. Remi street. The level crossing which existed prior to the construction of the subway, necessitating the closing of the gates during an aver-

age of 40 per cent of the time every day was a very serious disadvantage. The subway is of a great benefit to the public in general and the plaintiff's property will have its share of it. This compensates in a large degree the inconvenience suffered by the plaintiff or by whoever may eventually become the owner of the property. This advantage must be taken into account when it comes to assessing the compensation to which the plaintiff may be entitled. I may add that the defendant has reduced to a minimum the injury to plaintiff's property by giving it an access by the stretch of street, however narrow it may be, which it has left open opposite said property.

Taking all the circumstances of the case into consideration, the inconvenience of access and the partial loss of advertising facilities on the one side and the advantage of the subway for the facilitation of the traffic on the other side, I believe I will render justice to the parties in assessing at \$1,200 the compensation which the plaintiff is entitled to recover from the defendant.

Although there is no specific demand for interest, I believe that, under the general conclusion relating to further and other relief, I am entitled to allow interest on the sum of \$1,200; the interest will run from the 20th January, 1932, date on which the proceedings were instituted.

There remains the question of costs. The amount of the claim is grossly extravagant and has in all likelihood shut out the possibility of a settlement. This might justify me in depriving the plaintiff of its costs: *McLeod v. The Queen* (1); *The King v. McLaughlin* (2). On the other hand, the defendant has denied all liability and made no offer. I think that justice will be done if I allow the plaintiff costs to the extent of \$250.

There will be judgment in favour of plaintiff against defendant for \$1,200, with interest from the 20th of January, 1932, and costs fixed at \$250.

*Judgment accordingly.*

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NOTE: The unreported cases of *Renaud v. C.N.R.*, tried at Montreal and *C.N.R. v. Latour*, tried at Quebec, raised questions of law similar to those dealt with in the case of *Autographic Register Systems Limited v. Canadian National Railway Company*.

(1) (1889) 2 Ex. C.R., 106.

(2) (1915) 15 Ex. C.R., 417.

BETWEEN:

DOMINION BUILDING CORPORATION LIMITED .....

CLAIMANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Sale of land—Crown—Offer to Crown represented by the Minister of Railways and Canals for Canada—Acceptance binding the Crown—Order in Council—Communication to offeror—Department of Railways and Canals Act, R.S.C., 1906, c. 85, s. 15—Public Lands Grants Act, R.S.C., 1906, c. 57, s. 4—Whether time of the essence—Assignability of contract—Damages for breach of contract when no specific performance decreed against Crown.

F., the claimant's assignor on July 19, 1925, sent to His Majesty the King, represented by the Minister of Railways and Canals for Canada, an offer to purchase certain land in the city of Toronto, occupied by the Canadian National Railways, for \$1,250,000, depositing \$25,000 (said deposit to be returned if offer not accepted), and agreeing, upon acceptance of the offer, to pay the balance of the purchase price at such time as possession "be given the undersigned (F.) not later than" September 25, 1925, and he further agreed that, upon his obtaining possession, on or before September 25, 1925, he would proceed with the erection of a 26 storey building upon said land and certain adjoining land, provided that His Majesty the King, represented as aforesaid, should execute a lease of certain floors for 30 years upon terms set out, the offer if accepted by Order in Council, to constitute a binding contract of purchase and sale subject to the conditions therein mentioned. In the draft lease attached to the offer, the Dominion Building Corporation Limited appears as lessor, and not F. On July 29, 1925, the Committee of the Privy Council authorized the acceptance of the offer, and a certified copy of the Order in Council was promptly communicated to F. In September, 1925, a recommendation of the Minister of Public Works to lease five floors in the proposed building for the Department of Customs and Excise was approved and on February 1, 1926, an Order in Council was passed granting authority for such lease. On September 19, 1925, the Canadian National Railways vacated the premises. Extensions of time, usually signed by the Deputy Minister of Railways and Canals, were given to F., in which to proceed with the construction of the building, the last one by letter of the Minister of Railways and Canals dated November 17, 1925. On December 29, 1925, F., asked for a further extension to January 31, 1926, within which to complete the purchase, but no answer to this request was ever obtained and the alleged contract was treated as at an end. No notice was given either to F., or the claimant, requiring completion of the purchase within any specified period and the deposit of \$25,000 was retained by Respondent. On August 5, 1925, F. assigned all his right, title and interest in the contract to the claimant who now sues for damages for breach of contract.

The Crown contends that it can only be bound on a contract executed according to section 15 of R.S.C. (1906) c. 35 (Department of Rail-

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ways and Canals Act); that all dealings were with *F.*, and that it never recognized the assignment from *F.*, to the claimant and that there is no privity between it and the claimant Dominion Building Corporation Limited; that *F.*, failed to comply with his own offer within the time prescribed.

*Held*, that the land in question being public land belonging to the Crown in right of the Dominion of Canada, and not being a matter pertaining to the Department of Railways and Canals alone, could be dealt with under section 4 of c. 57 of R.S.C. (1906) (Public Lands Grants Act) and that section 15 of c. 35 (1906) does not apply.

2. That the offer of purchase, the passage of the Order in Council and its communication to *F.*, and other writings disclosed in the evidence, together with the retention of the deposit, constitute an enforceable parol contract between the Crown and *F.*, for the sale and purchase of the real property in question.
3. That the present case is one, where, in equity, time should not be considered as of the essence of the contract, and the fact that the premises were vacated and that no remonstrance was made by anybody against the delay in completing the purchase, strengthens the equities in favour of the claimant. Moreover, the terms of the contract did not make time the essence of the contract, and the claimant or *F.*, was entitled to a notice, before the Respondent sought to put an end to the contract, that the same would be treated as at an end if not completed within a limited time.
4. That this contract was assignable, and considering all the facts of the case, the Crown must be assumed to have known that *F.*, was acting for the company and that it acquiesced in the assignment.

REFERENCE by the Acting Minister of Railways and Canals of the claim of Dominion Building Corporation Limited for damages for breach of an alleged contract.

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

*I. F. Hellmuth, K.C., R. V. Sinclair, K.C., and W. R. Wadsworth, K.C.*, for the Claimant.

*A. Geoffrion, K.C., and C. P. Plaxton, K.C.*, for the Respondent.

The facts and questions of law raised are stated in the reasons for judgment (1).

THE PRESIDENT, now (March 4, 1931), delivered the following judgment:

This is a Reference made in September, 1926, by the Acting Minister of Railways and Canals, and the same is expressed in the following terms:—

Reserving the right to plead and maintain that the said Dominion Building Corporation Limited is not entitled to any compensation, I

(1) The earlier report of this case was overlooked. It has since been considered by the Supreme Court of Canada, (1932) S.C.R. 511, and by the Judicial Committee of the Privy Council.

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hereby refer to the Exchequer Court of Canada the annexed claim of the said Dominion Building Corporation Limited for compensation alleged to be due by reason of the allegations therein set forth.

The claim is for damages for a breach of an alleged contract.

This matter presents many difficulties and I think it is desirable that all the salient facts be first stated. Some evidence was given, properly I think, regarding the events leading up to the alleged contract which is the basis of the claim here made for damages. In 1923, the Respondent acquired by purchase from the Imperial Bank of Canada the title to a certain property located at the corner of King and Yonge Streets, Toronto, for the use, it would appear, of the Canadian National Railways. A comparatively small building stood upon the property, and at the time the alleged contract was entered into, the Canadian National Railways was in occupation of the same. Early in 1925, one Forgie of Toronto, who as a solicitor had something to do with the Respondent's acquisition of the property from the Imperial Bank of Canada, suggested to the President of the Canadian National Railways, the desirability of the Respondent acquiring an adjoining property, known as the Home Bank of Canada property, with the view of erecting upon the combined properties a large modern office building. Forgie also made the same suggestion to the Deputy Minister of Railways, and he states he was instructed by the Deputy Minister to inquire upon what terms the Home Bank property might be acquired, and he did have some negotiations with the owners. The railway authorities, Forgie states, and probably the Respondent also, decided in the end to abandon the idea of the erection of a new building upon the property acquired from the Imperial Bank, and so the suggestion of the purchase of the Home Bank property by the Respondent ended. Thereupon Forgie, in May, 1925, made an offer in writing to the President of the Canadian National Railways to purchase the property of the Respondent for a stated sum, and to erect upon the combined properties of the Respondent and that of the Home Bank, a large office building, and it was a condition of the offer that the Canadian National Railways was to lease for the term of thirty years, the ground floor and the next three floors in the proposed building. This proposal was formally approved by

the Executive Committee of the Board of Directors of the railway company. In the same month of May, Forgie made an offer in writing to His Majesty The King, represented by the Minister of Railways and Canals, to purchase the property. Later, on the 19th day of July, 1925, Forgie made another offer in writing directed to "His Majesty The King represented by the Minister of Railways and Canals," and it is this offer with which we are presently concerned. The last mentioned offer is in precisely the same terms as that made to His Majesty in May; no explanation was given why the offer of the former date was not acted upon. Evidently negotiations were proceeding during the interval.

As I have just stated Forgie addressed his offer of purchase to "His Majesty The King represented by the Minister of Railways and Canals," and the price offered for the property was \$1,250,000. Accompanying the offer was a deposit of \$25,000 and in this connection the offer states:—

The undersigned herewith deposits with His Majesty, represented as aforesaid, on account of the above purchase price, the sum of twenty-five thousand (\$25,000) dollars, to be applied by His Majesty on account of said purchase price, in case of and upon the acceptance of this offer, otherwise to be returned, without interest, to the undersigned.

The undersigned undertakes and agrees, upon the acceptance of this offer to pay to His Majesty the balance (one million two hundred and twenty-five thousand dollars) of the said purchase price at such time as possession of the said premises be given to the undersigned not later than the fifteenth day of September, 1925.

The offer contained many provisions and no doubt was intended to operate as a complete contract, if accepted. Provision was made as to the distribution of unearned fire insurance premiums between the parties if Forgie took over the property. Forgie agreed to bear any cost and expense incident to the search of the title to the premises, and there were additional provisions in the offer respecting the title to the property which need not be mentioned. The offer provided that if Forgie obtained possession of the property, on or before the 15th day of September, 1925, he was to erect a twenty-six story building on the combined premises of the Respondent and that of the Home Bank. That portion of the offer is expressed as follows:—

It is to be further understood that the undersigned agrees that upon his obtaining possession of the said lands hereinbefore referred to, on or before the fifteenth day of September, 1925, that he, the undersigned, will immediately proceed with the erection of a twenty-six story modern fireproof office building on the said lands and on the lands (formerly known as the Home Bank of Canada Head Office site), now owned by

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the undersigned, and adjoining immediately to the west thereof, on King street, and complete and have ready the said office building for occupancy by His Majesty as tenant under lease as hereinafter provided, not later than the twenty-fifth day of October, 1926, subject to the usual delays that may happen in the construction of said office building beyond the control of the undersigned the contractors, builders and architects and as evidence of such undertaking or completion of said office building within the time above specified, the undersigned will furnish His Majesty, represented, as aforesaid, with a certified copy of the contractor's (constructing the said office building) bond guaranteeing the completion of the said building within the time specified; the said office building to be constructed in accordance with the plans, details and specifications prepared and to be prepared by Eustace G. Baird, Architect of the City of Toronto, and which said plans shall be subject to the approval, in so far as space in the said office building to be occupied by His Majesty as tenant under lease hereinafter referred to, by a representative or representatives of and to be named by the Canadian National Railways.

Further provided that His Majesty, represented as aforesaid, shall execute a lease for the renting space of the ground floor and of the next three typical floors of the said office building for a term of thirty years from the twenty-fifth day of October, 1926, at a rental of sixteen (\$16) dollars per square foot per year for the ground floor and three (\$3) dollars per square foot per year for the next three typical floors, for the first twenty years of said term, said rentals to be increased during the next ten years of said term by such amounts, if any, as will bring the rentals during the last period of ten years to the full market value as it will exist at the end of the twenty-year period provided, however, that the rental for the last ten year period of the said term of thirty years shall not be reduced below rental for the first twenty year period of the said term, the lease to be executed by His Majesty represented as aforesaid to be in and to embody the exact terms and provisions as in draft lease hereto annexed, marked A, set out, it being understood that in the event of any inconsistency between the above set out terms and provisions of the lease to be executed and the terms and provisions of the draft lease hereto annexed marked A, that the terms and provisions of the said draft lease hereto annexed marked A, shall prevail and govern in the lease to be executed under the provisions of this offer of purchase.

It may be convenient to recite fully the last two paragraphs of the offer which are as follows:—

That notwithstanding anything in this offer of purchase it is understood that in the discretion of His Majesty it may be a condition of the instrument of conveyance from His Majesty to the undersigned of the said lands in the terms of the said instrument that the title in and to the said lands by the said instrument to vest in the undersigned only upon the execution and delivery by the undersigned of the lease, hereinbefore referred to His Majesty, represented as aforesaid, and the due furnishing of the bond by the undersigned as under the terms and provisions of said draft lease provided for.

This offer or purchase, if accepted by Order of His Excellency the Governor General in Council, shall constitute a binding contract of purchase and sale, subject to all the terms and provisions thereof and which contract shall enure to the benefit of the undersigned, his heirs, executors, administrators and assigns and to the benefit of His Majesty, His Successors and Assigns.

It is to be observed that in the draft lease referred to in the offer, and which accompanied the offer, the Dominion Building Corporation Ltd., the claimant herein, appears as lessor, and not Forgie. It is also to be pointed out that the offer if accepted by Order of His Excellency the Governor General in Council, should constitute a binding contract of purchase and sale, enuring to the benefit of Forgie and his assigns, and to the benefit of His Majesty, His Successors and Assigns, and further, there is no stipulation that time is to be of the essence of the contract and upon this fact the claimant places much reliance.

The next step in the transaction was, that upon the recommendation of the Minister of Railways and Canals, the Committee of the Privy Council on the 29th of July, 1925, authorized the acceptance of the offer of Forgie. The Order in Council recites the offer of Forgie, a copy of which is annexed to the Order in Council marked A, and it states that the Minister of Railways and Canals had "accepted said offer subject to the approval and authority of Your Excellency in Council." The main provisions of the offer are recited in the Order in Council; the offer made by Forgie to the President of the Canadian National Railways and the approval of the same by the Board of Directors is referred to, and documents evidencing all this are annexed to the Order in Council. A copy of the draft lease in which Dominion Building Corporation Ltd. appears as Lessor, and the Respondent as Lessee, is annexed to the Order in Council. The Order in Council concludes as follows:—

The Minister submits the above and, upon the advice of the Deputy Minister of Railways and Canals, recommends that authority be given for the acceptance of the said offer of purchase hereto attached marked "A", and that authority be given for the sale and transfer of the premises by His Majesty to the Purchaser, the transfer by its own terms only to vest title of the premises in the purchaser upon the execution and delivery of the lease hereinbefore referred to, and such transfer to be in form to be approved by the Department of Justice.

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

The Order in Council was approved of by His Excellency the Governor General in due course. A certified copy of the Order in Council was promptly communicated to Forgie, and while it is not clear by whom, yet it may be inferred that this would be done by the direction of the Minister of Railways.

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It might be convenient at this stage to state that long before Forgie made the written offer of purchase dated July 19, 1925, he had commenced negotiations with the Respondent, represented by the Minister of Public Works, respecting the leasing of certain other floors of the proposed building for the use of the Department of Customs and Excise, at Toronto, and apparently an understanding was reached between Forgie and The Minister of Public Works respecting the leasing of five floors in the proposed building. For reasons which Forgie explained, a general federal election followed by uncertainty as to the result, delays occurring in obtaining the passage of an Order in Council approving of a recommendation made by the Minister of Public Works in September, 1925, for the leasing of the five floors for the use of the Department of Customs and Excise. Eventually, on February 1, 1926, an Order in Council passed granting authority for the leasing of five floors by the Respondent for the Department of Customs and Excise, from Dominion Building Corporation Ltd., notwithstanding, as will later appear, the Respondent had previously thereto repudiated the alleged contract which is the subject matter of this proceeding. Forgie stated in evidence, and I have no doubt it is correct, that the Department of Railways and Canals was aware of Forgie's effort to lease the additional five floors to Customs and Excise, which no doubt would greatly facilitate the financial arrangements necessary for his building project. They were, however, separate matters, and the negotiations for the leasing of space to Customs and Excise is of importance, only in that it affords the explanation for Forgie's delay in completing the purchase of the Respondent's property on the date specified in his offer.

For the reason just stated, Forgie alleges he was not ready to complete the purchase on the date specified in his offer. The Canadian National Railways vacated the premises on the 19th day of September, 1925, in order that Forgie or his assigns might have possession of the same. Forgie, acting either for himself or the claimant, secured an extension of time until September 25, for the completion of the purchase, and other extensions were later applied for and granted, usually by the Deputy Minister of Railways in the form of a letter. On November 17, the time

for completion of the purchase was extended to the 30th day of December, 1925. This last extension was made by the Minister of Railways in a letter addressed by him to Forgie, and that letter is as follows:—

DEAR SIR,—

*Re Purchase of Crown Property (Imperial Bank Property, so called),
Corner of Yonge and King Streets, Toronto, Ont.*

I have your letter of the 16th instant, addressed to the Deputy Minister, applying for a further extension of time within which to receive possession of the property in question and to make payment of the balance of purchase price therefor and to perform and carry out on your part other details of the contract of purchase under your offer of purchase, dated July 27, 1925, and the acceptance thereof.

In reply, I am to advise you that a further extension of time, namely, from November 17, 1925, to December 30, 1925, is hereby given, but without prejudice on the part of His Majesty as to, and without waiver on the part of His Majesty of, any of His rights, reservations or remedies under and as provided for by the said contract should you fail to perform and carry out, within the hereby extended period, all the covenants and conditions, which on your part, under and as provided by the said contract, were to be performed and carried out within the original period thereunder provided.

On December 29, Forgie wrote requesting of the Deputy Minister of Railways a further extension of time until January 31, 1926, within which to complete the purchase. To this no answer was ever obtained and consequently no further extension was ever made. On February 3, Forgie received a certified copy of the Order in Council passed on February 1, 1926, authorizing the leasing of five floors from the Claimant for the use of Customs and Excise, and on the same day he wrote the Minister of Railways stating that he would be ready to complete the purchase price on or about February 10. That was the end of negotiations for a further extension of time; the Minister of Railways and Canals declined further to extend the time and treated the alleged contract as at an end. No notice was given either to Forgie, or the Claimant, requiring the completion of the purchase within any specified period. The deposit of \$25,000 made by Forgie on account of the purchase price was retained by the Respondent.

On the 5th day of August, 1925, Forgie assigned in writing to the Claimant, Dominion Building Corporation Ltd., all his right, title and interest in the contract alleged to be concluded with the Respondent by virtue of his offer and the acceptance made by the Order in Council, as

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already explained. The claimant company had been incorporated some time previous to the assignment. It was in existence on the date of the offer of purchase in question, and it is the Lessor referred to in the draft lease accompanying the offer of Forgie, and also in the draft lease annexed to the Order in Council when it was passed. While Forgie's offer stated that he was the owner of the Home Bank site so called, it transpires that he had only an option to purchase the same, and that in the name of another person. The draft lease referring to the Home Bank property states that it is "acquired or to be acquired by the Lessor from the Home Bank of Canada." The option of purchase of the Home Bank property Forgie caused to be assigned to the claimant company on or about the 5th day of August, 1925.

The Respondent, *inter alia*, contends that no contract was ever concluded between the parties and that the requirements of sec. 15 of the Department of Railways and Canals Act, R.S.C., 1906, Chap. 35, were not complied with. That statutory provision is as follows:—

No deed, contract, document or writing relating to any matter under the control or direction of the Minister shall be binding upon His Majesty unless it is signed by the Minister, or unless it is signed by the Deputy Minister, and countersigned by Secretary of the Department, etc.

The Respondent also contends that he had no notice of the assignment of the contract to the Claimant and did not consent to the same, and further that the contract could not be assigned so as to give the assignee a cause of action against the Crown. It was also contended that the extensions of time made for completing the purchase were unauthorized by the Respondent, and that if any agreement was concluded with Forgie, it was an express term of the agreement, and of its essence, that the sale and purchase thereunder should be finally completed on the 15th day of September, 1925, on which date the Respondent was ready to deliver possession of the property, but Forgie failed or was not ready or willing on that date or within a reasonable time thereafter, to complete the said agreement of purchase and sale.

Disregarding for the moment the question of the applicability of sec. 15 of the Department of Railways and Canals Act, the first point for decision is whether there was

in law a contract reached between the parties, that is to say, does the offer of purchase, the passage of the Order in Council and its communication to Forgie, and the other writings disclosed in the evidence, constitute an enforceable parol contract between the parties in respect of the sale and purchase of real property. I think it does. There was an offer and there was an acceptance, both in writing. An acceptance by Order in Council is the way the Crown would express its will and intention to accept the offer in question. The Governor in Council alone, under the provisions of the Public Lands Grants Act, Chap. 57, R.S.C., 1909, could authorize the alienation of the property in question. The Order in Council is in itself either an acceptance of the offer, an authorization for some one to make an acceptance, or it is an approval of an acceptance already made; I do not think it matters much in which of these ways one construes it. It must be looked at in a sensible way, and there is no occasion, I think, for hair splitting about the matter of the language of the Order in Council. The report of the Minister of Railways to the Committee of the Privy Council was not put in evidence, but the Order in Council in two places states that the offer had been accepted, and it may therefore be assumed that the Minister in his report to the Committee, which would be signed by the Minister, stated that the offer had been accepted subject to the approval of the Governor in Council. I am not sure that the acceptance of the Minister at this stage would have any effect, but at any rate it is established that he recommended an acceptance. I do not think it is a matter of much importance in a case of this kind, who was named to inform the offeror that his offer was accepted; or if the information was not conveyed in a formal way. I think the Order in Council by itself should be so construed as to constitute an acceptance, and particularly because a certified copy of the same was promptly communicated or delivered to Forgie, and that would only have been done by the Minister of Railways or some one of his officers under his direction. I think one is fully justified in holding that the delivery or communication of the Order in Council to Forgie was in the nature of a written notification of the acceptance of the offer. If it were thought necessary to show that the Order in Council re-

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quired a written acceptance by the Minister to implement the Order in Council, then the Minister's letter of November 17, 1925, is an acknowledgment of the acceptance of the offer and of the existence of a contract. According to the authorities, that, I think, would constitute an acceptance in writing even at that date. Further, the retention of the \$25,000 deposited with the offer was another way of expressing acceptance of the offer because it was a condition of the offer that the deposit was to be returned to Forgie, if the offer was not accepted by Order of His Excellency the Governor in Council. If the Order in Council may be construed as an acceptance, then the service of the same upon Forgie, together with the retention of the deposits makes that construction all the more reliant. Enactments which impose forms and solemnities in contracts on pain of invalidity are construed so as to be as little restrictive as possible of the natural liberty of contracting. *Maxwell on the Interpretation of Statutes*, p. 249. The essential elements of the contract must appear in writing, such as the subject matter, the consideration, the parties, but it has been held time and again that it is not necessary that they be contained in any formal document. The contract may be collected from a series of documents. I am of the opinion that in this case the written offer, the Order in Council, the delivery of a certified copy of the Order in Council to Forgie, the letter of the Minister stating that the offer had been made and accepted, the act of the retention of the deposit when related to the written offer and the Order in Council, constitute a sufficient memorandum or note of the contract in writing, and thus satisfies the Statute of Frauds. Moreover, the Statute of Frauds was not raised by the Crown in its defence.

