

1926

CANADA
LAW REPORTS

Exchequer Court of Canada

ARNOLD W. DUCLOS, K.C.
OFFICIAL LAW REPORTER

*Published under authority by Charles Morse, K.C.
Registrar of the Court*



OTTAWA
F. A. ACLAND
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1926

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 LOUIS ARTHUR AUDETTE.
(Appointed 4th April, 1912)

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF
CANADA

- The Honourable ARCHER MARTIN, appointed 4th March, 1902—British Columbia Admiralty District.
- do CHARLES D. MACAULAY, appointed 6th January, 1916—Yukon Admiralty District.
- do F. E. HODGINS, appointed 14th November, 1916—Toronto Admiralty District.
- do W. S. STEWART, appointed 26th July, 1917—Prince Edward Island Admiralty District.
- do SIR J. DOUGLAS HAZEN, appointed 9th November, 1917—New Brunswick Admiralty District.
- do HUMPHREY MELLISH, appointed 25th November, 1921—Nova Scotia Admiralty District.
- do R. S. WEIR, appointed 31st March, 1926; died 20th August, 1926—Quebec Admiralty District (now vacant).

DEPUTY LOCAL JUDGES:

- do W. A. GALLIHER—British Columbia Admiralty District.
- do F. S. ROGERS—Nova Scotia Admiralty District.

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE ERNEST LAPOINTE, K.C.
THE HONOURABLE E. L. PATENAUDE, K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE LUCIEN CANNON, K.C.
THE HONOURABLE ANDRÉ G. FAUTEUX, K.C.

MEMORANDUM

During the period of these Reports, namely on the 20th day of August, 1926, the Honourable Mr. Justice Weir, who was appointed Local Judge in Admiralty for the Quebec Admiralty District on the 13th March, 1926, departed this life.

CORRIGENDA

Page 35.—2nd head-note, L. 1, word "or" should read "of."

Page 46.—3rd head-note, L. 2, word "should" should read "to".

The defendant in the case reported on pages 210 *et seq* should be Ontario Gravel Freighting Co. Ltd., instead of Ontario Sand and Gravel Company.

ERRATUM

Errors in the cases cited in the text are corrected in the Table of Names of Cases Cited.

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- Bergeon v. DeKermor Electric* [1925] Ex. C.R. 160. Appeal allowed. Appeal to Privy Council dismissed.
- Can. N. Ry. Co., The v. Boland* [1925] Ex. C.R. 173. Appeal allowed [1926] S.C.R. 239.
- Canada S.S. Lines v. The King* [1926] Ex. C.R. 13. Appeal allowed in part.
- Donovan S.S. Co. v. S.S. Helen* [1925] Ex. C.R. 114 and [1926] Ex. C.R. 59. Appeal allowed.
- King, The v. Consumer's Gas Co.* [1926] Ex. C.R. 137. Appeal dismissed.
- King, The v. R. Stuart* [1926] Ex. C.R. 91. Appeal allowed in part. Case referred back.
- McLeod v. Minister of Customs and Excise* [1925] Ex. C.R. 105. Appeal dismissed, no costs. Cross-appeal dismissed with costs. Leave to appeal to Privy Council refused.
- Proud v. The King* [1926] Ex. C.R. 1. Appeal dismissed.
- Smith v. Minister of Customs and Excise* [1924] Ex. C.R. 193, reversed by Supreme Court and restored by Privy Council.
- Wright & Corson v. Brake Service Ltd.* [1925] Ex. C.R. 127. Appeal dismissed.

Pending:—

- Blucher v. The Custodian* [1926] Ex. C.R. 77.
- Canadian Westinghouse Co. v. Grant Ltd.* [1926] Ex. C.R. 164.
- Canadian Raybestos Co. v. Brake Service Corp.* [1926] Ex. C.R. 187.
- Gerrard Wire Tying Machines Co. v. Cary Manufacturing Co.* [1926] Ex. C.R. 170.
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- Maunsell v. The King* [1925] Ex. C.R. 133.
- Panyard Machine & Mfg. Co. v. Bowman* [1926] Ex. C.R. 158.
- Sincennes-McNaughton Lines v. The King* [1926] Ex. C.R. 150.

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

ELSIE PROUD SUPPLIANT;
 AND
 HIS MAJESTY THE KING RESPONDENT.

1925
 Nov. 28.

Crown—Returned Soldiers' Insurance Act—Beneficiaries—Proof of Marriage—Presumption.

P. a returned soldier, was insured under The Returned Soldiers' Insurance Act, the beneficiary named being "Elsie Proud, wife of the insured." Upon P's death, payment to suppliant was refused because of the absence of certificate of marriage or of other satisfactory proof of marriage. No certificate was produced at trial, but the uncontradicted testimony of suppliant and others established that she had been married in New York by one said to be a clergyman, that they co-habited until P's death, as man and wife, that children were born to her by P., that P. had in various ways acknowledged her as his wife, and that she was generally reputed and known as such in the community. The Act allows insurance to be made in favour of the wife, or wife and children only.

Held, that the suppliant had discharged the burden of proof upon her and had established a strong presumption of her marriage to P., which the Crown had failed to rebut; and that she was entitled to recover the amount of the insurance sued for.

2. That even if the marriage had been performed by an unauthorized person, and was impossible according to the place where it was performed, nevertheless, the presumption of marriage must prevail on the facts proved.

ACTION to recover from the Crown the amount of a policy of insurance taken out by the late husband of the suppliant under the provisions of the Returned Soldiers' Insurance Act.

Edmonton, October 14, 1925.

Action now tried before the Honourable Mr. Justice Maclean.

G. H. Steer for the suppliant.

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F. D. Byers, K.C. for the respondent.

The facts are stated in the reasons for judgment.

MACLEAN J. now 28th November, 1925, rendered judgment (1).

This is a Petition of Right in which the suppliant claims to recover from the Crown the sum of \$1,000 and interest, under a policy of insurance in that sum, issued upon the life of P. E. Proud, under the provisions of the Returned Soldiers Insurance Act, Chap. 54, Statutes of Canada, 1920, the beneficiary thereunder, being named as "Elsie Proud, wife of the insured." The statute referred to was designed to grant to returned men, limited insurance upon favourable terms for the benefit of certain classes of beneficiaries. A married man might name only his wife, his child or children, or both, as beneficiaries. A single man might name only his future wife, or his future wife and children, as beneficiaries.

The insured died in Edmonton in February, 1924. The suppliant applied to the department of Government administering the Act, for payment of the amount payable under the policy of insurance in question, but this apparently was refused upon the ground that no certificate of marriage, or satisfactory evidence of marriage, had been produced.

The suppliant as a witness on her own behalf, stated at the trial that she was married to the deceased P. E. Proud, in March, 1922, in New York, with whom and where she lived for about one year, when they both moved to Edmonton, Alberta, where they lived as man and wife until the death of Proud in February, 1924. She was unable to produce a marriage certificate or in fact any thing in the nature of the best evidence of the marriage, but she persistently asserted that she was then married to the deceased, by a person whom she believed to be a clergyman, in the city of New York, and I have no reason to doubt her testimony in this regard. To those who knew them in Edmonton, they were reputed man and wife, and Proud spoke of the suppliant as his wife. He furnished the Registrar of Vital Statistics information in regard to the birth, in August, 1923, of twins, to the sup-

(1) An appeal has been taken to the Supreme Court of Canada.

pliant by him, and in this record these children are described as legitimate children of the suppliant, and he the father. The statement furnished in this connection was signed by the deceased, Proud. A newspaper announcement of the subsequent death of these children was very probably furnished by the deceased. His application for membership in the Great War Veterans' Association describes his wife as his next of kin. His conduct unquestionably caused his acquaintances in Edmonton to assume they were man and wife. The cohabitation was professedly and publicly, husband and wife; and by their conduct they were known as husband and wife. It might be said further that the deceased enjoyed a good reputation among his acquaintances in Edmonton.

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I apprehend the law applicable to the issue in this action, to be comprehensively stated in Halsbury's Laws of England, Vol. 16, p. 309, and as follows:—

603. Where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed, though there may be no positive evidence of any marriage having taken place, and the presumption can be rebutted only by strong and weighty evidence to the contrary.

604. Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special license.

I would also refer to Best on Evidence, 11th edition, p. 353, where it is said that cohabitation and reputation are held to be presumptive evidence of marriage, and to *Campbell v. Campbell* (1); *Morris v. Davies* (2); *Piers v. Piers* (3); *Sastry Velaidier Aronegary v. Sembecuttu Vaigalie* (4); *Collins v. Bishop* (5), and *In re Shepherd* (6).

Habit and repute do not as a matter of fact constitute marriage, but serve only as evidence and presumption of a marriage having been celebrated between competent persons to enter into it. More satisfactory than presumption of course, would be proof of a marriage in fact, over and above presumption, but nevertheless the presump-

(1) [1867] L.R. 1 H.L. Sc. 182.

(2) [1836] 5 C. & F. 163.

(3) [1849] 2 H.L. Cas. p. 331.

(4) [1881] 6 A.C. 364.

(5) [1878] 48 L.J. Ch. 31.

(6) [1904] 1 Ch.D. 456.

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tion of marriage from cohabitation, particularly when accompanied by some evidence supporting that presumption, would appear to be a well-settled principle of law, and for very good reasons. The validity of a marriage cannot obviously be tried like any other question of fact, which is independent of presumption. And this presumption is not lightly to be repelled. It is not to be broken in upon by a mere balance of probability, but as the authorities state, the presumption must prevail, unless this is most satisfactorily repelled by evidence in the cause, appearing conclusive to those who have to decide the question. In this case the Crown did not offer any positive evidence to rebut the presumption of marriage, and we have the positive declaration of the claimant as to a marriage ceremony. We have the acknowledgment by the deceased husband, of the relationship of man and wife, in the insurance policy sued upon, which is just as strong as if he had named the claimant as his wife, and a legatee, under a will. And there is further evidence of the acknowledgment of the relationship of man and wife which I have already mentioned. The failure of the claimant to recall with exactness, the time and place of the marriage, is not at all surprising to one having had an opportunity of seeing and hearing her as a witness at the trial. But even if the marriage ceremony was performed by an unauthorized person, and the marriage impossible according to the law of the state of New York, still I think the presumption of marriage under the evidence presented to me would and should prevail. There is authority for the statement, that statutes prescribing forms of marriage are directory, and a failure to comply with them would not render the marriage void unless the statute so provided.

It has been urged that cohabitation here was but for a short period of time. This probably is suggested because, in certain reported cases, the period of cohabitation covered a lengthy period, and the fact was regarded as important in strengthening the presumption. It could not mean more. Here the deceased Proud lived all his life, after his marriage which I think is to be presumed, with the claimant and more he could not do. He died during the continuance of cohabitation with the suppliant. I cannot conceive of any process of reasoning by which a presumption in law might be negated by the fact that cohabita-

tion covered only a comparatively short period of time, and as I have stated, unless accompanied by other evidence calculated to destroy the presumption. Here, there is no evidence in my opinion to rebut the presumption.

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Such being the law, and there being no reason why in fact I should not accept the evidence of the suppliant as to her marriage to Proud, and which is uncontradicted, nothing remains but to find that the suppliant is entitled to succeed in her action, and she shall have judgment for the principal sum mentioned in the policy of insurance, and her costs of action. I cannot allow the claim for interest.

Judgment accordingly.

ELECTROLYTIC ZINC PROCESS CO. PLAINTIFF;
 AND

1925
 Nov. 20.

FRENCH'S COMPLEX ORE REDUC- }
 TION CO. OF CANADA LIMITED... } DEFENDANT.

Practice—Motion to strike allegation of defence as irrelevant and illegal.

Plaintiff by his action herein seeks to impeach the validity of certain of defendant's patents for invention. The defendant, by a paragraph of its defence alleges that the Consolidated Mining and Smelting Company of Canada (which is not a party to this action) is estopped from impeaching the validity of the patents in question herein by reason of having obtained an option to purchase the same from the defendant and that the plaintiff herein being only the apparent or nominal party (prête-nom) to this action, and, being in fact the same entity as The Consolidated Mining and Smelting Co. of Canada, it is itself estopped from impeaching the validity of the patents herein.

Held, that the facts pleaded do not in law disclose any estoppel between the parties to this action. That the said allegations are irrelevant to the issues raised between the parties herein, and tend "to prejudice, embarrass or delay the trial of the action" within the meaning of Rule 117 of the Practice of this Court and should be struck from the defence.

APPLICATION to strike out an allegation of the defence as being irrelevant and as being embarrassing and prejudicial.

Ottawa, October 27, 1925.

Application now heard before the Honourable Mr. Justice Maclean.

Britton Osler, K.C. for plaintiff.

Gérin-Lajoie, K.C. and *Russel S. Smart* for defendant.

1925

ELECTRO-
LYTIC ZINC
Co.v.
FRENCH'S
COMPLEX
OREREDUCTION
Co. OF
CANADA LTD.

The facts are stated in the reasons for judgment.

MACLEAN, J. this 20th November, 1925, delivered judgment.

This was an application by way of summons for an order to strike out paragraph 6 of the statement of defence on the ground that the allegations and statements made therein are immaterial and irrelevant to the issues involved in this action, and tend to prejudice, embarrass and delay the fair trial of the action.

Apart from the substantial grounds upon which this application rests, it was objected by the defendant that as the issues were joined between the parties before the application to strike out was made, the application comes too late.

I find that the issues have only been joined between the parties for some six weeks, and I do not think that the defendant has in any way been prejudiced by the delay. Therefore I do not consider that this particular objection should interfere with my discretion to grant the application. On this point reference might be had to the case of *Cross v. Howe* (1).

The impugned paragraph of the defence as it stands would undoubtedly have been demurrable under the English practice prevailing before the Judicature Acts, and having regard to the ground it alleges in support of the allegation, namely, that the plaintiff is estopped from impeaching the patents, I think that is also bad pleading under Rule 117 of the Practice of this Court.

The ground so alleged in the 6th paragraph of the statement in defence shortly stated is that the plaintiff company is only the apparent or nominal party ("prête-nom") to the action and that in fact it is the same entity as the Consolidated Mining and Smelting Co. of Canada Ltd., a company having its principal place of business in the city of Montreal; and, furthermore, that the defendant has instituted against the last-mentioned company an action now pending before the Superior Court for the District of Montreal, for the infringement of one of the patents in dispute in this case before the Exchequer Court, in which action the defendant (The Consolidated Mining

and Smelting Company of Canada Ltd.) must be held to be estopped by its option to purchase, from impeaching the validity of the patent there in question.

Now it is clear that the court should not concern itself with relations existing between the plaintiff and persons or entities not before the court, nor should the plaintiff here be prejudiced or embarrassed by allegations of fact which are *res inter alios acta*. Then coming down to the controversy between the immediate parties to the case in the Exchequer Court it is not now incumbent upon me, I think, to decide whether the plaintiff is entitled as a matter of law to maintain an action by statement of claim to impeach the patents in question here. That is an issue which it may be necessary to decide at a later stage of the case. For the purposes of this application the plaintiff must be assumed to be properly before the court. In this connection it might be useful to recall what was said by Lord Buckmaster in *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.* (1):—

It not infrequently happens in the course of legal proceedings that parties who find they have a limited company as debtor with all its paid-up capital issued in the form of fully-paid shares and no free capital for working suggest that the company is nothing but an *alter ego* for the people by whose hand it has been incorporated, and by whose action it is controlled. But in truth the Companies Acts expressly contemplate that people may substitute the limited liability of a company for the unlimited liability of the individual, with the object that by this means enterprise and adventure may be encouraged. A company therefore, which is duly incorporated, cannot be disregarded on the ground that it is a sham, although it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence.

I can reach no other conclusion than that paragraph 6 of the statement in defence is bad pleading in that it alleges matters which are irrelevant to the real issues raised between the parties, and may tend "to prejudice, embarrass, or delay the trial of the action" within the meaning of Rule 117 of the Practice of the Court. The facts pleaded do not in law disclose an estoppel between the parties here. See the case of *Gillette Safety Razor Co. v. A. W. Gamage Ltd.* (2).

There will be an order that all the words contained in the said paragraph of the statement in defence after the words

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(1) [1921] 2 A.C. 465 at p. 475.

(2) [1909] 25 T.L.R. 808.

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La demanderesse est empêchée (estopped) d'invoquer la prétendue invalidité des dits brevets nos 136,341 et 140,402 ou d'aucun d'eux
 be struck out. That will leave the plaintiff with the right to ask for particulars of the alleged estoppel if it desires to do so. It occurs to me to add that the interests of justice between the parties might be better served by allowing the defendant to substitute an entirely new paragraph for the one now attacked wherein any proper grounds of estoppel, if such there be on which the defendant might wish to rely at the trial may be pleaded.

If the defendant is advised to so amend his defence leave is hereby given for the purpose, with leave to the plaintiff to reply to the same. . . .

Judgment accordingly.

1925
 Dec. 4.

J. LOCKIE WILSON CLAIMANT;

AND

HIS MAJESTY THE KING DEFENDANT.

Conveyancing—Transfer—Description—Surplusage—Maxim Falsa demonstratio non nocet.

Claimant's son and one W. purchased a property from the Soldier Settlement Board, each getting half, which they farmed in partnership for a time. Later W. abandoned farming and placed his half of the property on the market for sale. The claimant then applied for the purchase of W's interest in the property, stating that without it his son would be handicapped in his farming operations. The Crown agreed to sell this to him and submitted an agreement of sale in which the property was described as "the east half of that part of lot 12, Range 13, Credit Indian Reserve, Township of Toronto, County of Peel, described in deed from C. J. Conover to His Majesty The King represented by the Soldier Settlement Board of Canada." Before signing the same the claimant requested the insertion of the words "being 8 and $\frac{2}{3}$ acres," which was done. Upon later making a survey it was found that there was only 7.4 acres in the parcel. In the meanwhile claimant had made payment to the Board but declined to accept a conveyance of the land unless a deduction in price were made. Hence this action.

Held, that as the description in the agreement as submitted was an adequate and sufficient description of what the Crown was selling, and the claimant was buying, the inaccurate statement of the number of acres contained in the parcel subjoined to the description should be treated as *falsa demonstratio* and rejected as surplusage.

ACTION for a rebate on the price of a property purchased from the Soldier Settlement Board. The claimant alleging that he had not received the acreage mentioned in his deed.

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 v.
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Toronto, October 11, 1925.

Action now tried before the Honourable Mr. Justice Maclean.

James P. MacGregor for claimant.

George Wilkie, K.C. for defendant.

The facts are stated in the reasons for judgment.

MACLEAN, J. now this 4th December, 1925, delivered judgment.

This is a reference under the Exchequer Court Act, and the question is, did the claimant buy of the respondent under an agreement of sale, a certain parcel of land represented to him, and by him believed to contain $8\frac{7}{8}$ acres, or did he buy a parcel of land of immaterial acreage.

There are facts, antecedent to the agreement of sale and purchase between the parties, which I should perhaps briefly recite, as the claimant regards them of importance.

In 1919 a son of the claimant, Ruthven Wilson, and a friend named Welton, both returned men, desirous of engaging in farming in proximity to one another, negotiated for the purchase of a farm reputed to contain 20 acres, from one Conover, for a specified sum. They applied to the Soldier Settlement Board for assistance in the acquisition of this farm, under the provisions of the Soldier Settlement Act, 1919, and in the course of time the Board agreed to purchase, and did purchase the farm, in order to sell it to these two young men. Apparently the purchase and resale, to Wilson and Welton, was recommended to the board by the claimant, at the time. In the course of negotiations it transpired, that the farm contained but $17\frac{3}{4}$ acres instead of 20 acres. The original acreage of this parcel of land had been diminished, owing to a right of way having been granted to one Fletcher, on one side, and on another side, a right of way had been granted to the Ontario Hydro-Electric Commission. The board's solicitor ultimately passed the title at $17\frac{3}{4}$ acres, Welton obtaining the east half of the farm, and supposedly of $8\frac{7}{8}$ acres, and Wilson, Jr., the other half of the farm. The

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advance made by the board on account of the purchase, and on the account of Wilson and Welton, was \$10,000, each being liable for \$5,000 to the board. They proceeded to work the property in partnership for two seasons, but in 1920 Welton gave notice of his intention of dissolving the partnership. In the meanwhile, by mutual agreement, Welton's portion of the farm was devoted to the growing of vegetables and small fruit, while Wilson's was planted as a cherry orchard. Eventually Welton abandoned farming operations, and placed his half of the farm, or his equity therein, on the market for sale.

There, the claimant, the father of Wilson, Jr., intervened. He is Superintendent of Agriculture for the Government of Ontario. In March, 1921, he wrote the Soldier Settlement Board reciting the fact that Welton was offering for sale his half of the property in question; that his son would be handicapped in his farming operations if he did not have the Welton half of the farm for market gardening, that it had been understood with the board that if one of the partners discontinued farming on the property, the other should have the right of purchase, over others. The claimant offered to take over the Welton agreement, reimburse Welton for any actual investment he had made in the property, and to purchase that interest on behalf of his son, describing the same in that letter as the "east half of the property," upon terms which were ultimately agreed upon, and which are not of importance here. In the end, an agreement of sale and purchase was entered into in writing, between the respondent and the claimant.

When the written agreement was first submitted to the claimant, the lands were described as follows:—

East half of that part of lot 12, range 13, Credit Indian Reserve, township of Toronto, county of Peel, described in deed from C. J. Conover to His Majesty the King represented by the Soldier Settlement Board of Canada.

The claimant requested the insertion of the words

being eight and seven-eighths acres

immediately following the above description, and this was done.

It later came to the knowledge of the Board, through a survey made for the purpose of procuring an accurate description for the deed of this land to the claimant, that the Welton half of this parcel of land contained but 7.4

acres, instead of $8\frac{7}{8}$ acres as it was generally supposed to contain. The claimant in the meanwhile had made payment to the Board of the purchase price, but declined to accept a conveyance of the land, unless some deduction in the price was made by the Board, by reason of the recently discovered reduction in acreage. Hence these proceedings wherein the claimant claims, an abatement in the purchase price, the amount claimed being here immaterial.

It might be useful here to say, by way of explanation of the origin of the error in the acreage, that in the deed from Conover to the Board the acreage is mentioned as being $17\frac{3}{4}$ acres more or less, the concluding words of the description being

saving and excepting thereout a lane or right of way conveyed to one Fletcher by said grantor, and a certain right of way granted to the Hydro Electric Commission,

which words were omitted in the agreement with the claimant. In the release to the Crown by Welton, of any right in law or equity which he had in the property, the acreage is referred to as

eight and seven-eighths acres be the same more or less.

The acreage of the rights of way is not anywhere stated, and probably had not been surveyed. In the agreement of sale with the claimant, the acreage was stated as $8\frac{7}{8}$ acres, again no consideration being given to the deduction or reservation necessary on account of the rights of way. Apparently at one stage, the Board's solicitors were of the opinion that the fee simple of the rights of way went with the property, the occupants having merely an easement.