Then there is the further question of the bearing of the Department of Railways and Canals Act on the contract as created between the parties. This case is, I think, distinguishable in fact from the line of cases governed by statutory limitations upon the right of a Minister of a Department to make informal contracts enforceable against the Crown. The sale of public lands, such as the lands in question, was not a matter pertaining to any Department of Government. Here, the facts in evidence establish that the subject matter in dispute was real property situated in

the city of Toronto, belonging to the Crown in the right of Canada, which the Crown was authorized and empowered, under the provisions of Sec. 4 of Chap. 57, R.S.C., 1906, to sell or lease. That section of the statute provides that the Governor in Council may authorize the sale or lease of any public lands which are not required for public purposes and for the sale or lease of which there is no other provision in the law. That was the statute in force at the time of the dealings between the parties which resulted in an offer by Forgie to purchase the land, and the alleged acceptance of the offer on behalf of the Crown; I think it is clear that it was under this statute the parties were purporting to act. A reference to the above-mentioned statute will show that in the case of a lease of such lands, section 5 of the statute empowered the Minister of the Department having the control and management of the lands to execute the lease on behalf of the Crown, but in that case only. In the case of a sale of public lands there is no method pointed out by which the sale would be formally effected. However, it would seem from the lack of special provision as to the form and method of sale in the Act in question that Parliament intended that the practice commonly prevailing in the English-speaking provinces of Canada before Confederation, should be continued under the Act. That, I think, is a fair construction where no other method is found in the statute. The omission to provide for the execution of an instrument by any Minister *in the case of a sale as distinguished from the case of a lease* makes such a construction tenable. Then again, section 2 of the Statute provides that a grant of land means and includes Letters Patent under the Great Seal of Canada. Section 3 mentions the term "grant" as applied to the disposition of public lands in the province of Ontario and other provinces therein mentioned. Had a patent issued in this case, according to the draft copy of patent introduced in evidence, it would not have been formally executed by the Minister of Railways. It is probably true, in a limited sense, that the property in question was under the control and direction of the Minister of Railways. I have no doubt that so long as the Canadian National Railways were in use and occupation of the property the Minister of Railways regarded the control and administration

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of the property as a Departmental affair. When it came to a sale of the property I should say it was not a matter under the control or direction of the Department of Railways and Canals, and the Minister was merely an avenue of approach to the Crown, which alone could alienate the public property. I am therefore of the opinion, upon this ground alone, that section 15 of the Department of Railways and Canals Act has no bearing upon the case.

Now, was compliance with Sec. 15, Chap. 35, R.S.C., 1906, necessary to constitute an enforceable contract. With reference to the liability of the Crown under a parol contract in connection with a purely Departmental matter, some light is thrown upon it by the language of Taschereau J., in the case of *The Queen v. Henderson* (1), where he is dealing with the very section of the Railway Act which is invoked in the present case. He says:—

We are of opinion with the Exchequer Court that this enactment has no application. The word "contract" therein means a written contract. . . . There is no statute here imperatively requiring that all contracts by the Crown should be evidenced by a writing, and in the absence of such a special statute the Crown cannot refuse to pay for materials bought by its officers in the performance of their duties and delivered to them for public works. If Parliament had intended that no oral contract should be binding on the Crown, it would have been so easy to say so in unambiguous terms; that we should not, by a forced construction of language in the section in question, make it say what it does not unambiguously say. . . . If this construction of the Act is contrary to the intentions of Parliament, the remedy lies in Parliament's own hands.

It is true this was said of a contract for the sale of goods, but it may be logically applied to a contract for the sale of land. Tracing the origin of this section back to 1867, when it first appeared in the Public Works Act of that year, the view that it only applies to departmental contracts and not to sales of lands by the Crown, receives very strong support. Sec. 7 of Chap. 12 of the Statutes of Canada, 1867, was as follows:—

No deeds, contracts, documents or writing shall be deemed to be binding upon the Department or shall be held to be the acts of the Minister unless signed by him or his deputy, and countersigned by the secretary.

It is my opinion that "contract" in Sec. 15, R.S.C., 1906, Chap. 35, means a written contract, that is to say, when a contract in writing is made, or is required by law to be made in writing, it can only be signed in the case of the

(1) (1898) 28 S.C.R. 425 at p. 432.

Department of Railways and Canals, by the person or persons therein mentioned. That provision of the statute does not require that every contract must be reduced to a formal written contract, signed by the persons mentioned in the statute. "Control or direction of the Minister" as used in Sec. 15 of the Department of Railways and Canals Act, must have been intended to refer to matters over which the Minister was given control by the statute creating his Department or by some special Act. The Act provides that the Minister shall have the management, charge and direction of all Government railways, and all properties appertaining or incident to such railways. It was not shown that the property in question appertained or was incident to a Government railway, or that the Government railways were under the control or direction of the Minister of Railways at the times material here. If the property in question was transferred to the Canadian National Railways under sec. 19 of the Canadian National Railways Act,—and that was not shown—it would be difficult to hold in that case that the lands were then under the control and direction of the Minister. The property may have been under the direction of the Minister for certain purposes, but not by virtue of the Department of Railways and Canals Act or sec. 15 thereof, or for the purposes or in the sense there contemplated. Consequently I do not think that section 15 of the Department of Railways and Canals Act is applicable to the facts of this case, and I do not think it was necessary that the Minister of Railways enter into a formal written contract with Forgie subsequent to the passage of the Order in Council. A departmental statute requiring a writing signed by the Minister, is a provision of administrative law, and does not bind the Crown per se in alienating its lands.

Specific performance cannot be decreed against the Crown but a suit for damages in respect of breach of contract is as much an action upon the contract as a suit for performance. This, I think, is well settled law. In *Windsor and Annapolis Railway v. The Queen* (1), it was said by Lord Watson:—

Their Lordships are of opinion that it must now be regarded as settled law that, whenever a valid contract has been made between the

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Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown. Sect. 8 of the Canadian Petition of Right Act (39 Vict., c. 27, Dom. Parl.) contemplates that damages may be recoverable from the Crown by means of such a petition; and the reasons assigned by Lord Blackburn for the decision of the Court of Queen's Bench in *Thomas v. The Queen* appear to their Lordships necessarily to lead to the conclusion that damages arising from breach of contract are so recoverable. A suit for damages, in respect of the violation of contract, is as much an action upon the contract as a suit for performance it is the only available means of enforcing the contract in cases where, through the act or omission of one of the contracting parties, specific performance has become impossible.

The respondent contends that neither Forgie nor the Claimant did on or before the 15th day of September, 1925, or within a reasonable time thereafter, perform the conditions of the agreement, that is to say, did not complete the purchase on or before the date mentioned in the alleged agreement or within a reasonable time thereafter. To this the claimant answers that time was not in equity of the essence of the agreement and that before repudiation of the agreement, it was entitled to a notice limiting a time, a reasonable time, at the expiration of which the Respondent would treat the contract as at an end. The law upon this point is very fully discussed in *Stickney v. Keeble* (1). As stated by Parker L.J., courts of law in a contract for the sale and purchase of real estate, have always held the parties to their bargain in respect of time, with the result that if the vendor was unable to deliver a title by the day fixed for completion, the purchaser could treat the contract as at an end and recover with interest any deposit made. But in such cases, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed a specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. Parker, L.J., points out that this is all that is meant by the maxim that in equity the time fixed for completion is not of the essence of the contract, and it had no application in cases in which the stipulation as to time could not be disregarded without injustice to the parties. In cases when the time fixed

(1) (1915) App. Cases, p. 386.

for completion is not in equity of the essence of the contract, the conduct of the party seeking equitable relief, before and after the date fixed for completion, might disentitle him to relief, and consequently that conduct had to be considered. In *Stickney v. Keeble*, supra, Parmoor, L.J., states that Joyce J., the trial Judge, accepted a passage from *Sugden on Vendors* (14th Edition, p. 268) as correctly expressing the general law: "Where time is not made of the essence of the contract by the contract itself, although a day for performance is named, of course neither party can strictly make it so after the contract; but if either party is guilty of delay a distinct written notice by the other, that he will consider the contract at an end if it be not completed within a reasonable time to be named, would be treated in equity as binding on the party to whom it is given." As Lord Parmoor stated, the difficulty is in the application of the law to the facts of a particular case.

Now, is this not a case, where in equity, time should not be considered as of the essence of the contract? Forgie undertook to promote an extensive building project involving a large capital expenditure which the Canadian National Railways was apparently anxious to see consummated. The land in question was acquired by the Respondent primarily for the use of the railway, and the railway had at one time, according to Forgie, in contemplation the erection of a new building itself, but, for some reason, it did not or could not proceed with the project. It is quite evident that the railway and the Respondent were quite willing that some one should undertake the project, providing the railway should have the first choice for accommodation in the building proposed to be erected on the combined sites. On September 19, 1925, the Canadian National Railways vacated the premises and they remained out of the premises until long after the contract was repudiated by the Respondent, but it has not been shown that the railway even once protested against the delay in completing the purchase, and neither did the Respondent ever protest against the delays as occasioning any damage or detriment to the railway. The fact that the premises were vacated and that no remonstrance was made by anybody against the delay in completing the purchase, rather

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strengthen the equities in favour of the claimant than otherwise. The Respondent granted the extensions of time within which to complete the purchase up to December 31, 1925, without protest. The grounds given by Forgie for the delay seem not unreasonable. He was dealing with the Respondent through two different departments of government for long leases of certain floor spaces in the proposed building, and one can readily see that with such leases authorized, his financial operations incident to the building scheme would be materially assisted. Forgie says that the Department of Railways was aware of his negotiations with the Department of Public Works for the leasing of certain floors for the use of Customs and Excise. He received several extensions without any difficulty and consequently was led to believe that time was not regarded as of the essence of the contract. The parties were not dealing at arms length but seemed willing to accommodate one another. The Respondent apparently did not regard the delay as working an injustice against him. Upon the expiration of the last extension the Respondent refused to grant a further extension without any previous intimation that the last extension would be the final one, and no notice was given Forgie after or just before the expiration of the last extension, limiting a time at the expiration of which the Respondent would treat the contract as at an end. In the meanwhile at a considerable cost the plans of the proposed building were being prepared, expense had been incurred in connection with a proposed bond issue in connection with the proposed building, \$60,000 had been paid on account of the purchase price of the Home Bank property which was ultimately forfeited to the owners of the property when an end was made of the contract, and a contract had been entered into with Anglin, Norcross Ltd., for the construction of the building in the sum of \$1,750,000. And besides, the terms of the contract did not make time the essence of the contract. If there was a contract, it does not matter whether the Minister of Railways had authority to make the extensions or whether extensions were made at all, the fact is that neither Forgie nor his assignee was required to complete the contract at any time up to December 31, 1925, and were led to believe that time was not regarded as of the essence of the contract. I am

of the opinion that this is a case, where in equity, the Claimant or Forgie, was entitled to a notice, before the Respondent sought to put an end to the contract, that the same would be treated as at an end if not completed within a limited time.

Then as to the question of the assignability of the contract. The offer stated that if the same was accepted by Order of His Excellency the Governor General the same should constitute a valid and binding contract and would enure to the benefit of Forgie and his assigns, and also to the benefit of His Majesty and His Assigns. If I am correct in holding that there was a contract, then, I think, the contract was assignable and that its assignability at the time of the making was acquiesced in by the Respondent. In view of all the facts of the case, the provision contained in the offer that the contract would enure to the benefit of the parties and their assigns, was quite to be expected. If it was in the mind of the Respondent to assign the benefits of the contract to the Canadian National Railways, then the respondent should have the right to assign. That Forgie should have the right to assign the alleged contract is so obvious that it does not call for comment. But I think I may properly go further, and hold that it is an express condition of the contract, deliberately made, that the same was assignable by Forgie. When one considers the nature of the contract, the heavy obligations which Forgie was assuming, and considering that in the draft lease which was a part of the offer and acceptance the Dominion Building Corporation is named as the Lessor, I think I am warranted in holding that from the very start, it was understood between the parties, and that it is sufficiently expressed in documents forming the contract, that the contract was to be assigned by Forgie to the corporation named in the lease, the claimant herein. What else could have been in the minds of the parties? After the property had been alienated the Respondent had no further interest in the property and would only be a Lessee for the Canadian National Railways of certain space in a building owned by the Dominion Building Corporation Ltd. The condition that the offer if accepted, was to enure to the benefit of the parties and their assigns was not made for any sinister purpose, it was a thing which common sense and reason

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would suggest being done, and a point upon which all concerned would be expected to be in agreement. That an assignment to the Dominion Building Corporation Ltd., would be made was, I think, clearly in the mind of all the parties interested in the agreement, and if an assignment was made, it was because it was a condition of the agreement, and in which the Respondent was an acquiescing party. The recognition of the claimant in the Reference is not without its significance. At the time the Reference was made the question was entirely as to whether the Claimant was entitled to compensation, not whether it was entitled to make a claim for compensation. Then again, when later Forgie requested that the patent be made directly to the Dominion Building Corporation so as to avoid a second transfer no objection was made, except that the Department of Railways advised Forgie that he should confer with the Department of Justice in respect of the matter. Upon the question of the assignability of the contract, the parties appear to have been acting as if each understood that the building was to be constructed and owned by the claimant company, and that must mean that the assignment of the contract by Forgie was always within the contemplation of the parties. I think this is made sufficiently clear by the written documents which go to make up the contract.

I should have earlier referred to another aspect of this case. While I am persuaded that the facts in evidence in this case establish a parol contract between the Crown and the claimant, and a breach thereof giving rise to damages, the case of the claimant for relief in this Court might also be rested on the principle of part performance. The element of fact justifying the application of that principle inheres in the payment by Forgie of the sum of \$60,000 on account of the purchase of the property of the Home Bank, and the consequent forfeiture of that sum to the owners of the Home Bank occasioned by the cancellation by the Crown of the contract in question here. Upon this point so much depends upon the facts, that it is necessary to refer to certain circumstances which probably have been already mentioned. While the property in question was in the end acquired by purchase from the owners, yet that was only after proceedings had been started by the Crown under

the Expropriation Act to acquire the property, it appears for the purposes of the Canadian National Railways. The needs of the railway so far as one can gather from the evidence, was the only consideration in acquiring the property. Following this, sometime after the Respondent acquired the property and the Canadian National Railways entered into occupancy of it, Forgie apparently induced the chief executive officers of the Canadian National Railways to consider the matter of the acquisition of the adjoining Home Bank property and the erection on the combined properties of a large office building. The idea of combining the properties for the purpose of erecting thereon a single structure must have possessed some merit, because the railway authorities looked favourably upon the suggestion and directed Forgie, as did the Deputy Minister of Railways, to negotiate with the Home Bank for the purchase of its property, but the price named by the owners seemed excessive, and the suggestion proved fruitless. Then the Canadian National Railways decided, so Forgie testifies, not to construct a new building upon the property acquired from the Imperial Bank. Technically, the railway may have had no authority to make a decision one way or the other, but they were a factor in having the property purchased, and they naturally would also be a factor in determining the future disposition of the property. Then Forgie enquired of the Canadian National Railways if it would not sell the property in question, and he additionally suggested that he would acquire the Home Bank property, and upon both sites would erect a large office building providing the railway would lease whatever space it required in the new building, and this offer Forgie put into writing in May, 1925. Of course, the Respondent would not sell its property, and the Canadian National Railways would not approve of a sale of the property unless it was to get what it required in the way of office facilities equivalent to if not better than it had in the building then on the property. The Canadian National Railways was intimately associated with all the negotiations leading up to the final offer of Forgie. That this should be so is not difficult to understand, in fact it was quite business like. Reviewing the whole course of the negotiations from the beginning to the end I cannot see that any other con-

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clusion can be reached, but that the Canadian National Railways and the Respondent were willing promoters of the idea to have some one promote the construction of a large and attractive office building on the combined properties at the intersection of Yonge and King streets, Toronto, wherein the needs of the Canadian National Railways in the city of Toronto might be more amply and satisfactorily supplied. Now it must have been known by the Respondent and the Canadian National Railways that Forgie did not own the Home Bank property, and they were not deceived, in my opinion, by anything in the offer which would seem to indicate that he did own it. He was merely agreeing, as a part of the whole scheme, to acquire the Home Bank property. It would be unreasonable to expect him to acquire the Home Bank property prior to his purchasing the Respondent's property. The building project was based upon the purchase of both properties as the site for the new building, and this no doubt, because the combined site would accommodate a more imposing structure than if it were limited to the Respondent's property; this prospect was no doubt pleasing to the railway company, and the Respondent by its conduct expressed a willing concurrence. I construe the whole thing as meaning this: The Respondent was willing to sell the property in question, if Forgie would agree to purchase the Home Bank property and erect on the combined properties a certain type of building the plans of which were subject to the approval of the Canadian National Railways; the leasing of the first four floors by the Canadian National Railways was a matter each desired and was therefore mutually agreed upon. If it was not the sense of the agreement that Forgie should acquire the Home Bank property, it is difficult to understand why the Respondent would agree to sell its property so early after a virtual expropriation of it from private owners. Forgie, or the claimant paid altogether \$60,000 on account of the purchase price of the Home Bank property up to the time when the contract ended, and the question for decision is whether or not this constitutes part performance of the contract. I think it does. The rule as to part performance of a contract taking it out of the Statute of Frauds is well laid down in *McManus v. Cooke*

(1) by Kay, J.: "The doctrine of part performance applied to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing." This is in contra-distinction to payments made on account of the purchase price which does not of itself take a parol contract for the purchase of real property out of the Statute of Frauds. It is true the courts will not decree specific performance against the Crown, but that is only one reason why equity should extend its arm by applying the doctrine of part performance to an informal contract where the Crown is a party. To take a case out of the Statute, the acts of part performance must be unequivocally, and in their own nature, referable to some such contract as is alleged, that is, the acts or circumstances relied upon as part performance must be such that the existence of an agreement as alleged, is the only reasonable inference therefrom. The payments amounting to \$60,000 on account of the purchase of the Home Bank property was, I think, in furtherance of the contract, and it was only by reason of the contract that the payments were made. The authorities clearly establish that payments of the nature made by Forgie, or by the claimant, in connection with the Home Bank property, would be held as part performance to take a parol contract out of the Statute of Frauds, and by the same reasoning it should have the like effect in respect to the requirements of Sec. 15 of the Department of Railways and Canals Act.

For the reasons stated I am of the opinion that the Claimant is entitled to damages, to be ascertained, for breach of the contract. For the present I reserve the matter of the assessment of damages. I do so because I would hope the parties might reach an agreement between themselves as to the amount of damages, and also for the reason that I wish yet to consider whether or not it is necessary to hear further evidence upon the question of damages.

A motion was made at the beginning of the trial, by the Claimant, for an Order permitting James Forgie to be added as a party to the proceedings, so that the claim for damages under the contract might be made in the name of the assignor, as well as in the name of the Claimant. It would also follow that any possible right or obligation

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between Forgie and the Respondent would be preserved. I know of no reason why this should not be done, it was a course always allowed at common law, and while in my view of the case it may not be necessary, yet I grant the application to do so. I do not think the Reference is to be construed so narrowly as to prevent this being done.

The claimant will have its costs of the Reference.

Judgment accordingly.

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Feb. 23.
May 27.

BETWEEN:

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

AND

JERRY PETITE, of the City of Halifax DEFENDANT.

Collision—Jurisdiction—Exchequer Court Act, R.S.C. (1927) c. 34, s. 30, ss. (d)—Non-Profit Earning Ship—Damages

The action is one for damages resulting from a collision between plaintiff's boat and that of defendant. The Court found that the collision was due to the negligence of the defendant.

Held, that the Exchequer Court has original jurisdiction in such a case by virtue of ss. (d) of s. 30 of c. 34, R.S.C., 1927 (The Exchequer Court Act).

2. That even though plaintiff's vessel is a non-profit earning ship plaintiff is entitled to recover from defendant damages based on maintenance, overhead and depreciation costs, for the time the ship was actually absent from her duties as a result of the collision, in addition to the actual cost of repairs.

INFORMATION of the Attorney General of Canada, claiming damages against the defendant for loss arising from a collision between plaintiff's boat and that of the defendant.

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

A. C. Dobell, K.C., and J. C. Fremont, K.C., for the Plaintiff.

D. MacInnes for the Defendant.

The facts are stated in the reasons for judgment.

ANGERS J. now (May 27, 1933) delivered the following judgment:

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By his action, the plaintiff claims from the defendant the sum of \$3,343, as damages resulting from the collision of the Custom cruiser *Baroff*, the property of the plaintiff, with the vessel *Emile-Louis*, owned by the defendant, on the 8th day of May, 1931, in the Gulf of St. Lawrence, at a distance varying between nine and fifteen miles, according to the divers testimonies, off Mont Louis, on the Gaspé coast. The exact distance is of no importance for the determination of the issues.

That His Majesty the King, represented by the Minister of National Revenue, was, on the day of the accident, the owner of the *Baroff*, is admitted in the statement of defence (parag. 1); moreover, the fact appears from the Registrar's certificate of ownership filed as exhibit 1.

In his statement of defence, the defendant says that he does not admit that the *Emile-Louis* was owned by him on the 8th day of May, 1931; the fact, however, is established by the Registrar's certificate of ownership filed as exhibit 2.

The certificate exhibit 1 shows that the *Baroff* was registered at the Port of Saint John, N.B., and the certificate exhibit 2 shows that the *Emile-Louis* was registered at the port of St. John's, Newfoundland.

[Here the learned judge referred to the pleadings and continued:—]

Apart from the question of want of jurisdiction, which counsel for defendant at trial did not press and of which I shall dispose forthwith, the whole case practically narrows down to a question of facts: the first question to determine is whether the *Baroff* ran into and struck the *Emile-Louis* on her port side or whether the *Emile-Louis* crossed the bow of the *Baroff* and struck her on the stem; if I reach the conclusion that the *Emile-Louis* was responsible for the accident, there will remain for me to appraise the amount of the damages.

The evidence, as is often the case in similar matters, is conflicting; the witnesses for the Crown and the witnesses for the defendant disagree on a few points of minor importance but principally on the main issue, viz., the manner in which the collision occurred.

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In his statement of defence the defendant raises the question of lack of jurisdiction. At trial counsel for defendant did not urge this ground of defence. In the circumstances I do not think it is necessary for me to deal with the matter at great length. I said at the hearing that I considered the objection to the jurisdiction unfounded and, after examining the question, I have not changed my opinion. I think that, under subsection (d) of section 30 of the Exchequer Court Act (R.S.C., 1927, chap. 34), I have jurisdiction to hear this case. Besides the Crown has the privilege of choosing its own forum: Chitty on Prerogatives of the Crown, p. 244; *Farwell v. The Queen* (1); *Attorney-General v. Walker* (2).

[Here the learned Judge considered the evidence adduced at trial and then continued:—]

The weight of the evidence is, in my opinion, on the side of plaintiff.

Another reason which leads me to accept the evidence adduced by the plaintiff's witnesses in preference to the evidence given by the defendant's witnesses is that on board the *Baroff* they kept a log in which the entries were made regularly, in fact daily (dep. G. Roberts, p. 15; *Ascah*, p. 31), while there was no log on the *Emile-Louis* (dep. Vallis, p. 111). As a result of the absence of a log on the *Emile-Louis*, the engineer Vallis was unable to say if his vessel might have steered a little bit to port: dep. p. 111:

1227. Q. Is it not possible that the *Emile-Louis* might have steered a little bit to port?—A. I cannot say, I did not know at the time.

1230. Q. You kept no log on board as far as the engine is concerned, a log that would show the movements of your engine?—A. No.

1231. Q. So that you do not know for sure whether the *Emile-Louis* might have gone a little bit to port?—A. No, sir, I could not say. She was generally steady.

The log evidently does not point out the cause of the accident, but, if properly and regularly kept, as it seems to have been kept on the *Baroff*, it undoubtedly serves to help the witness memorize the circumstances surrounding the accident; in the present case it indicates the movements, speed and course of the *Baroff* from the time she overtook the *Emile-Louis* until after the collision and it

(1) (1893) 22 S.C.R. 553, at 561,
 in fine, and 562.

(2) (1877) 25 Grant's Ch. Rep.,
 233, at 237; 3 Ont. A.R. 195.

flatly contradicts the statements of two of defendant's witnesses, Vallis and Miles, when they swear that the *Baroff* had not slowed down her speed when she came into contact with the *Emile-Louis*.

In cases of collision, where the evidence is conflicting, the Court should look into the probabilities of the two versions which are expounded and draw its own conclusion as to which is the more reasonable and likely: *The Mary Stuart* (1); *The Ailsa* (2); *Coy v. The Ship D. J. Purdy* (3), confirmed by the Supreme Court on April 6, 1920; *Vancouver Orient Export Co. v. The Ship Anglo-Peruvian* (4).

I cannot conceive that a customs cruiser, like the *Baroff*, in charge of a duly qualified and experienced master, accustomed to chasing and overtaking vessels engaged in the smuggling business would, deliberately or otherwise, run into a smaller and slower vessel, even if her officers wanted to board her, which was not the case in the present instance. The *Baroff* was a much faster boat than the *Emile-Louis*; her maximum speed was at least eleven knots whilst the *Emile-Louis* could not exceed $7\frac{1}{2}$ knots; it was impossible for the *Emile-Louis* to escape from the *Baroff*, had she wished to do so.

Gordon Roberts, the master of the *Baroff*, approached the *Emile-Louis* from behind with the object of getting her port of registry; as the name was not visible, the *Baroff* came along the *Emile-Louis* on her port side and hailed someone on board asking what was the port of registry. The *Baroff* was at a distance of between 40 and 50 feet from the *Emile-Louis*, which was, in my opinion, a safe distance had the latter kept her course.

Mention was made of the likelihood of the *Emile-Louis* trying to ram the *Baroff*. I do not believe that the master of the *Emile-Louis* ever intended to do that. What happened, in my opinion, is this: either the *Emile-Louis* made a false manoeuvre and turned to port instead of starboard or, seeing the *Baroff* at a standstill and miscalculating the distance, she tried to pass in front of her to go off shore. In fact if there had been 2 or 3 feet more the *Emile-Louis* would have passed safely and no collision would have occurred.

(1) (1844) 2 Rob., 244.

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

(3) (1919) 19 Ex. C.R., 212.

(4) (1931) Ex. C.R., 127.

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It is quite possible, as was suggested by counsel for plaintiff, that the *Emile-Louis* was afraid of being squeezed into territorial waters, which would explain her anxiety of going off shore.

There were on the *Baroff* one port and two starboard drive engines; it was urged on behalf of defendant that the fact of putting these three engines full speed astern, the port one first, then the middle one and lastly the starboard one, had the effect of sending the bow of the *Baroff* to starboard. The evidence on this point is contradictory and is far from being conclusive (see dep. G. Roberts, p. 23, and Petite, p. 98) and the fact that the *Baroff* was practically at a standstill when the collision occurred induces me to believe that the cause of the accident does not lie there.

It was argued with some strength that the *Baroff* was either an overtaking vessel, or a crossing vessel and that in the first case she was subject to article 24 of the Regulations for preventing collisions at sea and in the latter case to article 19 of the said rules.

Article 19 reads as follows:

When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

In the light of the evidence the *Baroff* was obviously not a crossing vessel.

The first paragraph of article 24, which is the only one that could possibly apply in the present case, reads as follows:

Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

This article applies to vessels on courses passing one another; I doubt very much whether the *Baroff* was an overtaking vessel within the meaning of article 24. However, taking for granted that she was, I do not think that she transgressed in any way the requirements of article 24. It was the *Emile-Louis* who veered to port and as a consequence struck the stem of the *Baroff*.

As regards article 23, upon which the defendant also relied and which decrees that a steam vessel, directed by the rules to keep out of the way of another vessel, shall, on approaching her, if necessary, slacken her speed or stop

or reverse, the proof shows abundantly that not only the *Baroff* did not violate its stipulations, but that, on the contrary, she literally complied with them: she slackened her speed, she stopped and she reversed. Another point raised by counsel for defendant is that the *Baroff* should have manoeuvred to go to port and that she could have thus averted the collision. I cannot agree with this proposition; the *Baroff* had practically come to a stop when the *Emile-Louis* suddenly turned to port and it was then too late, nay even impossible for the *Baroff* to execute the manoeuvre to which counsel for defendant pretends she should have had recourse. In reducing her speed when she approached the *Emile-Louis*, stopping her engines when parallel with her and putting her engines full speed astern when she noticed the *Emile-Louis* coming towards her, the *Baroff*, I think, adopted the best and only manoeuvre at her disposition, in the circumstances.

For all these reasons I have reached the conclusion that the *Emile-Louis* must be held responsible for the accident and pay the losses or damages resulting therefrom.

The evidence shows that the repairs to the *Baroff* cost \$593: see exhibits 6 and 7; also depositions Davie, p. 44, and Stephen, p. 66. The plaintiff is entitled to recover this amount from the defendant.

There remains the claim for \$2,750 for the deprivation of the use of the *Baroff* during eleven days, representing a sum of \$250 per day.

The proof of record discloses that the *Baroff* was absent from her duties for a period of eleven days as a direct consequence of the accident. Repairs other than those occasioned by the collision were made to the vessel while she was lying in the dry dock, the cost whereof is not claimed; these additional repairs were made simultaneously with those rendered necessary by the accident and did not in any way keep the *Baroff* out of service any longer than if they had not been made. The question for me is to determine if the plaintiff is entitled to damages for the temporary loss of the use of his customs cruiser and, if so, fix the amount of such damages. It is established, and practically admitted that the *Baroff* was not a profit earning vessel. Previous to the decision of the House of Lords, reversing the judgment of the Court of Appeal in England,

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in re *The Greta Holme* (1), no damage was allowed for the deprivation of the use of a vessel, if there was no pecuniary loss.

In the case of *The Greta Holme* (*ubi supra*) it was held that the owners of a dredge (a harbour board) "could recover damages for the loss of the use of the dredger while it was under repair, though they could not prove any actual pecuniary loss, and that such damages were not too remote."

The same principle was adopted by the Court of Appeal in re *The Mediana* (2) and the judgment of the Court of Appeal was affirmed by the House of Lords (3).

In the case of *The Mediana*, the vessel which was damaged, the *Comet*, was a lightship used for the purpose of lighting the approaches to the Mersey river; the head note sets forth clearly and concisely the facts as well as the decision; it reads as follows:

Whenever by a wrongful act another person is deprived of his property, a claim for damages may be sustained, and such damages are not merely nominal, though no actual pecuniary loss may be proved.

The Mersey Docks and Harbour Board are charged by statute with the duty of lighting the approaches to the Mersey and maintain four lightships in constant use, and two in reserve to take the places of the others when they need repair or in other emergencies. One of the lightships, the C., was damaged by collision with the M., a steamship belonging to the appellants. The collision was owing to the negligence of those in charge of the M. The O., one of the reserve lightships, took the place of the C. while her damages were repaired. The owners of the M. paid the cost of the repairs and all other out of pocket expenses, but the board made a claim for the loss of the use of the lightship C. while she was under repair, or for the hire of the substitute. It was admitted that the O. would not have been employed if she had not been acting as substitute for the C.

Held (affirming the judgment of the court below), that they were entitled to recover substantial damages for the loss of the use of the C.

The Greta Holme (77 L.T. Rep. 231; 8 Asp. Mar. Law Cas. 317; (1897) A.C. 596) followed.

At page 42 of the report, the Lord Chancellor (Lord Halsbury) says:

That decision (*in re The Greta Holme, ubi supra*) has a much wider application than has been assigned to it by the appellants' counsel, and Lord Herschell in terms stated the proposition, and I may say that I myself intended to lay it down, that where by a man's wrongful act something belonging to another was injured or taken away, a claim for damages may be sustained, and that the damages in such a case are not

(1) (1897) 8 Aspinnall's Rep., 317. (2) (1899) 8 Aspinnall's Rep., 493.

(3) (1900) 9 Aspinnall's Rep., 41.

merely nominal. Damages are not necessarily nominal because they are small in amount. The term "nominal damages" is a technical one which negatives any real damage, and means nothing more than that a legal right has been infringed in respect to which a man is entitled to judgment. But the term "nominal damages" does not mean small damages. The whole region of inquiry into damages is one of extreme difficulty, and you cannot lay down any fixed principle to a jury as to the amount of compensation which ought to be given. Take the most familiar and ordinary case. How is anyone to measure pain and suffering caused by an accident in terms of moneys counted? By a manly mind pain and suffering, when passed, are soon forgotten, but the law recognizes that as a topic under which damages may be given. In this particular case the broad proposition is that the respondents were deprived of their vessel. I purposely do not use the words the use of their vessel. For the wrongdoer has no right to inquire what or whether any use would have been made of the vessel of which the respondents were deprived.

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The broad principle applicable to this appeal is quite independent of the particular use which the respondents would make of the *Comet*. It is wholly different from a case of special damage, where you have to ascertain the specific loss of profit or other advantage which would otherwise have accrued. Where special damage is alleged you must show precisely the nature and extent of the injury sustained, and the person liable must have an opportunity of inquiring into the details before the case comes into court. In the case, however, of general damage no such principle applies, and the jury have only to give a proper equivalent for the unlawful withdrawal of the particular subject-matter. That broad principle comprehends this and many other cases, and the jury may assess damages which are not nominal damages though the amount may be trifling.

In the case of *The Marpessa* (1), in which a sand dredger was concerned, it was held by the House of Lords, affirming a judgment of the Court of Appeal:

That, no vessel having been hired to take the place of the disabled dredger, the damages were rightly calculated on the daily cost of maintaining and working the dredger, with an allowance for depreciation, but with no allowance for owners' profit.

In re *The Astrakhan* (2), in which the same principle was applied, the facts were briefly the following: a Danish warship came into collision with a British vessel and the latter was found to blame; had there been no collision the warship would have been docked and overhauled and would not have been commissioned for a period of three months; before the expiry of three months, the damages caused by the collision had been repaired and the warship was ready to be commissioned on the day she would have been, if no accident had happened; the Danish Government claimed

(1) (1907) 10 Aspinall's Rep., 464. (2) (1910) 11 Aspinall's Rep., 390.

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£1,500 for the loss of the use of the vessel and an additional sum for repairs to the bottom of the vessel, rendered necessary by one of the blocks in the dry dock being upset. Regarding the claim for the loss of the use of the vessel, it was held by the Probate, Divorce and Admiralty Division of the High Court of Justice, reversing the registrar's decision, "that the Danish Government were entitled to recover damages for the deprivation of the use of the vessel for the period during which she could have been repaired".

Bargrave Deane, J., at page 393, says:

If you deprive the owner of the use of a thing, it is not necessary to show that he would have used it, but if you put it out of the power of the owner to use it, then, according to Lord Halsbury's reasoning in *The Mediana*, I think you have to pay damages for that.

See also: *Clyde Bank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda* (1).

In this case the Spanish Government had contracted with the appellant company for the building of four torpedo boats, the delivery whereof was to be made within varying periods from the date of the contract. A penalty at the rate of £500 per week for each vessel for late delivery was stipulated in the contract. The boats having been delivered several months after the stipulated period and the price of the boats having been paid in full, the Spanish Government claimed from the company payment of £500. per week for late delivery, in accordance with the terms of the contract. The company appellant claimed that the sum of £500 per week for late delivery did not constitute liquidated damages pre-estimated by the parties as representing the loss which might be incurred through late delivery, but a penalty in the strict sense of the word and recoverable only to the extent to which actual loss was established. The House of Lords, affirming the decision of the Court below, held "that the sum of £500 a week was to be regarded as liquidated damages and not as a penalty and that the Spanish Government were entitled to recover".

Referring to the question of damages, the Lord Chancellor (the Earl of Halsbury) said (p. 12):

Then the other learned counsel suggests that you cannot have damages of this character, because really in the case of a warship it has no

value at all. That is a strange and somewhat bold assertion. If it was an ordinary commercial vessel capable of being used for obtaining profits, I suppose there would not be very much difficulty in finding out what the ordinary use of a vessel of this size and capacity and so forth would be, what would be the hire of such a vessel, and what would therefore be the equivalent in money of not obtaining the use of that vessel according to the agreement during the period which had elapsed between the time of proper delivery and the time at which it was delivered in fact. But, says the learned counsel, you cannot apply that principle to the case of a warship because a warship does not earn money. It is certainly a somewhat bold contention. I should have thought that the fact that a warship is a warship, her very existence as a warship capable of use for such and such a time, would prove the fact of damage if the party was deprived of it, although the actual amount to be earned by it, and in that sense to be obtained by the payment of the price for it, might not be very easily ascertained—not so easily ascertained as if the vessel were used for commercial purposes and where its hire as a commercial vessel is ascertainable in money. But, my Lords, is that a reason for saying that you are not to have damages at all? It seems to me it is hopeless to make such a contention.

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In re *The Chekiang* (1), another case in which a warship was involved, it was held by the House of Lords, reversing the decision of the Court of Appeal (2):

(1) That inasmuch as it was found in fact that there was no necessity to make the refit, the Admiralty were entitled to take advantage of the vessel being in dry dock without being called on to contribute to the expense of docking or to forego the payments in full to which they were entitled as for the loss of the use of the vessel for the period of detention which had been properly fixed at twenty days for the collision during which the vessel was rendered unfit for her active service.

Ruabon Steamship Company v. London Assurance (9 Asp. Mar. Law Cas. 2; 81 L.T. Rep. 585; (1900) A.C. 6) followed.

(2) That the registrar had not proceeded upon a wrong principle in an assessment of the damages, which was based on a calculation of a percentage of the actual value of the ship, with an allowance for depreciation.

Lord Sumner (at pp. 77 et seq. of the report) deals with the two questions in a very able and exhaustive manner.

See Roscoe, *Measure of Damages in Maritime Collisions*, 3rd ed., pp. 103 et seq.

In accordance with the decisions hereinabove referred to, I think that the plaintiff ought to be allowed the cost of maintenance of the *Baroff* during the time she was idle and an additional sum for overhead and depreciation. The plaintiff is claiming \$250 a day. Stephen, a technical officer for the Department of National Revenue, in charge of Preventive Service Ships, heard as witness on behalf

(1) (1926) 17 Aspinall's Rep., 74. (2) (1925) 16 Aspinall's Rep., 495.
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of plaintiff, estimated at \$117 per day the maintenance, overhead and depreciation (dep. p. 69):

860. Q. I want to know what additional sum you would add to the daily figure of \$117 which you have given us. You gave us a total figure of \$29,985 for the year, \$117 per day, for a year's complete operation based on 255 operating days, but that does not include this overhead figure?—A. The overhead is included in this figure and the depreciation is such a small amount that we did not consider it worth while including it.

861. Q. What would be the figure you come to and by this I mean the cost to the Government daily; have you anything else to add to \$117?—A. No, sir.

Mr. MACINNES: Does that \$117 include everything?

The WITNESS: Yes, depreciation, overhead, operating costs, everything is included.

I do not think that loss of profit in the case of a customs cruiser ought to be taken into account: the damage is too remote and in addition far too indefinite; moreover, in the present case, the evidence regarding this item is, and it could hardly be otherwise, inadequate and unsatisfactory.

The amount of \$117 includes \$17 for fuel per day. During the time the *Baroff* was on the slip, viz., approximately eight days, the plaintiff saved \$17 per day on fuel and this sum must be deducted from the amount of the claim. The plaintiff will therefore be entitled to recover from the defendant, in addition to the actual cost of repairs (\$593), the sum of \$1,151 for maintenance, overhead and depreciation, during the eleven days she was absent from her duties, as follows:

3 days at \$117..	\$ 351
8 days at \$100..	800
	\$1,151

There will be judgment for plaintiff against defendant for \$1,744, with interest from the date hereof and costs.

Judgment accordingly.

BETWEEN:

C. K. HANSEN.....SUPPLIANT;

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AND

HIS MAJESTY THE KING.....RESPONDENT.

Practice—Petition of right—Amendment

Suppliant alleges that he suffered loss by his boat stranding on an island due to the negligence of Respondent's employee in the screening of a certain light and seeks to amend his Petition of Right by setting up that "the said light is a public work of Canada and that suppliant's claim is one for damages against the Crown arising out of injury to suppliant's property resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment on a public work."

Held, that the practice of the Court permits amendments to a Petition of Right provided the same do not state a new cause of action.

2. That the test whether a particular amendment should be allowed is: If the Petition had originally been presented in the form in which it stands after amendment, is there a reasonable probability that the fiat would not have been refused?
3. That the amendments proposed to the Petition of Right herein do not involve any material alteration in the cause of action; nor do they state a new cause of action.
4. After a fiat "Let Right be Done" is granted, and the Petition is filed in Court, it becomes a pleading, and under the Rules of Court is subject to any reasonable amendment, providing it does not involve any substantial alteration in the cause of action, or does not set up a fresh cause of action.

MOTION by suppliant to amend his Petition of Right.

The motion was argued before the Honourable Mr. Justice Maclean, President of the Court, in Chambers.

T. A. Beament, K.C., for Suppliant.

E. Miall for Respondent.

THE PRESIDENT (May 23, 1933) delivered the following judgment:

This is a motion made on behalf of the suppliant to amend a petition of right.

By his petition of right, filed November 18, 1932, the suppliant sets forth that he was and is the owner of a motor ship which in the course of a voyage from Vancouver to

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Nanoose Harbour, in the Province of British Columbia, stranded on an island; that a formal investigation into the circumstances attending the stranding of the suppliant's ship was held by the Deputy of the Dominion Wreck Commissioner, assisted by two assessors, and their finding was to the effect that a defect then existed in the screening of a recently installed unwatched light on the north side of Nanoose Bay and to that mechanical defect must be attributed the stranding of the ship; and that the defect in the screening of the light was due to negligence on the part of the Government employee who adjusted the screens. And the suppliant claims damages therefor.

The suppliant now moves for an order permitting him to amend his petition of right by adding paragraphs 3A, 3B, and 4A. The first two proposed amendments are hardly in controversy and I did not understand them to be seriously opposed. It is the last mentioned amendment that is opposed by counsel for the Crown, and it is as follows:

4A. The suppliant submits that the said light is a Public Work of Canada and that suppliant's claim is one for damages against the Crown arising out of injury to suppliant's property resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment on a public work.

It has been the practice of this Court to permit amendments to a petition of right provided that the same did not state a new cause of action. See *Audette's Practice of the Exchequer Court*, at pages 447 and 448. Such amendments were allowed, I assume, upon the theory that a petition of right was a pleading, and, like any other pleading, stood subject to amendment, providing the amendment did not state a new cause of action. The Petition of Right Act contains no reference whatever as to pleadings in petition of right proceedings, as does the corresponding English Petition of Right Act of 1860, which provides by sec. 7 thereof that all laws and statutes in force, as to pleading, and the practice of the Courts of Law and Equity, "shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such Petition of Right". The Rules of the Exchequer Court of course provide for the amendment of pleadings. In England it has been held that the terms of sec. 7 of the Petition of Right Act, permit the Court to amend a petition of right provided the amendment does not involve a substantial

alteration in the cause of action. The test whether a particular amendment should be allowed is this: if the petition had originally been presented in the form in which it stands after amendments, is there a reasonable probability that the fiat would not have been refused? Mr. Miall for the Crown, upon the motion, admitted that it was probable that in this case the fiat would not have been refused if it had been originally presented in the proposed amended form. See *Badman Bros. v. The King* (1); *Ruffey Arnell Company v. The King* (2); and *Northern Construction Co. v. The King* (3).

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I do not think the amendments proposed to the petition of right involve any material alteration in the cause of action; nor do they state a new cause of action. One dictionary defines "cause of action" as meaning the fact or combination of facts which give rise to a right of action. The amendments here sought do not propose to change the character of the action which is one of damages for injury to property. It may be inferred from the petition that it is claimed that the alleged damages arise through the negligent act of some person or persons acting for or on behalf of the respondent; and by statute all aids to navigation in the way of lighthouses, etc., are vested in His Majesty and are under the control and management of the Minister of Marine. That fairly well discloses the cause of action. It will probably be necessary, though I do not now so decide, that the suppliant, in order to succeed, must satisfy the Court that the light in question was a public work of Canada, which, I assume, will be largely a question of law. I apprehend that one of the respondent's pleas, No. 3, means that the light in question is not a public work of Canada and that the damage did not occur through the negligence of the servants of the Crown, and that therefore there is no jurisdiction in this Court to adjudge upon the petition of right. But these are questions to be determined at the trial. I do not think the Crown ever misunderstood what was the cause of action. While I think the principal amendment proposed had better been pleaded originally, yet I should hesitate to say that the petitioner could not safely proceed to trial without the amendment.

(1) (1924) 1 K.B. p. 64.

(2) (1921) 38 T.L.R. p. 210.

(3) (1923) 3 D.L.R. p. 1069.

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When once it is said "Let Right be done," it would, I think, be unreasonable to refuse an amendment which after all is intended, I think, to clarify and not to alter the issue. I cannot but think that when once the fiat that right be done is granted, and the petition is filed in the Court, it becomes a pleading, and under the Rules of the Court is subject to any reasonable amendment, providing it does not involve any substantial alteration in the cause of action, or does not set up a fresh cause of action. While it is unfortunate that the Petition of Right Act does not contain some provision corresponding to sec. 7 of the English Act, so as to remove all doubt, I am inclined to the view that its absence is not fatal to the power of the Court, which has exclusive original cognizance of such petitions and with power to grant every species of relief claimed or prayed for, to permit the amendments here asked for. I therefore allow the amendments mentioned in the notice of motion and the costs of the motion will be costs in the cause.

Judgment accordingly.

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BETWEEN:

THE CREAMETTE COMPANY.... PLAINTIFF;

AND

FAMOUS FOODS LIMITED, PETER
 TOSI, DOING BUSINESS UNDER THE
 FIRM, NAME AND STYLE OF P. TOSI
 & COMPANY, AND THE SAID P. TOSI
 AND COMPANY..... } DEFENDANTS.

*Trade-mark—Infringement—Motion to strike out certain defences—
 —Impertinent or Irrelevant defence—Defence tending to prejudice,
 embarrass or delay a fair trial of action.*

In an action for infringement of trade-mark the defendants pleaded *inter alia* (1) that the plaintiff company not being registered or licensed under the laws of any of the Provinces of Canada or under the laws of the Dominion of Canada has no right to protection of its trade-mark against imitation thereof; (2) that the plaintiff company by using the said trade-mark in connection with its products has done so in violation of the provisions of the Food and Drugs Act of Canada, and the regulations made thereunder.

On motion under Rule 114 to strike out the said defences as being impertinent or irrelevant and as tending to prejudice, embarrass or delay a fair trial of the action it was held:

1. The Dominion Companies Act does not require a friendly alien, either a natural or an artificial person, to take out a licence before asserting any legal right in Court.
2. The Canadian Naturalization Act (R.S., 1927, c. 138, Part III, sec. 20) provides that an alien may take, acquire, hold and dispose of real and personal property of every description in the same manner in all respects as a natural born British subject.
3. The provisions of the *International Convention for the Protection of Industrial Property* as revised at Washington in 1914 recognize the right of the plaintiff to institute this action as freely as a Canadian owner of a trade-mark.
4. At common law the alien has such a right.
5. This Court in a civil action has no jurisdiction to try the issue raised by pleading the Dominion Food and Drugs Act.

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MOTION by plaintiff to strike out under Rule 114 certain paragraphs of the statements of defence herein.

The motion was argued before the Honourable Mr. Justice Maclean, President of the Court, in Chambers.

E. G. Gowling for Plaintiff.

Ainslee Greene, K.C., for Defendants.

THE PRESIDENT (May 11, 1933) rendered the following judgment:

This was a motion on behalf of the plaintiff company to strike out certain paragraphs in both of the defences filed herein.

Famous Foods, Limited, in paragraphs 14 and 15 of its defence, and the other defendants, in paragraphs 8 and 9 of their defence, alleged that because the plaintiff company is not registered or licensed under the laws of any of the provinces of Canada or under the laws of the Dominion of Canada, it is not entitled to carry on business in any of the provinces of Canada, and is not capable of being the registered owner of the trade mark and designs in question, and has not acquired any right to the use of the said trade marks and designs within the Dominion of Canada and has not acquired any right to protection against imitation thereof. Furthermore, the defendants allege that the plaintiff company is now carrying on business in violation of the laws of the provinces of the Dominion, and by reason there-

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of has not and cannot acquire rights within the Dominion of Canada.