The claimant's case is, that he dealt with the Board on the basis, that the whole parcel of land contained $17\frac{3}{4}$ acres; that he had advised the Board by letter on January 24, 1922, in response to an enquiry from it, that he had never surveyed the land; that in his first letter to the Board, March 21, 1922; he described the property as "containing by admeasurement $17\frac{3}{4}$ acres, or $8\frac{7}{8}$ acres allotted to each," that is Wilson Jr. and Welton, and on that basis he made the offer of purchase contained in that letter; that the agreement of sale states the acreage to be $8\frac{7}{8}$ acres; that the decreased acreage is a serious deduction in the quantity of land, in a small farm of high-priced acreage, and lessens materially the possible quantity or volume of production, with little or no material reduction in the production costs.

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The respondent's case is that the claimant knew he was buying the east half of the Conover farm; that what he offered to purchase was Welton's portion of the farm, and which in his offer of purchase he designated as *the east half of the property*, and that he did not purchase a specific acreage; that he knew the property and was familiar with it as a farm; that he bought the property for his son, and in pursuance of an alleged understanding between his son and Welton with the Board, that if either of them gave up farming the property, the other would have the first option of purchase, and that what he the claimant desired to purchase and did purchase, was the interest of Welton, whatever the acreage.

I have thought it proper thus to set forth, at perhaps unnecessary length, the circumstances and facts, antecedent and relating to the execution of the agreement in question. There is no question as to the good faith of the parties herein, which is admitted.

It appears to me that the description in the agreement, east half of that part of lot 12, range 13, Credit Indian Reserve, township of Toronto, county of Peel, described in deed from C. J. Conover to His Majesty the King, represented by the Soldiers' Settlement Board, being eight and seven-eighths acres must be construed against the claimant's contention. This description, less the reference to the acreage, clearly indicates what the claimant was buying and the Crown was selling, and supply the leading words of description. It described the subject matter with reasonable certainty, and the further particulars as to acreage being inaccurate, must be rejected as surplusage. It is a mere *falsa demonstratio* and does not affect that which is already accurately described. There is the legal maxim, *falsa demonstratio non nocet*, which means that if there is an adequate and sufficient description, with convenient certainty as to what was to pass, a subsequent erroneous addition will not vitiate it. In such cases the description so far as it is false, applies to no subject at all. I would refer to *Morrell v. Fisher* (1), *Doe v. Hubbard* (2), *Llewellyn v. Earle of Jersey* (3), *Cowen v. Truefitt Ltd.* (4).

(1) [1849] 4 Ex. 591 Alderson, B.
 at p. 605.

(2) [1850] 15 Q.B.R. 227, at pp.
 240 & 241.

(3) [1843] 11 M. & W. 183 Parke
 B., p. 189.

(4) [1899] 2 Ch. D. 309, Lind-
 ley M.R., at p. 312.

The action is for abatement in the purchase price and not for rescision. The claimant made an offer for the property as generally described, which property he knew, and the boundaries of which he must have observed, and the rights of way as well. If he was buying $8\frac{7}{8}$ acres of land and this was definitely in his mind when making the offer of purchase, he had means for raising distinctly the issue then, and clearly making it a condition absolute. The claimant, is a person I might say of more than ordinary intelligence and capacity, and he so impressed me. I cannot but conclude that what he wished to purchase, and did purchase, was the east half of the property, and that part which had been occupied by Welton, and that was what the Crown intended to sell him, whatever the exact acreage. The circumstances motivating the strongly expressed desire of the claimant, in his letter of March 21, to acquire this property, rather excludes the hypothesis that he wished to buy $8\frac{7}{8}$ acres of land, or that the property he wished to purchase was other than that designated by the general description, being the east half of the property, or the property occupied by Welton and adjoining his son's property. In reality, the claimant was but completing the Welton agreement to purchase the property, and he wished to put himself in the place of Welton, and all he could have had in mind or could have expected, was the purchase of whatever interest Welton had in the whole parcel of land, nothing more and nothing less.

I must therefore hold that the claimant's action fails. As agreed upon, there will be no costs to the successful party.

Judgment accordingly.

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CANADA STEAMSHIP LINES LIM- } SUPPLIANTS;
 ITED, ET AL..... }

1925
 Dec. 2.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Contract—Breach of contract—Damages—Wharfage

By an order in council passed in 1906 the Crown rented to a steamship company for \$1,000 per annum the use of the wharves "between Quebec and Chicoutimi." By subsequent order in council of 1917 a similar arrangement was made for the consideration of the annual sum of \$2,000 as commutation of wharfage for the use "of government

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wharves at which the steamers of the company call on the River St. Lawrence below Quebec." The wharf at l'Anse Tadoussac was built in 1912, after the first but before the second order in council. Following upon a lengthy correspondence between the company and the Crown, the Crown repaired this wharf early in 1923. It had been used by some of the company's steamers previous to 1923 and by the *R.* for five trips in 1923. On July 7, 1923, while the *R.* was landing passengers at such wharf, the slip upon which the passengers were standing collapsed precipitating several of them into the water. This slip was old and in a rotten and dangerous condition, to the knowledge of the Crown, and no warning was given. The steamship company was forced to settle with these passengers for the damages sustained, and presented a petition of right to recover from the Crown the amount so paid.

- Held*, that under the order in council of 1917 it was clear that the wharf at l'Anse Tadoussac was one of the wharves which the company had a right to use and was one of those for the use of which it was paying \$2,000 per annum.
2. That on the above facts there existed between the Crown and the company a contract whereby the company for a yearly consideration, could, as of right, use for its vessels the Government wharves "between Quebec and Chicoutimi," which included the wharf in question.
 3. That, inasmuch as a person who invites another to come onto his premises upon a business in which both are concerned, or a lessor who, for consideration, grants the use of certain premises to a lessee, is bound to take care that his premises, and all appliances provided by him as incident to the use thereof, are safe for that person to come upon and to use them as required, or to give warning, the Crown in not keeping the wharf or slip in safe and proper condition for the use for which it was intended, was guilty of a tortious breach of contract and liable for the damages suffered by its lessee.

PETITION OF RIGHT to recover from the Crown the sum of over \$65,000, amount paid in damages to passengers by reason of the fact that a wharf rented by the Crown to the company was in poor and rotten condition, and broke down, causing damage to certain passengers.

Tadoussac, 22nd, 23rd and 24th July, 1925, and Ottawa, 22nd and 23rd October, 1925.

Action tried before the Honourable Mr. Justice Audette.

W. F. Chipman K.C. and *J. A. Mann K.C.* for suppliants.

Léon Garneau K.C. for respondent.

The facts are stated in the reasons for judgment.

Audette, now, this 2nd December, 1925, delivered judgment (1).

(1) An appeal has been taken to the Supreme Court of Canada.

The suppliants, by their Petition of Right, seek to recover damages in the sum of \$65,744.61, together with such other and further sums which it may be found they have been obliged to pay,

for the loss, cost, damage and expense arising out of an accident that occurred on the 7th July, 1923, at Tadoussac, P.Q., while landing their passengers in the usual and customary manner at L'Anse Tadoussac wharf, when a lateral tie-beam of the movable slip attached thereto suddenly broke and the slip collapsed injuring a number of passengers, some of them being thrown to the bottom of the cut in the wharf and two of them precipitated into the river.

It will be convenient, at this stage, to dispose of some preliminary matters.

[His Lordship here discusses two motions to amend; the question of prescription raised by the defence and disposes of the question of the right of the Traveler's Insurance Co. joining with the steamship company as suppliants, and then proceeds.]

Now the controversy as formulated and presented may be approached under two different heads or aspects. 1. A case in tort against the Crown under the Exchequer Court Act, namely, under sec. 19 and sub-sec. (c) of sec. 20 thereof; 2. A case against the Crown *ex contractu*, for breach of contract, or under any law of Canada under the provisions of sub-sec. (d) of sec. 20 of the Exchequer Court Act.

Considering the case on this last aspect, i.e., for damages against the Crown arising out of a tortious breach of contract depending upon a wrong arising out of contractual relation, etc., it will first appear, by reference to exhibit "C," that as far back as the 12th December, 1906, an Order in Council was passed on a report by the Minister of Marine and Fisheries, wherein the Minister recites that it had been decided to make an arrangement with the Richelieu and Ontario Navigation Company (now the suppliant Canada Steamship Lines, Limited) to receive from them a bulk sum of \$1,000 per annum for wharfage at some of the wharves used by them between Quebec and Chicoutimi, Tadoussac coming within that territory.

Then by a further Order in Council of the 27th February, 1917, referring to the above-mentioned arrangement entered into between the said parties under the Order in

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Council of 1906, and the bulk sum of \$1,000 payable thereunder per annum as commutation of wharfage, it is further provided that the charge of \$1,000, owing to increase of business at the wharves, has been found inadequate and *that an arrangement* has been entered into with the Canada Steamship Lines, Limited, whereby the company agrees to pay to the Crown \$2,000 per annum as commutation of wharfage, from the beginning of the season of 1916.

The Canada Steamship Lines, Limited, have ever since the passing of this last Order in Council—which is still in force—paid annually to the Crown for the use of the wharves between Quebec and Chicoutimi, including Tadoussac, which is specifically mentioned in the Order in Council, the sum of \$2,000 per annum as commutation of wharfage, including the year 1923.

There are two wharves at Tadoussac—one at L'Anse à l'Eau and one at l'Anse Tadoussac. They are situate a short distance from each other. The former has been in existence from almost time immemorial and only accommodates vessels drawing a limited depth of water. The latter was built between the year 1910 and 1912. Now, it was contended by the Crown that at the time of the passing of the Order in Council of 1906, the wharf at l'Anse Tadoussac was not in existence and that it was not in contemplation and covered by either the Order in Council of 1906 or of 1917.

The Order in Council of 1906 rents to the company, for \$1,000 per annum, the use of the wharves “between Quebec and Chicoutimi.” By the Order in Council of 1917 a similar arrangement is made, for the consideration of the annual sum of \$2,000, as commutation of wharfage for the use of “the Government wharves at which the steamers of the *company call on the river St. Lawrence* below Quebec.”

I find that under the language used in this Order in Council, there cannot be any doubt that the company, in consideration of \$2,000 duly paid, had the clear right to the use of any Government wharf below Quebec, including the Anse Tadoussac wharf built between the years 1910 and 1912.

This finding is still made clearer or rather confirmed by the lengthy correspondence exchanged between the officers

of the company and the Crown in anticipation of the user of that wharf, and in respect of the repairs and improvements which became necessary to allow the company's steamer *Richelieu* so to moor at the Anse Tadousac wharf, and which repairs and improvements were made in the early part of the season of 1923. Moreover l'Anse Tadousac wharf had also been used, previous to 1923, by some of the company's steamers without any additional charge. The *St. Irénée* had moored at that wharf a couple of times and the *Cap Trinité* came and moored there two or three times in 1921 or 1922. This was the fifth trip of the *Richelieu* to that wharf in 1923.

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Therefore, I hold that, under the above facts there existed, between the Crown and the Company, a contract whereby the company, for the yearly consideration of \$2,000 which had been duly paid, could, as of right, moor its vessels at l'Anse Tadousac wharf in 1923 which, by means of a slip, afforded facilities for its passengers landing from the boat onto the dock, and had therefore the right to assume that the wharf, or slip, was reasonably fit for the use for which it was let, trusting to the performance of duty of the owners of the wharf, without independent examination of their own. The suppliant company had no obligation under the contract to maintain or repair the wharf which was the exclusive property of the Crown, their lessor. There was no duty on the part of the company, or any one on its behalf, to test the safety of the slip supplied, but on the part of the owner there arose an obligation that the slip supplied should be reasonably fit for the purpose for which it was to be used. *Heaven v. Pender* (1); Beven, 3rd ed., pages 53, 54, 59.

A person who invites another to come on his premises upon a business in which both are concerned or a lessor who, for consideration, grants the use of certain premises to a lessee, is bound to take care that his premises and all appliances provided by him as incident to the use of his premises are safe for that other person to come upon and use them as required; or else to give due warning of any danger to be avoided. *Southcote v. Stanley* (2); *Indermaur v. Dames* (3); 2 Can. Bar Review 94.

(1) [1883] 11 Q.B.D. 503; 9 Q.B.D. 302. (2) [1856] 1 Hurl. & Nor. 247.

(3) [1866] L.R. 1 C.P. 274 at 279.

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The company was under contractual obligation, as a carrier of passengers, to their passengers, and the Crown was under contractual obligation with the company, for consideration to provide and maintain a safe landing at the wharf. The Crown failed and the direct consequences of this breach are the damages claimed.

Under the arrangement or contract between the parties, the company had the right to expect the slip to be reasonably fit for their purposes. The injured passengers had obviously a right of action against the company as carrier of passengers. (See *Francis v. Cockrell* (1); 53 Can. Law Journal 417; *McFee v. Joss* (2).

As settled by the case of *The Windsor and Annapolis Railway Co. v. The Queen* (3) a petition of right will lie for damages resulting from a breach of contract by the Crown, whether or not the breach is occasioned by the acts or by the omissions of the Crown officials.

Moreover, it is further contended by the suppliants that they have a right of action against the Crown under any law of Canada, pursuant to sub-sec. (d) of sec. 20 of the Exchequer Court Act.

Furthermore that the cause of action having arisen in the province of Quebec the controversy must be determined by the laws of that province, citing in support of the same the cases of *The City of Quebec v. The Queen* (4); *The Queen v. Filion* (5); *The King v. Armstrong* (6); *The King v. Desrosiers* (7).

Under the arrangement or contract set out in the Order in Council above cited and the payment of \$2,000 a year of which there is written acknowledgment, the company had a right to use the wharf in question and to take it for granted that it was reasonably fit for the use for which it was let. Therefore, in addition to what has already been said, under article 1054 C.C.P.Q. the Crown, being the owner of the wharf, became responsible for the damage "caused by the thing which it had under its care" and control.

(1) [1870] L.R. 5 Q.B. 184, 501.

(2) [1925] 2 D.L.R. 1059.

(3) [1886] 11 A.C. 607.

(4) [1894] 24 S.C.R. 420.

(5) [1894] 24 S.C.R. 482.

(6) [1908] 40 S.C.R. 229.

(7) [1908] 41 S.C.R. 71.

In the case of *Quebec Railway, Light, Heat and Power Co., Ltd. v. Vandry* (1) it was held that

upon the true construction of art. 1054 C.C. a person capable of discerning right from wrong is responsible, *without proof of negligence*, for damage caused by things which he has under his care, unless he establishes he was unable to prevent the event which caused the damage.

The evidence establishes this slip had been found old, rotten and in a dangerous state previous to the accident and specially on the day before the accident. The traffic was not stopped. It was the opinion of witness Cameron, the chief engineer of the Department of Public Works, that if he thought a degree of danger existed, he would stop traffic. The company was not notified of the dangerous condition of the slip (*The Grit* (2)) and the passengers fell in the trap,—an expression used by counsel at bar as a figure of speech—which involves the idea of an appearance of safety under circumstances cloaking a reality of danger. 2 Can. Bar Review 25. See *Exchange Bank of Canada v. The Queen* (3); *Indermaur v. Dames* (ubi supra), *Brebner v. The King* (4).

For the consideration to which I have adverted above it is obvious that the case is founded on contract and I find the Crown liable in damages for a tortious breach thereof. Therefore it becomes unnecessary to delve into the other numerous questions of law (some of them quite formidable) raised at bar, which would indeed carry us too far afield. However, as some of these questions have occupied the major part of the argument, I might merely mention it has become unnecessary, in the view I take of the case, to decide whether or not the suppliants would or would not have a right of action under sub-sec. (c) of sec. 20 of the Exchequer Court Act, or whether the subrogations, by the injured persons, as against the Crown are valid or not under the decision of the cases of *Powell v. The King* (5); *Malone v. The King* (6); *The Queen v. McCurdy* (7); *Olmstead v. The King* (8); *The Queen v. Dunn* (9). Furthermore as to whether or not under the

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(1) [1920] A.C. 662.

(2) [1924] 94 L.J. Adm. 6.

(3) [1885] 11 A.C. 157.

(4) [1913] 14 Ex. C.R. 242.

(5) [1905] 9 Ex. C.R. 364.

(6) [1918] 18 Ex. C.R. 1 at 7; 59 S.C.R. 678.

(7) [1891] 2 Ex. C.R. 311 at 317.

(8) [1916] 53 S.C.R. 450 at 453.

(9) [1885] 11 S.C.R. 385.

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decision in *McHugh v. The Queen* (1); *Mavor v. The King* (2); *The Hamburg American Packet Co. v. The King* (3), the Crown, apart from a contract as in the case in question, was or was not bound to maintain the wharf in repair.

Therefore, having come to the conclusion that the Crown is liable *ex contractu* for the damages arising from the said accident, there will be judgment that the suppliants are entitled to recover the same from the respondent; and further there will be, as prayed, a reference to the Registrar of this Court, for enquiry and report to ascertain the amount of such damages, the whole with costs in favour of the suppliants.

Judgment accordingly.

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MAX JACOBSPETITIONER;
 AND
 W. F. BUSHOBJECTING PARTY.

*Trade-Marks—Voluntary Association—Right to object to registration—
 “Person aggrieved”—“Interest.”*

J. filed a petition to be permitted to register a certain trade-mark, and the objecting party was authorized, by order of this court, to oppose such application for the benefit of the Union Garment Workers of America, a voluntary association or trade union. Upon application by petitioner to have the objections filed by Bush dismissed because he was not a person entitled to object, it was

Held, that section 42 of the Trade-Marks and Designs Act applied only where a person is seeking to have a trade-mark expunged, varied or rectified, in which case such person must be a “person aggrieved,” but that in the present case any person “interested” may oppose the registration, and that the objecting party herein was a person entitled to so object to the registration asked for, under rules 34 et seq. of the Rules and Orders of this Court.

HEARING on questions of law.

Ottawa, October 30, 1925.

Hearing on said questions of law had before the Honourable Mr. Justice Maclean.

R. S. Smart for the petitioner.

L. P. Sherwood for the objecting party.

(1) [1900] 6 Ex. C.R. 374.

(2) [1919] 19 Ex. C.R. 304.

(3) [1901] 7 Ex. C.R. 150; 33 S.C.R. 252.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 9th day of December, 1925, delivered judgment.

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By his petition filed herein on the 17th of March, 1925, Max Jacobs, doing business in Montreal as a manufacturer of overalls and other garments under the name and style of the Union Overall Manufacturing Company of Canada, seeks to obtain an order of the court directing that a mark or label consisting of two clasped hands with the words "Mechanics and Labourers are you Union Men," and the words "Union Overalls of Canada" be registered as a specific trade-mark in Canada.

On the 6th June, 1925, an order was made by me directing that

Walter Frederick Bush, of Greenwood, in the province of Ontario be and he is hereby authorized to oppose this application on behalf of and for the benefit of the United Garment Workers of America, and that all members of the said association be bound by the result of this action or proceeding as though they had been before the court throughout the action or proceeding.

On the 9th of July, Bush, in his representative capacity, filed a statement of objections to the petition alleging, among other things, that the United Garment Workers of America was a voluntary association or trade union having its chief place of business in New York City, U.S.A., that it had a large membership throughout the United States and Canada, and that he, Bush, was a member of it. He further alleged that the association was organized in April, 1891, and about that time had adopted as its distinguishing badge or union label a representation of two clasped hands; that such label had been used by the association continuously since its adoption in connection with its various activities, and is usually associated with other features, as, for instance, the name of the association; that the association has contracts with a large number of manufacturers in the United States and Canada whereby such manufacturers operate their establishments as union shops and are permitted by the association, as a method of advertising and as a means of promoting sales, to affix the union label to all garments manufactured by them under such contracts; that the petitioner has no contract with the association, and that his establishment is not operated

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under or in accordance with the rules of the association nor is union labour employed therein; that the said label is used by the petitioner without the permission of the association. The association further alleges that the label is not the proper subject of a trade-mark, is calculated to deceive or mislead the public, and that the association would be aggrieved by such registration.

On the 23rd October, 1925, Mr. R. S. Smart, on behalf of the petitioner, obtained an order setting the case down for argument on points of law. These points substantially ask it to be determined whether Bush is a person entitled to appear and file a statement of objections herein; whether the use of the label of the said association is such as entitled it to object to the registration of the mark in question by the petitioner; and whether the facts set out in Bush's statement of objections constitute any answer to the prayer of the petition.

The argument of the said points of law was heard before me on the 30th October, 1925, Mr. R. S. Smart appearing for the petitioner, and Mr. L. P. Sherwood for Mr. Bush. It is well to state here that a statement of objections to the petition was also filed by the Superior Knitting Mills, Limited, of Winnipeg, but that company was not represented at the hearing of the said argument, and took no part therein.

I think it well to confine my present decision on the points of law to the question as to whether Mr. Bush is a person entitled to file a statement of objections to the petition, leaving the other points mentioned to go over for consideration at the trial.

So far as the pleadings disclose—and on the present hearing I am confined to the facts as stated therein—I see no reason to order that the statement of objections filed by Mr. Bush should be stricken out of the record.

It is no answer to the objections of this voluntary association or trade union to say that they have as a body no legal right to register as a trade-mark the label used by them in connection with their various activities. That might well be the case, but it does not derogate from their right to oppose the registration of their label, as a trade-mark by the petitioner.

Mr. Smart objects that this trade union is not a "person aggrieved" by the proposal of the petitioner to register the mark in question. I do not find, either by statute or by the rules of court, that a person desiring to oppose a petition for registration must especially qualify as a "person aggrieved." It is true that section 42 of the Trade-Marks and Designs Act contemplates that any person taking action to expunge or vary the entry of a trade-mark must be a "person aggrieved," but that is not this case. Here the trade union is opposing an application to register a mark which affects their interests, an entirely different matter. Turning to the Rules governing such a matter, I find that Rule 34 directs that a petitioner for registration, must publish a notice of his petition, requiring "any person desiring to oppose it" to file his objections within a specified time. Rule 35 requires the petition to be served "upon any person known to the petitioner to be interested in or opposed to the application." Rule 37 directs the time within which "any person" who appears to oppose the application to register, must file his statement of objections. Nothing is said in any of these Rules as to the person objecting being a "person aggrieved." I cannot reach the conclusion that Mr. Bush, who has been authorized to represent the United Garment Workers of America, in these proceedings is not "a person" within the meaning of the Rules above cited. As I have before pointed out, he is a member of such association.

The application of the petitioner to have the statement of objections by Mr. Bush dismissed from the record is refused, and with costs to the objecting party Bush, in any event.

Judgment accordingly.

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TORONTO ADMIRALTY DISTRICT

1925
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PITTSBURG COAL CO. ET AL. PLAINTIFFS;

AND

SS. *BELCHERS* DEFENDANT.

Shipping—Necessaries—Maritime lien by foreign law—Effect of wrongful seizure

The P.C. Co., a foreign corporation, furnished coal to the SS. *B.*, a vessel of Canadian registry and owned by a company domiciled here. The coal was furnished at an American port, and not being paid, the P.C. Co. seized the vessel within this jurisdiction.