In paragraph 16 of the defence of Famous Foods, Limited, and in paragraph 9 of the defence of the other defendants, it is alleged that by using the said trade mark and designs in connection with macaroni and other paste products the plaintiff company is now and continuously has been in violation of the provisions of the Food and Drugs Act of the Dominion of Canada, and amendments thereto, and of the regulations made by authority of the said Act and amendments.

The plaintiff company by its motion seeks to strike out, under the provisions of Rule 114, the paragraphs mentioned from the defences filed as being impertinent or irrelevant and as tending to prejudice, embarrass or delay a fair trial of the action herein.

As to the effect of the alleged failure of the plaintiff company to register or obtain a licence on its capacity to maintain the present action, I think the defendants in raising the question have confused the assertion of a right of ownership in a trade mark or a design with the enforcement of a right arising from a business transaction. If the plaintiff was seeking to assert a claim of the latter nature in the courts of this country it may well be, although I have some hesitation upon the authorities in so deciding were such a question properly before me, that a licence or registration would be necessary in order to ground a capacity to sue. But in seeking a remedy in this Court for the infringement of a trade mark registered here a foreign corporation is in no worse position than a corporation created under provincial or Dominion legislation in Canada. I can find no provision in the Dominion Companies Act requiring a friendly alien, either a natural or an artificial person, to take out a licence before asserting any legal right in this Court; and, apart from the common law privileges accorded to an alien, the Canadian Naturalization Act (R.S., 1927, Chap. 138, Part III, Sec. 20) provides that:

Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural born British subject.

The provisions of the *International Convention for the Protection of Industrial Property* as revised at Washington in 1914, also recognize the right of the plaintiff to institute

this action as freely as a Canadian owner of a trade mark. Article II thereof reads as follows:

The subjects or citizens of each of the Contracting Countries shall, in all the other countries of the Union, as regards patents, utility models, industrial designs or models, trade-marks and trade names, indications of origin, and the suppression of unfair competition, enjoy the advantages that their respective laws now grant or may hereafter grant to their own subjects or citizens. Consequently, they shall have the same protection as the latter, *and the same legal remedy against any infringement of their rights*, provided they observe the conditions and formalities imposed on native subjects or citizens. No obligation as to the possession of a *domicile or establishment* in the country where protection is claimed shall be imposed on those who enjoy the benefits of the Union.

Then, the alien's common law right is affirmed in *Kerly on Trade Marks*, 6th Edition, p. 438, as follows:—

An alien, not being the subject of a country actually at war with England, if he is the proprietor of a trade-mark which exists as such in this country, may sue in the English Courts in respect of infringements in England.

To the same effect is Halsbury, 2nd Ed., Vol. 1, p. 449. So that the contention of the Defendants that the Plaintiff must be registered or licensed to do business in this country before acquiring a right to sue for the infringement of its trade-mark and designs must be treated as irrelevant as a matter of defence.

Turning now to paragraph 16 of the defence of the Famous Foods Limited and paragraph 10 of the defence of the other defendants which allege that by using the trade mark and designs in question in connection with macaroni and other paste products the plaintiff is now and has been continuously in violation of the provisions of the Dominion Food and Drugs Act, it is abundantly clear that to set up such an issue by way of defence to an action in this Court for infringement of a trade mark is to plead impertinent or irrelevant matter or matter which tends to prejudice, embarrass or delay the fair trial of the action within the meaning of Rule 114 of the practice of this Court. I do not think that this Court has jurisdiction in a civil action such as this to try such an issue. To allow these paragraphs to stand as framed in the defences might compel the plaintiff to "come to trial with a body of evidence to prove the validity (of his mark and designs) which would be entirely thrown away", to quote the language of Bowen, L.J. in *Liardet v. Hammond Electric Light and Power Co.* (1).

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If the plaintiff has violated the provisions of the Dominion Food and Drugs Act there are proper proceedings to be taken on behalf of the Crown for punishing any such violation. And even if the plaintiff were guilty of the acts alleged in the defences it would not have the effect of destroying the validity of its trade mark or designs.

There will be an order directing the aforesaid paragraphs in the two statements of defence filed to be struck out, and that paragraph 17 of the defence of Famous Foods, Limited, and paragraph 11 of the defence of the other defendants, be amended by striking out the words "constitutes a violation of the said Foods and Drugs Act, and of the regulations made pursuant thereto and," as the same appear therein.

The costs of and incidental to this application will be costs to the plaintiff in any event of the action.

Judgment accordingly.

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 Jun. 22.

BETWEEN:

HIS MAJESTY THE KING PLAINTIFF;

AND

CONSOLIDATED LITHOGRAPHING }
 MANUFACTURING COMPANY } DEFENDANT.
 LIMITED

Sales Tax—Playing cards—Excise Tax not included in sale price—Special War Revenue Act (R.S.C., 1927, Ch. 179)

Defendant, a licensed manufacturer under Part XIII of The Special War Revenue Act (R.S.C., 1927, ch. 179), manufactured and sold playing cards. It paid the sales tax on all cards sold, said tax being computed on the sale price of the cards exclusive of the excise tax imposed by section 82 of the Act. The Crown contends that the sales tax should have been computed on the sale price including the excise tax.

Held: The Act having defined *sale price* as the *duty paid value* in the case of imported goods, said *duty paid value* including, as regards playing cards, the excise taxes imposed by Parts X and XII of the Act, and omitting to include excise taxes in the sale price of playing cards manufactured in Canada, the excise tax imposed under Part XII of the Act is not included in the sale price of such cards for the purpose of calculating the sales tax.

ACTION by the Crown to recover from defendant certain money alleged due for sales tax on playing cards manufactured and sold by it.

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

F. P. Varcoe, K.C., for plaintiff.

L. A. Forsyth, K.C., and *J. de M. Marler* for defendant.

The facts are stated in the reasons for judgment.

ANGERS J., now (June 22, 1933), delivered the following judgment:

The defendant is and was at all material times herein, to wit from December 1, 1931, to June 30, 1932, licensed as a manufacturer under part XIII of the Special War Revenue Act (R.S.C., 1927, chap. 179, and amendments) and as such manufactured and sold playing cards.

Under section 86 of the said Act the defendant became liable to pay a sales tax on the playing cards manufactured and sold by it. In virtue of regulation 2 (paragraphs (a) and (b)) of the regulations pertaining to part XIII of the Act, this tax is payable on or before the last day of the month next succeeding the month in which the sales were made.

From the 1st of December, 1931, to the 30th of June, 1932, the defendant sold playing cards in a quantity which is not in dispute.

The defendant paid to His Majesty the sales tax on all its sales during that period, the tax being computed on the sale price exclusive of the excise tax imposed on playing cards in virtue of section 82 of the Act.

The plaintiff contends that the sales tax should have been computed on the sale price including the said excise tax.

The plaintiff accordingly claims the sales tax on the excise tax paid on the playing cards sold by the defendant during the period aforesaid, namely, the sum of \$2,611.58.

Counsel for defendant admitted at trial that the sum of \$2,611.58 represented exactly the amount of the sales tax on the excise tax on the cards it had sold from December 1, 1931, to June 30, 1932.

Counsel on both sides declared, at the opening of the case, that the main object of the action was to obtain a

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decision as to whether the sales tax must be computed on the sale price exclusive of the excise tax or on the sale price including the excise tax.

Evidence was adduced which could have been dispensed with.

Two copies of invoices of Canadian Playing Card Company, Limited, which is owned and operated by the defendant company, one to International Fine Arts Co., dated April 8, 1932, and the other to The T. Eaton Co. Ltd., dated April 27, 1932, were filed as exhibits 2 and 1 respectively.

The invoice exhibit 1 mentions the price and the excise tax separately and the sales tax is computed on the total of the two items. The invoice exhibit 2 indicates the price in a lump sum, which includes the excise tax, and the sales tax is calculated on the whole.

According to Reid, the secretary-treasurer of the defendant company, the great majority of the invoices sent out by the company indicated separately the price and the excise tax.

The manner in which the invoices were made is, in my opinion, immaterial.

The proof shows that the company charged to its customers the sales tax on the sale price including the excise tax; its object, according to Reid's testimony, was to avoid a loss in case the Crown's contention that the sales tax was payable on the price inclusive of the excise tax was sustained by the Courts; this appears logical and reasonable.

It was argued on behalf of the defendant that the excise tax is not necessarily, if at all, payable by the manufacturer, the argument being made for the purpose of showing that the sale price does not include the excise tax. I must say that I cannot agree with this proposition; the Act and the regulations are perhaps not as explicit as one might wish, but they appear to me to impose on the manufacturer the obligation of affixing the excise stamps on the packages of cards before they leave his establishment.

Subsection 2 of section 82 of the Act stipulates that:

The excise taxes imposed by the preceding subsection shall be payable at the time

(a)

(b) of sale by the Canadian manufacturer.

The regulations pertaining to part XII of the Special War Revenue Act, of which section 82 forms part, contain, *inter alia*, the following provisions:

2. Excise Tax Stamps on playing cards, manufactured in Canada, shall be affixed to the individual packs, and be cancelled, before the playing cards are removed from the premises of the manufacturer.

4. Purchases of Excise Tax Stamps by playing card manufacturers shall be accounted for on individual entries, on Form B. 93A.

Regulation 5, relating to the security which the manufacturer of playing cards is required to furnish to the Collector of National Revenue speaks of the "Manufacturer's Tax on playing cards". It seems obvious to me that the intention of the legislators was to have the tax paid by the manufacturer at the time the cards were sold.

This however does not settle the question and the fact that the manufacturer is, in my opinion, bound to see that the excise stamps are affixed on the packages of playing cards before they leave his premises does not necessarily mean that the sale price, within the meaning of the Act, includes the excise tax.

Previous to the month of April, 1924, the Commissioner of Customs and Excise was of the opinion that the sale price did not include the excise tax. Indeed on the 16th of January, 1924, one S. W. Hobart, acting for the Commissioner, wrote to the defendant the following letter (exhibit A):

With reference to your telephone conversation respecting the application of sales tax as it applies to playing cards, I would inform you that the sales tax applies on the selling price of the cards, which does not include the stamp tax of 8 or 15 cents per pack, as provided for under the Special War Revenue Act.

On the 24th of the same month, the said Hobart, in a letter to the defendant (exhibit B), reiterated his statement as follows:

The consumption or sales tax is applicable on playing cards on the actual selling price thereof, not including the value of the stamp tax.

Sometime later the Commissioner referred the matter to the Department of Justice for a ruling. The ruling was at variance with the opinion of the Commissioner and the defendant was so informed by a letter from said Hobart bearing date the 17th of April, 1924; it reads as follows (exhibit 5):

With reference to the payment of sales tax and excise tax on playing cards, I have to inform you that this matter was referred to the Department of Justice for a ruling.

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A ruling has been issued that the fact that the excise tax on playing cards is shown as a separate item on your invoice should not have any effect to reduce the liability and the vendor should pay the tax on the full selling price, including the excise tax, whether such excise tax is mentioned as a separate item or not.

You are therefore instructed that from the 22nd inst. sales tax will apply as shown above.

Evidently clearness was not the main quality of that particular clause of the statute.

During the period from December 1, 1931, to May 26, 1932, date on which chapter 54 of 22-23 Geo. V, came into force, section 86 of the Special War Revenue Act contained, among others, the following stipulation:

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

(a) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

On May 26, 1932, an Act to amend the Special War Revenue Act, being chapter 54 of 22-23 Geo. V, was assented to. By section 11 of said Act, subsection (1) of section 86 of the Special War Revenue Act was repealed and another one substituted therefor. The substituted section contained, *inter alia*, the following provision:

(1) There shall be imposed, levied and collected a consumption or sales tax of six per cent on the sale price of all goods,—

(a) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

The amendment made by 22-23 Geo. V, chap. 54, has no bearing on the case.

Section 85 defines the expression "sale price" as follows:

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

Subsection (b) of section 85 then gives the definition of the words "duty paid value":

(b) "duty paid value" shall mean the value of the article as it would be determined for the purpose of calculating an ad valorem duty upon the importation of such article into Canada under the laws relating to the customs and the customs tariff whether such article be in fact subject to ad valorem or other duty or not, and in addition the amount of the customs duties, if any, payable thereon: Provided that in computing the "duty paid value" of tea purchased in bond in Great Britain the amount of the customs duty payable on tea for consumption

in Great Britain shall not be included in the value of such tea for purposes of this Part: and that in the case of matches or playing cards, the excise taxes imposed by Parts X and XII of this Act shall be included in the duty paid value.

In January as well as in April, 1924, when the letters exhibits A, B and 5 were written, the definition of "sale price" was substantially, though not literally, the same; it is to be found in the first two paragraphs of subsection (1) of section 19 BBB of the Special War Revenue Act, 1915, as amended by 13-14 Geo. V, chap. 70, section 6.

The definition of "duty paid value" in 1924 was almost identical to that appearing in the statute of 1931, but for one omission: section 19 AA, as enacted by 13-14 Geo. V, chap. 70, section 4, did not contain the second proviso found in subsection (b) of section 86, to wit

that in the case of matches or playing cards the excise taxes imposed by parts X and XII of this Act shall be included in the duty paid value.

The inclusion of this last proviso in the definition of the expression "duty paid value" is, in my opinion, of great consequence in the present case.

The definition of "sale price" and subsidiarily of "duty paid value", in the statute of 1923 (13-14 Geo. V, chap. 70, ss. 4 & 6 (ss. 19 AA and 19 BBB), was not so definite nor complete as the one now on the statute; for lack of precision, the old definition was not so comprehensive as the new one. One may conceive how, under the old definition, the Commissioner and the Department of Justice did not give to the statute the same interpretation. I am not called upon and I do not think that I ought to express an opinion as to whom the Minister, or the Commissioner, was right in the interpretation of the statute and I shall content myself with interpreting the law as it now exists.

In subsection (a) of section 85 the definition of "sale price" excludes any amount payable in respect of the sales tax and includes all other excise duties when the goods are sold in bond. It says nothing of excise tax. Can it be said that the legislators' intention was to leave out the excise tax? This contention can be upheld with at least as much plausibility and logic as the contrary. It would have been easy for the legislators, had they wished to include in the sale price the excise tax, to have said so specifically as they did in connection with the excise duties. Their silence may be interpreted as an intention of leaving out the excise tax.

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But there is more: the legislators went on to define what the sale price is to be in the case of imported goods, and they say that it shall be deemed to be the duty paid value. The legislators then proceed to define what is to be understood by "duty paid value". It means the value of the article as it would be determined for the purpose of calculating an ad valorem duty upon the importation of such article and in addition the amount of customs duties payable thereon, *provided that* in the case of playing cards *the excise tax imposed by Part XII shall be included in the duty paid value.*

So we have in the case of imported goods an express declaration by the legislators that the "sale price" shall be deemed to be the duty paid value and that the duty paid value shall include, apart from the value of the article as determined for the purpose of calculating an ad valorem duty upon the importation thereof into Canada, the amount of customs duties, if any, and, in the case of playing cards, the excise tax. On the other hand, in the case of goods manufactured in Canada, the legislators declare that the sale price shall include the excise duties when the goods are sold in bond and they omit to mention the excise taxes. It seems to me that the intention of the legislators is quite apparent and that the omission of the excise taxes from the sale price of domestic goods was just as intentional on their part as the inclusion thereof in the sale price of imported goods.

I can reach no other conclusion than that the legislators did not want to include in the sale price of playing cards manufactured in Canada, for the purpose of calculating the amount of the sales tax, the excise tax imposed thereon under Part XII of the Act.

It was argued on behalf of the Crown that if the excise taxes were to be excluded from the sale price in the case of domestic goods, this would constitute a discrimination as against the importer. This is obviously one of the results of the exclusion. It may be that the policy of Parliament was to protect the Canadian manufacturer, as was suggested during the argument. It was undoubtedly its right to do so. At all events, what may have been the object of the Legislature is immaterial. The law must be interpreted according to the apparent meaning which the

legislators attributed to it and, unless the interpretation arrived at be absurd or against public order, it must be adhered to, whatever its effects may be.

Counsel for defendant stressed the point that taxing statutes must be strictly construed and that, in case of ambiguity, the construction most favourable to the subject must be adopted, and he cited many authorities in support of his contention. This doctrine is perfectly sound and is now a well-settled rule of law; perhaps I may just refer to the authorities most in point: Maxwell, Interpretation of Statutes, 7th Ed., 246; Craies on Statute Law, 3rd Ed., p. 105; Beal, Cardinal Rules of Legal Interpretation, 2nd Ed., pp. 436 et seq.; Halsbury's Laws of England, vol. 27, p. 180, and vol. 24, p. 711; Canadian Encyclopedic Digest (Ont. Ed.), vol. 10, p. 267, parag. 66 and notes (v) at foot of page 267 and (w) and (x) at foot of page 268; *Stockton & Darlington Railway Co. v. Barrett* (1); *The Queen v. Barclay* (2); *Partington v. Attorney-General* (3); *Cox v. Rabbits* (4); *Attorney-General v. Peek* (5); *Canadian Northern Railway Co. v. The King* (6); *Foss Lumber Co. v. The King* (7); *In the matter of Micklethwait v. Commissioners of Inland Revenue* (8); *Attorney-General v. Beech* (9); *Tennant v. Smith* (10).

The conclusion to be derived from the above authorities is that every charge upon the subject must be imposed by clear and unambiguous language; if the authority bestowed upon the Crown to levy and collect a tax is doubtful, the doubt, provided it be a reasonable doubt, must be resolved against the tax. In the present case however, it seems obvious to me that the Legislature did not intend to levy a sales tax on the amount of the excise tax.

A good deal can be said in favour of the proposition that the sale price is what the purchaser pays to the vendor as consideration for the object of the sale and that, since the purchaser has to pay and does pay the excise tax included in the sale price, such excise tax must be considered, for

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| (1) (1844) 7 M. & G., 870, at 879. | (5) (1912) 2 K.B., 192, at 208. |
| (2) (1881) L.R., 8 Q.B.D., 306, at 312. | (6) (1922) 64 S.C.R., 264, at 275. |
| (3) (1869) L.R., 4 E. & I. App., 100, at 122. | (7) (1912) 47 S.C.R., 130, at 140. |
| (4) (1878) A.C. 473, at 478. | (8) (1855) 11 Exch. R., 452, at 456. |
| | (9) (1899) A.C., 53, at 59. |
| | (10) (1892) A.C., 150, at 154. |

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the purpose of calculating the sales tax, as forming part of the purchase price. I must admit that, if the sale price had not been defined in the Act, the above proposition would carry much weight. But the Legislature has deemed it advisable to give a definition of "sale price" and it is the meaning put in that definition that I had to determine and by which I must be guided. For the reasons above stated I am of opinion that the sale price, as defined in section 85 of the Act, for the purpose of calculating the sales tax, does not include, in the case of playing cards made in Canada, the excise tax imposed under section 82.

For these reasons I do not believe that the defendant is liable to pay to His Majesty the sales tax claimed herein and the action will accordingly be dismissed, with costs.

Judgment accordingly.

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IN THE MATTER OF THE FOREIGN INSURANCE
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AND

IN THE MATTER OF THE RULING OF THE SUPER-
 INTENDENT OF INSURANCE REFUSING
 REGISTRY OF THE CONTINENTAL ASSUR-
 ANCE COMPANY, ACCORDING TO THE PRO-
 VISIONS OF THE SAID ACT.

*Foreign Insurance Company—Registration—Ruling of Superintendent of
 Insurance—Appeal—Time*

Held; that the report of the Superintendent of Insurance to the Minister of Finance, that registration of a foreign insurance company be refused because the name of such company is similar to that of a Canadian or British company, constitutes a ruling from which an appeal lies to the Exchequer Court under s. 34 of 1932 (22-23 Geo. V, Ch. 47).

MOTION for an order requiring the Superintendent of Insurance to give to Continental Assurance Company, for the purposes of appeal, a certificate in writing setting forth his ruling and the reasons therefor.

The motion was heard before the Honourable Mr. Justice Angers, in Chambers, at Ottawa.

J. W. Gauvreau K.C. for applicant.

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

ANGERS J., now (June 16, 1933), delivered the following judgment:

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On or about October 29, 1932, the Continental Assurance Company, incorporated under the laws of the State of Illinois, one of the United States of America, made an application for registry under the Foreign Insurance Companies Act, 1932 (22-23 Geo. V, chap. 47).

On December 30, 1932, the Superintendent of Insurance made a report to the Honourable the Minister of Finance recommending "that the Company be advised that its application cannot be granted."

On the same day, the Superintendent wrote to R. D. Bedolfe, Canadian General Manager of Continental Assurance Company, the following letter:

Replying to your letter of the 29th instant we have given careful consideration to this application and we are advised that it is open to the Minister to refuse the Company's application on the ground that there is danger of confusion between the name of the applicant company and that of a Canadian company.

In view of the protest of the Canadian Company and of the established practice of the Department in similar cases I have recommended to the Minister that the Company's application be not granted.

In a letter addressed to V. Evan Gray, solicitor for the applicant company, bearing date the 13th of January, 1933, the Superintendent made, among others, the following statements:

As you are aware, I wrote to Mr. Bedolfe on the 30th ultimo advising him of my report to the Minister, but *in the absence of the Minister this report has not yet been acted upon.*

Action upon that report would appear to be necessary before any further proceedings are taken.

However, apart from the requirements of the section, the Department can see no objection whatever to a hearing being granted and I would suggest some day week after next.

Apparently the Commissioner did not consider the matter closed.

On January 27, 1933, the Superintendent, at the request of the Continental Assurance Company, held a hearing at the City of Toronto, in the Province of Ontario, in reference to the Company's application for registry, at which the said Bedolfe and one George B. Woods, president of the Continental Life Insurance Company, were examined as witnesses.

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On May 16, 1933, the Superintendent wrote to V. Evan Gray, solicitor for the Continental Assurance Company, as follows:

Replying to your letter of the 15th instant, I may say that I have not revised my previous report to the Minister in which I recommended that the application by the above-mentioned company for registration in Canada be not granted.

On May 22, 1933, the Continental Assurance Company gave notice to the Superintendent that it appealed from his ruling refusing the Company's application for registry, on the ground that it had complied with all the requirements of the Act precedent to registry and that it was entitled to be registered and on such other grounds as the Company might be advised to submit, when the reasons for the ruling were delivered.

On the same day (May 22, 1933), the Continental Assurance Company further gave notice to the Superintendent of Insurance that it required from him, for the purposes of the appeal, a certificate in writing setting forth the ruling appealed from and the reasons therefor. These were not supplied.

The Continental Assurance Company now makes a motion for an order requiring the Superintendent of Insurance to give to it, for the purposes of the appeal, a certificate in writing setting forth his ruling and the reasons therefor.

When the motion was presented, the Superintendent appeared by counsel to oppose it.

An affidavit of the Superintendent, dated June 12, 1933, was read; after a recital of the facts, it contains a declaration that, upon the advice of the Deputy Minister of Justice, the Superintendent did not comply with the Company's notice requiring him to furnish a certificate of his ruling for, among others, four reasons which briefly are as follows:

(1) Because the report of the Superintendent upon the Company's application was made in the exercise of a discretion and is not subject to judicial review;

(2) Because the said report was based upon the objection that the name of the applicant Company so nearly resembled that of the Continental Life Insurance Company as to be calculated to deceive the public and to be therefore "on public grounds" objectionable;

(3) Because the said report does not constitute a ruling within the meaning of sections 9 and 34 of the Foreign Insurance Companies Act, 1932, and no appeal therefrom is provided;

(4) Because the applicant Company did not serve upon the Superintendent a notice of its intention to appeal from his report within 15 days after receiving notice thereof and said report, even if a ruling under sections 9 and 34 of the Act, became in consequence binding upon the Company.

The second reason deals with the merits; the first and third are correlative. The case then narrows down to two points: (a) does the report of the Superintendent in the present case constitute a ruling which as such is appealable? (b) was the notice of appeal served within the delay prescribed by subsection 2 of section 34?