Held, that the *B.* not being a foreign vessel and its owners being domiciled in Canada, this court had no jurisdiction on a claim for necessities and that the action should be dismissed.

2. A maritime lien for necessities created by the law of a foreign country and not recognized by the law of this country or by general international law cannot be enforced as such by the Exchequer Court in Admiralty.
3. The seizure of a ship under a claim for the enforcement of which this court has no jurisdiction, is wrongful *ab initio*, and other claimants cannot set it up or rely on it as enuring to their benefit.

This action of the Pittsburg Coal Company, was, with a number of others, instituted against the steamer *Belchers*, and in the progress of these cases they were before trial consolidated.

Toronto, November 10, 1925.

Actions now tried at Osgoode Hall before the Honourable Mr. Justice Hodgins.

J. B. Allen for plaintiffs, Pittsburg Coal Co. and other plaintiffs.

H. H. Davis for plaintiffs, Mullen Coal Co.

G. Grant, K.C. and *R. Clyde Auld* for Chartered Trust Co., trustees under bond mortgage.

The facts are stated in the reasons for judgment.

HODGINS L.J.A., now 30th November, 1925, delivered judgment.

The SS. *Belchers*, registered in Canada, is owned by a company domiciled here. It has been seized within this jurisdiction by the Pittsburg Coal Co. The trustees under a bond mortgage have intervened to assert their priority over the plaintiffs in the various actions, now consolidated, who have supplied necessities to this ship. All the plain-

tiffs admit this priority except the Pittsburg Coal Co. a foreign corporation which furnished coal to the ship, at the request of her master while in an American port. They urge that they have a maritime lien by virtue of the Jones Act (Merchant Marine Act, 1920, U.S. Statutes, sec. 30, ss. P. and Q.). Undoubtedly such a lien is created by that statute, flowing from the supply of necessaries, which could be enforced if the ship had been seized in the United States. The Jones Act also creates a presumption of authority in the master to order necessaries, and the supplying of them upon his order is what in this case is relied on as creating a maritime lien. But the enforcement of any claim for necessaries, whether as a maritime lien or otherwise, is limited by the statutes conferring jurisdiction on this court. Where the owner of the vessel when the action is begun, is domiciled in the Dominion, the Admiralty Court has, generally speaking, no jurisdiction over a claim for necessaries. But the Pittsburg Co. seek to invoke its aid on the assumption that where a valid and enforceable maritime lien is created by the supplying of coal in the United States, that lien attaches to the vessel and may be enforced wherever it is found.

The case of *Minna Craig SS. Co. v. Chartered Mercantile Bank of India, London & China* (1), cited, is not in point because the court was there considering the effect on the ship and its proceeds, of the judgment of a German Court which, in Germany, had clear jurisdiction over the ship to pronounce a judgment *in rem*. Lord Esher M.R., said that according to international comity no court in England could say that the German Court had no jurisdiction to decide as it did, and consequently that its decree affected the *res* and the distribution of the moneys realized by its sale. Nor are the cases in the English courts cited by counsel, which decline to enforce a maritime lien arising under a foreign statute, under circumstances which negative the existence of such a lien by English or general international law, applicable to the exact question arising here. These are, *Clark v. Bowring* (2); *The Tagus* (3); *The Colorado* (4).

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(1) [1897] L. R. 1 Q.B.D. 460.

(3) [1903] P. 44.

(2) [1908] Sc. S.C. 1168 (Ct. of Sess.)

(4) [1923] P. 102 (C.A.).

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The jurisdiction of this court as to claims for necessaries is statutory, and the circumstance that a maritime lien for necessaries is given by the law of the place where they were supplied, does not help the coal company. The claim is still one for necessaries, and the remedy does not change that fact. The conditions under which I can exercise the powers of Admiralty are not complied with, in that the ship is not foreign and the owners are domiciled in Canada.

The result is that judgment must be pronounced against the claim of the Pittsburg Coal Company, resting, as it does, upon facts which oust the jurisdiction of this court to deal with it. The same rule must apply to all the other plaintiffs whose actions must also be dismissed. Those of them who claim for repairs can only sustain their demand if the seizure by the Pittsburg Company was valid.

As I find no jurisdiction in the court under which the claim of that company can be sustained, the seizure was wrongful *ab initio* and the other claimants cannot set it up or rely on it as enuring to their benefit. The costs of the trustees of the bond mortgage may be added to their claim and their taxable costs including their costs of the trial will be paid by the Pittsburg Coal Company. There will be no other costs.

Judgment accordingly.

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 Jany. 14.

KAUFMAN RUBBER COMPANY, LTD... PLAINTIFF;
 AND
 MINER RUBBER COMPANY LIMITED.. DEFENDANT

Industrial design—Trade variance—Novelty of invention

Plaintiff registered two industrial designs which were the outline or representation of an overshoe. The means of fastening the flaps thereof being the usual metal buckle arrangement on the lower part and cross straps on the upper part to which dome fasteners are applied. One design shows two straps with buckles and two straps with dome fasteners. The other, one strap with buckles and three straps with dome fasteners. The only description given is "the said industrial design consists of the novel configuration of overshoes or goloshes as shown."

Held, that the form or configuration of the overshoe and the fasteners, whether with buckles or dome fasteners or both, is old and discloses no originality, and that the addition of buckles or straps with dome fasteners, whether concealed or exposed, or the substitution of one for the other, or the variation in the respective numbers of each, all well known, can not render a design new or original. Such variations are

mere trade variants, without invention, originality or novelty, the introduction or substitution of which in a design, is not sufficient to make the design new or original, and that the industrial designs in question are not proper subject matters for registration within the spirit and intentment of the Trade-Marks and Designs Act.

2. That a design to be registrable must be some conception or suggestion as to shape, pattern or ornament, applied to a particular article, and is judged solely by the eye, and does not include any mode or principle of construction. It cannot be an article of manufacture, but something to be applied to an article of manufacture or other article to which an industrial design may be applied, and capable of existence outside of the article itself.

ACTION for infringement of industrial designs and counter-claim by defendant asking for the expunging of plaintiff's designs.

Ottawa, 11th December, 1925.

Action now tried before the Honourable Mr. Justice Maclean.

J. F. Edgar for plaintiff;

R. S. Smart for defendant.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 14th January, 1926, delivered judgment.

The plaintiff is the proprietor of two industrial designs, registered in Canada, under the provisions of the Trade Mark and Designs Act, and this is an action for the infringement of the same by the defendant. The design is the usual outline or representation of an overshoe, and the means of fastening the flaps of the overshoe, the means being the usual metal buckle arrangement on the lower part, and cross straps on the upper part, to which dome fasteners, well known in gloves, are applied. The one design shows two straps with buckles, and two straps with dome fasteners, while the other design shows but one strap with a buckle, and three straps with dome fasteners. The only description accompanying the application is, "the said Industrial Design consists of the novel configuration of overshoes or goloshes as shown."

Part 11 of the Trade Marks and Designs Act relates to Industrial Designs and the registration of the same. No definition of Industrial Designs is contained in the Act, and there has been no litigation in our courts upon the point

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so far as I know, and consequently no assistance is available from judicial decisions, in determining what constitutes an Industrial Design, under the statute.

A review of some sections of the statute should however furnish some light, as to what was intended to be the principal characteristics of an Industrial Design, and what are the necessary elements to be found in a design to sustain its registration.

Sec. 24 required that the design be one not in use by any other person than the proprietor, at the time of his adoption thereof. Sec. 27, ss. 3, would indicate that originality of the design was necessary. Then sec. 31 is to the effect that no person shall without the license of the registered proprietor, apply a design, to the ornamentation of any article of manufacture or other article, to which an industrial design may be attached or applied, or to sell or use any article to which such design may be applied. Section 34 provides that the name of the proprietor of a design shall appear upon the article to which his design applied. Sec. 36 is the penalty clause for violation of this part of the Act, and ss. (a) states, that any person applying a design to the ornamenting of any article of manufacture or other article, without license, is subject to a money penalty.

The sections of the statute to which I have just referred, would therefore seem to indicate that "industrial designs" is there intended to mean some design or mark, which is to be attached to a manufactured article. The use of the word "ornamenting," in two different sections of the Act, would clearly indicate that a design might be adapted to purposes of ornamentation. In dealing with designs, the legislature had, I think, primarily before it, the idea of shape or ornamentation involving artistic considerations. Clearly a design cannot be an article of manufacture, but something to be applied to an article of manufacture, or other article to which an industrial design may be applied, and capable of existence outside the article itself, nor do I think that the registration of a design would afford any protection for any mechanical principle or contrivance, process or method of manufacture, or principle of construction. Then there must be something original in a registered design, and it must be substantially novel or original, having

regard to the nature and character of the subject matter to which it is applied.

A design to be registrable must therefore be some conception or suggestion as to shape, pattern or ornament applied to any article, and is judged solely by the eye, and does not include any mode or principle of construction. What would constitute a registrable design, is, I think, admirably and comprehensively expressed in *Pugh v. Riley* (1) by Parker L.J., at p. 202, and is I think quite applicable to the provisions of our statute. There he said:—

A design to be registrable under the Act must be some conception or suggestion as to shape, configuration, pattern or ornament. It must be capable of being applied to an article in such a way that the article to which it has been applied, will show to the eye the particular shape, configuration, pattern, or ornament, the conception or suggestion of which constitutes design. In general any application for registration must be accompanied by a representation of the design; that is, something in the nature of a drawing or tracing, by means of which the conception or suggestion constituting the design may be imparted to others. In fact, persons looking at the drawing ought to be able to form a mental picture of the shape, configuration, pattern, or ornament of the article to which the design has been applied. A conception or suggestion as to a mode or principle of construction though in some sense a design, is not registrable under the Act. Inasmuch, however, as the mode or principle of construction of an article may effect its shape or configuration, the conception of such a mode or principle of construction may well lead to a conception as to the shape or configuration of the completed article, and a conception so arrived at may, if it be sufficiently definite, be registered under the Act. The difficulty arises where the conception, thus arrived at, is not a definite conception as to shape, or configuration, but only a conception as to some general characteristic of shape or configuration, necessitated by the mode or principle of construction, the definite shape or configuration being, consistently with such mode or principle of construction, capable of variation within wide limits. To allow the registration of a conception of such general characteristics of shape or configuration might well be equivalent to allowing the registration of a conception relating to the mode or principle of construction.

I would also refer to the judgment of Moulton L.J. in *Phillips v. Harbro Rubber Company* (2); to the judgment of Astbury J. in *Wilson v. Chalco Ltd.* (3), and *Bayer's Design* (4).

In the case before me, the design covers the shape or configuration of the whole overshoe, together with the buckles and straps, the means of fastening. That this is

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(1) [1912] 29 R.P.C. 196.

(3) [1922] 39 R.P.C. 252 at p.

(2) [1920] 37 R.P.C. 233 at p.

255.

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(4) [1906] 24 R.P.C. 65.

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a registrable design within the contemplation of the statute, is not I think to be seriously considered. To hold that it is so registrable would be as said by Bowen L.J., in *Le May v. Welch* (1),

to paralyse industry, and to make the *Trade Marks and Designs Act* a trap to catch honest traders.

The registrations are but an attempt to protect a mode of construction. There is nothing original or novel in the configuration of an overshoe as shewn by the plaintiff's designs, or any part of them. The form or configuration of the overshoe, and the fastenings, whether with buckles or dome fasteners or both, are old and disclose no originality. The addition of straps with buckles or straps with dome fasteners, whether concealed or exposed, or the substitution of the one for the other, or the variation in the respective numbers of each, everyone of which are well known, cannot render a design new or original, because it merely represents a change in the mode of construction of the article. Such variations are mere trade variants, and do not represent invention, originality or novelty. The introduction or substitution of ordinary trade variants in a design, is not only insufficient to make that design new or original, but it does not even contribute to give it a new or original character.

For the reasons which I have above given, I am of the opinion that the registered designs in question, are not proper subject matters for registration within the spirit and intendment of the *Trade Marks and Designs Act*, and in any event neither of them possess the originality or novelty necessary to warrant registration. If it were necessary to dispose of this matter upon other grounds, I might say that the evidence does not establish, that the idea of applying the dome fasteners with a strap, beneath the flap of the overshoe, and which is admittedly the only original suggestion in the configuration of the overshoe, originated with the plaintiff, but with Beddoe, who does not claim any invention for it, or the authorship of it. Then again, the statute and the rules require a description of the design, to accompany the drawing upon the application for registration. This was not done, the only description being

(1) [1885] 28 Ch. Div. 24.

the mere statement that the design consists of the novel configuration of an overshoe which is no description at all. If the plaintiff's case is rested upon the contention that the design was intended to cover only a part of the configuration of the overshoe and its fastenings, then the registration is void by virtue of the absence of a description. If it was intended to comprehend the whole of the overshoe and all its parts, then the registration is also void for want of description.

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The plaintiff's action therefore fails. There will be judgment directing that the two industrial designs, mentioned in the pleadings, be expunged from the Register of Industrial Designs. The judgment will also contain an order allowing the defendant his costs of the action.

Judgment accordingly.

J. W. WINDSOR LIMITED.....PETITIONER;
AND
MARITIME FISH CORPORATION LTD..RESPONDENT.

1925
Dec. 31.

*Trade-Marks—Expunging—"Chicken haddies"—Distinctiveness—
Descriptive*

Held, that the words "chicken haddies" having been in use in the trade for a long period prior to the respondent's trade-mark, and such words forming part of the English language and thereby having become *publici juris*, could not be appropriated by any one as his trade-mark, and, further, that such words being descriptive of the character and size of the goods did not distinguish the goods of the proprietor of such trade-mark from those of other persons, and a trade-mark for the same was fundamentally null and void and should be expunged.

PETITION to expunge the trade-mark "chicken haddies" applied to the sale of fish and various products of fish and registered in the Canadian Trade Marks Register, at folio 15660.

Montreal, December 4, 1925.

Case now heard before the Honourable Mr. Justice Audette.

R. S. Smart for petitioner;

H. A. Chauvin, K.C., for respondent.

The facts are stated in the reasons for judgment.

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AUDETTE J., now this 31st December, 1925, delivered judgment.

This is an application, by the petitioner, to expunge from the Canadian Register of Trade-Marks, the respondent's specific trade-mark

to be applied to the sale of fish and various products of fish, and which consists of the words "Chicken Haddies."

This trade-mark, which was registered on the 5th day of April, 1911, applies to the sale of fish generally and to various products of fish and is, in its scope, larger than the respondent's evidence seems to claim; since the respondent's evidence establishes that the word *chicken*, as applied to halibut, lobster and herring, was used in the trade many years before the registration of their trade-mark.

However, the petitioner's evidence has satisfactorily established that the expression *chicken haddies* has been in use in the trade for a long period anterior to the date of the respondent's trade-mark, some of the witnesses being able to say that they knew of it as far back as 35 years ago. Witnesses Denton, Letourneay, Byrne, Snow, Wilson and Nickerson establish that fact beyond any doubt. True some of the respondent's witnesses say they were not aware of it, but it is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negantibus*, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed. *Lefeunteum v. Beau-doin* (1).

The trade-mark was obtained upon the usual affidavit stating that the same "was not in use, to our knowledge, by any other person than ourselves at the time of the adoption thereof."

This statement was untrue without, however, charging any bad faith on behalf of the deponent.

Now both words *chicken haddies*, are words forming part of the English language and thereby made *publici juris* which no one can appropriate to the exclusion of others. No one can monopolize the English language, nor can any one have a monopoly in the name of anything. *Chicken*

(1) [1897] 28 S.C.R. 89, at p. 93.

means young, baby, small, and in the trade as applied to haddock or haddie, which are also English words, denote haddock below 18 inches and also in latter years below 20 inches.

Distinctiveness is the cardinal requirement for a trade-mark to be good and valid, and distinctiveness means that the word, symbol or device shall be used or adopted to distinguish the goods of the proprietor of the trade-mark from those of other persons. Therefore the present trade-mark was bad, null and void *ab initio* as the words chicken haddie formed part of the English language and was in common use in the trade years back before the date of the trade-mark, and were used to designate and did denote a haddock of a small size. It could not in any manner whatsoever be used by itself to designate the goods of a trader to distinguish them from the goods of any other trader trading in fish.

Chicken is the prefix to denote the size of the fish as one witness said, the word jumbo would mean a large fish. The word was in common use before the date of the registration; it is descriptive of the character and size of the goods and is therefore fundamentally null and void and should be removed from the Register. See *Lamont, Corliss and Company v. The Star Confectionery Company* (1); *Re William's Ltd. re "Chocaroons"* (2).

The case is too clear to call for any further comment. The trade-mark in question is bad, null and void *ab initio*, as having been an expression in common use in that trade for years, composed of words forming part of the English language and furthermore as being descriptive of the goods and thereby inappropriate to distinguish the goods of a trader from those of another trader trading in the same class of goods and in the whole as detrimental to trade at large.

Moreover, it would seem that, under the respondent's own evidence, the trade-mark as registered is too broad, since it would also cover halibut, lobster, herring or any fish, in respect of which the word chicken has been in common use for years back, as testified to by respondent's own witnesses.

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(1) [1924] Ex. C.R. 147.

(2) [1917] 34 R.P.C. 197.

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Therefore, I have come to the conclusion, for want of validity of the said trade-mark, as above set forth, to order and adjudge that the Specific Trade-Mark No. 64, Folio 15660, registered on the 5th day of April, 1911, consisting of the words "chicken haddies" as applied to the sale of fish "and various products of fish" be expunged from the Register of the Canadian Trade-Marks. The whole with costs.

Judgment accordingly.

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January 12

A. E. KENDALL ET AL. SUPPLIANTS;
AND
HIS MAJESTY THE KING RESPONDENT

Crown—Petition of Right—Negligence of servant—Fraud

Suppliants desiring to obtain 600 tons of hay from Indian Lands, made out a joint statement of their respective holdings of horses, cattle, etc., and the amount of hay required by each, duly sworn to, which document contained the following: "We, the undersigned hereby appoint the bearer, Jack Ryggs, to act in our behalf." R. proceeded to G. with this document, where he saw the Indian Agent, but was unable to get definite assurance that hay would be available. When there he met one McL., bent on the same errand for others, and, as McL. was remaining on, R. then and there endorsed on the document aforesaid the following: "I have instructed Mr. McLarnon with my power to act for the above," which document he left with the Indian Agent. He then returned home and reported to his associates. Some time later being advised by McL. that he had returned to Medicine Hat, R. and some of his associates there called on McL., who claimed to have arranged for hay for the suppliants, and stated that the price would be \$1.50 per ton. Suppliants shortly after gave McL. a draft for \$900 payable to the order of the Indian Agent, to be handed to him for the hay. Under the regulations a deposit of 50 cents per ton was to accompany the application for hay, and the price charged for the hay in the year in question by the Department of Indian Affairs was \$1 per ton. Arriving at G., McL. saw the Indian Agent, handed him the draft, and represented that the amount of the draft exceeded the amount required to be deposited, and that the suppliants had been put to much expense, and suggested that a portion of the proceeds of the draft be handed back to him. Thereupon the agent cashed this draft, deposited \$400 to the credit of the Indian Department, and handed back \$500 to McL. as requested. This amount McL. never returned to suppliants. Hence this action to recover from the Crown the sum of \$500 on the ground that the Indian Agent acted improperly in so returning the money to McL. who, they allege, was authorized only to hand over the draft, but had no authority to receive the refund. As a matter of fact no permits were ever allotted to the suppliants, and no hay ever became available to them.

Held, that even if the facts disclosed negligent conduct on the part of the agent, a petition of right would not lie against the Crown to recover damages therefor; and that the \$500 in question not being and never having been in the possession of the Crown, in fact or in law, the petition of right herein should be dismissed.

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2. That where one or two innocent parties must suffer from the fraud of a third, the loss should be borne by him who has enabled such third party to commit the fraud, and that, as it was the conduct of the suppliants which mislead the Crown's agent as to McL's powers and which made possible the train of events leading to their loss, their action must fail.

PETITION OF RIGHT to recover from the Crown the sum of \$500 alleged to have been improperly paid out by an employee of the Crown.

Calgary, September 28, A.D. 1925.

Action now tried before the Honourable Mr. Justice Maclean.

C. S. Blanchard for suppliants.

W. J. A. Mustard, K.C., for respondent.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 12th day of January, 1926, delivered judgment.

This is a petition of right in which the suppliants ask for the recovery of the sum of \$500 from the respondent. The cause was partially heard by Mr. Justice Audette at Calgary, in October, 1923, and concluded before me at Calgary, by agreement between the parties, almost two years later. While the amount involved is not very substantial, still an important point of law is involved in the issue, and I confess a great deal of difficulty in reaching a conclusion. In the event of an appeal it is perhaps desirable that I should set forth the facts as fully and clearly as is possible.

The suppliants, residents of Winnifred, Alberta, in August, 1918, applied in the circumstances I shall later set forth, to a representative of the Department of Indian Affairs, for permits to cut 600 tons of hay from Indian Reserve Lands, in northern Alberta. It would appear that in this year, there was a general shortage of hay for animals in southern Alberta, and the Department of Indian Affairs and the Dominion Lands Branch of the Department of the Interior, in order to assist the farmers in that situation,

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were jointly associated in the reception and granting of permits to cut and remove hay from Indian Reserve Lands, upon terms, to bona fide farmers, and proportioned upon their holdings of animal stock. The price payable for hay cut upon Indian Reserve Lands, under the permits so granted that year, was \$1 per ton, and the payment of 50 cents per ton was required to accompany the application. The authorization for the sale of such standing hay was provided by section 48, ss. 1, of the Indian Act, chap. 81, R.S.C., 1906.

In the year in question, Mr. J. W. Martin, of the Dominion Lands Office at Edmonton, it appears, was required to approve of applications for permits to cut hay on Indian Reserve Lands, and such applications if approved by him, were usually transmitted to Mr. W. B. Crombie, an Inspector of Indian Agencies, who was sent into northern Alberta this year, to deal with applications to cut hay on Indian Reserve Lands, and to issue permits if the same were possible. Mr. Harold Laird was, in 1918, the acting Indian Agent for the Lesser Slave Lake Agency, and was located at Grouard, Alberta. He was absent from Grouard from some time in May till late in September on other official business, except that he once returned early in August, how long he remained is not quite clear. While at Grouard, it would seem he was free to receive applications for hay permits, but in any event, he or his office was the proper recipient of any moneys paid on account of the applications for permits to cut hay, on Indian Reserves.

The suppliants, prior to making their formal application for hay permits as by regulation required, had prepared a statement in writing, setting forth their respective holdings of horses and cattle, and that writing contained the following paragraph:

We the undersigned hereby appoint the bearer Jack Ryggs to act in our behalf.

Jack Ryggs was one of the parties to this written statement under the name of John Ryggs, and is one of the suppliants. The statement was signed and sworn to by the parties thereto, on the 24th day of July, 1918.

Ryggs left Winnifred during the month of August with a view to ascertaining, if any so called hay permits would likely be available to him and his associates, in northern

Alberta. He first called at the office of the Dominion Lands Agency at Edmonton, and by Mr. Martin of that office, he was directed to the Indian Agent at Grouard. There he met Mr. Laird, the Indian Agent, to whom I have already referred, and who evidently had returned to Grouard, and there Ryggs informally applied for the hay permits required by him and his associates. At Mr. Laird's office Ryggs met a Mr. McLarnon, and according to Ryggs, they travelled together on the train from Edmonton to Grouard. McLarnon was on the same mission, namely, to obtain hay permits for himself and his associates, belonging to Medicine Hat. Mr. Laird informed Ryggs that he was then unable to definitely state if hay from Indian Reserves would be available to applicants, as it had yet to be ascertained and determined, what amount of hay the Indians would require, their needs having first to be supplied, and so Mr. Ryggs was obliged to return home without being informed as to the probable reception of his application. Before returning home, he states he left with Mr. Laird the sworn statement to which I have referred, and which contained the authority to him to act for his associates, and he then and there endorsed thereon authority for McLarnon to act in his stead. This was in the following words:—

I have instructed Mr. McLarnon with my power to act for above.

This Ryggs signed. McLarnon intended then remaining at Grouard awaiting official decision upon his own application, and he volunteered to advise Ryggs as to the probable reception of the latter's application. Laird admits that he saw the document appointing Ryggs the agent of his associates, but that it had not been left with him, and that he knew nothing about the presumed delegation of authority from Ryggs to McLarnon, and that his only information about it was that contained in a letter he received from Mr. Martin, and to which I shall later refer. I am inclined to think that Laird is incorrect, in stating that the document itself had not been delivered to him. Ryggs states distinctly that the document was taken possession of by Mr. Laird, and placed in a box from which receptacle Laird later took it, and delivered it to Ryggs, to endorse thereon the authority to McLarnon, and he says he did this at the suggestion of Laird, and to whom he handed back the

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document. This positive evidence of Ryggs I accept as correct. When Laird gave evidence before me, some seven years had since elapsed, and I think he had forgotten all the incidents of that occasion. His duty apparently was to receive applications, and moneys paid for hay permits, the permits being granted only by Crombie with the approval of Martin. The document was soon passed over to Crombie, and Laird probably never saw it again.

Ryggs on his return to Winnifred, reported to his associates that Mr. McLarnon was shortly to advise him, whether or not their application would likely be granted, and whether any hay would be available to them. Subsequently some two weeks later, Ryggs received word from McLarnon that he was returning to Medicine Hat, where he was apparently located, and Ryggs and some of his associates went there to see McLaren. When they returned they reported to their associates who had not gone to Medicine Hat, that McLarnon had informed them, according to the evidence of Ryggs, that the suppliants had been allotted hay at Sucker Creek Reserve, and that the price would be \$1.50 per ton. There is also evidence to the effect that Mr. McLarnon stated that he had arranged for a considerable tonnage for himself and his associates, from which the suppliants might obtain their requirements, but at the price of \$1.50 per ton. Altogether the evidence as to what occurred at this interview is not clear. I have no doubt that McLarnon was then meditating upon his scheme to defraud the suppliants, if he could. He had obviously lied to them on that occasion, and doubtless he would ambiguously express himself in order to confound those whom he was clearly and deliberately deceiving.

I think Ryggs and his associates thought, that the hay was to come in the usual way, through the Indian Agency at Grouard, and that the increased price was to go to the office of the Indian Agent at Grouard. Ryggs, however, had been informed by Laird when he first saw him at Ground, that the price of the hay under the permits, if granted, would be \$1 per ton, and this should have put Ryggs and his associates upon their inquiry. The suppliants, in truth, were unconcerned as to the increase in the price of the hay, or how it was obtained. Their necessities

were such that they would have paid almost any price for hay, could they but get it, as one witness expressed it. There is no evidence to convince me of the suggestion that the suppliants, or any of them, believed that McLarnon had it in his mind, or within his power to corruptly influence the Indian Agent or any other official of the department, so as thereby to secure preferential treatment in the allotment of hay permits, or that they thought that any part of the stated excess purchase price was to go to the Indian Agent of any other official, for his or their personal use. McLarnon's whole conduct at the Medicine Hat meeting, possibly suggested to some of them the suspicion that he was able in some way, to secure a more favourable consideration of their applications than they themselves might obtain, and believing they were to obtain the required hay, they were not inclined to be at all inquisitive about any of the details of the matter, such as the increased price or to whom it was to go. The fact that they later remitted \$900 by draft payable to the order of the Indian Agent at Grouard, dispels the theory that they were to obtain their permits or the hay, other than through the regular channel.

The petitioners then arranged to borrow \$900 from a bank, with which they purchased a draft dated August 7, and in that amount, payable to the "Indian Agent, Grouard, Alberta," and which draft was turned over to McLarnon for delivery to the Indian Agent, in payment of 600 tons of hay which they believed they were to receive under their applications, and they say that all McLarnon was asked to do, was to deliver the draft to the Indian Agent. McLarnon represented himself to be then proceeding north again, for the purpose of cutting hay for himself and his associates.

When McLarnon started for Grouard, on this the second occasion, and with the draft of \$900 given to him by the suppliants he called at Edmonton where he saw Mr. Martin the inspector of Dominion Lands, to whom he delivered a statutory declaration made by himself and dated the 8th day of August, to the effect that Ryggs who had authority in writing to act for the suppliants had assigned the same to him, so that he could act in his stead. A part of this declaration is as follows:—

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I, Joseph F. McLarnon, of the city of Medicine Hat, province of Alberta, do solemnly declare that Mr. Ryggs had power of attorney for people in the Winnifred District, and he assigned this power of attorney to me so that I could act in their behalf. These powers of attorney were given by me to Mr. Crombie.

The written authority to Ryggs, and the delegation of the same to Mr. McLarnon, according to this declaration, came into the possession of Mr. Crombie through McLarnon, the former as I have already stated, being the officer specially detailed to administer the applications for hay permits in northern Alberta that year. There is no reliable or clear evidence to indicate that the so called power of attorney came into the hands of Crombie through McLarnon. Crombie would no doubt obtain it at the office of the Indian Agent at Grouard, where Ryggs said he left it. Having made up his mind to defraud the suppliants if he was able to do so, I have no doubt McLarnon would not hesitate to make a false declaration in this regard. However, it matters little whether this portion of McLarnon's declaration be true or false, for it is of little importance how the so called power of attorney reached Crombie.

On August 9, Mr. Martin wrote Mr. Laird a letter, after his interview with McLarnon on the previous day, and as this letter was much referred to at the trial, I had better set it out in full. It is as follows:—

Office of
 INSPECTOR OF DOMINION LANDS AGENCIES

Edmonton, August 9, 1918.

Sir,—I am enclosing herewith a declaration made by Mr. J. F. McLarnon in which he states that a Mr. Ryggs had power of attorney for certain people in the Winnifred District to secure hay for them and that Mr. Ryggs assigned this power of attorney to him so that he might transact this business. The parties interested in this hay have made declarations which will be found attached. The hay desired is from Sucker Creek Indian Reserve and the quantity is apportioned by Mr. Crombie for Ryggs and his associates is 600 tons.

A second declaration made by this gentleman in which he states that Messrs. Edwards and Myers had authority from people in the Seven Persons District to secure hay for them and also that this power of attorney was assigned to him by this gentleman so that he could act for these settlers. Declarations from the settlers interested will be found attached and Mr. McLarnon informs me that he handed this power of attorney to Mr. Crombie. The quantity of hay involved is 500 tons apportioned to them on the Sucker Creek Indian Reserve by Mr. Crombie.

You will find attached a draft in your favour in the Dominion Bank, Medicine Hat, No. 4312 for \$600, this is \$50 in excess of the 50 per cent to be paid at the time the application is made.

It is presumed that Mr. Crombie handed over to you the powers of attorney above mentioned, if what Mr. McLarnon states is correct.

Respectfully,

J. W. MARTIN,
Inspector.

Harold Laird, Esq.,
Indian Agent,
Grouard, Alberta.

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It is only the first and last paragraphs of this letter that refer to the applications of the Winnifred syndicate. It should perhaps here be stated that the suppliants, individually made applications for hay permits in the form of solemn declarations, being a printed form furnished by the Department of Indian Affairs or the Dominion Lands Branch, setting forth *inter alia*, the number of tons of hay required by each declarant. These declarations are dated at Winnifred August 6, 1918, and were later approved by Martin. Copies of these declarations were enclosed to Laird by Martin in his letter of August 9, also the declaration of McLarnon respecting the assignment of the power of attorney from Ryggs. Martin, in the third paragraph of his letter assumed, it would appear, that the Medicine Hat draft of \$600 had some relation to the application of the Winnifred Syndicate. If I am correct in this, he was clearly in error.

McLarnon then proceeded to Grouard, reaching there the same morning as the letter from Martin to Laird, and he then delivered over the Laird the Winnifred draft for \$900. McLarnon at the same time represented to Mr. Laird that the people for whom he was presuming to act, Ryggs and his associates, had been under great expense, and requested that, as the amount of the draft was greater than the amount of the deposit necessary to accompany the applications for the permits to cut 600 tons of hay, which would be \$300, a portion of the amount of the draft should be returned to him. Laird acquiesced in the request.

There being no bank at Grouard, it was the practice of the officers of the Department of Indian Affairs at that point to deposit moneys received by them with the Hudson Bay Company, for the account of the department, and I understand they were officially authorized and directed to do so. Laird then deposited or discounted the draft with the Hudson Bay Company. Out of the proceeds of the

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draft he procured \$500 in cash which he paid to McLarnon, and left the balance of \$400 with the Hudson Bay Company, to the credit of the account of the Indian Department, and which amount was later refunded to the suppliants. I assume that what must actually have occurred, and which might easily have been shewn, was that the Hudson Bay Company credited the department with \$900 and debited it with \$500, which in effect means that \$400 was the net amount received by the Hudson Bay Company for the credit of the department, and McLarnon kept the money so paid him, and never returned the amount to the suppliants. A receipt, dated the 13th day of August, from the Hudson Bay Company for \$1,600, was tendered in evidence to shew that the proceeds of the \$900 draft constituted part of this amount, and was at one time to the credit there of the department. This receipt affords no such proof, and I do not attach any importance to it. Further, the draft which had been forwarded to the Bank of Montreal at Edmonton for collection was received by that bank on the 12th instant, a day prior to the date of the receipt. No proceedings either civil or criminal were brought against McLarnon by the suppliants although for a time they knew of his whereabouts.

Relying on the statement of McLarnon as to the allotment of hay to the suppliants, or his ability to secure the permits for them, and make all arrangements therefore, some of the suppliants, including Ryggs, later went north to cut and remove the hay, taking with them the necessary equipment for that purpose, and on September 2nd they arrived at Grouard. There they learned that no hay would be available to them in that region. Mr. Laird, the Indian Agent at Grouard, was absent on official business elsewhere, but they saw a Mr. Cunningham, a homestead inspector, who was temporarily acting in the place of Mr. Laird. Mr. Cunningham gave them a written memorandum dated September 2, being something in the nature of a certificate, to the effect that \$900 had been deposited with the Indian Agent, Mr. Laird, by the suppliants, and Mr. Laird being away at the time, the money could not then be returned to the suppliants during Laird's absence, but would be available as soon as he returned. This document

was intended to operate as a recommendation for credit to the suppliants, in their efforts to purchase hay or other feed from other parties elsewhere. I do not think any importance attaches to this letter whatever, and neither do I think it relevant.

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Mr. Laird stated at the trial that he acted on the letter of Mr. Martin, the declaration of McLarnon, and the formal applications for hay permits made by the suppliants, recommended by Crombie and approved of by Martin, copies of which were enclosed to him in the letter from Martin.

In cases where lands, goods or money of the subject are in possession of the Crown, or where the claim arises out of a contract entered into by or on behalf of the Crown, a petition of right will lie. In the case under consideration, there is not, I think, to be found the elements which would constitute a contract, and upon consideration that is my conclusion. In fact, this point was not I think urged on behalf of the suppliants. The suppliants' claim for relief, therefore, I think depends upon whether or not there is in the possession of the Crown and belonging to the suppliants, the amount claimed, \$500, and it is upon this ground that the suppliants rely. If such money is not in the possession of the Crown, then the claim for relief must be denied. If the money in question is not in the possession of the Crown, but was negligently paid to McLarnon, the suppliants must also fail because it is a well established principle of law, that a petition of right will not lie to recover compensation for a wrongful or negligent act done by a servant of the Crown, in the supposed performance of his duty, and by this authority I am bound.

Is the money in question in the possession of the Crown? I do not think this can fairly be answered affirmatively. Concurrently with depositing the draft to the credit of the Department of Indian Affairs at the office of the Hudson Bay Company, or perhaps speaking more accurately, concurrently upon discounting the draft, Laird paid over to McLarnon \$500 out of the proceeds of the same. As a matter of bookkeeping, the amount of the draft was probably credited to the account of the respondent, and debited with the sum of \$500, and in fact the net amount credited to

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the respondent at the moment was but \$400. The result of the disposition of the draft in this manner is not I think different from that which would have occurred had cash been entrusted to McLarnon, and he had handed the same to Laird, and then subsequently requested and obtained a refund of \$500. I cannot concur in the contention urged upon me by the suppliants' counsel, that the amount deposited was \$900 and that this amount is still in possession of the Crown, less the amount of \$400 already refunded to the suppliants. While not entirely free from doubt, I have reached the conclusion that in respect of the \$500 in question it is not in the possession of the Crown, in fact or in law.

It is not necessary to rest my judgment entirely upon the points I have just mentioned. Outside the question as to whether or not there was negligence on the part of Laird, and whether or not the respondent actually received the \$900, the suppliants I think would fail. There is the well recognized proposition of law, that where one party is guilty of such a degree of negligence, as to enable another party to commit a fraud, the former must bear the loss rather than an innocent third party, acting of course in good faith. Where one of two innocent parties must suffer from the fraud of a third, the loss should be borne by him who has enabled the third party to commit the fraud. The suppliants by their conduct I think, either made McLarnon their agent, or validated the delegation of agency made by Ryggs, which of course by itself was void. In fact, so far did the suppliants rely on McLarnon that they permitted themselves to be assured that they would obtain hay when there was to be no hay for them, that the hay would cost \$1.50 per ton, which would not have been the fact had the hay been available to them, and of this they had some evidence. They must have placed reliance on McLarnon's ability in some way or other, to procure the hay for them when others might fail, and would not I think hesitate to make him their agent. Ryggs admitted that he was not hopeful of procuring hay as the result of his first visit to Grouard, and he and his associates were greatly concerned about the matter. And it is to be remembered that Ryggs was not again going to Grouard on behalf of his associates,

to make any arrangements regarding the permits and prior to their going there to actually engage in the cutting and removing the hay. It need occasion no wonder then that they were willing to clothe McLarnon with all the authority intended for Ryggs, and to empower him to consummate all the arrangements for the hay permits, and to do anything incident thereto if needs be, and I think it was so intended. The formal and approved applications only went forward to Grouard from Edmonton after McLarnon's arrival at the latter place, and no doubt his presence there was responsible for this. While there is no evidence upon the point, yet I suspect that McLarnon carried the formal applications or declarations of the suppliants, dated August 6, to Edmonton with him. In the circumstances, Laird's act in refunding the \$500 and retaining the amount required to accompany their several applications for 600 tons of hay, and a little more, was hardly an act of negligence, or in excess of his duty. Altogether it was the conduct of the suppliants themselves, that created the belief in the mind of Laird, that McLarnon was authorized to do anything that Ryggs was empowered to do on their behalf, or on their account, and it is this conduct which creates an equity against themselves, in favour of the innocent party even if agency in fact has not been actually established. The excess in the required amount of the draft was not chargeable to Laird, but rather to the suppliants themselves, and being an obvious error, it was but natural that a prompt refund should be made by the receiving party, if a demand were made by one acting under a colour of agency or authority, and who was entrusted to deliver the same, and to make all other necessary efforts to secure the hay permits. Laird was not bound to accept more than \$600 in any event. If there be blame on both sides, the loss occasioned must I think fairly be borne by the suppliants, as they themselves made possible the train of events, leading to their loss.

I have no hesitancy in finding Mr. Laird's actions throughout to have been in good faith, and that there is nothing on which to found the suggestion made, that Laird was in collusion with McLarnon.

For the above reasons, and on the facts as I have reviewed them, I reach the conclusion that the suppliants

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have failed to establish the relief sought by the petition of right, or any part of it, and that the petition must therefore be dismissed. There will be an order that no costs be allowed to either party.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT

BETWEEN :

1925
 Dec. 13.

THE POPLAR BAY STEAMSHIP CO..... PLAINTIFF;

AND

THE SHIP *CHARLES DICK*..... DEFENDANT.

Shipping—Collision—Inevitable accident—Duty of Master—Negligence

Held, that in a case of collision, in order to succeed under a plea of “inevitable accident” it must be shown that the accident could not possibly have been prevented by the exercise of ordinary care, caution and maritime skill.

2. That a defendant with such a plea must show what was the cause of the accident, and that the result of that cause was inevitable or must show all the possible causes, one or other of which produced the collision, and must further show with regard to every one of these possible causes, that the result could not have been avoided.
3. That careful navigation requires the Master of a ship, in a narrow channel in leaving the bank, with another vessel oncoming, should first test his helm, and if he decides to trust his engines and steering gear, he should make provision for a possible breakdown or the unanticipated force or effect of the current from the oncoming ship, and his crew should be so placed as to be prepared to meet the consequences of such a contingency.

This was an Action brought by the plaintiff against the ship *Charles Dick* for damage by reason of collision between the said ship and a ship owned by the said plaintiff.

Toronto, December 8 and 9, 1925.

ACTION now tried before the Honourable Mr. Justice Hodgins at Osgoode Hall.

W. Lawr and *A. M. Garden* for plaintiff.

R. I. Towers, K.C., and *F. Wilkinson* for defendant.

The facts are set out in the reasons for judgment.

HODGINS L.J.A., now (13th December, 1925), delivered judgment.

Action arising out of a collision between the SS. *Poplar Bay* and the defendant ship on the 7th August, 1924, in

the Welland Canal just below Humberstone bridge, a mile and a half north of Port Colborne. No complaint is made with regard to the navigation, crew or actions of the *Poplar Bay* (though charged in the Preliminary Act). The *Charles Dick*, which ran into her, sets up inevitable accident, due to the jamming of the steering gear, as being responsible for the collision. This defence, if established, involves the proposition that there was no negligence before or after the time when the helm jammed nor in the jamming itself. The *Poplar Bay* is a steel vessel of 1,263 gross and 664 net tons, 236 feet long, 36 feet beam and was laden with wheat, drawing 14 feet. The *Charles Dick* is a steel vessel, built in 1922, of 1,774 gross tons and 654 net tons, 260 feet long, 43 feet beam, drawing (light) 5 to 6 feet forward and 11½ feet aft.

The *Charles Dick* was coming through the canal on her way up (south) and having heard the signal of the *Poplar Bay* above the bridge, went into a bight on her starboard side of the canal, some 1,200 feet below Humberstone Bridge, where the canal is about 150 feet across (one witness says 175 by plan but this is not correct), and lay there about twenty minutes. When the *Poplar Bay*, coming down (north), had passed through the bridge, and was her own length from the *Charles Dick*, the *Poplar Bay* ported and swung to the right to pass. When the *Poplar Bay* was about fifty or between fifty and seventy-five feet away, the Master of the *Charles Dick* started her engines ahead slow. He then gave an order to the wheelsman, Doucet (the wheel being amidship), to port a little, when the steering gear, it is said, jammed. The Master then ordered hard a port with no result. The vessel, he says, had started when the order, ahead slow, was given. On the second failure of the wheel to act, the Master gave five blasts as a danger signal—the *Poplar Bay* being about 30 feet away—and then rang the engines full speed astern. He then tried the wheel himself, and ordered the mate, Foote, to let go the starboard anchor and to go to the lower wheelhouse to disconnect the rod connecting the lower wheel with the upper wheel on the bridge. The mate says he found it useless to anchor, but that the lower wheel was able to operate when he had disconnected the one above. On his reporting this, the Master sent the wheelsman to

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the lower wheel. By that time the vessels had come together. This is the order of events given by the Master of the *Charles Dick*. The mate, Foote, and the wheelsman, Doucet, corroborate him. The mate says it was too late to anchor when he got to the starboard anchor, and that the Master then sent him to the lower wheelhouse, but believes his going earlier would not have averted the accident. The wheelsman says he got two orders to port helm before the direction hard a port. The bow of the *Charles Dick* had swung out to port and struck the *Poplar Bay* on her port bow, and, as her witnesses said, forced the vessel to the bank on her starboard side, the *Charles Dick* slipping along the side of the other vessel for between thirty and fifty feet. Apparently the *Poplar Bay* did all she could to avoid the accident, so that it is not necessary to discuss her movements further.

The question I have to decide is whether the jamming of the steering gear proved to be unavoidable and brought about the collision and also whether it and the handling of the ship before or after it occurred, establish "inevitable accident."

To succeed under the plea of "inevitable accident" the *Charles Dick* has to show that the collision could not possibly have been prevented "by the exercise of ordinary care, caution and maritime skill," per Dr. Lushington in the *Virgil* (1), an expression approved in the cases of the *Marpesia* (2), and *The Schwan* and *The Albano* (3), and in many other English and Canadian cases, to some of which I shall refer later.

In the *Merchant Prince* (4), the Court of Appeal laid it down that to make out such a plea the defendants must either (1) show what was the cause of the accident and show that the result of that cause was inevitable, or (2) they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes, that the result could not have been avoided.

The steering gear of the *Charles Dick* is the Ligerwood Steam Gear, and the brass top or cover of the indicator on the topmost bridge is produced (Ex. 3). The jamming is said to have been caused by the teeth of the lower sprocket

(1) [1843] 2 Wm. Rob. 201, 205.

(3) [1892] P. 419, 433-4

(2) [1872] L.R. 4 P.C. 212, 220.

(4) [1892] P. 179.

wheel under the indicator cover failing to mesh properly with the steel worm on the shaft. This shaft is moved by the action of the wheel. The sprocket wheel in question is welded on the lower end of a brass tube which revolves, when properly in contact with the worm, round a spindle threaded into the brass top. The brass tube has, as its upper end a smaller wheel which meshes into a brass segment which moves the indicator on top of the cover. The whole object of transmitting motion to the sprocket wheel from the shaft on which the worm is fixed, is to move the indicator as the wheel moves, and the disablement of the sprocket wheel alone would in no way affect the steering gear, unless it retarded or stopped the movement of the shaft on which is the steel worm.

The evidence suggests that the jam occurred as described above because when the rod connecting the upper wheel with the lower wheel, immediately under it on the main-deck, or with its gearing, was disconnected, the lower wheel operated the rudder. The evidence as to the cause of the jam was given by Donaldson, Chief Engineer of the *Charles Dick*, backed in certain portions by the evidence of Henry, foreman machinist of the Collingwood Ship Building Co., which built and equipped the *Charles Dick*. Both swore that the Ligerwood Steering Gear was one in common and recognized use. The steel worm was not produced, and Donaldson being recalled testified that it was not damaged at all when examined after the jamming had occurred.