I think that the report of the Superintendent in the present case constitutes a ruling which is appealable under the Act. Section 34 enacts that

an appeal shall lie in a summary manner from the ruling of the Superintendent as to the admissibility of any asset not allowed by him, or as to any item or amount so added to liabilities, or as to any correction or alteration made in any statement, or as to any other matter arising in the carrying out of the provisions of this Act, to the Exchequer Court of Canada

The words "any other matter arising in the carrying out of the provisions of this Act" are very broad, and, in my opinion, include the matter of determining whether the name of an applicant Company applying for registry under the Act so closely resembles the name of another Company, be it Canadian, British or foreign, as to be liable to mislead the public.

True it is that under section 9 as worded the legislators might appear to have intended to restrict the appeal to cases where the report of the Superintendent concludes to the refusal of the application on the ground that the name of the applicant Company is liable to be confounded with that of a *foreign* Company. As pointed out by the Superintendent in his report, it may well be that an error was made in the drafting of section 9, "which was not noticed by those responsible for the Act in time to have the correction made at the last Session of Parliament," whilst the necessary change was made in the corresponding section (section 123) of the Canadian and British Insurance Companies Act, 1932 (22-23 Geo. V, chap. 46).

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At all events, in the face of the very broad terms of section 34, I do not feel justified to dismiss the motion. I cannot believe that it was the intention of the legislators to grant the right of appeal in cases in which the name of the applicant Company is similar to that of a foreign Company and to refuse it in cases in which the name of the applicant Company is similar to that of a Canadian or a British Company. Indeed I see no reason why such a discrimination should exist.

There remains the question of delay. I do not think that the letter of the 30th of December, 1932, complies with the requirements of the Act. Even if it did, it seems to me that the Superintendent, in holding a hearing on the 27th of January, 1933, reopened the matter and that, after this hearing, he was bound to give the applicant Company a notice of his ruling. The Superintendent wrote to V. Evan Gray, solicitor for the Continental Assurance Company, on the 16th of May, 1933, notifying him that he had not revised his previous report, in which he recommended that the application for registration be not granted. In my opinion, this letter is not a notice of the Superintendent's ruling in the sense of section 34. At any rate, this is immaterial inasmuch as the Company served its notice of appeal on the 22nd of May, 1933, which was well within the 15 days provided for by section 34.

For these reasons the applicant Company's motion is granted.

I may say that I hesitated before granting the motion seeing that the Superintendent's ruling does not appear to be arbitrary nor unreasonable. However the applicant may possibly have arguments to urge why its application should not be refused and for this reason I believe that the appeal ought not to be rejected at this stage.

The costs of the motion will be costs in the cause.

Judgment accordingly.

ELWOOD B. MOYER.....PLAINTIFF;

AND

ARTHUR A. HOLLAND.....DEFENDANT.

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Trade-mark—Petition to expunge—Registration without sufficient cause—Assignment of trade-mark—Reservation by assignor of right to use trade-mark—Assignment acted upon by assignee—Person aggrieved.

Defendant granted plaintiff, a manufacturer of ice cream cones, permission to use defendant's registered trade-mark, reserving to himself the right to continue the manufacture of ice cream cones and the use of his trade-mark in connection therewith. Plaintiff manufactured and sold cones under defendant's trade-mark. At the trial of the action it was shown that defendant's trade-mark was similar to another that had been in use for a number of years.

Held: That defendant's trade-mark is on the register "without sufficient cause" and should be expunged.

2. The assignment of a trade-mark to be valid must be made in conjunction with the assignment of the business with which it is connected.
3. To void the trade-mark, the assignment must have been acted upon by the assignee.
4. The plaintiff is a person aggrieved within the meaning of s. 45 of the Exchequer Court Act, R.S.C., 1927, Ch. 201.

ACTION by the plaintiff asking an order that defendant's trade-mark be expunged from the Register of Trade-Marks.

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

W. A. McMaster K.C. for plaintiff.

R. S. Robertson K.C. for defendant.

The facts are stated in the reasons for judgment.

ANGERS J., now (May 8, 1933), delivered the following judgment.

The plaintiff, by his action, is asking:

(a) that the specific trade-mark of the defendant registered on the 2nd day of June, 1930, register No. 229, folio 49610, consisting of the word "Crispy," in letters of diminishing size, enclosed within a looped border, used in connection with the sale of ice cream cones be expunged;

(b) that an order be given directing the patent office to register the plaintiff's trade-mark applied for under Serial number 154023, being a specific trade-mark, consisting of

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the drawing of a cone with the words "Sugar Crisp" printed in a plain circle on the cone, which is otherwise corrugated, and the drawing of the head and shoulders of a girl in a circle, which is partially hidden by the said cone, the girl having in her hand one of the said cones.

In his statement of claim the plaintiff alleges that he is and has been since about the 25th of May, 1930, a manufacturer of an ice cream cone having the words "Sugar Crisp" printed in a plain circle on a cone which otherwise is corrugated; that the defendant obtained on the 2nd of June, 1930, a trade-mark consisting of the word "Crispy," registered in connection with ice cream cones, register No. 229, folio 49610; that the defendant had never, at the time of registration, used the said trade-mark, not being engaged in the business of manufacturing or selling ice cream cones and that he had never intended to engage in such manufacture or sale; that, at the time the defendant obtained the said trade-mark, he knew or should have known that the word "Crispy" or "Crisp" or a combination of such words, or words similar thereto, were used by manufacturers and vendors of ice cream cones in Canada prior thereto; that, by reason of said registration, plaintiff was wrongfully prevented from registering his trade-mark "Sugar Crisp"; that he was notified of the refusal by the Commissioner of Patents to register it on the 21st of April, 1931.

In his statement of defence the defendant admits that he obtained his trade-mark "Crispy" as set forth in the statement of claim, denies all the other allegations thereof and pleads especially: that he was the first user of the said trade-mark "Crispy" and has since October 1929 used it in connection with the manufacture and distribution of ice cream cones and has, at great expense, constructed and operated a special machine for the manufacture of ice cream cones, the moulds of said machine having the said trade-mark imprinted therein; that by a written agreement dated the 23rd of June, 1931, the defendant granted to plaintiff the right to use the said trade-mark, which said agreement is now in default; that the action is an attempt on the part of plaintiff to evade his obligations under the said agreement and to secure the use of the defendant's trade-mark free from obligation; that defendant has no knowledge of any prior use of the word "Crispy" or "Crisp" or com-

bination of such words, or words similar thereto, and that, even if such words had been so used, they would not constitute prior use, nor would they defeat the defendant's trade-mark nor his right to use it.

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In his reply and joinder of issue the plaintiff admits the agreement referred to in the statement of defence but says that the assignment to plaintiff of the use of the said trade-mark was not made in connection with any business.

A copy of the defendant's trade-mark was filed as exhibit 2.

An uncertified copy of the defendant's application for the registration of his trade-mark, admitted in evidence in lieu of a duly certified copy thereof, together with a letter from the Commissioner of Patents to plaintiff's solicitor, were filed as exhibit 4.

The letter from the Commissioner quotes the report received from the Examiner in charge of the application, which reads partly as follows:

Under Folio 49610, of Register No. 229, Mr. Arthur A. Holland, of Toronto, Ont., has a trade-mark consisting of the word "Crispy" having the letters of diminishing size and enclosed within a looped border, registered in connection with ice cream cones, since June 2, 1930.

Your client's application, copy enclosed, appears to be in conflict with the registration cited and must be refused.

At trial counsel for plaintiff declared that he abandoned his demand for an order directing the Patent Office to register the trade-mark applied for by his client, because he had not advertised or taken the necessary proceedings to obtain that relief. Consequently the only demand now before the Court is for the expunging of the defendant's trade-mark.

The essential facts may be summarized as follows.

The defendant first became interested in the ice cream cone business in March or April 1929. At that time he made an endeavour to purchase the business of the International Cone Company Limited, of Toronto. He was introduced to Mitchell, the president and general manager of the company, by one Yerex, a self-termed sales organizer. Holland spent a good deal of time during the month of May 1929 in the plant of the International Cone Company, having interviews with the president or watching the cone machine in operation (*see dep. Holland, p. 98 and Yerex, pp. 153 and 154*). He made an offer of \$25,000 to Mitchell, but the offer was refused.

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After his negotiations with Mitchell had fallen through, Holland says that he tried to buy a cone making machine, but did not succeed. He then made up his mind to have one made. He prepared designs and took them to Ward and Cooper, machinists, of Toronto, who built the machine for him (dep. Ward, p. 130, in fine, and 131, and Holland, p. 99).

The work on the machine was started in September or October 1929 according to Ward's testimony (p. 131), or about the month of June 1929 according to the version of Clarke, machinist in the employ of Ward and Cooper, who worked on the machine (dep. Clarke, p. 66). The work lasted a considerable time; a lot of experimenting had to be done before the machine was gotten to the point where it produced a satisfactory cone.

On August 10, 1929, the defendant, through his solicitor, filed an application for a specific trade-mark consisting of the word "Krispy": see file exhibit 1. The application, a copy whereof is included in the file exhibit 1, is dated the 15th of July, 1929.

On the 20th of August 1929, defendant's solicitor wrote to the Commissioner of Patents, sending him a new application, amended by substituting the word "Crispy" for the word "Krispy"; the application, as the previous one, bears date the 15th of July, 1929.

On the 4th of November, 1929, the Commissioner notified the defendant's solicitor that the word "Crispy" was "descriptive of the biscuitlike qualities of ice cream cones, and therefore not registrable as a trade-mark," and that his client's trade-mark was refused.

On the 23rd of May, 1930, defendant's solicitor wrote to the Commissioner as follows:

This application has now been amended in conformance with a conference had with the Commissioner, the letters of the word "Crispy" being of diminishing size to fit on the cone and having a looped border extending therearound.

Following this amendment, the defendant's trade-mark was registered in the form in which it appears in exhibit 2, consisting, as I have previously noted, of the word "Crispy," having letters of diminishing size and enclosed within a looped border.

As it has already been mentioned, Clarke, who was a machinist in the employ of Ward and Cooper, says that he

commenced working on the machine in June 1929. Ward, on the other hand, declares that the work started in October. Orley White, a cone maker, called as witness on behalf of plaintiff, says that he saw the machine some six weeks before Christmas of that year. He was hired by Holland to help him bake some cones (dep. pp. 61 and 62). When he first saw the machine in Ward and Cooper's premises, there was only the frame; he worked for a week before he had a unit to light. During the six or seven weeks he worked with Holland, they turned out approximately 500 good cones.

Clarke, the machinist, to whom I have previously referred, says that no cones were made before White came; he adds that during the time White worked with the defendant, they produced between 500 and 1,000 cones. A thing which appears to me evident is that in November and December, 1929, Holland was experimenting and trying out the machine. He did not, during that period, manufacture cones in large quantities, obviously not in quantities sufficient to supply the trade.

Holland at that time had a number of boxes of the type of exhibit C, but without the label; he started to use the label after the trade-mark had been registered, which means after June 2, 1930.

Asked as to what he did with the cones he manufactured during the fall of 1929, Holland replies as follows (p. 100):

I never produced them commercially but I employed Mr. Yerex to go out and introduce these cones throughout the country. We made up boxes and he took them out as samples, and distributed them throughout the country.

Q. What sort of boxes did you use?—A. The box you have there, exhibit C. That is one of the boxes.

Holland, on this point, is corroborated by Yerex, except that the latter does not remember exactly whether he started distributing cones in the latter part of 1929 or the early part of 1930 (dep. pp. 154 and 155).

Experimenting went on in 1930, the machine being gradually perfected. At first the machine was operated with two moulds of five cones each similar to the mould filed as exhibit B. Around March or April, 1930, these moulds were replaced by two others of eight cones each (dep. Clarks, p. 67).

The experimental stage, according to Holland, lasted until the spring of 1931 (dep. p. 102). Moore, a machinist

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in the employ of Ward and Cooper, declares that he worked on the machine practically up to the time it was taken over by Moyer (dep. p. 84).

Holland claims that the building of the machine and the experiments he made cost him nearly \$30,000, of which \$22,000 or \$23,000 were disbursements (dep. pp. 102 and 122).

Holland swears that probably 50,000 cones were made before the trade-mark was registered (dep. p. 100).

The cones were not sold, excepting a few which were sold by Yerex, unknown to Holland; they were distributed gratuitously to dealers in ice cream cones with a view to introducing them on the market and investigating the possibilities of sales: see depositions of Langley, p. 126, and Yerex, p. 154.

Yerex says that he distributed cones in boxes or otherwise "well over or around 150,000 or 200,000." This figure must include the number of cones distributed from the commencement of the operations up to the time the machine was sold to Moyer and perhaps also a little bit of exaggeration. At all events, whatever may have been the number of cones distributed up to the 2nd of June, 1930, the date on which the defendant's mark was registered, or rather to the 23rd of May, 1930, the date on which the application was amended, I am satisfied that there was then a bona fide established business. There was no established business on July 15, 1929, when the application for the trade-mark "Crispy" was made, nor even on August 10, 1929, when it was filed; but with this we are not concerned. The operations were started in the fall of 1929 and in May, 1930, the machine, although only partly finished, was producing cones. The proof shows that the defendant, at that time, really carried on and intended to carry on the business of cone manufacturing. The plaintiff's claim that there was no established business when the defendant's trade-mark was applied for, viz., in May, 1930, is unfounded and the action on this ground fails.

It is argued on behalf of plaintiff that the defendant's trade-mark should be expunged because the word "Crispy" is descriptive. The word "Crispy" is a common word of the English language, an adjective to be found in all standard English dictionaries; it undoubtedly describes the quality

of the thing or object to which it is applied. When the defendant sought to register the word "Crispy" alone, the Commissioner refused to register it, and rightly so. The defendant however was not to be easily deterred; he modified his mark by enclosing the word "Crispy," written in letters of diminishing size, within a looped border and as a result of his persistency he persuaded the Commissioner to register the new mark. I must admit that there is very little in the defendant's mark and that, had I been the Commissioner, I would have hesitated very much before registering it. However, now that the mark is on the register, I do not feel inclined to order that it be expunged on this ground.

Counsel for plaintiff raised the question that the defendant's trade-mark ought not to have been allowed because of the existence of the trade names "Dandy-Crisp" of the Consolidated Wafer Company Limited, a subsidiary of Robinson Cone Company Limited, and "Best Cake" of the International Cone Company Limited, the cones "Best Cake" being sold in a box bearing, among others, the words "sweet and crispy."

Regarding the name "Dandy-Crisp," the evidence shows that it has been used for approximately fifteen years and that an average of 2,000,000 cones have been sold under that name each year. Copies of invoices covering sales of "Dandy-Crisp" cones dating back to July and August 1925 were filed as exhibit 14.

As to the "Best Cake" cone, the evidence discloses that this product has been sold since 1925.

Counsel for plaintiff submitted that the defendant knew of these two trade names and that he made a false statement in his application when he declared that he was the first to make use of the name "Crispy"; counsel further submitted that, if a trade-mark is registered upon a misrepresentation of the facts, the Court should, for that reason alone, expunge it from the register, and cited in support of his contention the case of *The Billings and Spencer Company v. Canadian Billings and Spencer Limited* (1). I quite agree with the decision of the Honourable Mr. Justice Audette in the above case, but I must say that the evidence of record does not convince me that the defendant made in

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(1) (1921) 20 Ex. C.R., 405.

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his application, knowingly or otherwise, an incorrect statement of facts. The proof does not show that he was aware of the trade name "Dandy-Crisp"; he apparently knew of the name "Best Cake" used in connection with the sale of ice cream cones by the International Cone Company Limited, for having been during several weeks in the company's plant during the spring of 1929, with the intent of purchasing its business; he saw cone boxes in the premises and he may or he may not have noticed the words "Sweet and Crispy" in the upper left hand corner of the box; for a casual observer not particularly interested in reading all the printed matter on a box, I must admit that the words "Sweet and Crispy" on the box exhibit 11 do not catch the eye. But even if the defendant did notice this inscription on the International Cone Company's boxes, I do not think that he made a false statement in saying that he was the first to use the word "Crispy" as a trade-mark. The words "Sweet and Crispy" just as the words "quality guaranteed" appearing on the upper right hand side of the box (exhibit 11) are merely indicative of the quality of the cones; neither are used as trade names. On this further ground the action fails.

It was urged furthermore on behalf of plaintiff that first use is a prime essential of a trade-mark; decisions were cited among which, most in point, are: *Groff v. Snow Drift Baking Powder Co.* (1) and *Partlo v. Todd* (2). Plaintiff's contention is that, in view of the prior use by Consolidated Wafer Company Limited of the mark Dandy-Crisp and by International Cone Company Limited of the words "Sweet and Crispy" on its cone boxes, the defendant's trade-mark should not have been allowed to go on the register. I do not think that the name "Best Cake" is in the way of the defendant's trade-mark notwithstanding the fact that the boxes in which they are sold have imprinted on them, among other literature, the words "Sweet and Crispy." The case is different however with the Dandy-Crisp mark. I am inclined to believe that the Commissioner would have refused the defendant's application had he been acquainted with the fact that Consolidated Wafer Company Limited had been using the name "Dandy-Crisp" for a period of fifteen years or thereabout; that is what I would have done

(1) (1889) 2 Ex. C.R., 568.

(2) (1888) 17 S.C.R., 196.

if I had been in his position. After some hesitation which I would not have experienced had the proceedings been instituted by the Consolidated Wafer Company Limited based on the likelihood of confusion, I have reached the conclusion that the defendant's trade-mark is on the register "without sufficient cause" and that it should accordingly be expunged: see *Epstein v. O-Pee-Chee Company Limited* (1); *Channell Ltd. v. Rombough* (2).

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There is however another reason for which I believe that the defendant's trade-mark ought to be expunged from the register and that is the permission given by defendant to plaintiff, under the agreement exhibit 6, to use it in connection with his own business.

The assignment of a trade-mark to be valid must be made in conjunction with the assignment of the business with which it is connected: *Bowden Wire Limited v. Bowden Brake Company* (3); *United Drug Co. v. Rectanus Co.* (4); Kerly on Trade-Marks, pp. 401, 405, 411 and 425; otherwise the public is liable to be misled.

At page 411, Kerly says:

The old section, which applied to patents and designs as well as to trade-marks, contained a reference to the granting of licences. This is now wholly dropped, no doubt because licences are inapplicable in respect of the rights in a trade-mark acquired by registration. A licence to use a trade-mark is unnecessary if the trade-mark is to be used in connection with the goods of the proprietor of the trade-mark, and is illegal, because leading to deception, if it is to be used in connection with the goods of anyone else. The principle of section 22 seems to be as applicable to a partial assignment as to an absolute assignment.

In the case of *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (5), Hodgins, J. said:

But I do not think that, in case they possessed and had used a trade-mark in connection with that business, whether an American or Canadian business, they could by assignment give the respondents the right to use that mark or name, unless they continued the business done here by selling goods made by the appellants. If the effect and intent of the sale-agreement was merely to enable the respondents to continue importing and selling the appellants' goods, their use of the trade-name or mark would seem to be quite within the cases. But, if it was contemplated by the agreement and so agreed that the respondents could manufacture and sell their own product, then I can see no foundation for the proposition that they could use, or that the appellants could give them the right to use, the latter's trade-mark in what was a new business in new goods.

(1) (1927) Ex. C.R., 156.

(4) (1918) 248 U.S.R., 90, at 97.

(2) (1925) 1 D.L.R., 234.

(3) (1913) 30 R.P.C., 580, at 590,
 and (1914) 31 R.P.C., 385, at
 pp. 392 and 395.

(5) (1923) 54 O.L.R. 537, at 555.

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Earl Loreburn in re *Bowden Wire Limited v. Bowden Brake Company* (1) clearly and concisely laid down this doctrine when he said:

The appellants have misconceived, or at all events misused, the protection which the law gives to a trade-mark. The object of the law is to preserve for a trader the reputation he has made for himself, not to help him in disposing of that reputation as of itself a marketable commodity, independent of his good-will, to some other trader. If that were allowed, the public would be misled, because they might buy something in the belief that it was the make of a man whose reputation they knew, whereas it was the make of someone else.

In the same case Lord Dunedin expressed a similar opinion (*ubi supra*, p. 392):

My Lords, in so acting, I think it is free from doubt that the Wire Company really vitiated their own trade-mark as registered. It was an attempt to assign a trade-mark in gross, a thing that cannot be done. By registration they affected to tell the public that goods in the class and of the description specified, marked with the registered mark, were their goods; that is to say, manufactured, or at least put on the market by them. But in reality, with their assent, the mark was, in practice, adhibited to goods which were not put on the market by them, but manufactured by or which were of composite manufacture and put on the market by the Brake Company. Therefore, on objection taken, I am of opinion that the registration as it stands must be expunged.

In the matter of the petition of *Jonkopings och Vulcans Tandsticksfabriksaktiebolag of Westra Storgatan and in the matter of the specific trade-marks Vulcan Superior, etc.* (2), Cassels, J., dealing with the difference between the Canadian statute and the English act and the assignment of a trade-mark in gross, expressed himself as follows (p. 271):

The Canadian statute differs materially from the English Act.

In *Smith v. Fair*—a decision of the late Vice-Chancellor Proudfoot, (14 O.R. 736) there is a dictum which would rather indicate that the Vice-Chancellor's view was that there must have been evidence of prior user in Canada. He also apparently is taken to have held that under our statute a trade-mark might be assigned in gross. This is merely a dictum and it was held the other way in the case of *Gegg v. Basset* (3 O.L.R. 263) by Lount, J. I have no hesitation in adopting the view of Mr. Justice Lount. It is thoroughly in accord with the opinions of the English judges. It is quite true that the Canadian statute permits an assignment of a trade-mark, but it would be contrary to all rule applicable to trade-marks if a mark could be assigned to somebody who would use it upon goods neither manufactured nor sold by the owner of the trade-mark. It would have the effect of leading to misrepresentation. I may say in passing that the Berliner case, referred to in *Smith v. Fair*, is a case of passing-off. If the judgment on appeal cited by Proudfoot, V.C., is looked at it will appear that it was not decided on the ground of infringement of trade-mark.

(1) (1914) 31 R.P.C., at 392.

(2) (1914) 15 Ex. C.R., 265.

The judgment of Cassels, J. was confirmed by the Supreme Court of Canada: see *In the matter of the "Vulcan" Trade Mark* (1), particularly the notes of Davies, J. at p. 417.

See also *Mello-Creme Products v. Ewan's Bread Ltd. et al* (2).

In *Gegg v. Bassett* (*ubi supra*, at pp. 264, in fine, and 265) Lount said:

The right is assignable it is true, but only, I think, in connection with the good-will of the business, general or specific, in which the trade-mark has been used.

The same principle applies to a partial assignment of a trade-mark and to a licence to use it, if the trade-mark is to be used in connection with the assignee's or licensee's own goods.

The clause in the agreement exhibit 6 relating to the trade-mark reads as follows:

4. The Vendor will permit the Purchaser, if he so desires, to use the trade name "Crispy" which the Vendor has registered in Canada, provided that this agreement is not at any time in default, in which case the right to use such name shall be immediately and without notice withdrawn.

The defendant did not assign his business to the plaintiff; on the contrary he reserved his right to continue the manufacture of ice cream cones and the use of his trade-mark in connection therewith.

By clause 6 of the agreement the defendant undertook, for a period of ten years, not to build in Canada cone machines of the stationary horizontal type, except to the order of the plaintiff; the clause is worded as follows:—

6. The Vendor covenants with the Purchaser that he will not for a period of ten years from the date hereof build in Canada cone machines of the Stationary Horizontal Type except to the order of the Purchaser, and agrees to build for the purchaser during said period such type of machines as he may require at actual cost plus twenty per cent.

The defendant had designs for the construction of another type of machine and he admits that he intended to continue making cones and using the name "Crispy." At page 106 of Holland's deposition, we find this answer:

The statement I made was that according to my contract I should not build any more of these horizontal machines but that I would go into the manufacture of a rotary machine under my patents, and reserve the "Crispy" name. I gave him the exclusive right on the horizontal machine. I had built and designed the rotary, and Mr. Moyer knew all about it.

(1) (1915) 51 S.C.R., 411.

(2) (1930) Ex. C.R., 124, at 129.