I am not completely satisfied upon the point that the jamming at the important moment, as it is accounted for, was unavoidable or irremediable. The chief engineer's log is not produced, and the entry made by him on the margin of his weekly report reads as follows:

Aug. 7. Note. Collided with SS. *Poplar Bay*. Steering indicator put out of order after collision.

This entry as it reads is quite contrary to his testimony.

Donaldson's evidence in chief is, at first, confined to stating that having found the indicator two points out, it showed that the sprocket wheel had jumped the worm on the steering shaft.

He further says that on examination of the gears he found the spindle on which these sprocket wheels revolved was loosened in the cover

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and that the spindle, which screws on threads in the brass cover, was slackened off, making the sprocket wheel disengage from the worm, with the result, that "when the wheels (sic) are passing over the worm, on top of the gears" it would tend to jam. The play of the lower end of the spindle just where it carries the sprocket wheel, when loose from its threads in the top of the cover to the extent of $\frac{1}{32}$ of an inch, is given as $\frac{1}{4}$ of an inch or $\frac{1}{8}$ each way. Later on the explanation is that if the worm comes on top of the gear, i.e., the sprocket wheel, it comes out of mesh and locks the sprocket wheel against the worm on the steering wheel shaft. The teeth of the worm are $\frac{1}{8}$ of an inch deep and those on the sprocket wheel about the same.

The Chief Engineer then proceeded at my request, to indicate the three teeth of the sprocket wheel which showed evidence of this jarring and they are marked on the exhibit by a rubber band round them. On cross-examination he said that it was the spindle coming off the thread that caused the jam, that it had worked loose without his notice, but how he cannot tell. As to repairing it he is asked: Now since you had to rivet that it showed that it worked loose considerably,

and he answers,

Yes, sir.

This rivetting is merely hammering the rim of the hole in the brass cover against the head of the spindle, so as to bind them together.

On examination of Exhibit 3 it will be found that if the indicator moves two points (the distance it was found to be out), it will only cause three teeth of the sprocket wheel to engage the worm and that those pointed out by Donaldson to me and marked are just that number. On examining these three there will be noticed a slight groove on the top of each of the teeth running along their length, which grooves were said to be caused by the action of the steel worm on these brass teeth when in contact with the top instead of enmeshing. I can see similar marks on 12 or 13 more out of the whole 18. Neither the worm nor any photograph or model of it was produced to enable me to check the statement that the worm could and did produce these marks, nor was any evidence given as to the position or shape of the worm, or in what exact way or angle it made contact with the sprocket wheel.

These marks on 15 or 16 out of 18 of the teeth of the sprocket wheel are not consistent with the theory that this jamming had never occurred before. The steering wheel was only moved, on this occasion about 4 or 5 inches to port and the indicator only two points or something under $\frac{3}{4}$ of an inch, so that there is no foundation for suggesting that this particular jam affected more than three teeth pointed out to me. It much more clearly indicates that this jamming or jarring had occurred before (neither the master, mate nor wheelsman were interrogated on this point), in the same way and from the same cause. If not, how were all these grooves cut in the teeth of the sprocket wheel? If I accept the evidence proving how and why this jam occurred on this occasion, I must also conclude that it had happened before or since the collision. No suggestion that it has occurred later than the 7th August, 1924, has been made.

If, then, it is open to the conclusion that this has happened before, what is the inference to be drawn as to care and caution before the collision. So far as the Chief Engineer is concerned, he swears he examined this contrivance carefully five days before. His log is not produced but his reports to the head office (ex. 4), which he takes or copies from his log, show numbers of entries in reference to the overhauling or inspecting of the steering gear, the last being 15 and not 5 days before the accident.

These reports cover the whole season of 1924, from April 27 to November 23. According to them an inspection of the steering gear was made on June 24 and on 28th June the steering engine broke down and was repaired temporarily. A thrust collar was fitted on the 29th June and on July 3 a new one was fitted to the port side of the engine. On June 17 an inspection was made, and an inspection and overhauling took place on July 22. On 26th July the steering engine pulleys were readjusted, and on 28th July a new controlling wire was put on steering gear and tightened up on 30th July.

This record, while not shown to involve attention to the particular gear now in question, indicates trouble with the engine dating from its breaking down on 28th June until the 26th or 28th July about 10 to 12 days before the accident. The ship had grounded four times in May and

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June, the propellor striking bottom on June 5. After the accident on August 7, the steering gear was inspected three times, the last being on October 10, and overhauling of the steering engine was done on October 19 and 28. There is nowhere, before or after the 7th August, any mention of the indicator, or its sprocket wheel, or the spindle requiring or getting attention, and the last inspection of the gear before the accident was made on July 22, when according to the evidence there was no indication of trouble.

On the best consideration I can give to this point, the evidence would suggest (in the absence of any light from the master, mate or wheelsman), that the gears had jammed before but that either it had been at once overcome by reversing the motion of the wheel or the use of more force without any adjustment of the teeth or sprocket wheel involved, or else that the marks now pointed to as indicating the jam are quite indecisive as to the time when they were made. According to his testimony, the chief engineer's services had not been called in before for the purpose of repair or adjustment to this part of the steering gear. The absence, however, of any evidence of the master, mate and wheelsman which might assist, on this point, leaves the matter in a very unsatisfactory state, and I shall deal with the other questions involved before finally dealing with this question.

The evidence of Capt. John Williams, called in reply, seems to me to be rather important on the question of careful navigation. His position and experience (32 years) lend weight to his statement that before a vessel in the position of the *Charles Dick* should start away from the bank, in presence of an oncoming steamer, in a narrow channel, the helm should be tested. The reason for this, as I gather it from his testimony and that of Capt. Stinson, is that in getting away from the bank the tendency is for the stern to "suck the bank" throwing the bow out, see *Export SS. Ltd. v. SS. Iocoma* (1), and that to start before the vessels are bow to bow is to invite danger, giving more play and force against the starting ship to the water from the oncoming ship; and that 50 feet away is too soon to start, and that if the vessels were abreast when

(1) [1923] Ex. C.R. 119, at p. 127.

the start was made they would not be likely to collide. Stinson agrees with Capt. Williams that the *Charles Dick* could not come out safely unless the rudder acted, and that he would have had it hard a port before starting his engines.

If, however, the master of the *Charles Dick* thought he might start and trust to his engines and steering gear, he should at least have made provision for a possible breakdown or an unanticipated force or effect of the current from the moving ship coming down to pass him. There was no reason assigned, and I can think of none, requiring or justifying the position of the mate, who was standing on the upper bridge on which were both the master and wheelsman. His place should have been where the master sent him when the gear jammed, that is by the anchor. Much time was lost, if the master's account of his actions as he narrated them are taken as accurate. The mate corroborates the master's evidence as to the order in which they occurred. The wheelsman adds that one additional order was given by the master before the mate was despatched to the anchor. Had the master ordered his engines full speed astern at once on hearing of the jam and had the mate been where he should have been, in my judgment the collision might have been avoided or its effects much modified.

Too many accidents occur in our canals due to lack of judgment or taking too many chances and I have consulted many authorities to ascertain if the views I have above indicated are in accordance with good navigation as understood here and in Great Britain and the United States.

In the case of *Merlo v. SS. Jones* (1), I considered the effect of suction and the distance within which it may operate, and need not repeat what is there said. The distance between the vessels here was very small. The width of the canal where the depth of 14 feet, can be found is only about 100 feet, and the beam of the two vessels is 79 feet. This gives only 21 feet of space between them when passing or perhaps a few feet more as the *Charles Dick* was only drawing 11½ feet. In that situation the master should have taken all reasonable precautions to

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secure his vessel when exposed or likely to be exposed to the influence of that force.

As to the duty of waiting the passing of another vessel in a narrow channel, as indicated in the evidence I have quoted, reference may be made to the *Geo. Hall Coal Co. v. SS. Beechbay* (1), in which such an attitude is stated to be the part of good seamanship under circumstances somewhat analogous to those here. The Supreme Court of Canada in the *Canada SS. Lines v. SS. Ketchum* (2) has discussed the difficulties that may be caused to an oncoming steamer by a meeting vessel altering her course instead of stopping and waiting, and these are well pointed out by Mr. Justice Newcombe. In *The Talabot* (3), the local rule of the River Thames is adopted as being of general application, namely, that where two vessels going in opposite directions will meet at a point where there is a strong bend in a river, the vessel with the tide should wait till the other vessel has passed clear. The same rule was applied in the *Ezardian* (4). In *The Union* (5), the Judge of the Quebec Vice Admiralty Court laid it down, as to inevitable accident, that

Before she can have the benefit of her plea of inevitable accident she must shew an overruling force, a *vis major*, which could not have been avoided either by waiting at her mooring berth until such time as the promoter's boat had passed or was out of the eddy, or the whirlpool as some of the respondent's witnesses have termed it, and further, that after she left her mooring it was impossible for her to keep out of the way of the boat.

In the American case of *Sherman v. Mott (The Clara)* (6), Blatchford J., in the U.S. District Court uses these words:

The act of the schooner, in being adrift, was, on the pleadings and proofs, a voluntary act on her part. It was wilful and deliberate. It was done to save herself from a greater peril, by endeavouring to incur a less one. It is established by the proofs, that, if she had not cast herself loose, she would have remained where she was, only, perhaps, sinking, and would not have collided with the brig. A collision would have been impossible if she had not cut herself loose, as a matter of voluntary choice.

Sir Gorell Barnes P., in *The Kaiser Wilhelm de Grosse* (7), when discussing the relative duties of ships meeting, in coming out of and into Cherbourg harbour, applying the

(1) [1925] Ex. C.R. 23-27.

(2) [1925] S.C.R. 81.

(3) [1890] 6 Asp. 602.

(4) [1911] P. 92.

(5) [1876] 2 Q.L.R. 186.

(6) [1871] 5 Benedict 372.

(7) [1907] P. 36.

narrow channel rule in the light of good seamanship, observes that while there would be difficulty in following out that practice or rule, adds the remark that there is no difficulty whatever, so long as you know there is a vessel entering the port, in either waiting a little while or else slowing down so as to be able to come round on a port helm and thus comply with what I think ought to be done.

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In the *SS. Coniston v. Walrod* (1), the propriety of stopping and waiting in the face of an approaching vessel is emphasized. It seems to me that the reason of Rule 22 relative to vessels passing at a lock, requiring the later one to tie up and wait till the other has passed, as well as the decisions adopting local rules in the cases I have cited as applicable to vessels meeting at a river bend, are only illustrations of what good seamanship demands under certain circumstances. They both indicate the good sense of remaining quiescent when tide or a narrow channel, or the force of suction or bow wave enter into the situation.

Upon the question of having the officers and crew properly stationed and standing by when intending to undertake a manoeuvre involving risk or danger, I refer first to an interesting case (in which the judgment is given by a judge who afterwards became a Justice of the Supreme Court of the United States), *Adam v. The Ontario* (2), where the plaintiffs failed because, when the steering gear on their ship became disabled, there was no one standing by to use the additional steering gear with which she was equipped. The court placed its decision upon two grounds, namely, because,

her steering gear in use was not properly secured, watched, or inspected; and because, when sailing through such a long, narrow and shoal channel as the South pass she did not keep her after steering gear in readiness for instant use in case of emergency.

In the *Merchant Prince* (ante) it was held by the Court of Appeal that,

the defendants were liable, as they had not satisfied the burden of proof, for, in order to support the defence of inevitable accident, and disprove the *prima facie* evidence of negligence, it was necessary for them to shew that the cause of the accident was one not produced by them, and the result of which they could not avoid, but the defendants knew of the tendency of new chain to stretch, and therefore that an accumulation of links at the leading wheels might possibly cause jamming, and, considering the crowded condition of the river where the accident occurred, the use

(1) [1918] 19 Ex. C.R. 238, 250.

(2) [1889] 39 Fed. Rep. 118.

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—or readiness for immediate use—of hand, instead of steam, steering gear, was a means by which the result could have been avoided.

In *The Turret Court* (1), the President, Sir F. H. Jeune, in dealing with steering gear says:

I do not say there was any suspicion of the steam steering gear, although I think there was suspicion, or should have been, of the bevelled wheels. Therefore I do not put this case so high as to say it is a case of defective machinery which a person knows to be defective. I put it in this way—that where you have steam steering gear, which is necessarily a delicate instrument liable to accidents of various kinds, and a vessel going up a narrow stream and in a place of difficulty, then I venture to say, after very careful consideration with the *Elder Brethern*, that it is the duty of the captain of that vessel not to neglect the means of safety which he has at his command; in other words, to have his hand steering gear available for use—I mean somebody standing by, so that at a moment's notice the hand gear may be attached and used.—What I desire to indicate in this case is the complete failure to have the hand gear available, or to have anybody there to use it or make any employment of it as substitute in case the steam gear failed.

To these may be added *Taylor v. SS. Prescott* (2), where lack of promptitude in the officers and of proper stationing of the crew before and at the moment of the accident was held sufficient to prevent the vessel having the benefit of the doctrine of “inevitable accident;” also *The Jessie and Zaanland* (3), where a vessel, run down by another and caused to drift down on a third ship riding by one anchor, was held to blame because her starboard anchor was not so placed as to be let go at once if necessity arose, the place being the Downs where a number of vessels were brought up.

Tremblay v. Hyman (4), reviews the cases and hold that where mooring cables part through the violence of the storm, yet in order to show inevitable accident it must be proved that

the breaking of the moorings was due to the irresistible force of the wind and waves, but also that all ordinary care, caution and maritime skill was exercised in mooring the vessel and in the handling thereof.

In reference to the lack of prompt action by the master in this case in waiting a second or perhaps a third trial of the wheel and then giving five blasts as a danger signal before reversing his engines, I refer to the *Santanderino* (5), where the steering gear broke, causing the vessel to strike

(1) [1900] 69 L.J. Adm. 117.

(3) [1917] P. 138.

(2) [1908] 13 Ex. C.R. 424.

(4) [1920] 20 Ex. C.R. 1.

(5) [1893] 3 Ex. C.R. 378; 23 S.C.R. 145.

a schooner at anchor. The master's evidence was as follows:

At the moment when the officer informed me that there was something the matter with the wheel, the rudder, I immediately went myself to the wheel to see if it was possible to manage the wheel, and seeing that the wheel was obstructed. I immediately gave orders to the second and third officers to go down and see what was the matter, and to advise and inform the engineer at the same time that I myself went to the telegraph to start the engine, and to give orders to anchor.

On this the learned trial judge, McDonald C.J., says:

According to the evidence of the latter (Master), and of his officers, most valuable time was lost by the master and his officers in the endeavour to ascertain the cause of the accident instead of taking instant measures to obviate its effects, while according to the pilot's evidence the master acted most promptly and in the right direction. It may be that the fact of the master and his officers speaking through an interpreter may have occasioned the discrepancy. However that may be, it is clear that if the captain's evidence be adopted as the true statement of the occurrence he was guilty of want of promptitude, foresight and seamanship, as well as a violation of rule 17, which under such circumstances required him to stop and reverse at once.

A valuable American case is *The Olympia* (1), where the court adopted the rule in the *Merchant Prince* (ante) and states it thus:

It is not meant by the expression "inevitable accident" one which it was physically impossible, from the nature of things, for the defendant to have prevented. We only mean that it was an occurrence which could not be avoided by the degree of prudence, foresight, care, and caution which the law requires for every one under the circumstances of the particular case. The rule in maritime law does not differ from that at common law, where there is no contractual relation between the parties. The able proctor who has appeared for libelants has himself defined an inevitable accident as an occurrence which could not possibly be prevented "by exercise of care, caution and maritime skill."

Applying these cases I think I am bound, even assuming that the jamming of the steering gear was unexpected and not due to negligence, to hold that the *Charles Dick* has not brought the result of that occurrence within the term "inevitable accident." I do so even apart from authority because I think that while the *Charles Dick* should probably have remained stationery till the *Poplar Bay* was lapped up on her bow, yet if her master determined to do otherwise, he should have tested his steering gear before getting into motion ahead, and stationed his mate in such a position that he could have either let go the anchor at once or used the lower wheel. The master was also negligent in not

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(1) [1894] 61 Fed. Rep. 120.

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taking proper action by reversing at once, on the jamming occurring, instead of waiting till he did other things, and that the mate should not have been on the upper bridge but below near the anchor or lower steering gear. Whatever may be said as to the propriety of starting when the *Charles Dick* did, there can be no question of the risk existing and if so it is no answer that the unexpected happened, if the ship is found unprepared to deal with it because of want of forethought and proper system. In addition to this my conclusion is that the evidence, such as it is, as to the cause of the jamming of the steering gear, fails, in the absence of any evidence from the master, mate or wheelsman on the point, to deal with the condition of the sprocket wheel, indicating as it does either that jamming had occurred before in the same way and apparently without evil result, or that the cause alleged cannot be inevitably assigned to the time of the accident. The result of this would be that inevitable accident is not proved. There is also the probability that, without the engineer being called in, some manipulation of the wheel or the use of more force had on other occasions freed the gear. This leaves the matter in doubt, assuming the cause assigned is true, whether if similar methods had been used on August 7, the collision would have taken place. I must therefore on all the grounds I have mentioned adjudge the defendant ship to be to blame for the collision, and refer the quantum of damages to the registrar to be ascertained. On his report of the usual judgment may go. The defendants must pay the costs of the action and reference. I may add that the defendants' Preliminary Act is so drawn as to ignore completely the cause of the accident as it is now alleged to have happened. It states none of the means used, as now set up, for avoiding the collision.

Judgment accordingly.

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY
DISTRICT

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February 9.

THE SS. *HELEN* (DEFENDANT) APPELLANT;

AGAINST

WM. DONOVAN STEAMSHIP CO. }
(Incorporated) (PLAINTIFF) } RESPONDENT.

Shipping—Collision—Narrow channel—Overtaking vessel—Duties of overtaken vessel

The steamers *D.* and *H.* were at the time of the collision in question, navigating in daylight, on the Chehalis River, in the state of Washington, U.S.A., seaward bound, the *D.* leading. This river has a winding course, and is a narrow channel within the Regulations, with buoys on both sides marking the channel or fairway. The *H.* when six or seven hundred yards behind the *D.* gave the regular signal to indicate her intention of passing the *D.* on the port side of the latter, which signal was properly answered. Before the *H.* had fully passed the *D.*, while the *H.* was on the port side of the channel, and near one of the port buoys, a collision occurred between the *H.* and the *D.* on the port side of mid-channel, and near one of the port buoys.

Held (reversing the judgment appealed from), that the *H.*, in passing the *D.* on the port side, could not be said to be on her wrong side of the channel, if in order to so pass she had to go to the port side of mid-channel.

2. That, notwithstanding that Art. 24 provides that an overtaking vessel must keep out of the way of an overtaken vessel, there is a correlative duty imposed upon the leading vessel to keep her course, which is the course reasonably to be attributed to her, and which in the circumstances was on the starboard side of the channel, as required by Article 25, and Rule 8 of Article 18 (U.S. Regulations), and that the *D.* crowding upon the course of the *H.* in violation of Rule 8, was solely to blame for the collision.

APPEAL and cross-appeal from judgment rendered in the British Columbia Admiralty District.

Vancouver, 21st September, 1925.

Appeal now heard before the Honourable the President.

S. A. Smith for the SS. *Helen*.

E. S. Mayers for the Donovan Steamship Co.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 9th February, 1926, delivered judgment.

This is an appeal and cross-appeal from a judgment of the Honourable Mr. Justice Martin L.J.A., for the Admiralty District of British Columbia, wherein he found both ships involved in a collision equally in fault. His reasons

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for judgment are to be found in Exchequer Court Reports, 1925, page 114, where the essential facts are very concisely set forth, and accordingly I need not repeat them, and there is very little, if any, that I need add thereto. The appeal was heard by me with the assistance of two nautical assessors.

The case for the *Donovan* is that the *Helen* by improper helm action sheared into her; that the *Helen* was an overtaking ship, and that it was her absolute duty to keep out of the way of the *Donovan* under article 24, and regardless of anything contained in any other rule. For the *Donovan* it was also urged, that if their courses were crossing, it was the duty of the *Helen* to keep out of the way of the *Donovan*, she having the *Donovan* on her starboard side. The case for the *Helen* is that the *Donovan* crowded upon her course and even crossed her course; that the *Donovan* should have proceeded on the starboard side of mid-channel; and that the *Donovan* by improper helm action sheared into the *Helen*.

The learned trial judge found that both ships were on the wrong side of the channel at the time of the collision, that is on the port side of the channel; and that both were guilty of unseamanlike conduct in their movements, particularly from red buoy No. 6, to red buoy No. 4 about where the collision took place, a distance of $1\frac{1}{4}$ miles. The trial judge, owing to the conflict of evidence, was unable to determine which ship by its helm action was responsible for shearing into the other at the last moment as claimed by each. I also understand the learned trial judge to have found that the *Helen* was at all times material here, and within the regulations, an overtaking ship. The real matter in issue is quite important, and like the trial judge, I have found it quite difficult in reaching a conclusion.

The ships in question were at the time of the collision, navigating in daylight, the Chehalis River, in the State of Washington, U.S.A., seaward bound. This river is a narrow channel within the regulations, and was buoyed on either side, red buoys being on the port side and black buoys on the starboard side. It was apparently the fairway between those buoys marking the channel, that ships navigated while proceeding up and down the river. The *Helen*, when 600 or 700 yards behind the *Donovan*,

gave the required signal to indicate her intention of passing the *Donovan* on the port side of the latter, and which signal was properly answered by the *Donovan*. I do not think that weather conditions were an important factor, if any, in the movements of either ship upon the occasion in question. The learned trial judge did not base his conclusion upon any condition of this nature, it was not emphasized before me on the hearing of the appeal, and a careful review of the evidence does not impress me with the idea that there was anything of this nature rendering it dangerous or difficult for either ship to navigate anywhere within the confines of the buoyed channel if care were exercised, and in this my assessors agree. Both ships apparently were proceeding at the rate of seven or eight knots or more, and there is no evidence of fog signals having been given by either ship. For a time, the weather was referred to as "hazy" or "misty" by the masters of both ships, but I do not feel justified in attaching any importance to that fact, because it is clear from the evidence that both ships could see a very considerable distance at all times.

The rules or regulations for the prevention of collisions applicable to the case are those applying to the inland waters of the United States on the Pacific Coast, and the following are particularly material to the decision:—

Rule VIII (of Article 18):—When steam-vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam whistle, as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel.

Article 24:—Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel, etc.

Article 25:—In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel.

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There is no doubt, I think, that the *Helen* was an overtaking ship, but I am not sure that under the facts developed in this case, that this circumstance is the important or controlling consideration in the case. Immediately before the collision the *Helen* was leading, but there was not clear water between them. An overtaking ship has the right I think, and is entitled to pass a leading ship, if she is able to do so, and where it may safely be done. I know of nothing in the regulations, or of any decision of which I am aware, to the contrary. In fact she may do so at her risk in the face of a signal against passing by the leading ship, or, if the leading ship refuses to answer the signal of the overtaking ship, indicating her desire to pass.

Rule 8 and article 24 when read together, would appear to mean that the *Helen* might pass, but she must keep out of the way of the *Donovan* in doing so. If such a construction without any qualification be the correct one in this case, and it is the construction so ably urged by Mr. Mayers, it would in practice mean that a slow leading ship in a narrow channel might be able, by acting on such an interpretation of the regulations, to cause confusion and impede unfairly the course of the overtaking ship, though Rule 3 would seem to have been designed specifically to provide for such a case, and to facilitate with safety, such an end. The proper construction of these two regulations is therefore of importance, and is, I think, the real point involved in the appeal.

Rule 8 was presumably enacted for a purpose. It was I think intended to cover a case like this. It was not I think enacted to meet the case of crossing ships, as other rules provide for that situation. It applies to ships running in the same direction and was enacted particularly for application in narrow inland waters. It gives an overtaking ship, running in the same direction as the leading ship, the right to pass, and while I think she has it clear of this rule, yet to absolve herself from blame in the event of a collision, she must show an observance of the terms of this rule.

Conceding, however, the applicability of Article 24 to narrow channels and to the facts in this case, the question arises, was there a correlative duty imposed upon the *Donovan*. What was the *Donovan's* "course" and did she

keep it, and what in all the circumstances and under the regulations, was the duty of the *Donovan*. The reason for strict adherence to "course and speed" is obvious and important in the open sea, particularly where ships are on crossing courses and where an unsteady or inconsistent course would prejudice and embarrass the overtaking ship. This rule was designed to ensure consistency in "course" so that the overtaking ship might with some security fix her course and line of action. "Course" does not mean compass course, when ships are in a winding channel. Vessels must follow the curves of a river or channel, and they are not crossing ships, if the course which is reasonably to be attributed to either ship, would keep one clear of the other. The *Donovan's* course in a narrow channel is first regulated by article 25, that is, she should if *practicable and safe* keep to the starboard side of mid-channel. That is a statutory direction. But regulations to prevent risk of collision only come into operation when there is a risk of collision. The *Donovan* having assented to the *Helen* passing her in a narrow channel, or having acknowledged that she understood the signals of the *Helen* to mean that she intended passing on the port side of the *Donovan*, this would I think constitute a risk of collision, and the appropriate rules would become operative. It was to prevent the risk of collision that Rule 8 was framed. Then article 25 says that in narrow channels ships shall "if practicable and safe" keep to the starboard side of mid-channel, and it was undoubtedly both safe and practicable for the *Donovan* to do this. The *Donovan* in my opinion should have been on the starboard side of the channel, or at least so far towards there, that there was no risk of collision. That was the "course" which the *Donovan* should have pursued, and I think that was the "course" designated by the regulations and prudent seamanship for her observance in the circumstances here, but which "course" she did not keep.

Further I might say, that the master of the *Donovan* states that when he answered the signal of the *Helen* he did not alter his helm because he was well on the right hand side of the channel, and that the *Helen* had ample room to pass. Again, a little later on when the ships were about to pass bell buoy No. 2 (port side), the *Donovan*

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slightly leading, the master of the *Donovan* says he kept this buoy well on his port, and had black buoy No. 5 (starboard side), on his starboard bow, which I understand to indicate the adoption of a course that would carry the *Donovan* well to mid-channel if not on the starboard side of mid-channel, and one which would at least afford the *Helen* ample water to pass if she could do so.

The *Donovan* did not, however, keep this course, for when she reached red buoy No. 6, she was on the port side of mid-channel, in fact only about 450 feet from the extreme port side of the buoyed channel, and about 600 feet to port of mid-channel. Then, the master of the *Donovan* states that when he first saw port buoy No. 4, in sailing between No. 6 and No. 4 port buoys, he was on the south side of mid-channel, with port buoy No. 4 on his starboard bow. He then states that he changed his course so as to leave red buoy No. 4 clear on his port side, but there is nothing in his evidence to indicate at what distance he intended to pass that buoy, and I think it is a fair inference that he calculated on passing that buoy just a short distance off his port bow. This was a course as it turned out, well upon the *Donovan's* port side of mid-channel, and in fact on the port side of a line midway between mid-channel and the port buoys, because the collision took place on the port side of such an imaginary line. It was the course which the *Helen* might have been expected to sail, and in fact the master of the *Helen* states he sailed almost a straight course between No. 6 and No. 4 port buoys, and that his plan was to reach No. 4 port buoy with the same on his port bow, at a distance of about 40 feet. Here, I should say, the buoyed channel was about 2,200 feet wide at No. 6 red buoy, and therefrom it gradually narrowed to about 1,200 feet at No. 4 red buoy. Only a short distance beyond the latter buoy both ships would be obliged to go sharply to port to pass through the channel leading to sea, which is also important to remember. There is no disclosed reason or justification for the *Donovan* sailing the course she did between these two buoys, except that the master of that ship acted on the assumption that he was not governed by any particular regulation, and that the *Helen* was in any event bound to keep out of his way.

If there was a duty under Article 24 upon the *Helen* to keep out of the way of the *Donovan*, there was a correlative duty resting upon the *Donovan* to keep on the starboard side of the channel, or at least on the course she adopted for quite a time after answering the signal of the *Helen* and which was apparently safe. Between port buoys No. 6 and No. 4, the *Donovan* was not in her right water, and did not keep her proper course, and this in my opinion brought about the collision.

Special consideration, however, must in my opinion be given to Rule 8, which is a special regulation for ships running in the same direction in narrow channels, and for passing one another. It seems to me that the *Donovan*, having understood that the *Helen* intended passing on her port side, she was bound to give the *Helen* sufficient water to do so, and which she could easily have done, and she should have followed all the rules applicable to such a situation in order to avoid a risk of collision, and I can see no excuse for her not having done so. If she thought there was danger in attempting to pass, she could at any time have warned the *Helen* not to pass. It might be contended that the *Helen* would have pursued a more prudent course had she again signalled her desire to pass on the port side, when she came closer to the *Donovan*. However, the *Donovan* knew what the *Helen* meant by her signal, she knew what the *Helen* was trying to do, and I am of the opinion that the burden of ending this understanding by reason of developing danger, or otherwise, was upon the *Donovan*. A consent to pass, being once given in a narrow channel, surely means the leading ship must not crowd the overtaking ship, and by consent I mean that the leading ship understood the signal of the overtaking ship, and that is all the return signal meant. From red buoy No. 6 to red buoy No. 4 the *Helen* was on the extreme port side of the buoyed channel, and nothing more could reasonably have been expected of her by the *Donovan*. The exact point of collision is not clearly fixed, but it was quite close to No. 4 red buoy, undoubtedly well on the port side of mid-channel. This certainly was crowding upon the course of the *Helen*, which was against the rule No. 8, and there was no possible excuse for so doing, because the *Donovan* had ample water to starboard. My assessors advise me that

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the *Donovan* should have steered for No. 3 starboard buoy from No. 2 port buoy, and kept that starboard course and not have gone close to port buoy No. 4. This seems so reasonable and obvious that I readily adopt it. It cannot, I think, be fairly said that the *Donovan* kept her side of the channel or did not crowd the *Helen*. Between the two port buoys, No. 6 and No. 4, there was no bend in the channel, and there was no danger whatever in the *Helen* attempting there to pass the *Donovan*, unless the latter were crowding upon the course of the former. That there was ample room for the *Donovan* to keep to her starboard side of mid-channel is not at all contested. The master of the *Donovan* again and again stated that the *Helen* was the overtaking ship, and it is I think clear that he acted upon the assumption that under the regulations he could go where he pleased in the channel, and that presumably the *Helen* should take care of herself as best she could. He apparently disregarded rule 8 altogether. Mr. Mayers contended that the *Donovan* was not on the wrong side of the channel because she was an overtaken ship, and that the *Helen* was obliged to keep out of her way in any event, and he also contended that if they were crossing ships it was equally the duty of the *Helen* to keep out of her way. I think this view is based on a misapprehension of the regulations applicable to this case. I have, however, already dealt with this contention and have expressed the opinion that even on this footing the *Donovan* did not keep her course as required by the rules, and by so doing brought about the collision. I think also that the *Donovan* utterly disregarded Rule 8 and crowded upon the course of the *Helen*.

I agree with the trial judge that the *Donovan* was on the wrong side of the channel at the times here material, and those who advise me are also of the same opinion. I also think that the *Donovan* crowded upon the course of the *Helen*, and steered a course which was likely to cross the course of the *Helen* in violation of rule 8, and in this my assessors also agree. I cannot, however, concur in the view of the learned trial judge that the *Helen*, in relation to the *Donovan*, was on the wrong side of the channel. In attempting to pass the *Donovan*, her proper place to attempt

to do so, in view of the signals exchanged, was on the port side of the channel, and at least on the port side of the *Donovan*. Having to pass on the port side of the *Donovan*, if at all, there was no other place in which she could make the attempt than where she did, and except for the conduct of the *Donovan* it at no time involved a risk of collision. I cannot agree that the *Helen* was on the wrong side of the channel, at least the *Donovan* cannot be heard to say so. She had undoubted right to be there, though perhaps at her own risk in respect of other ships navigating on that side of the channel. A situation might be imagined wherein another ship going up the channel might say so, but not the *Donovan*. I think the *Helen* did everything that could reasonably be expected of her in passing the *Donovan*, that she was not guilty of negligence in any respect, and that it was the conduct and seamanship of the *Donovan* alone that brought about the collision. In all this the persons who advise me agree. With very great respect for the conclusions of the experienced and learned trial judge in a very important and difficult case, I can reach no other conclusion than that the *Donovan* is wholly to blame for the collision, and that after the most careful study and consideration I could give to the matter.

The result is that the plaintiff's action and cross-appeal is dismissed, and the defendant ship, the *Helen*, succeeds in its defence and counter-claim in its action below and in its appeal, and is entitled to its costs following the event in both courts, and the cause is remitted to the court of first instance to be there dealt with in conformity with this judgment.

Judgment accordingly.

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March 17.

HIS MAJESTY THE KING.....PLAINTIFF;
AND
LADY ELLA V. McMASTER ET AL.....DEFENDANTS.

*Crown—Indian lands—Lease by Indians—Royal Proclamation, 1763—
Tenant-at-will*

Held, that as by the Royal Proclamation of 1763, which has the force of a statute, and the several Indian Acts since passed, lands forming part of Indian Reserves could not be alienated or otherwise dealt with by the Indians, a contract of lease made in 1817 by certain chiefs of the Indian tribe then in occupancy thereof, of a certain island (part of the St. Regis Indian Reserve) for 99 years with right of renewal, was null and void. That the Indians never had such an interest in lands reserved for their occupancy that they could alienate by lease or sale. That the Crown could not itself lease or ratify a lease made by the Indians of such land at any time save upon a surrender of the same by the Indians to the Crown.

2. That the right of the Crown to recover possession of the lands in question, improperly in possession of the defendants, is one incident to the control and management of such lands, given it by the British North America Act, and is not to be confused with a claim on the part of the Crown asserting title thereto either in right of the Dominion or of a province. (*Mowat, Attorney General v. Casgrain, Attorney General* (1897) Q.O.R. 6 Q.B. 12 referred to.
3. That the lease being void, the tenancy acquired by the defendant, from those charged with the control and management of Indian lands, under the Indian Act, was that of a tenancy-at-will, or that of a yearly tenant, which could be terminated by notice to quit and to deliver up possession.

INFORMATION by the Attorney General of Canada to recover possession of certain lands now in the occupancy of defendants, part of an Indian Reserve.

Ottawa, October 15 and November 6, 1925.

Action now tried before the Honourable the President.

W. C. McCarthy and *A. S. Williams* for plaintiff.

George A. Campbell, K.C., for the defendant.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 17th March, 1926, delivered judgment.

This is an action brought by His Majesty the King, on the information of the Attorney General of Canada, wherein the plaintiff claims possession of certain lands, now in possession of the defendants, and being a portion of the St. Regis Indian Reserve located in the eastern part of the province of Ontario.

Certain historical and constitutional facts in connection with the cession of Canada to Great Britain by France,

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under the Treaty of Paris, 1763, and the issuance of the Royal Proclamation of October 7, 1763, are of importance here, but as the same are to be found comprehensively outlined in *St. Catherine Milling and Lumber Company v. The Queen* (1). I need hardly repeat them here. In the case just mentioned, there had been a surrender by treaty to the Crown, by the Indians, of the lands involved in that litigation, whereas in this case there has never been any such surrender, and the Crown is not I understand, asserting ownership or title to the lands here in question in the right of the Dominion, and these are the particular facts distinguishing the cases.

The property in question, known under several names, but generally as Thompson's Island, was in Indian occupation from the date of the proclamation of 1763, and doubtless prior to that date, until 1817, when the same was leased in writing, to one David Thompson, by certain chiefs of the Indian tribe then in occupancy of the same, and which constituted a part of what was known as the St. Regis Indian Reserve. The lease was for a period of 99 years and contained a covenant for renewal in the following terms:—

For themselves and their heirs, executors, administrators, assigns, and successors, do hereby covenant, grant and agree to and with the said David Thompson his heirs and assigns under the penalty of five thousand pounds sterling, that they the said party of the first part their heirs or successors at the expiration of the said term of ninety-nine years shall and will renew, make, sign, seal and deliver to the said David Thompson his heirs, executors, administrators or assigns a legal or lawful lease for a further period or term of ninety-nine years under the same terms and yielding the same rents as is hereby covenanted and agreed by the said David Thompson to be given and paid for the premises hereby demised and leased to him as aforesaid or intended so to be. And it is hereby further covenanted, granted and agreed by and between the parties aforesaid their and each of their heirs, executors, administrators, assigns or successors that if no owner or proprietor shall be forthcoming or can be found to give a further lease of the said premises for a further period of ninety-nine years, then and in such case that these presents and the term of years hereby granted and leased shall be and continue in force for and during and unto the full end and term of nine hundred and ninety-nine years thence next ensuing and it is hereby declared and agreed that in such case the said David Thompson his heirs, assigns or successors shall and may occupy, possess and enjoy all and singular the said premises hereby leased with the appurtenances for and during and unto the full end and term of nine hundred and ninety-nine years thence next ensuing as aforesaid, without the let trouble, hindrance, molestation, interruption, eviction or denial of any person or persons whatever.

(1) [1889] 14 A.C. 46; 13 S.C.R. 577; 13 O.A.R. 148.

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Any rights acquired under this lease in the subsequent years, passed down from one party to another, and in 1862, the title to the lease stood in the name of one Donald McDonald or his heirs. From 1817 down to 1862 the annual rental stipulated in the lease was apparently paid, and to some person or persons acting on behalf of the Indians or in their interests. When the defendant Sir Donald McMaster desired to acquire the lease, or the property covered by the lease, the same was being administered or controlled by the Department of Indian Affairs of the Government of Canada, on behalf of the Indians, and as by statute authorized. With that department this defendant commenced, in 1872, negotiations for the recognition of the lease which he proposed to acquire, and the negotiations extended over a number of years. At this time there was an arrearage of rentals due under the lease, covering a period of about 23 years, and altogether amounting to the sum of \$237.50. In the end, this sum was paid to the Department of Indian Affairs in January, 1884, by the defendant Sir Donald McMaster, and he entered upon the property in question under the lease. It might be convenient, however, to mention in greater detail some of the facts disclosed during the negotiations between the Department of Indian Affairs and this defendant. When, hereafter, I refer to the defendant, I shall mean the original defendant Sir Donald McMaster.

As already stated in 1862 Thompson's Island was in the possession of one Donald McDonald or his heirs, the lease having been acquired by McDonald by assignment. At this date, however, and prior thereto the defendant's father occupied the island apparently under an agreement of sale and purchase of the lease, made with McDonald, but it appears he never procured in his lifetime a formal assignment of the lease. In June, 1872, the defendant, then being desirous of obtaining an assignment of the lease from the heirs of McDonald, commenced making inquiries of the Department of Indian Affairs as to the validity of the lease granted by the Indians in 1817 of Thompson's Island, and he was advised that though in previous years, Indians had made leases of land reserved for their benefit, the same was done without adequate authority. Fearing some infirmity in the title under the lease, the defendant inquired if the

department would recognize the title to the lease if the same were assigned by the heirs of McDonald, to him, if he the defendant would pay the past due rentals which had been accumulating since 1862. In this correspondence the defendant refers to the land in question as part of an Indian Reserve. The correspondence was protracted, but in 1881 the defendant was advised by the Deputy Superintendent General of Indian Affairs, that the old lease had become void through non-fulfilment of its conditions, but that the department would endeavour to lease it again on conditions advantageous to the Indians, and in that year the defendant was advised by the same official that if he could get an assignment from the representatives of McDonald deceased, in whom such title as the original lessee had seemed to be vested, and would pay the rental arrearages, his title under the lease would be recognized as far as it could legally be done. This did not appear quite satisfactory to the defendant, as he did not care for a lease that was liable to attack, and he replied that if the department would give him a lease for the original term of 99 years, with covenants for renewals, he would willingly arrange with the McDonald heirs and pay the rental arrearages, but he was insisting upon a recognition of the validity of the tenure of the McDonald heirs under the lease before carrying out such terms. On July 11, 1882, he was informed that if he could establish a legal assignment from the representatives of McDonald to himself, his title as assignee would be recognized. He was informed, however, in the same letter, that he could not obtain a new title in his own name because the Island never having been surrendered by the Indians to the Crown it could not be sold or leased, but as the original lease had long been recognized, the department would recognize him as assignee upon payment of the past due rentals. To this he replied that recognition of the existing lease would satisfy him. On November 3, 1883, the defendant was definitely advised that upon the payment of the arrears of rent his tenancy would be recognized. In the end the unpaid rentals amounting to \$237.50, was remitted by the defendant on December 22, 1883, to the Department of Indian Affairs. In a letter from the department dated January 9, 1884, acknowledging receipt of this amount, there appears a review of the title from the

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original lessee down to the assignment to Donald McDonald, and the defendant was therein informed that admitting the right of the Indian Chiefs to lease the Island, the law of Ontario would give him title by possession as against any one but the Crown, and that if McDonald's possession and that of his legal representatives were established since 1844, the department stated, it would be justified in recognizing the defendant as assignee of the lease. On May 20, 1884, the department wrote the defendant that the various documents referring to the title to the lease had been referred to the Department of Justice for an opinion as to whether they were sufficient to admit of the lease of the Island being renewed in his favour, and on June 5, he was advised by the department that he had shewn sufficient title to be considered as the holder of the lease originally granted to Thompson, and that his possessory title as against anyone but the Crown was admitted.

In 1887 the Indians commenced to assert right of occupancy to the Island and threatened to take possession of it, but nothing came of this largely through the intervention of officers of the Department of Indian Affairs, who induced the Indians to abandon such intentions. On August 5, 1915, the defendant made formal application to the department for a renewal of the lease, as the first 99-year period was expiring the following year. He was advised on September 7 following that no assurance had been given him as to a renewal of the lease, but only that his rights under the lease would be recognized as far as the same could be done legally. He was later advised that favourable consideration could not be given to his request for a renewal, and the department disclaimed liability for payment of the penalty provided in the original lease for non-renewal of the same. To this view the department adhered and the defendant never received a renewal, and in due course he was given notice to quit the property, and later the present action was commenced against the defendant.

The proclamation of 1763, as has been held, has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed. The proclamation enacted that no private person shall make any purchase from the Indians of lands reserved to them,

and that all purchases must be on behalf of the Crown, etc. Throughout the subsequent years all legislation in the form of Indian Acts continued the letter and spirit of the proclamation in respect of the inalienability of Indian reserves by the Indians. As was said by Lord Watson in the *St. Catherine Milling and Lumber Company* case, since the date of the proclamation Indian affairs had been administered successively by the Crown, by the provincial governments, and since the passing of the British North America Act, 1867, by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty, and as determined in the *St. Catherine Milling and Lumber Company case*. There can be no doubt but that the property in question was part of an Indian Reserve covered by the proclamation. For these reasons I am clearly of the opinion that the lease to Thompson in 1817 was void, and that the Indians never had such an interest in the lands reserved for their occupancy, that they could alienate the same by lease or sale. The Crown could not itself lease, or ratify any lease, made by the Indians of such lands at any time since the proclamation, save upon a surrender of the same by the Indians to the Crown. If the lease was void anything that the Department of Indian Affairs or any other authorized body or person administering Indian affairs did, or could do in the way of adoption or ratification of the same, would be contrary to the enactment of the proclamation and of the subsequent statutes relating to Indian affairs, and which in this respect were declaratory of the provisions of the proclamation and not binding on the Crown. I am unable also to concur in the defendant's contention that the Quebec Act, which enlarged the limits of the province of Quebec, destroyed the rights of the In-

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dians in the lands reserved under the proclamation. This I think has been authoritatively settled.

The defendants also rely on title acquired by prescription. This contention is I think wholly without force. Rental was apparently paid during the whole period since the date of the lease, although for a time it remained unpaid as I have already explained. Even if this were not clearly proven in respect of the whole period of 99 years, still, admittedly, the defendant paid to the appropriate authority the annual rental mentioned in the lease during his occupancy, and for more than twenty years prior thereto when the rentals became in arrears by his predecessors in occupancy under the lease. A title by prescription cannot be asserted concurrently with such an acknowledgment of title in another or others.

One of the defendant's most formidable contentions is, that if the legal title to the property in question is in the Crown, it must be in the Crown in the right of the province of Ontario, and that the Crown in the right of the Dominion has no status to claim the land as owner, and they rely upon the authorities of *St. Catherines Milling & Lumber Company v. The Queen* (1), and *Attorney General for Quebec v. Attorney General for Canada* (2). I do not think this position is tenable. In the two authorities cited the lands had been surrendered by the Indians to the Crown, and the substantial point in issue in both cases was whether in virtue of secs. 109 and 117 of the British North America Act such lands had passed to the Crown in the right of the province interested. Here there has been no surrender, and the legal title is in the Crown where it always was, subject to what was termed in the *St. Catherine Milling & Lumber Company* case, the burden of the Indian title. What is asserted or claimed in this action, it seems to me is that the right to repossess is in the Crown, not that the title to the property is in the Crown in the right of the Dominion. The fact that the Attorney General for Canada prosecutes for the Crown does not show that a Dominion title is necessarily claimed. *The Attorney General v. Harris* (3). The Parliament of Canada, in virtue of sec. 91 (24) B.N.A. Act has exclusive legislative authority over

(1) [1889] 14 A.C. 46.

(2) [1921] 1 A.C. 401 at p. 407.

(3) [1872] 33 U.C.Q.B.R. 94.