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I may note here incidentally that Moyer denies categorically he knew anything about this other machine (dep. p. 171):

His LORDSHIP: Q. Did you know about the other machine?—A. No, sir.

Q. Nothing at all?—A. No, sir. I would not have brought the first machine if he had had a better one to sell. We had a whole year ahead of us. There was no rush for me.

In cross-examination, the defendant emphasized his statement that he intended to continue carrying on business as cone manufacturer and using his trade-mark (dep. p. 107):

Q. Notwithstanding the fact that you intended to build a machine which could be run more economically than this one, he went and bought this machine?—A. He did.

Q. You told him at the time that you were intending to have the new machine to go on and manufacture “Crispy” cone?—A. I reserved the right for that purpose.

Q. But did you tell him?—A. I don’t know that I gave him the details to that extent.

Q. You actually did reserve the right to use the word “Crispy”?—A. Yes.

Q. And intended to use the word “Crispy” in the manufacture of cones upon this new machine you were going to make?—A. Yes, I certainly did.

It has been said that, to void the trade-mark, the assignment must have been acted upon by the assignees; I find in Kerly (op. cit. at p. 425) the following observations:

And, although an assignment of a trade-mark be inoperative by reason of being an assignment in gross, the assignor may lose his right to the mark by such assignment, at all events if the assignee has acted upon the assignment. Thus, where an exclusive licence in gross for a term of years to use a trade name was granted, it was held that the assignor had at the end of the term lost his right to claim that the name indicated his manufacture.

See *Ford v. Foster* (1); *Thorneloe v. Hill* (2).

The evidence adduced on the part of plaintiff shows that the latter acted upon the assignment and manufactured and sold a large quantity of cones using the defendant’s trade-mark and on some occasions the word “Crispy” without the looped border: see deposition Moyer at pages 17, 18, 19 and 20; also exhibits 7, 8 and 17.

At page 20 we find the following statements:

Q. Have you manufactured many cones similar to Exhibit 8?—A. That is the only kind of cone we make now.

Q. How many, I said?—A. We have manufactured, I presume, possibly six or eight millions. We have never packed that many, because we have had to throw a lot of them away.

Q. Can you tell me how many you have sold, in an estimate?—A. Around four million or thereabouts.

The plaintiff's version on this point is uncontradicted; on the other hand, it is corroborated by Mulvihill (dep. p. 96).

Moyer had started in the cone business in May, 1930; exhibit 3 is a sample of the cone he was putting out at that time with the name "Sugar-Crisp." According to his statement, he manufactured approximately one and a half millions of these cones during the summer of 1930 (dep. p. 3).

He applied for his trade-mark Sugar-Crisp: see exhibit 4. The application was refused on account of Holland's trade-mark "Crispy." It was then that plaintiff communicated with the defendant: see deposition Moyer at page 5 and correspondence filed as exhibit 5. When Holland returned to Toronto early in May, 1931, he went to see Moyer and after some negotiations the agreement (exhibit 6) was entered into.

Section 45 of the Trade Mark and Design Act (R.S.C., 1927, chap. 201) enacts that:

45. 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

The plaintiff, who has been a cone manufacturer since May, 1930, is undoubtedly, in my opinion, an aggrieved person within the meaning of section 45: Kerly on Trade-Marks, 6th Ed., pp. 324 *et seq.*; *In re Appollinaris Co.'s Trade-Mark* (1); *In the Matter of Powell's Trade-Mark* (2); *In the Matter of Talbot's Trade-Mark* (3); *Jones v. Horton* (4); *W. J. Crothers v. Williamson Candy* (5.).

When the case first came up for trial, counsel for plaintiff, after calling two witnesses, made a motion to amend his statement of claim by adding thereto paragraph 3a, worded as follows:

3a. At the time that the defendant applied for and obtained the said trade-mark he knew or should have known, that the word "Crispy" or

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| (1) (1891) L.R. 2 Ch., 186. | (3) (1894) 11 R.P.C., 77, at 82 |
| (2) (1893) 10 R.P.C., 195, at 201; | and 83. |
| (1893) 11 R.P.C., 4, at 7 and 8. | (4) (1922) 21 Ex. C.R., 330. |
| (5) (1925) S.C.R., 377. | |

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“Crisp” or a combination of such words or of words similar thereto were used by manufacturers and vendors of ice cream cones in the Dominion of Canada prior to the said time.

The motion being granted, counsel for the defendant asked for an adjournment on the ground that he was not prepared to meet this new allegation. The case was adjourned *sine die* and the costs were reserved.

The amendment raised a new and serious ground of attack against the defendant’s trade-mark and I believe that counsel for defendant was, in the circumstances entitled to an adjournment. Having now to deal with the costs of the motion to amend and the costs thrown away as a result of the adjournment, I have reached the conclusion that I will render justice in ordering that the plaintiff pay the costs of the motion to amend and the costs of the day.

Adjudicating now on the merits, there will be judgment ordering that the defendant’s trade-mark registered on the 2nd day of June, 1930, register No. 229, folio 49610, consisting of the word “Crispy” having the letters of diminishing size and enclosed within a looped border, be expunged from the register, with costs against the defendant.

The costs of the motion to amend and the costs of the day shall be set off against the costs of action.

Judgment accordingly.

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May 31.
Jun. 1.
Oct. 31.

BETWEEN:

J. ARTHUR RENAUD ET AL. PLAINTIFFS;

AND

CANADIAN NATIONAL RAILWAY }
COMPANY } DEFENDANT.

Expropriation—Injurious affection to property not expropriated—Measure of damages—Damage peculiar to property—Loss of trade and personal inconvenience not recoverable.

The Plaintiffs seek to recover compensation for part of their lands taken by expropriation and for damages for injury to an adjoining lot owned by them, due to the construction of a viaduct for which the other part of the land was expropriated.

Held, that section 17 of 19-20 Geo. V, c. 10, amending the Canadian National Railway Company Act, does not limit the scope of section 23 of the Expropriation Act, and that the Canadian National Railway Company must pay, not only the value of the land actually

- taken by expropriation but also the damages caused to lands injuriously affected by the construction of the public work, in this case a viaduct.
2. That the damages recoverable for injurious affection are such as are attributable to the construction of the public work and not such as would flow from its operation, and only to the extent to which such injurious affection depreciates said land and makes it less valuable.
 3. That no damage can be recovered for personal inconvenience or loss of trade, nor damages which the owner of the land suffers in common with the public generally.

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ACTION to recover from the defendant the compensation for the land expropriated and taken by it for the construction of a viaduct and for damages resulting from injurious affection to a lot owned by the plaintiffs adjoining the one expropriated.

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

A. Geoffrion, K.C., and F. Chaussé for Plaintiffs.

G. Barclay, K.C., and E. H. Eberts for Defendant.

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

ANGERS J., now (October 31, 1932), delivered the following judgment:

Les demandeurs, en leur qualité d'ayants droit à la succession de l'honorable Louis Renaud, en son vivant sénateur de Montréal, réclament de la défenderesse, Canadian National Railway Company, un montant de \$83,639.21.

La réclamation comprend deux item distincts: le premier, pour un montant de \$27,305.21, réclamé à titre d'indemnité pour une propriété expropriée par la défenderesse pour la construction d'un viaduc, au-dessus de ses voies ferrées, sur la rue de la Montagne, entre les rues Saint-Antoine et Notre-Dame, à Montréal; le second, s'élevant à \$56,334, réclamé à titre de dommage à une propriété voisine non expropriée, résultant de la construction de ce viaduc.

[The learned Judge here discusses the question of title and also the matter of the compensation to be allowed to the Plaintiffs for the property taken and expropriated and fixes such compensation at the sum of \$17,416.02 for the land and buildings. He then proceeds to discuss the other question of the right to recover for injurious affection to property not expropriated, and the matter of the amount to

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be allowed for such injurious affection by the construction of the public work in question.]

J'examinerai maintenant la réclamation des demandeurs pour dommages causés à leur immeuble de la rue Rolland comme conséquence de la construction du viaduc de la rue de la Montague.

Le cas des dommages causés un immeuble détérioré par la construction d'ouvrages publics est régi par l'article 23 de la loi des expropriations (S.R.C., 1927, ch. 64): (See text.) (Texte français et anglais donné ici.)

L'article 17 de la loi des chemins de fer Nationaux du Canada (S.R.C., 1927, ch. 172) tel qu'amendé par 19-20 Geo. V, ch. 10, article 2, contient, entre autres, la disposition suivante: (Voir texte.)

Le sous-paragraphe (d) du paragraphe (2) de l'article 17 décrète *inter alia* ce qui suit: (Voir texte.)

Le sous-paragraphe (c) du paragraphe 2 de l'article 17, avant l'amendement fait par 19-20 Geo. V, ch. 10, article 2, état ainsi conçu: (Voir texte.)

Comme on le constate, le sous-paragraphe (d) du paragraphe (2) du nouvel article 17 ne fait aucune allusion à l'indemnité payable à l'égard de terrains endommagés ou lésés par suite de la construction d'ouvrages publics. Est-ce à dire que le législateur a entendu priver le propriétaire de terrains ainsi endommagés de l'indemnité prévue par la loi des expropriations? Je ne le crois pas, pour deux raisons: d'abord parce que la clause générale de l'article déclarant la loi des expropriations applicable à la Compagnie est aussi large dans le nouvel article que dans l'ancien. Celui-ci stipulait que "toutes les dispositions de la loi des chemins de fer, sauf. . . . les dispositions. . . . se rapportant. . . . à l'expropriation ou l'utilisation de terrain, s'appliquent à la Compagnie et à son entreprise, déclaration étant faite que toutes les dispositions de la loi des expropriations, sauf quand elles sont incompatibles avec la présente loi, s'appliquent, *mutatis mutandis*, à la Compagnie et à son entreprise, au lieu des dispositions de la loi des chemins de fer ainsi exceptées." Le nouvel article 17, de son côté, décrète que "toutes les dispositions de la loi des chemins de fer s'appliquent à la Compagnie, sauf les réserves suivantes: . . . . (c) celles des dispositions qui sont inconciliables avec les dispositions de la loi des expo-

priations telle que rendue applicable à la Compagnie par la présente loi; (2) (a) toutes les dispositions de la loi des expropriations, sauf lorsqu'elles sont inconciliables avec les dispositions de la présente loi; s'appliquent, *mutatis mutandis*, à la Compagnie."

En comparant ces deux textes, qui ne pèchent pas par excès de précision, il me semble que le législateur n'a pas eu l'intention de libérer la Canadian National Railway Company de l'obligation de payer une indemnité au propriétaire d'un immeuble endommagé ou lésé par la construction d'ouvrages publics. Bien que cela ne puisse légalement servir à l'interprétation d'une loi, j'ai eu la curiosité de prendre connaissance du "bill" qui a provoqué cet amendement: c'est le bill 130, intitulé "Loi modifiant la loi des chemins de fer nationaux du Canada", dont la première lecture eut lieu le 15 avril 1929; je trouve en marge de l'article 2, abrogeant l'article 17 de la loi des chemins de fer nationaux du Canada et le remplaçant par l'article 17 actuel, la note explicative suivante:—

2. L'objet de cet amendement est de rendre applicable aux chemins de fer Nationaux les dispositions de la loi des expropriations. Sous l'article actuel, n'est applicable à la compagnie cette partie de la loi des expropriations qui concerne la prise de possession et l'utilisation des terrains; et par cet amendement les dispositions relatives à la détermination de l'indemnité s'y appliqueront également.

Poussant plus loin mes recherches pour tâcher de découvrir quel avait été le but du législateur, j'ai consulté le Hansard—ou, pour lui donner son titre régulier, le rapport officiel des débats de la Chambre des Communes—où j'ai trouvé, à la séance du 22 avril 1929, celle où le bill a subi la deuxième lecture, les explications suivantes de la part du parrain du "bill" (p. 1804, 2ème colonne):

There is, however, one important provision which is contained in section 2 of the bill. It can be dealt with probably more intelligently in committee of the whole than at this stage of the bill. Briefly, it seeks to make available to the Canadian National Railways the provisions of the Expropriation Act, and as it will be of some interest to my legal friends in the house, I can say that the object of it is to endeavour to secure a uniform procedure in connection with large matters of expropriation which, from the point of view of the Canadian National, can be more conveniently carried on through the Exchequer Court, than by the means available in various parts of the country.

Naturellement, pas plus que la note explicative dans le "bill", ces déclarations faites à la Chambre peuvent-elles me servir à interpréter la loi. Elles ne font que confirmer l'opinion que je m'étais formée que le législateur n'avait

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pas eu en vue, en remplaçant l'article 17, d'enlever au propriétaire dont l'immeuble se trouve détérioré ou lésé par la construction d'ouvrages publics l'indemnité qui lui est accordée par la loi des expropriations.

La deuxième raison pour laquelle je ne crois pas que le législateur ait voulu priver de son recours le propriétaire d'un immeuble détérioré ou lésé par la construction d'un ouvrage public, c'est qu'aux termes de la loi des expropriations, la Couronne, en pareil cas, est responsable et doit indemniser le propriétaire; je ne puis concevoir que le législateur ait voulu mettre la Canadian National Railway Company dans une position plus avantageuse que la Couronne et la libérer d'une responsabilité que celle-ci, en pareilles circonstances, encourrait.

Je me crois justifié de conclure que le nouvel article 17 de la loi des chemins de fer Nationaux du Canada n'a pas pour effet de restreindre la portée de l'article 23 de la loi des expropriations.

Ceci établi, il me reste à déterminer si l'immeuble des demandeurs qui n'a pas été exproprié, savoir le lot 575, a été détérioré ou, selon l'expression anglaise, "injuriously affected", par la construction du viaduc en question.

Il ne peut y avoir indemnité que pour le dommage causé par la construction de l'ouvrage public; il ne saurait être question d'indemnité pour le dommage résultant de la mise en opération ou de l'exploitation de ce dernier.

Pour donner lieu à un recours en indemnité, quatre conditions sont requises:

1. il faut que le dommage ait été causé par un acte autorisé par le statut;

2. il faut que ce dommage provienne d'un acte qui, s'il n'eût pas été autorisé par le statut, aurait donné ouverture à une action en vertu du droit commun;

3. il faut que le dommage soit causé à l'immeuble lui-même c'est-à-dire que la construction de l'ouvrage public le déprécie ou en diminue la valeur; il ne peut être question d'indemnité dans le cas de dommage personnel ou au Commerce;

4. il faut que le dommage résulte de la construction et non de l'exploitation de l'ouvrage public.

Il y a maintes décisions dans ce sens et il est inutile d'insister.

La première condition me paraît remplie: il s'agit bien en effet d'un ouvrage public autorisé par statut. La seconde condition me paraît également remplie: si la défenderesse ou toute autre personne eût, sans autorisation, érigé le viaduc dont il s'agit, un propriétaire lésé par cette construction aurait eu, à mon avis, un recours en dommages en vertu de la loi.

Il reste les troisième et quatrième conditions; ce sont les seules qui, en l'espèce, présentent quelque difficulté.

Il ne suffit pas que le propriétaire subisse quelque inconvénient ou encourt quelque perte dans son commerce pour qu'il ait droit à une indemnité; il faut que l'immeuble lui-même, pour le propriétaire actuel ou pour tout autre, soit détérioré—la traduction française n'est pas heureuse et le mot "détérioré" ne comporte pas le même sens que les mots "injuriously affected" du texte anglais—ou déprécié ou diminué en valeur. Il ne faut pas que le dommage causé en soit un dont souffre le public en général; ce dommage doit être particulier à la propriété du réclamant. Ceci cependant ne doit pas être interprété trop rigoureusement; je ne crois pas qu'il y ait lieu de prétendre que seule la propriété du réclamant doit être affectée et que s'il y en a plus d'une le recours disparaît; il peut fort bien se trouver deux ou trois autres propriétés dans la même localité qui subissent également une dépréciation, sans que pour cela l'on puisse soutenir que la dépréciation est générale et n'affecte personne en particulier. Prenons, par exemple, la propriété de la rue Rolland; elle comprend trois magasins. Si chacun de ces trois magasins eût appartenu à un propriétaire différent, il me semble qu'il serait absurde de conclure qu'aucun d'eux ne saurait avoir de recours du fait que la dépréciation est commune aux trois. Ce que la loi et la jurisprudence, il me semble, ont en vue c'est de restreindre les cas où il pourrait y avoir ouverture à une indemnité aux immeubles situés dans le voisinage immédiat de l'ouvrage public et d'empêcher que tous les propriétaires dans un rayon considérable puissent prétendre à des dommages plus ou moins aléatoires et indéfinis à leurs immeubles. Ceci est juste; il ne faut pas rendre impossible l'exécution de travaux publics en accordant à tous et chacun, qui se croient lésés et qui, en fait, ne subissent

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que des inconvénients, un recours en dommages, l'intérêt public doit primer l'intérêt privé.

D'un autre côté, s'il est établi que des immeubles dans le voisinage immédiat d'un ouvrage public sont dépréciés comme résultat de la construction de cet ouvrage, je crois qu'il y a lieu de dédommager les propriétaires de ces immeubles et de leur accorder une indemnité raisonnable, équivalente autant que possible à la dépréciation que subissent ces immeubles. Chaque cas naturellement est un cas d'espèce. La question de savoir si un immeuble en particulier subit une dépréciation est une question de fait. S'il ne faut pas s'écarter des principes établis et reconnus, il est impossible d'ignorer les faits de chaque cas particulier et de décider un cas par l'autre.

Dans la cause de *The King v. MacArthur* (1), sur laquelle le procureur de la défenderesse s'appuie principalement, pour ne pas dire uniquement, pour conclure au rejet de la réclamation des demandeurs, la Cour Suprême, infirmant le jugement de la Cour de l'Echiquier (2), a décidé que le propriétaire d'un immeuble n'a pas droit à une indemnité du seul fait que, par suite de la construction d'un ouvrage public, il a été privé de l'usage d'un chemin conduisant à un district avoisant et obligé de se servir d'un autre chemin moins avantageux ou convenable.

Il s'agissait d'une pétition de droit en vertu de laquelle le pétitionnaire réclamait de la Couronne une indemnité dans les circonstances suivantes. MacArthur était propriétaire d'un immeuble résidentiel dans le village de Cardinal, comté de Grenville. Le village de Cardinal est situé sur la rive nord du Saint-Laurent. Jusqu'à 1897, le canal passait au sud du village, soit entre le village et le fleuve. En 1897, le Gouvernement a changé le cours du canal, le faisant passer au nord du village; de la sorte les deux extrémités du village, à l'est et à l'ouest, se sont trouvées bornées par le nouveau canal et le seul pont, traversant le canal, s'est trouvé situé vers le centre du village. La propriété du pétitionnaire étant à l'une des extrémités du village, il a réclamé des dommages pour diminution de valeur de son immeuble et inconvénient de n'avoir accès au district avoisinant que par un pont mobile, sur lequel passait un

(1) (1904) 34 S.C.R. 570.

(2) (1904) 8 Ex. C.R. 245.



chemin de fer, ce qui avait pour effet d'allonger sa route et de la rendre plus dangereuse. Le juge Nesbitt, qui a rendu le jugement en Cour Suprême, résume avec assez de précision les faits desquels il a conclu à une absence de responsabilité de la part de la Couronne; je ne puis mieux faire que citer ses remarques:

"In this case all the evidence shows is that the suppliant, in common with all others, is cut off from one access to Prescott, by what is known as the old highway, but all other methods of access or egress to or from the village remain the same, and the Government, under the Expropriation Act, section 3, subsec. f, substituted another road in lieu thereof, so that the suppliant still has access to Prescott although by not so convenient a road. This is an inconvenience which he suffers in common with all the other persons desiring to use that portion of the highway which is cut off. I do not think that any case can be found which, under the English law, would hold that for such a construction the plaintiff could himself maintain an action. I think the remedy by indictment, it is absolutely clear, from all the authorities, that mere inconvenience of a person, or loss of trade or business, is not the subject of compensation." et plus loin (p. 576):

"The evidence makes it quite plain that the reason the witnesses said that the property was depreciated in value is because it is less convenient as it is a somewhat longer road, and parties are held by the opening of the bridge, and also because railway tracks are upon the bridge, which of course is not an item which can be considered in this case."

A la lecture du rapport il est évident que cette cause offre plusieurs points de dissemblance avec la présente. Dans la cause du *Roi v. MacArthur*, le Gouvernement a déplacé le lit d'un canal et, en ce faisant, a coupé une rue aux deux extrémités d'un village. Pour parer à cette éventualité et donner accès aux résidents de cette rue au sud du village et au chemin de Prescott en particulier, il a jeté un pont sur le canal à peu près à mi-chemin des deux extrémités, ouest et est, de la rue en question. En agissant ainsi le Gouvernement a enlevé au pétitionnaire et à tous les autres résidents dans la même localité une route vers la partie sud du village et la chemin de Prescott, mais il a substitué à la route qu'il a fermée une autre route; la seconde était apparemment un peu plus longue que la première, ce qui pouvait être un inconvénient, mais rien de plus. Le juge de la Cour de l'Exchiquier avait vu plus qu'un simple inconvénient et avait accordé au pétitionnaire une indemnité de \$1,200. Comme je le disais tout à l'heure, la Cour Suprême n'a vu qu'un inconvénient dans cette substitution de chemin et elle a trouvé que cet inconvénient était le même pour tous les résidents de Cardinal et le

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public en général et elle a infirmé le jugement de cette Cour.

Ici la défenderesse, en construisant son viaduc, a fermé au trafic en voiture la rue de la Montagne entre la rue Rolland et la rue Notre-Dame. Elle aurait pu donner et elle aurait de fait donné une issue par la rue de la Montagne, de la rue Rolland à la rue Notre-Dame, si elle eût ouvert de chaque côté du viaduc les chemins ou rues que prévoyait son plan, accepté par la Cité de Montréal et approuvé par la Commission des Chemins de fer. Elle prétend qu'elle a ouvert une route de l'extrémité sud de la ruelle Rolland (ou rue Taillefer) à la rue Notre-Dame sur un terrain lui appartenant. Je dois dire que, pour moi, la ruelle Rolland est une impasse et restera telle tant et aussi longtemps que la défenderesse n'aura pas créé une servitude de passage perpétuelle en faveur des demandeurs ou leurs ayants cause ou cédé par dédicace ou autrement, à la Cité de Montréal, le terrain situé à l'extrémité sud de la ruelle Rolland et s'étendant jusqu'à la rue Notre-Dame. La défenderesse a soutenu devant la Commission des Chemins de fer et elle soutient devant cette Cour que les chemins indiqués sur le plan exhibit 2 ne devaient être que pour son usage personnel. Qui l'empêchera de soutenir la même chose au sujet du terrain au sud de la ruelle Rolland, quand bon lui semblera? Elle pourra clôturer ce terrain ou y ériger les constructions qu'elle voudra et les demandeurs n'auront aucun recours pour la contraindre à l'ouvrir ou le laisser vacant pour qu'ils puissent continuer à y passer. L'on a prétendu que le cas des demandeurs était celui du public en général dans le voisinage. Il suffit de jeter un coup d'oeil sur les plans F et Q pour se convaincre du contraire. Toutes les propriétés ayant front sur la rue de la Montagne, du côté est aussi bien que du côté ouest, entre la rue Rolland et la rue Notre-Dame, ont été acquises ou expropriées par la défenderesse. Au nord de la rue Rolland à aller jusqu'aux voies de la défenderesse, les propriétés des deux côtés de la rue de la Montagne appartenaient avant la construction du tunnel et appartiennent encore à la défenderesse. Toutes les propriétés du côté nord de la rue Rolland, entre les rues de la Montagne et Aqueduc, à l'exception peut-être du lot numéro 585 situé au coin nord-est des rues Aqueduc et Rolland,

sont depuis longtemps la propriété de la compagnie; du côté sud de la rue Rolland, il n'y a, en arrière de la propriété Peterson située au coin sud-ouest de la rue de la Montagne, expropriée par la défenderesse, que celle des demandeurs. En arrière de la propriété des demandeurs rue Rolland, il y a les lots 570, 571, et 574 ayant front sur la rue Taillefer; ils n'ont pas de façade sur la rue Rolland et leur position diffère essentiellement de celle de la propriété des demandeurs. Au surplus le lot 570, à en juger par le plan exhibit F, paraît appartenir à la défenderesse. En effet Wass, ingénieur à l'emploi de la compagnie, a déclaré que sur ce plan F, qu'il a lui-même produit, se trouvent indiqués en brun, outre les rues à proximité de l'immeuble des demandeurs, les lots sur lesquels la compagnie a, durant les travaux, ouvert et pavé des chemins pour faciliter le trafic. Sur le plan F, tout le devant du lot 570 est indiqué en brun. Il ne resterait donc sur le côté est de la rue Taillefer que les lots 571 et 574 au sujet desquels la preuve ne révèle rien et qui pourraient appartenir à des particuliers. Même si l'on devait en arriver à la conclusion que la position des propriétaires des lots 571 et 574 est indentique à celle des demandeurs il n'y aurait pas lieu, à mon sens, de conclure de là qu'il s'agit du public en général. L'on ne peut non plus soutenir que les propriétés au sud de la rue Rolland, du côté de la rue Aqueduc, sont dans la même situation que celle des demandeurs et qu'aurait pu l'être l'arrière partie du lot 577, si elle n'eût été expropriée. La sortie naturelle et la plus rapprochée pour ces quelques propriétés est la rue Aqueduc.