“Indians and lands reserved for Indians,” and there never having been any surrender of the lands in question to the Crown, and the control, direction and management of lands reserved for Indians being in the Dominion, I think the Crown is entitled to seek possession of the property in question from the defendants for the benefit of the Indians. The power of the Crown to manage and legislate in respect of Indian lands, surely implies the right to bring action to recover or protect any interest of the Indians in such lands. The Indian Act, chap. 81, R.S.C., 1906, sec. 4, states that the Minister of the Interior shall be Superintendent General of Indian Affairs and shall have the control and management of the land and property of the Indians in Canada. The corresponding legislation, in force at the time the defendant went into possession of Thompson’s Island, contained a similar provision. To seek recovery of possession of the lands in question, believed to be improperly in the defendants, is incident to the control and management of such lands, and is not I think to be confused with a claim on the part of the Crown asserting title to such lands either in the right of the Dominion or of a province. *Mowatt, Attorney General v. Casgrain, Attorney General* (1).

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The plaintiff’s statement of claim is a bare claim for the possession of the lands in question. It is not pleaded that the lands are a portion of any tract or tracts of land, set apart by treaty or otherwise, for the use or benefit of the Indians, or that the same is under the control and management of the Minister of the Interior representing the Crown. On the other hand it is not claimed that the title to the said land is in the Crown in the right of the Dominion. The cause was tried upon the footing that the lands in question were Indian lands, and that the control and management of the same was in the person designated by the Indian Act, and who is a Minister of the Crown, and that in virtue of such duty and power so vested in him this action was brought. I shall consider the pleadings as amended so as to properly set forth the nature and quality of the interest of the plaintiff in the lands here in question.

(1) [1897] Q.O.R. 6 Q.B. 12.

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If the lease was always void, it remains to be considered what was the nature of the tenancy acquired by the defendant from those charged with the control and management of Indian lands, under the Indian Act, in accepting annual rentals from the defendant during the period of his occupancy. As contended by plaintiff's counsel, I am of the opinion that his highest position was that of a yearly tenant, and that the tenancy was terminated by the notice to quit and deliver up possession. If the view I take that the lease is and always was void, and that the same has not and could not since have been ratified by the Crown, then the defendant could not be more than a tenant-at-will, or a yearly tenant, and which here it matters not.

The defendants claim that in the event of the plaintiff succeeding in this action for the recovery of possession of the lands covered by the lease, they are entitled to compensation for improvements and expenditures made upon the property by the defendant Sir Donald McMaster in reliance upon the security of his rights under the lease, and particularly his right of renewal of the same at the end of the 99-year period. No evidence was given at the trial as to the liability of the plaintiff for compensation, or the amount if any, and accordingly I reserve the right to hear counsel and evidence, or to direct a reference upon this point when and if necessary. This, I understand, to be agreed upon by counsel. If the view I take of the case ultimately prevails, I should hope that this might be amicably arranged between the parties.

I am therefore of the opinion that the plaintiff is entitled to judgment, and a declaration that he is entitled to the possession of the lands described in the statement of claim. No evidence was given by the plaintiff as to the claim for issues and profits, and accordingly I need say nothing as to this part of the plaintiff's claim. The circumstances of the case warrant me in directing that there be no order as to costs.

Judgment accordingly.

LOTHAIR WILLIAM GEBHARD }
 BLUCHER } CLAIMANT;

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AND

THE CUSTODIANRESPONDENT.

*Consolidated Orders respecting Trading with the Enemy, 1916—Custodian
 —Dividends—Rate of conversion in U.S. Funds—Interest*

B., a natural born British subject, was owner of shares in the Canadian Pacific Railway Company, which were registered in the name of the National Bank fur Deutschland, through whom he received his dividends, down to the outbreak of war in 1914. In 1919, these shares with dividends accrued and to accrue, were duly declared vested in the Custodian, but were never paid in to him. At the close of the war, B. applied to the Canadian Pacific Railway Company for payment of his dividends, which forwarded to the Custodian the necessary evidence to obtain release of same, and on the 11th May, 1921, the Custodian released both shares and dividends, relieving the Canadian Pacific Railway Company from the inhibition to pay. On the 3rd March, 1924, the Canadian Pacific Railway Company paid B. the dividends declared during the war, which were payable in U.S. funds, at the then rate of exchange. The rate was then materially lower than when the dividends were declared and B. claims that payment should have been made on the basis of the value of the American dollar on the 1st June, 1921.

Held: that the rate for conversion of these dividends is the rate ruling on the date when each dividend became due, and should have been paid to the Custodian, and not the 1st June, 1921 or the 3rd March, 1924.

2. That the claimant is further entitled to interest from the 1st June, 1921, by way of damages for wrongful withholding of money due.

CLAIM arising out of the World War in respect of trading relations with the enemy.

Ottawa, February 5, 1926.

Case now heard before the Honourable Mr. Justice Audette.

E. Bristol for claimant.

Geo. Wilkie, K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 15th day of March, 1926, delivered judgment.

This is a case arising out of the World War in respect of trading relations with the enemy.

Resulting from such of the allegations of the statement of claim as are admitted both by the statement in defence and the admission filed on the 4th February, 1926, it appears that the claimant, notwithstanding his German

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name, is a natural born British subject, residing in Guernsey, one of the Channel Islands, and that at various times between 1909 and June, 1914, he acquired by purchase 420 shares of common stock of the C.P.R. company, which were and remained registered in the name of the National bank fur Deutschland and that he received through the said bank the quarterly dividends paid in respect of these shares down to the outbreak of the war in 1914.

These shares, with all dividends accrued thereon since the 4th of August, 1914, or thereafter to accrue, were on the 23rd day of April, 1919, declared vested in the Custodian by an order of the Superior Court of the District of Montreal. (See section 28 of the Consolidated Orders respecting Trading with the Enemy, 1916.)

Notwithstanding this vesting order, and notwithstanding secs. 24 and 36 of the Consolidated Orders, 1916, respecting Trading with the Enemy, which provide that such dividends, etc., shall be paid to the Custodian and held by him until the termination of the war, and notwithstanding repeated demands to that effect made by the Custodian, the C.P.R. Co. unlawfully refused to obey and never complied with the law and these demands—retaining these dividends in its own possession, having thus the use and forbearance of these moneys.

At the close of the war, in July, 1920, the claimant applied in writing to the C.P.R.—supported by affidavit—as disclosed by the evidence on discovery filed as exhibit No. 1—to have, among other things, payment of his dividends, and the Vice-President of the C.P.R. forwarded to the Custodian the necessary evidence to obtain the release of the same.

Pursuant to such application *in writing* made to the C.P.R. by the claimant and by the C.P.R. to the Custodian, on the 11th May, 1921, the Custodian executed a release of both the shares and the accrued dividends relieving the C.P.R. from the inhibition to pay.

Notwithstanding this, the dividends on the shares in question—duly declared and paid to other shareholders—from the 1st October, 1914, to the 1st October, 1917—were not paid by the C.P.R. to the claimant until the 24th March, 1924,—and at the rate of exchange in United States

funds prevailing at that date when the rate had materially gone down. Hence the present controversy.

These dividends were payable in the United States, that is in United States funds, and the present shareholder claims the value of the same at the current rate of exchange on the 1st June, 1921, in United States funds, correspondent to and equivalent in Canadian currency. That is, an amount in Canadian currency as would, at that date (1st June, 1921), have been produced by the American dollar.

The release by the Custodian bears date the 11th May, 1921.

The relative position of the parties: the claimant, the C.P.R. and the Custodian, is clearly defined in the pleadings and admitted by the parties.

Now the question to be decided in the present case is at what rate of exchange these dividends should be paid. The exchange has greatly varied between 1914 and the date of payment by the C.P.R., which was on the 3rd March, 1924.

After careful consideration, I have come to the conclusion that the rate for conversion must be the rate ruling on the date when each dividend became due or payable to the Custodian—and not either the 1st of June, 1921, or the 3rd March, 1924. That is at the date of the breach or default, a sum in Canadian currency as would at that date have been produced by the American currency. *Barry v. Van den Hurk* (1); *Di Ferdinando v. Simon Smits & Co.* (2).

In other words there should be no discrimination as between the shareholders of the company. The C.P.R. was bound in law to pay these dividends to the Custodian as they from time to time became due and payable to its shareholders. (See secs. 24 and 27 of the Orders, 1916). Their unlawful conduct, their default in not complying with the law cannot change the relative position of the parties and cannot prejudice the rights of the claimant. A right in their favour cannot arise out of their wrong. Had the C.P.R. paid, as requested by the Custodian, they would have been relieved from all liability in that respect and the Custodian would, at the time of the release in 1921,

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(1) [1920] 2 K.B. 709.

(2) [1920] 2 K.B. 704; [1920] 3 K.B. 409.

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have paid the claimant the right amounts already deposited with him in accordance with the law. *Schon v. New York Life Insurance Co.* (1); *Peyrae v. Wilkinson et al* (2); *In re British American Continental Bank and Crédit Général Liégeois' claim* (3).

Now there remains the question of interest, a question of law, unsatisfactory as it is in view of numerous conflicting decisions and which is never free from difficulty.

Is the claimant, under the circumstances of this case, entitled to interest from 1921? By wrongfully withholding the payment of these dividends contrary to law and as requested by the Custodian, the C.P.R., as a consequence of such default, retained the use and forbearance of these moneys. *Hoare v. Allen et al* (4); *Maryland Casualty Co. v. Omaha Electric L. and P. Co.* (5). Demand in writing by the claimant was also made for the payment of these dividends in 1920, when the C.P.R. were still in possession of the money representing such dividends. Indeed when a company declares a dividend on its shares, a debt immediately becomes payable to each shareholder in respect of his dividend for which he can sue at law; but that does not make the company, as contended at bar, a trustee of the dividend of the shareholder. *In re Severn and Wye and Severn Bridge Ry. Co.* (6). Should interest be recoverable by way of damages for undue delay or for wrongfully withholding the payment of a debt? *Marsh v. Jones* (7); *Webster v. British Empire Mutual Life Soc.* (8); *Arnott v. Redfern* (9); *Meredith v. Bowen* (10); *Caledonia Ry. v. Carmichael* (11); *Barry v. Van Den Hurk* (12). See also 41 Can. L.T. 733, 737 and 738. *Goodchap v. Roberts* (13); *Boardman v. Lake Shore and Michigan S.R. Co.* (14); *The Queen v. Grand Trunk* (15).

(1) [1922] 63 D.L.R. 475.

(2) [1924] 2 K.B. 166.

(3) [1922] 2 Ch. D. 589.

(4) [1789] Dallas R. (2 U.S.) 102.

(5) [1907] 157 Fed. R. 514.

(6) [1896] 1 Ch. D. 559.

(7) [1889] 40 Ch. D. 563; 60 L.T. 610 c.a.

(8) [1880] 49 L.J. Ch. 769; 15 Ch. D. 169; 43 L.T. 229.

(9) [1826] 11 Moore 209.

(10) [1836] 1 Keen 270.

(11) L.R. 2 Sc. App. 56 (per Lord Westbury).

(12) [1920] 2 K.B. 709.

(13) [1880] L.R. 14 Ch. D. 49.

(14) [1881] (Sickels C. of A.) 84 N.Y.R. 157.

(15) [1890] 2 Ex. C.R. 132.

Where a defendant by unreasonable conduct has delayed payment, has deferred it beyond stipulated or reasonable time, a plaintiff prejudiced thereby may obtain from the court interest by way of damages. A defendant may be liable to pay damages in shape of interest or otherwise for not having paid them at the proper time, as said by Lindly M.R. in *Manners v. Pearson* (1); *Suse v. Pompe* (2).

By 3 and 4 William IV, ch. 42, sec 28, it is enacted as follows:

XXVIII. And be it further enacted, that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing; so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

Under the Ontario Judicature Act, as set out in Holmsted and Langton, 2nd ed., p. 148, is found, under sec. 114, practically the same enactment with citations thereunder, reading as follows:

144. (1) On the trial of any issue, or any assessment of damages, upon any debt or sum certain, payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable.

See *Towsley v. Wythes* (3); *McCullough v. Clemow* (4).

"Debt or sum certain, etc." The Act requires that the contract shall ascertain the sum and the time; the certainty of both must appear from the contract. But still, if all the elements of certainty appear by the contract, and nothing more is required than an arithmetical computation to ascertain the exact sum or the exact time for payment, that will be sufficient. Per Lindley L.J. in *London, etc. S.E. Ry. Co.* (5); and *McCullough v. Clemow* (ubi supra).

Further on at page 149:—

As regards the rule followed by Courts of Equity in the allowance of interest, Bacon V.C. said, in *Spartali v. Constantinidi* (6); "I take the law of this court to be perfectly clear and distinct, and to have prevailed for centuries, that upon the wrongful withholding of a debt, the party who wrongfully withholds it is liable to pay interest upon that debt. A jury might always have given it, I do not say it did, but it might always have given it at law. But without reference to what a jury might do, this court has given it in numberless instances. See *Rodger v. Comptoir d'Escompte*

(1) [1898] 1 Ch. D. 581.

(2) [1860] 8 C.B. (N.S.) 538.

(3) [1859] 16 U.C.Q.B. 139.

(4) [1895] 26 Ont. R. 467, at p. 473.

(5) [1892] 1 Ch. D. 120 at p. 144; see also 1893 A.C. 429.

(6) [1872] 20 W.R. 823.

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de Paris (1); but it is said that as regards legal claims the Courts of Equity always followed the law; see per Lindley L.J. *London, Chatham & Dover Ry. v. South Eastern Ry.* (2); *Booth v. Leicester* (3).

See also *The Bahia and San Francisco Ry. Co.* (4); *Mackintosh v. G.W.R. Co.* (5);. See also *Hull and Selby Ry. Co. v. N.E. Ry. Co.* (6); *Alexandra Docks and Ry. Co. v. Taff Vale Ry. Co.* (7); *Dalby v. Humphrey* (8) 29 American Digest verbo Interest—56.

In the present case the sum is *certain*. It is the amount of these dividends as payable from time to time in American currency equivalent to the Canadian dollar which should have been deposited with the Custodian. 2. It is payable at a *certain time*. That is a *sum certain* payable at the time of the release in 1921. 3. The sum certain is payable by virtue of a *written document*. That is the release duly filed; and had the C.P.R. complied with the law, these dividends would have been in the hands of the Custodian at the date of the release and duly paid by him. It would seem that the case comes within the ambit of the first part of the section and entitles the claimant to interest. And besides there was a demand in writing made by him to the C.P.R. in 1920, after the termination of the war when the C.P.R. were still in possession of the moneys.

In re *Boardman et al v. Lake Sh. and M.S. Ry. Co.* (9), interest was allowed on deferred payment of dividends when an unlawful appropriation of the moneys which were applicable to the payment of the same was made.

For the reasons above mentioned, the claimant is entitled to recover the dividends in question at the rate of exchange ruling on the date when each dividend became due and payable to the Custodian, as required by law,—and with interest thereon from 1st June, 1921, in the shape of damages for wrongfully withholding, contrary to law, the payment thereof.

Failing the parties herein to adjust the matter among themselves, in accordance with the above finding, leave is hereby reserved to either party, upon notice, to apply to

(1) [1871] L.R. 3 P.C. 465.

(2) [1892] 1 Ch. D. 120 at p. 142.

(3) [1838] 3 My. and Cr. 459; 1 Keen 247.

(4) [1868] L.R. 3 Q.B. 534.

(5) [1864] 4 Giff. Ch. R. 683.

(6) [1854] 5 deG. M. & G. 871.

(7) [1911] 28 T.L.R. 163.

(8) [1875] 37 U.C.Q.B.R. 514.

(9) (Sickels C. of A.) 84 N.Y.R. 157, at pp. 186 & 190.

this court for further directions in respect of the same and to adduce evidence enabling the court to do so.

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Judgment accordingly.

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT

THE SHIP *CHARLES DICK* (DEFENDANT). APPELLANT;

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March 2.

AGAINST

THE PINE BAY STEAMSHIP COMPANY LIMITED (PLAINTIFF) } RESPONDENT.

Shipping—Collision—Canal Regulations—Moored ship—Canada Shipping Act

Held, (reversing the judgment appealed from), that nothing in sections 24 and 25 of Ch. 35, R.S.C. (1906), under the authority of which the Canal Regulations are made, authorizes the enactment of any by-law making a moving ship liable for damages to a moored ship in a canal, by reason of non-compliance with a canal regulation, and that that portion of the canal regulation No. 19 reading as follows:

“ And they shall also be liable for any damage to moored vessels resulting from failure to comply with this regulation ”

is unauthorized by such statute and is void.

- 2. That sections 916 and 917 of Canada Shipping Act have been specially enacted to cover the principle of presumption of fault by reason of the violation of the regulations with respect to the sailing, etc., of ships, and any local regulations inconsistent therewith are void. The regulation in question though enacted by the Governor in Council is nevertheless a local regulation within the meaning and spirit of section 914, Ch. 35, R.S.C. 1906.
- 3. That although under regulation 19 of the canal regulations, a moving vessel, when passing a moored vessel, is directed to stop her engines, if, by reason of a current against her she would, with engines stopped, be unable to pass without the probability of a collision with the moored ship, she is justified, under rule 37 of the rules of the road for the Great Lakes and by the ordinary rules of seamanship, in not conforming to the said regulation.

APPEAL and cross-appeal from judgment rendered in the Toronto Admiralty District.

Ottawa, November 20, 1925.

Appeal now heard before the Honourable the President.

R. I. Towers, K.C. and *F. Wilkinson* for appellant.

H. J. Scott, K.C. and *E. Languedoc, K.C.* for respondent.

The facts are stated in the reasons for judgment.

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MACLEAN J., now this 2nd day of March, 1926, delivered judgment.

This is an appeal and cross-appeal from a judgment of the Honourable Mr. Justice Hodgins L.J.A., for the Admiralty District of Ontario, wherein he found the plaintiff's ship, and the defendant ship, equally to blame, and which appeal I heard with the assistance of a nautical assessor. The facts are sufficiently set forth in the reasons for judgment of the learned trial judge, and as reported in 1925 Exchequer Court Reports at page 203, and I need not here restate the same. While the amount here involved is probably very small, still the case is quite important, and not without very great difficulties.

It might be convenient first to deal with the case of the *Pine Bay*, the plaintiff's ship. After a careful review of the evidence, and a consideration of the arguments presented by counsel, I am of the opinion that the conclusion of the learned trial judge in so far as the *Pine Bay* is concerned, should be sustained and for the reasons which he gave. I say this, subject, however, to a later consideration of the legal effect of a portion of canal regulation No. 19. My assessor advises me that the *Pine Bay* is to blame in that her bow and stern lines, as well as the abreast lines were not tied at the appropriate angle to insure the utmost or the necessary protection against passing ships; that this ship and her lines were not properly watched; that the after-moorings were improperly fastened on the deck to a post, instead of the winch, which was defective and not ready for operation or prompt action; that she was moored at an unsuitable and unsafe place, while a safer and more suitable one was available to her. In all this I agree. I am satisfied she was not properly moored nor watched, and unless this was done there was always the imminence of danger to herself and others. Upon this phase of the case of the *Pine Bay*, I think I need say nothing further.

There was, however, another point raised by the *Pine Bay* which is important. Canal regulation No. 19 is as follows:—

Rule 19. The engines of vessels passing vessels moored to a wharf, pier or the bank of any canal shall be stopped while so passing. Any violation of this regulation shall subject the owner or person in charge of such vessel to a penalty of not less than two dollars and not exceeding

ten dollars and they shall also be liable for any damage to moored vessels resulting from failure to comply with this regulation.

The plaintiff contends by virtue of the latter part of this regulation, that if the *Charles Dick* passed the *Pine Bay* without stopping her engines, that she is liable for the damages occurring to the latter ship, regardless of whether the *Pine Bay* is guilty of the infraction of any regulation, improper seamanship, or contributory negligence, and whether or not non-observance of regulation 19 by the *Charles Dick* contributed to the accident. If this regulation in its entirety is valid, there is much to say in my opinion for this contention, although it is not necessary I think to decide the point, in the view I take of this portion of that regulation.

Canal regulations are made under the authority of sections 24 and 25, Chapter 35 R.S., 1906, Department of Railways and Canals Act, and which are as follows:—

24. The Governor in Council may, from time to time, make such regulations as he deems necessary for the management, maintenance, proper use and protection of all or any of the canals or for the ascertaining and collection of the tolls, dues, and revenues thereon.

25. (a) The Governor in Council may, by such regulations impose such penalties, not exceeding in any one case four hundred dollars, for any violation of any such regulation, as he deems necessary for ensuring the observance of the same and the payment of the tolls and dues imposed as aforesaid;

(b) Provide for the non-passing or detention and seizure at the risk of the owner, of any steamboat, vessel or other craft, timber or goods, on which tolls or dues have accrued and have not been paid or in respect of which any such regulations have been violated, or any injury done to such canals and not paid for, or for or on account of which any penalty has been incurred and remains unpaid, and for the sale thereof, if such tolls, dues, damages or penalty are not paid by the time fixed for the purpose, and for the payment of such tolls, dues, damages or penalty out of the proceeds of such sale: Provided that no such regulation shall impair the right of the Crown to recover such tolls, dues, penalty or damages in the ordinary course of law.

Section 24, therefore gives to the Governor in Council power to make regulations for the proper use of the canal by vessels and other craft. Sec. 25 (a) enables the Governor in Council to provide for penalties for the violation of such regulations, and it is to be observed that such penalties are restricted to money penalties, and nothing more. Sec. 25 (b) enables the enactment of regulations providing, *inter alia*, for the non-passing or detention and seizure of steamboats, vessels or other craft for violation of any of the regulations, or for damages to the canal, or unpaid pen-

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alties, etc., but nothing whatever is said to indicate authority to enact a by-law, making one ship liable for any damages to another ship while using the canal, when contemporaneously with damage occurring to the latter there has been a violation of a regulation by the first ship.

I do not think that the latter portion of canal regulation 19, reading as follows:—

and they shall also be liable for any damage to moored vessels resulting from failure to comply with this regulation.

is authorized by the provisions of the Department of Railways and Canals Act, empowering the enactment of regulations. The portion of that regulation which I have quoted, in my opinion is unauthorized by the statute, and is void. It is improbable indeed, that the legislature intended the grant of power to the Governor in Council, to enact a regulation of such an important nature, and which would be out of harmony with many long established principles of Admiralty law, and with other statutory enactments of the Parliament of Canada. Sections 916 and 917 of the Canada Shipping Act, appear to have been specially enacted to cover the principle of the presumption of fault by reason of the violations of regulations with respect to sailing, etc., of ships, and any local regulations inconsistent therewith is I think void. The regulation in question though enacted by the Governor in Council, is nevertheless a local regulation within the meaning and spirit of sec. 914, chap. 35, R.S.C., 1906.