*MacArthur et Keeffe*—il y avait deux causes, s'il n'y a eu qu'un appel, comme le fait voir le rapport de la Cour de l'Échiquier—n'ont pas, autant que la preuve le fait voir, été incommodés dans la possession ou la jouissance de leurs résidences respectives; la route pour aller à la gare ou tout autre endroit au sud du canal pouvait être un peu plus longue; c'est le seul inconvénient qu'ils subissaient. Dans le cas qui nous occupe les occupants de l'immeuble ont complètement perdu leur sortie par la rue de la Montagne—la défenderesse n'y a substitué aucune autre route bien qu'apparemment elle s'était engagée à le faire. La sortie sous le viaduc par la rue School et la rue Saint-Félix, quoique peu avantageuse, leur a été rendue impraticable à

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cause des piliers qui soutiennent le viaduc à l'entrée de la rue School dans la rue de la Montagne. Les occupants de la propriété de la rue Rolland restent avec une seule sortie; celle de la rue Aqueduc, plus éloignée et moins avantageuse pour les raisons déjà exposées et qu'il m'est inutile de répéter.

Les locataires sont partis, non pas durant la construction du viaduc, mais depuis. La raison en est simple: la clientèle s'éloignait; les embarras du trafic et la perte de temps en résultant les amenaient ailleurs, dans des endroits plus accessibles, où le trafic était moins entravé.

Je n'entends pas discuter, encore moins critiquer le jugement de la Cour Suprême *In re The King v. MacArthur*; je m'y soumettrais bien volontiers si je croyais les circonstances semblables dans les deux causes. Les deux cas diffèrent: l'honorable juge Nesbitt résumait ainsi dans la cause de *The King v. MacArthur* (p. 577) le motif déterminant de sa décision:

I think the property in this case is not so dependent upon the existence of the access which was so cut off as to constitute an injurious affection within the authority of the statute.

Or dans le cas qui m'occupe, je ne puis me convaincre qu'il n'y a qu'un inconvénient, le même pour tout le public du quartier. Il y a, à mon humble avis, une dépréciation évidente de la propriété elle-même. Je suis enclin à croire, après avoir entendu et pesé la preuve avec soin et avoir visité les lieux à deux reprises, une fois avec les procureurs des parties et une fois seul, que les constructions érigées sur le lot 575 n'ont plus et n'auront probablement jamais, à moins qu'un débouché convenable ne soit ouvert sur la rue de la Montagne, de la rue Rolland à la rue Notre-Dame, la valeur qu'elles avaient avant la construction du viaduc. Cette dépréciation n'est pas générale et commune à tous les immeubles du quartier; elle n'atteint que celui des demandeurs et, peut-être, à un moindre degré, les deux lots susdits sur la rue Taillefer ou ruelle Rolland. Les quelques immeubles à l'ouest de la rue Taillefer ont leur sortie naturelle par la rue Aqueduc. La défenderesse, dans sa réponse à la requête de la Cité de Montréal (exhibit D) alléguait que seule la succession Renaud, représentée par les demandeurs, s'était plainte de la non-ouverture du chemin du côté ouest de la rue de la Montagne, entre les rues Rolland et Notre-Dame. La raison en est simple; elle

était la seule à en souffrir. Il ne faut pas perdre de vue qu'après l'expropriation, toutes les propriétés des deux côtés de la rue de la Montagne entre la rue Notre-Dame et les voies de la défenderesse et toutes les propriétés du côté nord de la rue Rolland entre la rue de la Montagne et la rue Aqueduc, sauf peut-être le lot 585, qui, en réalité, a front sur la rue Aqueduc, appartenaient à la défenderesse. Outre la propriété des demandeurs, il ne restait de propriétés privées sur la rue Rolland que celles à l'ouest de la rue Taillefer et sur la rue Taillefer il n'y avait que les lots 571 et 574 susmentionnés, à l'arrière de l'immeuble des demandeurs. Encore une fois il n'y a rien d'étonnant que seule la succession Renaud se soit plainte du défaut d'ouverture d'un chemin de long du viaduc, du côté ouest, entre les rues Rolland et Notre-Dame.

Je crois devoir mentionner brièvement que le procureur de la défenderesse a, outre la cause de *The King v. MacArthur* citée à l'appui de sa prétention les causes suivantes: *The King v. La Cie des Carrières de Beauport* (1) et *Archibald v. The Queen* (2).

A la lecture du rapport dans la cause de *The King v. La Cie des Carrières de Beauport*, il ressort que la défenderesse prétendait avoir droit à une indemnité pour la fermeture de rues publiques qui, avant l'expropriation, existaient sur le terrain pris par la couronne; la cour en est arrivée à la conclusion que la défenderesse n'avait aucun droit particulier à ces rues, qu'elle était privée de leur usage et jouissance dans la même mesure que le public en général et qu'en conséquence il n'y avait aucune raison de lui accorder une indemnité: cette décision est basée sur les causes de *The King v. MacArthur* et de *Archibald v. The Queen*. Cette décision me paraît conforme au principe énoncé dans le jugement de la Cour Suprême *in re The King v. MacArthur* et je n'ai aucunement l'intention d'en discuter le bien-fondé; comme je le disais au sujet de cette dernière cause, je m'y soumettrais sans hésitation, si je croyais qu'il y a identité d'espèce, mais, à mon sens, les cas différents matériellement.

Les mêmes remarques s'appliquent à la cause de *Archibald v. The Queen*; là encore les faits sont bien différents

(1) (1918) 17 Ex. C.R., 415.

(2) (1893) 3 Ex. C.R., 251 et
(1894) 23 S.C.R., 147.

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de ceux de la présente cause et, à mon humble avis, justifiaient le refus d'une indemnité. Je me contenterai de citer les quelques remarques suivantes de l'honorable juge Burbridge, p. 257:

Assuming that Barrachois Pond was navigable and that the suppliant had a right to use the same for rafting and floating his timber or lumber thereon, the right was common to the public, and the interference therewith of which he complains though it may have differed in degree did not differ in kind from that to which others of Her Majesty's subjects were exposed. There was no injury to the suppliant's land as such, nor to any right or interest therein. I had occasion to discuss this question in *The Queen v. Barry et al* and to refer to the cases at some length, and to the principles deducible therefrom, and I am satisfied that under the facts of this case the suppliant's claim for compensation for the injurious affection of his property cannot be sustained.

Cas d'espèce, comme le sont d'ailleurs la plupart des causes de cette nature.

En somme la doctrine aujourd'hui est bien établie et ne se discute plus; il ne peut y avoir recours en indemnité que lorsque la propriété est détériorée ou lésée, en d'autres mots, lorsqu'elle est dépréciée ou diminuée en valeur, ou, selon l'expression anglaise, *injuriously affected*. Aucun recours n'existe lorsqu'il n'y a qu'un inconvénient dont souffre le public en général.

Je crois que les causes de *Caledonian Railway Co. v. Walker's Trustees* (1) et de *Metropolitan Board of Works v. McCarthy* (2), sur lesquelles le procureur des demandeurs s'est appuyé et auxquelles l'honorable juge Nesbitt réfère *in re The King v. McArthur*, sont au point. Je me permettrai de citer les remarques suivantes du Lord Chancelier dans la cause de *Caledonian Railway Co. v. Walker's Trustees*, p. 284:

In the present case, as in *Chamberlain v. West End of London Railway Co.* and *Beckett's Case* (both which were approved and followed by this House in *Metropolitan Board of Works v. McCarthy*), the claim was made in respect of a direct and immediate injury to the respondent's estate by cutting off their direct and immediate access to Eglinton Street. The circumstances of Chamberlain's case closely resembled those of the present case. In *Beckett's Case* the width of the public road immediately opposite the plaintiff's premises was reduced, so as to render it, not useless to those premises for the purpose of access, but less convenient than before. In *McCarthy's Case* this House gave compensation for the obstruction of access to the River Thames from the plaintiff's premises through a public dock lying on the other side of a public road adjoining those premises.

It was argued for the appellants that these authorities ought not to be extended to any case of the obstruction of access to private property

(1) (1882) L.R., 7 App. Cas., 259. (2) (1874) L.R., 7 H.L., 243.

by a public road, when such construction is not immediately *ex adverso* of the property. This limitation, however, seems to me arbitrary and unreasonable, and not warranted by the facts either of *Chamberlain's* or of *McCarthy's Case*. A right of access by a public road to particular property must, no doubt, be proximate, and not remote or indefinite, in order to entitle to owner of that property to compensation for the loss of it; and I apprehend it to be clear that it could not be extended in a case like the present to all the streets in Glasgow through which the respondents might from time to time have occasion to pass for purposes connected with any business which they might carry on upon the property in question. But it is sufficient for the purposes of the present appeal to decide that the respondents' right of access from their premises to Eglinton Street, at a distance of no more than ninety yards, was direct and proximate, and not indirect or remote. The Court of Session has so decided, and I think your Lordships cannot, consistently with your decision in *McCarthy's Case*, do otherwise than affirm their judgment. I therefore so move your Lordships.

Les intimés, dans cette cause, étaient propriétaires d'un emplacement qui était borné sur trois côtés par des rues, dont deux croisaient la rue Eglinton à angle droit. La compagnie avait construit une voie ferrée du côté ouest de la rue Eglinton, interceptant ainsi l'accès des intimés à la rue Eglinton par les deux rues transversales susdites. Les intimés conservaient néanmoins un accès à la rue Eglinton par un chemin détourné, plus long et moins commode. La distance de la manufacture des intimés à la rue Eglinton par les deux rues transversales, sur lesquelles leur manufacture avait front, était de 90 verges. Comme nous l'avons vu, la Chambre des Lords a jugé qu'il y avait dépréciation de la propriété et que les intimés avaient en conséquence droit à une indemnité. Cette cause offre, avec la présente, beaucoup de similitude.

Lord Cairns, dans la cause de *Metropolitan Board of Works v. McCarthy* (p. 252 du rapport) s'exprimait ainsi:

Now, my Lords, divesting the present case of the more precise description which I have read from the Case, it appears to me to amount to this: The occupier or tenant of a house has got in front of his house two highways, the one highway being a road or a street, and the other immediately beyond and abutting upon the road or the street, being a highway by water. The highway by water is taken away from him—the highway by land remains. It appears to me that it is impossible to doubt that the destruction of the highway by water, situate as I have described it, is otherwise than a permanent injury to the property in question, by whomsoever, or for whatsoever purpose, that property may be occupied. The case appears to me to be extremely analogous to a case decided by the Court of Common Pleas before the present case, the case of *Beckett v. The Midland Railway Company*, in which there was, in front of the premises in question in that case, one single highway, the farther half, or the farther third portion of which was taken off and blocked up by the execution of the Defendant company's works. It was there held that that

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was an injury which permanently and injuriously affected the premises in question; and it appears to me to be a matter entirely indifferent whether you have one highway, the farther half of which is blocked up and destroyed, or whether you have a double highway, first by land and then by water, and the part of the highway which consists of water is blocked up and destroyed.

Dans la même cause Lord Penzance disait (p. 263):

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The question then, is, whether when a highway is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed; suffer especial damages 'more than' and 'beyond' the rest of the public. It surely cannot be doubted but that they do.

The immediate contiguity to a highway, commonly called frontage, is a well known and powerful element in the value of all lands in populous districts. Where frontage to a high road does not exist, propinquity and easy access to a high road are equally undoubted elements of value in such districts, distinguishing lands which have them from those which have them not. If, then, the lands of any owner have a special value by reason of their proximity to any particular highway, surely that owner will suffer special damage in respect of those lands beyond that suffered by the general public if the benefits of that proximity are withdrawn by the highway being obstructed. And if so, the owner of such lands appears to me to fall within the rule under which an action is maintainable, though the right interfered with is a public one.

Le Lord Chancelier (Lord Cairns) indique (p. 253, in fine, et p. 254). La distinction qui existe entre cette cause et celle de *Ricket v. Metropolitan Railway Co.* (1) mentionnée et commentée *in re The King v. MacArthur*. Il m'est inutile de discuter cette cause.

Deux décisions antérieures, suivies dans les causes de *Metropolitan Board of Works v. McCarthy* et *Caledonian Railway Co. v. Walker's Trustees*, dans lesquelles une indemnité a été accordée dans des circonstances assez semblables à celles de la présente cause, que je ne ferai que citer vu qu'elles sont discutées et analysées dans ces deux causes, mieux que je ne pourrais le faire moi-même, sont celles de *Chamberlain v. West End of London & Crystal Palace Railway Co.* (2) et *Beckett v. Midland Railway Co.* (3).

Une indemnité a été aussi accordée dans les causes suivantes: *McQuade v. The King* (4); *The Queen v. Barry* (5); *McPherson v. The Queen* (6).

(1) (1867) L.R., 2 H.L., 175.

(2) (1863) 2 B. & S., 617.

(3) (1867) L.R., 3 C.P., 82.

(4) (1902) 7 Ex. C.R., 318.

(5) (1891) 2 Ex. C.R., 333.

(6) (1882) 1 Ex. C.R., 53.



Les diverses lois sur lesquelles reposent ces arrêts sont substantiellement les mêmes que les nôtres sur le point particulier qui nous occupe; il s'agit en somme d'interpréter les mots "injuriously affected" ou "injury done" que l'on y rencontre: c'est l'opinion du juge Nesbitt *in re The King v. MacArthur* (p. 557):

I do not think that there is substantially much difference between the various expropriation acts which were referred to.

C'est aussi l'opinion du juge Fournier *in re McPherson v. The Queen* (loc. cit., p. 61):

Les expressions "injuriously affected" de l'acte impérial et "injury done" dans la 31 Vic., (D) c. 12, peuvent certainement être considérées comme parfaitement équivalentes. Ainsi les décisions rendues sur l'interprétation de l'acte impérial peuvent être citées, avec à propos, pour l'interprétation de notre statut.

La construction du viaduc rue de la Montagne a enlevé à l'immeuble des demandeurs rue Rolland sa sortie naturelle vers la rue Notre-Dame. L'accès à cette propriété n'est plus aussi facile. La clientèle des marchands qui l'occupaient s'en est détournée à cause de son accessibilité difficile et des délais en résultant. Les locataires sont partis. La propriété est vacante depuis l'automne de 1931 et difficile à louer. Elle ne pourra plus, aux dires de certains témoins, être utilisée que comme entrepôt. Sa valeur est dépréciée de façon permanente, indépendamment du genre de commerce que l'on pourra y exercer à l'avenir, à moins, comme je l'ai déjà dit, que le défenderesse ne se décide d'ouvrir, le long du viaduc, entre les rues Rolland et Notre-Dame, les chemins indiqués sur son plan, comme elle l'a fait à l'autre extrémité de son viaduc, du côté nord de la rue Saint-Jasques.

Il me reste à déterminer l'étendue de la dépréciation causée à l'immeuble de la rue Rolland par la construction du viaduc de la défenderesse.

[The learned judge here discusses the evidence adduced as to the amount of damages to be allowed for "injurious affection," finds the property was worth \$37,129, and that there was a 25 per cent depreciation in value due to the above mentioned construction, and allowed \$9,282.25 for injurious affection.]

*Judgment accordingly.*

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The Court found upon the evidence that it was open to serious doubt if Ship Island was in 1867 situate within the bounds of what was then known as Goderich Harbour. That in any event it did not then form part of the said Harbour and was not then a harbour or river improvement. — *Held* that even assuming that Ship Island was in 1867 situate within the bounds of the harbour of Goderich, inasmuch as it was not part of the said harbour and was not at that time a harbour or river improvement, it did not pass to the Crown in right of the Dominion of Canada under section 108 of the British North America Act. *THE KING v. ATTORNEY GENERAL OF ONTARIO ET AL.*..... 44

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**COPYRIGHT — *Radio sketch — Authorship — Dramatic work — Infringement — Injunction—Damages.*** The defendant company employed the plaintiff, a dramatic author and producer, to prepare a radio sketch for use in advertising defendant's business, defendant suggesting the general outline of the work. The plaintiff prepared and procured production of the sketch through the defendant Grant. The plaintiff and defendant company entered into a written agreement covering production of the sketch, the agreement containing *inter alia*, the following clause: "The feature is only to be used as arranged through Fred W. Kantel." Subsequently the defendant company purported to cancel the agreement and continued to broadcast the sketch under the defendant Grant's direction. Later the defendant Grant broadcasted the sketch on his own account, for a short time, without plaintiff's consent. In an action for infringement of copyright and for damages.— *Held*, that the plaintiff was the sole aut or of the sketch, he having given it form and expression although certain ideas had been suggested by the defendant.—2. That the sketch was a dramatic work within the meaning of copyright law which does not require that the expression must be in an original or novel form, but that the work must not be

**COPYRIGHT—Concluded**

copied from another work. Nor did it matter that the original manuscript was departed from in each broadcast as, in the presentation of a dramatic work in whatever form, it is open to the performer to depart from the literal text of the work.—3. That there was infringement of plaintiff's copyright since defendant company for several months caused to be performed or broadcasted through defendant Grant the sketch originally prepared and broadcasted by direction of the plaintiff without his consent. *KANTEL v. GRANT ET AL.*..... 84

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**CROWN—Contract—Alterations of conditions—Authority of District Engineer and Chief Engineer.]** The contract in question was for the construction of an Ice Pier at Barrington Passage, N.S. The specification, *inter alia*, provided that the foundations for the crib "must be excavated by means of a dredge to the rock and cleared off by a diver." This the contractor found more difficult than he anticipated, and he told the District Engineer that the excavation by

**CROWN—Continued**

dredge was impossible of performance. Thereupon the District Engineer verbally relieved him of the dredging, the foundation area for crib to be levelled off with bags of concrete, etc., but refused to put the instructions in writing. The contractor would not carry on and the work was taken out of his hands for delay in execution of the contract. Hence the present action for damages alleged to have been suffered.—*Held*, that if a party by his contract charges himself with an obligation possible to be performed he must make good, unless the performance becomes impossible in law or in fact, or by the conduct of the other party. If what is agreed is possible and lawful, it must be done.—2. That the changes in the work under the contract made by the District Engineer in this case were not matters of detail, but, from an engineering standpoint, were fundamental changes which could only be authorized by the Chief Engineer. *BOONE v. THE KING* 33

2—*Contract—Sale of land—Offer to Crown represented by the Minister of Railways and Canals for Canada—Acceptance binding the Crown—Order in Council—Communication to offeror—Department of Railways and Canals Act, R.S.C., 1906, c. 35, s. 15—Public Lands Grants Act, R.S.C., 1906, c. 57, s. 4—Whether time of the essence—Assignability of contract—Damages for breach of contract when no specific performance decreed against Crown.]* *F.*, the claimant's assignor on July 19, 1925, sent to His Majesty the King, represented by the Minister of Railways and Canals for Canada, an offer to purchase certain land in the city of Toronto, occupied by the Canadian National Railways, for \$1,250,000, depositing \$25,000 (said deposit to be returned if offer not accepted), and agreeing, upon acceptance of the offer, to pay the balance of the purchase price at such time as possession "be given the undersigned (F.) not later than" September 25, 1925, and he further agreed that, upon his obtaining possession, on or before September 25, 1925, he would proceed with the erection of a 26 storey building upon said land and certain adjoining land, provided that His Majesty the King, represented as aforesaid, should execute a lease of certain floors for 30 years upon terms set out, the offer if accepted by Order in Council, to constitute a binding contract of purchase and sale subject to the conditions therein mentioned. In the draft lease attached to the offer, the Dominion Building Corporation Limited appears as lessor, and not *F.* On July 29, 1925, the Committee of the Privy Council authorized the acceptance of the offer, and a certified copy of the Order in Council was promptly

## CROWN—Continued

communicated to *F.* In September, 1925, a recommendation of the Minister of Public Works to lease five floors in the proposed building for the Department of Customs and Excise was approved and on February 1, 1926, an Order in Council was passed granting authority for such lease. On September 19, 1925, the Canadian National Railways vacated the premises. Extensions of time, usually signed by the Deputy Minister of Railways and Canals, were given to *F.*, in which to proceed with the construction of the building, the last one by letter of the Minister of Railways and Canals dated November 17, 1925. On December 29, 1925, *F.*, asked for a further extension to January 31, 1926, within which to complete the purchase, but no answer to this request was ever obtained and the alleged contract was treated as at an end. No notice was given either to *F.*, or the claimant, requiring completion of the purchase within any specified period and the deposit of \$25,000 was retained by Respondent. On August 5, 1925, *F.*, assigned all his right, title and interest in the contract to the claimant who now sues for damages for breach of contract.—The Crown contends that it can only be bound on a contract executed according to section 15 of R.S.C. (1906) c. 35 (Department of Railways and Canals Act); that all dealings were with *F.*, and that it never recognized the assignment from *F.*, to the claimant and that there is no privity between it and the claimant Dominion Building Corporation Limited; that *F.*, failed to comply with his own offer within the time prescribed.—*Held*, that the land in question being public land belonging to the Crown in right of the Dominion of Canada, and not being a matter pertaining to the Department of Railways and Canals alone, could be dealt with under section 4 of c. 57 of R.S.C. (1906) (Public Lands Grants Act) and that section 15 of c. 35 (1906) does not apply.—2. That the offer of purchase, the passage of the Order in Council and its communication to *F.*, and other writings disclosed in the evidence, together with the retention of the deposit, constitute an enforceable parol contract between the Crown and *F.*, for the sale and purchase of the real property in question.—3. That the present case is one, where, in equity, time should not be considered as of the essence of the contract, and the fact that the premises were vacated and that no remonstrance was made by anybody against the delay in completing the purchase, strengthens the equities in favour of the claimant. Moreover, the terms of the contract did not make time the essence of the contract, and the claimant or *F.*, was entitled to a notice, before the Respondent sought to

## CROWN—Continued

put an end to the contract, that the same would be treated as at an end if not completed within a limited time.—4. That this contract was assignable, and considering all the facts of the case, the Crown must be assumed to have known that *F.*, was acting for the company and that it acquiesced in the assignment. DOMINION BUILDING CORPORATION LIMITED *v.* THE KING..... 164

3 — *Petition of Right — Public work — Collision of motorboat with a buoy — Exchequer Court Act, Sec. 19, ss. "C."* Suppliant's motorboat collided with a buoy at the mouth of the Bracebridge river, in the Muskoka Lakes region, on which there was no light, and by his petition seeks to recover \$500 by way of damages to the boat, alleged to be the result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work, to wit, in not seeing that the buoy carried a light—*Held*, that the buoy in question, was not a public work within the meaning of Sec. 19, ss. "C" of the Exchequer Court Act, and that, in consequence, the suppliant was not entitled to the relief sought by his petition of right. CAPON *v.* THE KING..... 54

4 — *Petition of right — Jurisdiction — Damages — Interference with navigation — Fisheries Act—Public work—Assumption of risk.* At Livingstone's Cove, Nova Scotia, is a breakwater owned by the respondent, to provide a shelter for boats of shallow draught. In this cove suppliant had set a salmon trap net under licence from the Department of Marine and Fisheries. Dredging operations were being carried on in the vicinity of the breakwater by the Department of Public Works under the supervision and direction of one of its officers. The tug *A.*, hired by the respondent, whilst moving a loaded scow to the dumping grounds came into contact with the suppliant's net, seriously damaging the same. The present action is to recover the value, or cost of repairing the net and the loss of the use thereof for about one month.—*Held*, that where one person lends his servant to another for a particular employment, the servant, for anything one in that particular employment must be dealt with as the servant of the person to whom he is lent, although he remains the general servant of the person who lends him.—2. That the master and crew of the tug *A.*, the crew of the scow, and the master and crew of the dredge were servants of the Crown employed upon a public work within the meaning of section 19c of the Exchequer Court Act, and that this Court has jurisdiction to hear and entertain the present action.—

**CROWN—Concluded**

3. That it cannot be implied from the fact that suppliant was earlier requested to move his net, which he did not do, that he therefore assumed the risk of damage to the net. Consent involves an express or implied agreement that the act may be rightfully done or danger rightfully caused, mere knowledge of the risk does not necessarily involve an agreement to accept the risk, it may be some evidence of an agreement, but nothing more.—4. That, on the evidence, the net in question was not an interference to navigation within the meaning of section 33 of the Fisheries Act (R.S., 1927, c. 73); that the master of the tug *A.*, was negligent in moving the scow as and when he did, and that the suppliant was entitled to damages for the injury caused to his net and damages for the loss of the use of his net. *MASON v. THE KING*. . . . . 1

5 — *Practice — Petition of right — Amendment.*] Suppliant alleges that he suffered loss by his boat stranding on an island due to the negligence of Respondent's employee in the screening of a certain light and seeks to amend his Petition of Right by setting up that "the said light is a public work of Canada and that suppliant's claim is one for damages against the Crown arising out of injury to suppliant's property resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment on a public work."—*Held*, that the practice of the Court permits amendments to a Petition of Right provided the same do not state a new cause of action.—2. That the test whether a particular amendment should be allowed is: If the Petition had originally been presented in the form in which it stands after amendment, is there a reasonable probability that the fiat would not have been refused?—3. That the amendments proposed to the Petition of Right herein do not involve any material alteration in the cause of action; nor do they state a new cause of action.—4. After a fiat "Let Right be Done" is granted, and the Petition is filed in Court, it becomes a pleading, and under the Rules of Court is subject to any reasonable amendment, providing it does not involve any substantial alteration in the cause of action, or does not set up a fresh cause of action. *HANSEN v. THE KING*. . . . . 197

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10—*Option by Lessee to Purchase Freehold*. No. 3.

**EXPROPRIATION**—*Injurious affection to property not expropriated—Measure of damages—Damage peculiar to property—Loss of trade and personal inconvenience not recoverable.*] The Plaintiffs seek to recover compensation for part of their lands taken by expropriation and for damages for injury to an adjoining lot owned by them, due to the construction of a viaduct for which the other part of the land was expropriated.—*Held*, that section 17 of 19-20 Geo. V, c. 10, amending the Canadian National Railway Company Act, does not limit the scope of section 23 of the Expropriation Act, and that the Canadian National Railway

**EXPROPRIATION—Concluded**

Company must pay, not only the value of the land actually taken by expropriation but also the damages caused to lands injuriously affected by the construction of the public work, in this case a viaduct.—2. That the damages recoverable for injurious affection are such as are attributable to the construction of the public work and not such as would flow from its operation, and only to the extent to which such injurious affection depreciates said land and makes it less valuable.—3. That no damage can be recovered for personal inconvenience or loss of trade, nor damages which the owner of the land suffers in common with the public generally. *RENAUD v. CANADIAN NATIONAL RAILWAY*..... 230

2 — *Expropriation Act — Canadian National Railways Act—Injurious Affection to Property—Compensation.*] Plaintiff owns lands in the city of Montreal and sought damages for injury to its property resulting from the construction of a subway by defendant company under its railway lines near plaintiff's property. No land belonging to plaintiff had been taken by defendant for its work. The Court found that plaintiff's property had been injuriously affected and awarded it compensation.—*Held*, that the Canadian National Railways Act (R.S.C., 1927, Ch. 172) does not deprive the owner of lands injuriously affected by the construction of a public work, of the compensation awarded by the Expropriation Act (R.S.C., 1927, Ch. 64).—2. That the damage must result from an act rendered lawful by statutory powers of the company.—3. That the damage must be such as would have been actionable under the common law, but for the statutory powers.—4. That the damage or loss must be to the property itself.—5. That personal injury, inconvenience, injury to trade or business are no grounds for compensation.—6. That the damage must be occasioned by the construction of the public work, not by its user. *AUTOGRAPHIC REGISTER SYSTEMS, LTD., v. CANADIAN NATIONAL RAILWAY*..... 152

3 — *Leasehold—Option by lessee to purchase the freehold—Elements of compensation.*] The information herein was filed to have the compensation to which the defendant was entitled, fixed by the Court. The defendant was lessee of the property expropriated and by the terms of his lease was given an option to purchase the freehold.—*Held*, that as a lessee is entitled to compensation for the loss of his lease and as the option to purchase was one of the covenants of the lease, the right to purchase the freehold is an element to be considered in computing the compensation to be allowed the defendant. *THE KING v. NORTHEASTERN LUNCH COMPANY, LIMITED*..... 64

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**PATENTS — *Infringement — Invention.*** [The invention claimed is for a radiator for heating purposes. The Court found that, at best, if plaintiff had added to the prior art it was merely the product of that mechanical skill which normally results from habitual and intelligent practice, and was not invention.—*Held*, that it is not enough that a thing should be new in the sense that in the shape or form in which it is produced it shall not have been known before, and that it shall be useful, but it must, under the Patent Act, amount to an invention or discovery.—2. A change of form within the domain of mere construction is not invention. MAUCK *v.* DOMINION CHAIN COMPANY, LIMITED..... 120

2 — *Infringement — Simplicity of invention — Anticipation — Subject matter.* [Plaintiff alleged infringement of a patent relating to handles for use on caskets and other receptacles. The Court found that there was invention in plaintiff's idea of the mode of construction of the two members of the handle which permitted the locking of the handle to be effected by merely lifting the grip after it was placed in the base; that there was no anticipation in the prior art; that defendant's handle differed from that of plaintiff only in the practice of locking the members by a machine operation, a means

**PATENTS—*Concluded***

which produced the same handle and the same result.—*Held*, that infringement cannot be evaded because one chooses to adopt a slower and more expensive method of doing what a patent clearly states may be done in another and better way.—2. That invention should not be denied upon the ground of the mere simplicity of the thing invented and patented. DOMINION MANUFACTURERS LTD. *v.* ELECTROLIER MANUFACTURING Co. LTD..... 141

3 — *Patentability; — Invention — Combination—Anticipation.* [The patent in suit is for a loud speaker. Previous to this patent the best loud speakers had a frequency range of somewhere from 300 cycles to about 2,500 cycles, which meant that the overtones were not reproduced and the tones of high and low pitch were distorted or not faithfully reproduced. By certain structural changes in the sound box, the present invention overcomes these defects. With it a frequency response as low as 60 cycles and good response as high as 4,000 cycles can be obtained. Between 4,000 and 6,000 cycles there is slightly reduced response, and a useful response as high as 8,000 cycles, thus permitting the overtones to be reproduced, giving a faithful reproduction of the tones of high pitch and a more uniform amplitude.—*Held*, that the invention in question being for a new and valuable loud speaker, structurally and operatively different from anything which preceded it, and giving much more satisfactory results, such invention disclosed ingenuity and was patentable.—2. That even if all elements in a combination are old, where the combination produces an old result or object in a more convenient, cheaper, or more useful way, it is proper subject matter for a patent assuming there is evidence of ingenuity or skill in the production of such combination.—3. That it is not sufficient to prove anticipation, to point to something in one published patent and something in another, and so on, and by an imaginary assemblage of all these things in combination to say that this mosaic constitutes anticipation. The patented article must be found as fully described in the prior art as it is described in the patent under attack in order to anticipate it. WESTERN ELECTRIC COMPANY, INCORPORATED, ET AL *v.* BALDWIN INTERNATIONAL LIMITED (12774)..... 13

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**REVENUE**—*Sales Tax—Special War Revenue Act, 1915, Sec. 86—Regulations.*] The following regulation was enacted under the Special War Revenue Act, 1915: Furriers are not to be granted a consumption or sales tax licence on and after the 1st September, 1924. Licences issued to furriers prior to that date are to be cancelled. Dressers and dyers of furs, however, are required to take out a sales tax licence and account to the Collector of Customs and Excise for consumption or sales tax on furs dressed or dyed by them. Such tax is to be computed on the current market value of the dressed furs whether the dresser is the owner of the furs or not.—Suppliant paid the tax computed on the actual selling price and now claims that it should have been computed on the current market value of the dressed furs, under the regulation, and

**REVENUE—Concluded**

sued to recover the amount alleged to be overpaid. The Crown contends that the tax was properly payable under section 19BBB of the then Act. The validity of the regulation was not raised.—*Held*, that as the validity of the regulation was not in question, it must, for the purposes of this case, be considered as valid, and that the tax payable by the Suppliant should have been computed on the current market value of the dressed furs and not on the actual selling price, and the Suppliant was entitled to the relief sought, but without interest. *VANDEWEGHE LIMITED ET AL v. THE KING*.. 59

2—*Sales Tax—Playing cards—Excise Tax not included in sale price—Special War Revenue Act (R.S.C., 1927, Ch. 179).*] Defendant, a licensed manufacturer under Part XIII of The Special War Revenue Act (R.S.C., 1927, ch. 179), manufactured and sold playing cards. It paid the sales tax on all cards sold, said tax being computed on the sale price of the cards exclusive of the excise tax imposed by section 82 of the Act. The Crown contends that the sales tax should have been computed on the sale price including the excise tax.—*Held*: The Act having defined *sale price* as the *duty paid value* in the case of imported goods, said *duty paid value* including, as regards playing cards, the excise taxes imposed by Parts X and XII of the Act, and omitting to include excise taxes in the sale price of playing cards manufactured in Canada, the excise tax imposed under Part XII of the Act is not included in the sale price of such cards for the purpose of calculating the sales tax. *THE KING v. CONSOLIDATED LITHOGRAPHING COMPANY LIMITED*.. 204

3 — *Seizure — Forfeiture — Customs Act—Burden of proof—Innocence of owner.*] —*Held*, there is no material dissimilarity in the essential provisions of the Excise Act (R.S.C., 1927, c. 60) and the Customs Act (R.S.C., 1927, c. 42) pertaining to seizure and forfeiture; claimant having failed to prove that his boat had been illegally seized and forfeited, the forfeiture was held good and valid, the Customs Act attaching to the vehicle unlawfully used the penalty of forfeiture, independently of the guilt or innocence of the owner. *The King v. Krakowec* (1932) S.C.R., 134, followed. *SANDNESS v. THE KING*.. 78

**RULING OF SUPERINTENDENT OF INSURANCE***See* FOREIGN INSURANCE COMPANY.**SALE OF LAND***See* CROWN, No. 2.**SALES TAX***See* REVENUE, Nos. 1 AND 2.

## SEIZURE

See REVENUE, No. 3.

## SHIPPING

- 1—*Canada Shipping Act*. No. 1.
- 2—*Collision*. Nos. 1 & 2.
- 3—*Contract of Carriage*. *re Law Applicable*. No. 4.
- 4—*Damages*. Nos. 2 & 3.
- 5—*Evidence*. No. 3.
- 6—*Exchequer Court Act*. No. 2.
- 7—*Intention of Parties*. No. 4.
- 8—*Jurisdiction*. No. 2.
- 9—*Limitation of Liability*. No. 1.
- 10—*Merchants Shipping Act*. No. 1.
- 11—*Negligence*. No. 3.
- 12—*Non Profit Earning Ship*. No. 2.
- 13—*Res Ipsa Loquitur*. No. 3.

**SHIPPING** — *Collision* — *Limitation of liability* — *Merchant Shipping Act* — *Canada Shipping Act*.] Plaintiff's vessel collided with the lock gates of the Lachine Canal permitting the water to rush through and damage property. Four actions were instituted against Plaintiff and it feared other actions. Plaintiff sued for limitation of liability under the Merchant Shipping Act, 57 & 58 Vict. Ch. 60. The Court found that the accident which occurred was due to the engineer misunderstanding a signal given from the bridge, and held, that the error of the engineer was a case of improper navigation, that the owners could not provide for such an event and that as the collision occurred without actual fault or privity of the owners they were entitled to judgment limiting their liability. 2. That as the Crown was not expressly mentioned in the Act, nor was the Act expressly made applicable to it, the responsibility to the Crown could not be limited by the Court.—3. That the question of limitation of liability was governed by the Merchant Shipping Act, 57 & 58 Vict., Ch. 60, and not by the Canada Shipping Act, since the Colonial Laws Validity Act, 28 & 29 Vict., Ch. 63, had not been abrogated by the British North America Act and the Statute of Westminster, 22 Geo. V, Ch. 4 has no retroactive effect. CANADA STEAMSHIP LINES LIMITED *v.* EMILE CHARLAND LIMITED ET AL. . . . . 147

2 — *Collision* — *Jurisdiction* — *Exchequer Court Act*, R.S.C., (1927) c. 34, s. 30, ss. (d)—*Non-Profit Earning Ship*—*Damages*.] The action is one for damages resulting from a collision between plaintiff's boat and that of defendant. The Court found that the collision was due to the negligence of the defendant.—*Held*, that the Exchequer Court has original jurisdiction in such a case by virtue of ss. (d) of s. 30 of c. 34, R.S.C., 1927 (The Exchequer Court Act).—2. That

SHIPPING—*Concluded*

even though plaintiff's vessel is a non-profit earning ship plaintiff is entitled to recover from defendant damages based on maintenance, overhead and depreciation costs, for the time the ship was actually absent from her duties as a result of the collision, in addition to the actual cost of repairs. THE KING *v.* JERRY PETITE 186

3 — *Negligence* — *Evidence* — *Res ipsa loquitur*—*Damages*.] Defendant's servants having sole control of certain boom sticks, made them fast to the shore of Kirkland's Island in the Fraser River, in an improper and insecure manner, and then left them unattended. The sticks escaped and caused damage to plaintiff's property.—*Held*, that defendant not having rebutted the presumption of negligence raised against it by the pleadings, the evidence and the admissions made at the trial, by showing the cause of the accident and that it was inevitable, the doctrine of *res ipsa loquitur* was applicable and defendant must be held liable in damages to the plaintiff. THE KING *v.* CANADIAN TUG BOAT CO. LTD. . . . . 104

4—*Contract of carriage*—*Law applicable thereto*—*Intention of Parties*.] The contract of carriage in question herein was made in the United States of America, both plaintiffs were United States corporations and the contract contained a clause valid and necessary according to such law, but not necessary under the Canadian or English law. Moreover, the insurance certificates issued by one of the plaintiffs contained an express reference to the Harter Act, a law of the United States which the plaintiffs now contend should not be applied.—*Held*, (affirming the judgment of the Local Judge in Admiralty for the Quebec Admiralty District) that, in the above circumstances, inasmuch as the intention of the parties is to govern, it must be presumed that the parties to the contract intended to be governed by the law of the United States (the Harter Act), and that such law applied.—2. That the best criterion of what law is to be applied is to be found in the intention of the parties, and where such intention is not expressed it is to be gathered from the terms of the contract itself and from the surrounding circumstances.—3. That where a bill of lading contains special clauses, not necessary or valid under other laws, but necessary and valid under the laws of the country where the contract was made, the parties are presumed to have contracted subject to the law which gives effect to such clauses. BUNGE NORTH AMERICAN GRAIN CORPORATION ET AL *v.* STR. Skarp ET AL. . . 75

## SIMPLICITY OF INVENTION

See PATENTS, No. 2.

**SOLDIER SETTLEMENT ACT**—*Petition of Right—Jurisdiction—Exchequer Court Act.*]—*Held*, that as the Soldier Settlement Act (R.S.C., 1927, c. 188) specifies the matters in which jurisdiction is given the Exchequer Court, the powers of the Court are restricted to those matters, and the Court has no jurisdiction under ss. "d," section 19, of the Exchequer Court Act (R.S.C., 1927, c. 34) in any matter not so specified, the maxim *expressio unius est exclusio alterius*, applying. *MARGACH v. THE KING*. . . 97

**SPECIAL WAR REVENUE ACT**  
See REVENUE, NOS. 1 AND 2.

**SUBJECT MATTER**  
See PATENTS, No. 2.

**TIME**  
See FOREIGN INSURANCE COMPANY.

### TRADE MARKS

- 1—*Assignment of Trade Mark*. No. 1.
- 2—*Assignment acted upon by Assignee*. No. 1.
- 3—*Burden of Proof*. No. 5.
- 4—*Calculated to Deceive*. Nos. 3, 4 & 5.
- 5—*Class of Goods*. No. 4.
- 6—*Defence tending to Prejudice, Embarrass or Delay a Fair Trial of Action*. No. 2.
- 7—*Descriptive Word*. No. 5.
- 8—*Expunging*. Nos. 3, 4 & 5.
- 9—*Impertinent or Irrelevant Defence*. No. 2.
- 10—*Infringement*. No. 2.
- 11—*"Lysol" and "Lysotab."* No. 5.
- 12—*Motion to Strike Out Certain Defences*. No. 2.
- 13—*Person Aggrieved*. Nos. 1 & 3.
- 14—*Petition to Expunge*. No. 1.
- 15—*Prior Adoption*. No. 3.
- 16—*Registration without Sufficient Cause*. Nos. 1 & 3.
- 17—*Reservation by Assignor of Right to use Trade Mark*. No. 1.
- 18—*"Zipper."* No. 4.

**TRADE-MARK**—*Petition to expunge—Registration without sufficient cause—Assignment of trade-mark—Reservation by assignor of right to use trade-mark—Assignment acted upon by assignee—Person aggrieved.*] Defendant granted plaintiff, a manufacturer of ice cream cones, permission to use defendant's registered trade-mark, reserving to himself the right to continue the manufacture of ice cream cones and the use of his trade-mark in connection therewith. Plaintiff manufactured and sold cones under defendant's trade-mark. At the trial of the action it was shown that defendant's trade-mark was similar to another that had been in use

### TRADE-MARK—Continued

for a number of years.—*Held*: That defendant's trade-mark is on the register "without sufficient cause" and should be expunged.—2. The assignment of a trade-mark to be valid must be made in conjunction with the assignment of the business with which it is connected.—3. To void the trade-mark, the assignment must have been acted upon by the assignee.—4. The plaintiff is a person aggrieved within the meaning of s. 45 of the Exchequer Court Act, R.S.C., 1927, Ch. 201. *MOYER v. HOLLAND*. . . . 217

2—*Infringement—Motion to strike out certain defences—Impertinent or Irrelevant defence—Defence tending to prejudice, embarrass or delay a fair trial of action.*] In an action for infringement of trade-mark the defendants pleaded *inter alia* (1) that the plaintiff company not being registered or licensed under the laws of any of the Provinces of Canada or under the laws of the Dominion of Canada has no right to protection of its trade-mark against imitation thereof; (2) that the plaintiff company by using the said trade-mark in connection with its products has done so in violation of the provisions of the Food and Drugs Act of Canada, and the regulations made thereunder.—On motion under Rule 114 to strike out the said defences as being impertinent or irrelevant and as tending to prejudice, embarrass or delay a fair trial of the action it was held: 1. The Dominion Companies Act does not require a friendly alien, either a natural or an artificial person, to take out a licence before asserting any legal right in Court.—2. The Canadian Naturalization Act (R.S., 1927, c. 138, Part III, sec. 20) provides that an alien may take, acquire, hold and dispose of real and personal property of every description in the same manner in all respects as a natural born British subject.—3. The provisions of the *International Convention for the Protection of Industrial Property* as revised at Washington in 1914 recognize the right of the plaintiff to institute this action as freely as a Canadian owner of a trade-mark.—4. At common law the alien has such a right.—5. This Court in a civil action has no jurisdiction to try the issue raised by pleading the Dominion Food and Drugs Act. *THE CREAMETTE COMPANY v. FAMOUS FOODS LIMITED ET AL.*. . . . 200

3—*Expunging—Calculated to deceive—Prior adoption—Registration without sufficient cause—Person aggrieved.*] Petitioner has carried on business since May, 1917, as a manufacturer of, and dealer in, lubricating and other oils, greases and similar goods, including on a small scale, gasoline, under the firm name of "Atlas Oil Company." Respondent company

## TRADE-MARK—Continued

in January, 1932, was granted a specific trade-mark consisting of the word "Atlas" to serve in connection with the sale of gasoline. The Court found not only that there was a likelihood of confusion but that there had been actual confusion in the minds of the public to the prejudice and detriment of the petitioner.—*Held*, that a trade-mark may be acquired by user and that the prior user of an unregistered trade-mark, the use of which by another is calculated to deceive, is entitled to protection, whether such use by another be made fraudulently and with deliberate intent to deceive or not.—2. That the registration of the trade-mark "Atlas" in the name of respondent was made, in the terms of sec. 45 of the Trade Mark and Design Act (R.S.C., 1927, c. 201), without sufficient cause.—3. That a specific trade-mark applies to all goods of the same class or description. WARREN *v.* EXCEL PETROLEUM LIMITED..... 131

4 — "Zipper" — *Calculated to deceive — Class of goods — Expunging.*] The petitioner, owner of the specific trade-mark "Zipper" to be used in connection with the manufacture and sale of footwear, by its petition, asks that the trade-mark of the respondent, consisting of the same word "Zipper" as applied to the sale of corsets or corsets and brassieres combined, be expunged.—*Held*, on the facts, that there was no likelihood of confusion in the mind of the public, that the registration of the respondent's mark was not calculated to deceive the public into purchasing the goods of the respondent believing them to be those of the petitioner, and the petition herein was refused.—2. That the petitioner, having chosen to limit its mark to ootwear, cannot now ask that the respondent's mark be expunged, on the ground that it (petitioner) may at some future time make or vend corsets, or corsets combined with brassieres, wherein the sliding fasteners are employed. CANADIAN GOODRICH CO. LTD. *v.* HALL..... 30

5—"Lysol" and "Lysotab"—*Calculated to deceive—Descriptive word—Expunging—Burden of proof.*] The petitioner, owner of the trade-mark "Lysol" which was registered in 1890 and renewed in 1915 for twenty-five years, asks that the trade-mark "Lysotab" be expunged from the Register for the statutory reasons. The owner of the latter mark contended

## TRADE-MARK—Concluded

that "Lysol," being the name given to the product by the patentee thereof, was therefore descriptive, was an improper trade-mark and should never have been registered.—The Court found, on the evidence, that the word "Lysol" was properly registered, was a valid trade-mark and that "Lysotab" was calculated to deceive and mislead the public, and ordered that it be expunged.—The Court also held that the burden of establishing that the registration was improperly made was upon the Objecting Party herein; and particularly in this case where the trade-mark had continued on the Register, and in use, for over forty years subsequent to its registration.—2. That where a person has invented and patented a new substance and gave to it a new name, and during the continuance of the patent had alone made and sold the substance by that name, there being in question no registered trade-mark of the same name during the life of the patent, he would not be entitled to the exclusive use of that name after the expiration of the patent, the name being descriptive of the substance itself. That in such cases it is a question of fact whether or not the name is descriptive of the article itself. LYSOL (CANADA) LIMITED *v.* SOLIDOL CHEMICAL LIMITED..... 21

## WHETHER TIME OF THE ESSENCE

*See* CROWN, No. 2.

## WORDS AND PHRASES

"*Calculated to deceive*"—*See* CANADIAN GOODRICH CO. LTD. *v.* HALL..... 30  
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 "Lysol" and "Lysotab"—*See* LYSOL (CANADA) LTD. *v.* SOLIDOL CHEMICAL LTD. .... 21  
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