It now remains to be determined whether or not the *Charles Dick* is also to blame as found by the trial judge, and I find that a most difficult question to solve with entire satisfaction. The evidence establishes I think, that the *Charles Dick* could not with safety have passed the *Pine Bay* at the point where moored, with her engines stopped, owing to a current prevailing in the canal at this point. The learned trial judge finds, according to what he terms uncontradicted evidence, that the *Charles Dick*, if literally obeying canal rule 19, could not have successfully passed the moored ship. The evidence would indicate that while the *Charles Dick* might have attempted to pass with her engines stationary, she would before proceeding far, have stopped, and would have sheared into the *Pine Bay*, or, she would be obliged in order to avoid such a result, to put her

engines full speed ahead, with consequences probably more serious than that which occurred while passing at dead slow speed, her minimum speed. Another alternative suggested by one of the witnesses, would be for the *Charles Dick* to approach the *Pine Bay* with considerable speed, and just prior to reaching her, to stop her engines, hoping to pass on the steerage way or momentum thus acquired. This course, though possibly constituting a technical compliance with the rule, would be as disastrous, or more so, than proceeding under dead slow engine speed, which course the *Charles Dick* in fact did adopt according to the evidence. It is the speed of the passing ship at the moment which determines the displacement wave, and not always the speed at which the engines are going. So here we have canal rule 19 requiring one thing, and the evidence and the findings of the learned trial judge to the effect that the *Charles Dick* could not pass if she obeyed that rule. And the trial judge also finds in the case of the *Pine Bay*, that standing by, which was necessary, was neglected. that she was not moored in a proper place, nor was she properly or securely fastened, and that had there been in use proper spring lines, what happened would not have occurred on the night in question.

In reaching the conclusion that the *Charles Dick* was also to blame, and what her course of action should have been, in the face of canal rule 19, the learned trial judge says:

As to the first point if literal obedience to the order which is quite clear, would in effect, according to the uncontradicted evidence here, forbid passing at all unless the engines were moving, or the risk of an accident was taken, then it must follow that a vessel essaying to break the regulation must assume responsibility for the consequences resulting from that step. The alternatives are to stop and wait, or to slow down and obtain permission or to warn in time to enable precautions to be taken. It is not shown by any evidence that the *Dick* could not tie up and wait till daylight so as to try to obtain consent or more favourable or less dangerous conditions.

I cannot agree that it was obligatory upon the *Charles Dick* to tie up, and await the negotiation of terms, upon which she might pass the *Pine Bay*, or to wait until the *Pine Bay* took special precautions against the consequences of the non-observance of a rule by the *Charles Dick*, or anything of that sort. I know of no rule, or practice which might reasonably require this, and in this my assessor

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agrees. That was not apparently contemplated by the regulation itself. Rules of navigation are not intended to impede traffic, but rather to accelerate it with safety. I cannot satisfy myself that the observations of the learned trial judge which I have just quoted, afford the correct solution of the real question involved in this case.

The issue then resolves itself into this, is the *Charles Dick*, not being able to pass the *Pine Bay* with her engines stopped as required by rule 19, but proceeding with her engines moving though not at an excessive speed, liable for contributory negligence, in the event of an accident such as occurred in this case, and where the moored ship, the *Pine Bay*, is found to be improperly moored, and watched.

By section 916, Part 14, of the Canada Shipping Act, it is provided that:—

If, in any case of collision, it appears to the court before which the case is tried, that such collision was occasioned by the non-observance of any of such regulations, the vessel, or raft by which such regulations have been violated shall be deemed to be in fault, unless it can be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said regulations necessary.

I have no doubt as to the applicability of this enactment to the present case, nor was its applicability contested before me on the hearing of the appeal, and it is still in force so far as the Great Lakes and canals are concerned. Chap. 13, sec. 5, Statutes of Canada, 1914. It might be argued, though it was not, on the appeal, that here there was no collision, and that section 916, did not here apply. The trial judge found that there was no impact between the two ships in question, yet it is clear I think that the *Pine Bay* struck the opposite bank of the canal after parting her lines, but without that fact, I have no doubt this section of the Canada Shipping Act is applicable to the facts disclosed in this case.

Rule 37 of the Rules of the Road for the Great Lakes is as follows:—

Rule 37. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

It was not contended that these rules were not applicable to the canals. There is nothing inconsistent in adding to the canal rules, the Great Lakes rules, where the former are silent and where they are not excluded by express pro-

vision. Even if the Great Lakes Rule 37 did not exist the ordinary rules of seamanship would apply. Marsden 8th Ed., at page 7, states:—

Where the regulations are clearly inapplicable as where the ship cannot take the step required without going ashore, or endangering herself or other vessels, the question which ship is in fault is tried, without regard to the regulations, by the ordinary rules of seamanship.

The question then to be considered is, whether or not the non-observance of canal rule 19 occasioned or contributed to the collision. In the case of a collision occurring in Canadian waters, a breach of the regulations creates no presumption of fault, as provided by sec. 916 Canada Shipping Act, so that the ordinary rules as to negligence apply, and the complaining vessel must prove that the non-observance of the rule contributed to the accident. The ship *Cuba* (1). In view of the evidence, and of the findings of the trial judge, I cannot conclude that the breach of canal rule 19 caused, or contributed to the collision.

The water displacement made by the *Charles Dick* I am advised, was not any greater by reason of her engines being in motion, than if they had been stopped, and she was moving at the speed of two miles over the ground. Against the current the speed of the *Charles Dick* could not well have been less. The circumstances would also in my opinion, and according to the evidence, justify non-observance of canal rule No. 19, and in fact at this point of the Welland Canal at least, it appears, that rule is never observed by ships. This canal rule does not say that ships shall not pass at all, but merely that they shall pass with their engines stopped. By reason of the current, a situation existed, which was not provided for by the canal regulations. Rule 37 of the Great Lakes Rules of the Road, authorizes departure from a regulation, in special circumstances. The special circumstances here urged as justification for non-observance of the rule is, that there was a current in the canal at this point and the *Charles Dick* could not pass with her engines stopped, and no other canal regulation made provision for this circumstance, and therefore rule 37 of the Great Lakes Rules became operative. The fact that the rule is never observed by ships operating in the Welland Canal, where this current prevails, is a cir-

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(1) [1896] 26 S.C.R. 651 at pp. 661, 662.

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cumstance of importance. The evidence, supporting the contention that the mere motion of the engines did not of itself cause or contribute to the accident, and I do not think it did; the learned trial judge having found that the *Charles Dick* could not pass the *Pine Bay* with her engines stopped, and the evidence supports this finding; there being no evidence of excessive speed or the lack of reasonable care on the part of the *Charles Dick*, or any suggestion of the same by the trial judge; and the *Pine Bay* having been improperly moored and watched while in a dangerous place, I cannot, upon such a set of facts reach the conclusion that the *Charles Dick* should be held to blame by reason of her engines being in motion, while passing the *Pine Bay*.

My assessor advises me that the collision was not occasioned or contributed to by the fact that the engines of the *Charles Dick* were not stopped, that had the *Pine Bay* been properly moored the passage of the *Charles Dick* at the rate of two miles over the ground would not have caused the *Pine Bay* to break from her moorings, that the speed of the *Charles Dick* as established by the evidence was not excessive and could not have been less, and that had the *Charles Dick* attempted to pass with her engines stopped she might reasonably have been expected to shear into the *Pine Bay*.

I am not exercised by the decision of the late Mr. Justice MacLennan L.J.A., in the case of *The Pine Bay Steamship Co. v. Motor Ship Steelmotor* (1), a collision case in which the same ship *Pine Bay* was involved, and which collision occurred only a few hours after the accident involved in this appeal, and at the same place. The learned trial judge discusses this decision in his reasons for judgment. In this cited case, the trial judge found that the *Steelmotor* passed the *Pine Bay* at an excessive speed, that she violated canal regulation 16, and did not exercise reasonable care. Were these elements present in the case before me, and they are not, I should perhaps reach a different conclusion. The findings of the trial judge and the evidence, in this appeal present a different set of facts altogether.

It is only after the most careful consideration of a very difficult case, that I respectfully venture to differ from the

(1) [1925] Ex. C.R. p. 147.

trial judge as to the liability of the *Charles Dick*, when I conclude, as I do, that the *Charles Dick* was not to blame. The appellant's appeal is therefore allowed with costs, the cross appeal is dismissed, and the action below is dismissed with costs. The cause is remitted to the court below to be dealt with in conformity with this judgment.

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Judgment accordingly.

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

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AND

ROLAND STUART ET AL.....DEFENDANTS.

Expropriation—Compensation—Market value—Prospective value—Mortgage

The Crown expropriated lots A, B, C, D, and E, the property of the defendant *S.*, and tendered the sum of \$22,000 in full compensation therefor. Defendant *M.* held a mortgage on lots A, B, C, and D, amounting with interest to \$22,000, the amount of the tender, which the crown paid off. Defendant *S.* claimed that as there was on lot *E.* a hot spring, the whole property being worked together had special value by reason of its prospective advantages and its special adaptability as a health and pleasure resort, when developed and conducted on a commercial basis; and further contended, that in paying the whole amount of the tender to *M.*, in discharge of his mortgage, which had no relation to lot *E.*, no consideration was given to the said lot in reaching the amount tendered. The evidence showed that it would take a very large capital to so develop the property and that the results were problematical. That the amount tendered covered \$10,000 for certain of the lots and another \$10,000 for defendant's interests in the hot spring.

Held: That although *S.*, was entitled to compensation not only upon the present market or intrinsic value of the property, but also to any advantage which the property might possess prospectively, or with reference to the probable use which would give him the best return possible, such further advantage must be calculable and calculated at the time of the expropriation. The proper basis of compensation is the amount which a prudent man would be willing to pay for it at that time.

2. That, upon the facts, the Crown in fixing the tender having considered all the properties expropriated including the lot not covered by *M's.* mortgage, the Crown was justified in paying the amount of such tender to *M.* to discharge part of the property expropriated from such mortgage.

INFORMATION by the Attorney General of Canada to have the compensation for certain properties expropriated from the defendants fixed by the court.

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Victoria, September 22; Vancouver, September 24, and
 Banff, October 4, 1924.

Action now tried before the Honourable the President.
A. B. Macdonald, K.C., and *R. V. Prenter* for plaintiff.
R. Cassidy, K.C., and *F. Higgins* for defendants.

MACLEAN J., now this 13th day of January, 1925,
 delivered judgment (1).

The plaintiff expropriated certain lands of the defendant Roland Stuart, under the provisions of Chap. 17, sec. 3, of the Statutes of Canada, The Dominion Forest Reserves and Public Parks Act, 1919, and the Expropriation Act, Chapter 143 of the Revised Statutes of Canada, for the purpose of extending the Dominion Parks system. The property expropriated known as lots 149, 9011, 9565, 9565A and 9566, is situated in the Columbia River Valley, in Kootenay District, in the province of British Columbia. The first mentioned lot 149 was acquired by the defendant in 1887 by grant, at a nominal figure, from the Government of British Columbia and contains about 160 acres. The remaining lots were acquired by the defendant by purchase in 1912, from one Malcolm, the defendant at the same time mortgaging this property to the said Malcolm in the principal sum of \$16,000, on account of the major portion of the purchase price. The plaintiff tendered the defendant the sum of \$22,000 for the whole of the property so taken. The defendant claims a sum very much in excess of the amount so tendered, and in the evidence produced at the trial he sought to establish a value of from \$200,000 to \$300,000.

It is admitted that the value of the property *qua* land is not the basis of the defendant's claim for compensation in excess of the amount tendered. From this viewpoint alone the property has little present value. Upon the expropriated lot 149, is a hot spring, known as Sinclair Springs, which, in the company of counsel for the respective parties to the action, I had the privilege of viewing, and the other lots of land as well. The temperature of the

(1) An appeal was taken from this judgment to the Supreme Court of Canada and judgment was rendered on the 5th day of February, A.D. 1926. The reasons of the Honourable Mr. Justice Mignault who gave the judgment for the court will be found printed at the end of this report.

spring is about 112 degrees, and has quite a considerable flow. The chemical constituents of the water are not claimed to be unusual, except that it is free from sulphur which is said to be a favourable condition, and the water is radio active. A report of Professor Boyle of Alberta University upon the radio activity of the spring is in evidence as an exhibit. In addition, it is claimed that by reason of the scenic qualities of the whole property, the altitude and climate, a special value attaches to the property as one particularly suitable for development as a health and pleasure resort. It is also claimed that the possibility of development has been accelerated by the construction of the Banff-Windermere highway recently completed by the Dominion Parks, administered by the Department of the Interior. This very splendid and creditable highway is fully constructed between Banff, Alberta, and the Columbia River Valley in British Columbia, and passes through lot 149, immediately by the hot springs, thus rendering it accessible to motor tourists particularly. The construction in recent years, of the Kootenay Central Railway, by the Canadian Pacific Railway Company also makes the hot springs more accessible than formerly. I might here say that lot 149 is about two and a half miles distant by road from the other four lots, and the defendant claims they were purchased as part of the same scheme whereon might be erected hotels, camps, golf course, etc., lot 149 not being suitable for such purposes owing to its mountainous nature.

On the other hand, the plaintiff asserts that there is no evidence of the hot spring possessing any therapeutic value, or that by reason of any radio activity of the water, the spring has any proved therapeutic value. That the climate and location combine to render the property available as a health or pleasure resort for only about four months of the year, that the Banff-Windermere highway is only open for traffic for about four months a year, and that altogether it is not possible by any expenditure of capital to develop a profitable enterprise of the character suggested by the defendant, and that the sum tendered the defendant is sufficient compensation for any value the property possesses for any purposes whatever.

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There is no doubt but that the hot spring on lot 149 is located amidst beautiful mountain scenery, the entrance to the property at Sinclair Pass is most striking indeed. The waters of the spring are undoubtedly hot and the flow very considerable, but it is to be observed that the defendant is not entitled to the exclusive use of the flow of water. There is no evidence whatever that the constituent qualities of the water, or that the spring itself, differs much from other hot springs in Canada, and in fact from that of Fairmont some few miles distant, except that the temperature is somewhat higher, and there is an absence of sulphur. This hot spring is, however, probably greater in radio emanation content than other known hot springs in Canada, but not so great as is to be found in many hot springs in the United States and Europe. All hot springs are, however, usually radio-active. It has not, however, in my opinion, been established that the waters by reason of being radio-active thereby enhance the value of the waters for therapeutic purposes. I am disposed to accept the evidence of Prof. Frederick Sody, Professor of Chemistry at the University of Oxford, upon this point. He states in effect that the hot spring waters might be recommended by physicians empirically, but not with any conviction that they possessed any positive therapeutic or curative values. I understand him to mean that hot springs at health resorts are an added attraction to engage the interest of persons of impaired health, and if patrons think the waters are conducive to the restoration of impaired health, it is a psychological condition not undesirable in the treatment of certain patients, but that any improvement in health would be purely psychological. There is no clear or affirmative evidence that the springs are of any therapeutic value beyond this. It is not established that there is any connection between the therapeutic properties of the spring and the radio activity of its water. If the water, for this or any other reason, possesses any therapeutic value, there is no reliable evidence of it. The water coming from the spring is hot which is always a novel condition attractive to many people, and may be utilized to attract tourists and persons in ill health. In this sense only do I think the waters of the spring possess any special value.

I am also disposed to accept the evidence of Dr. Robert Fortesque Fox, who gave evidence before a commissioner in London, England, as true of all hot springs operating for commercial gain, which was to the effect that establishments do not as a general rule pay. There are, of course, exceptions. There is a hot spring at Fairmont twenty miles distant from Sinclair Springs and this apparently is not profitable. The well known Banff Springs, readily accessible by the Canadian Pacific Railway, and situated within the Dominion Parks amidst unrivalled mountain scenery, advertised very freely, and operated and conducted by the Dominion Parks, are not self sustaining. Apparently the same is true of the hot springs at Harrison, B.C., where a hotel operated in connection with the hot spring was burnt down in 1920 and has not since been rebuilt.

The defendant produced altogether three or four witnesses to establish the value of the property. The first was Mr. Murray, of Victoria, a real estate broker. He expressed the opinion that with an expenditure of \$300,000 the property could be made productive. He had no experience whatever in matters of this kind, and his opinion was not convincing nor based, I thought, on any sound business principles. Mr. Rutherford was hardly an unprejudiced witness, having been a bonused shareholder in a company once projected to operate the springs and also intimately associated with the defendant Stuart in the promotion of the property as a going concern. His evidence was not at all helpful. The defendant gave evidence on his own behalf, but I cannot say that he contributed anything which really assisted the court. He early had in mind the development of the property for the purposes and with the objects already outlined. Not having the requisite capital himself, he endeavoured to get it from others. He induced one Harmsworth of London, England, to invest \$20,000 in the project, but according to Rutherford only about \$7,000 actually went into the project. Later one Alexander organized a company to acquire the property for £58,000, and the defendant as vendor was to accept £41,000 in fully paid shares as part of the consideration, together with some cash payment. This project fell through, and the plaintiff sought to establish that fraud or

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misrepresentation was associated with the attempt to dispose of the company's shares to the public. In this promotion apparently questionable representations were made to the public, and although some shares were sold, the offering of shares to the public was in the end withdrawn, and the property was never even conveyed to the company by the defendant. While some evidence was admitted in this connection, I do not think it relevant, nor do I think that this abortive sale of the property affords the slightest basis whatever for the determination of the present or future value of the property, and I disregard it altogether.

The most important witness on behalf of the defendant was His Honour the Lieutenant-Governor of Alberta, R. G. Brett, M.D. This witness for years conducted a sanatorium and hotel at Banff, in which the thermal waters of Banff were used therapeutically. He was also acquainted with other thermal springs in Canada such as Fairmont and Sinclair, and he thought that the latter were quite as good as any other springs in Canada or any he knew. He was not in a position to say anything as to the radio activity of this or other springs. After reciting the favourable qualities of the property, the springs, etc., he states that if a comfortable hotel and good bath houses were built, golf and tennis facilities afforded, he thought such a project should attract people as other springs do. The development should be progressive, he thought, if and as circumstances justified. He thought the expenditure of a fairly good sum would be justified at once. Having demonstrated that the patronage of such a project was not a transitory thing, he would have in mind a speculative value for the property which he might get from some one more optimistic than himself and who might wish to buy it. He thought that \$20,000 might be earned within three years after the start. Questioned by defendant's counsel as to the value of the property this witness gave the following piece of evidence and which rather discloses his method of arriving at the value of the property.

Q. Taking it to-day with the intrinsic qualities of the property. A. I certainly think if I owned those springs and was 40 years younger than I am, and with the faith I have in my own ability to develop them, and the faith I have in the country, of its ability to support them, I certainly would not take two hundred thousand dollars for them—that is the conclusion I have come to. I would take as much over that as I could get. I certainly would not take anything less.

Altogether I construe this witness's evidence to merely mean that in his judgment it is not impossible, that with a proper capital expenditure to provide attractive facilities for patrons, with proper management, advertising, etc., in time a substantial and enduring business might be built up, but that as in most other businesses, in the effort of building up there was the element of speculation and risk. I do not think I should be justified in adopting this line of reasoning in attempting to fix the value of the property here expropriated.

If the property has any value in excess of the amount so tendered it is by reason of advantages which the property possesses prospectively, by virtue of its special adaptability as a health and pleasure resort, developed and conducted upon a commercial basis. The defendant is entitled to compensation not only upon the present market value or intrinsic value of the property; but it is well settled, he is entitled to any advantage which the property possesses prospectively, or with reference to the probable use which will give him the best return possible. The future advantage must, however, be calculable and calculated at the time of the expropriation, and the proper compensation is the amount which a prudent man would then be willing to pay for it. The value to be paid for it is the value to the owner as it existed at the date of taking. The value to the owner consists in all the advantages which the land possesses present or future, but it is the present value alone of such advantages that must be determined. I would refer to *Cedar Rapids Case* (1); *Cripps Law of Compensation*, 5th ed., 117, and *Lake Erie Northern Railway Co. v. Schooley* (2). In *The King v. Wilson* (3), and *The King v. MacPherson* (4), will be found a comprehensive review of the law applicable to cases of this kind. The defendant seeks to establish a special value for the property upon the contingency of capital being procurable for the construction of the requisite plant, and following that a profitable patronage by the public. But the condition upon which this method of valuation is based does not exist, and in any event, any attempt to measure the possible profits to ensue from the sale of hotel accommodation, scenery, hot baths,

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(1) [1914] A.C. 569.

(3) [1914] 15 Ex. C.R. 283.

(2) [1916] 53 S.C.R. 416.

(4) [1914] 15 Ex. C.R. 215.

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etc., demands the consideration of factors so conjectural and speculative as to make it impossible of calculation.

Having in mind therefore the law applicable to the case, the question is whether \$22,000 is a sufficient compensation. I think it is, subject to what I shall hereafter say concerning the defendant's claim for compulsory taking. Lot 149 has no land value whatever, and one of its defects is the lack of building sites which would prohibit any such development as has taken place, say at Banff or Fairmont. In 1909 the defendant offered this lot to the Canadian Pacific Railway for \$3,000. The property is, of course, more accessible to-day. It is true also that expenditures were subsequently made on this lot 149, but this has been taken into consideration. The subsequently acquired Malcolm property, consisting of about 450 acres, was probably a necessary expenditure in view of the general project which the defendant had in mind, but its present market value *qua* land is small compared with the purchase price. It must have been purchased in boom days. These lots are unimproved and have no agricultural value unless irrigated, and a very large portion consists of steep slopes. As to the special adaptability of the property for a business such as suggested by the defendant, I have nothing before me but pure conjecture as to the prospective earnings of such a business if developed. Tested in an imaginary market, there is nothing to sustain the defendant's claim as to the value of the property. There is no evidence that this class of business has anywhere in Canada been profitable. The springs have been recently made more accessible to motor tourists by the Banff-Windermere highway, but this traffic is only for four months, and it is not possible to find what degree of patronage would thereby enure to such a business, and the measure of profit, if any. There was always the possibility of course that some person, at some time, might desire to buy this property and engage in the suggested kind of business, but if so, I feel quite certain that no prudent person would entertain the idea of such a capital expenditure as suggested by the defendant for the site or location of a business that is so obviously risky and uncertain. I am of the opinion, therefore, that the sum tendered, \$22,000, is sufficient, except that I think there should

be added ten per cent for the compulsory taking, and which the defendant claims.

I was concerned for a time as to another point in the case. The trial of this cause opened at Victoria. At a later date further evidence was heard at Vancouver, and still later at Banff. In the course of the trial many exhibits were filed, and altogether I thought it not inadvisable to suggest to counsel, at the end of the trial, that they each file a brief on the evidence and law which was agreed upon, and accordingly no argument took place upon the conclusion of the trial. The defendant's counsel in his brief raised a point to which my attention had not been directed during the trial, although a careful reading of the plaintiff's information would suggest the point. Subsequently I filed a memorandum covering the fact that this point had been directly raised by defendant's counsel and suggesting a reply thereto from the plaintiff's counsel if he desired, which was done.

The land in question, exclusive of lot 149, as already stated, was subject to a mortgage made by the defendant in favour of one Malcolm in the principal sum of \$16,230.80 with interest. On June 5, 1922, and after the expropriation proceedings herein were initiated, the plaintiff through the Minister of the Interior of the Dominion of Canada, discharged this mortgage by payment of the sum of \$22,000 to the said Malcolm, and this appears in the plaintiff's information. This amount of \$22,000 so paid is the full amount tendered by the plaintiff in full satisfaction of any interest the defendant had in all the property expropriated. The defendant's counsel now raises the point, in the manner already stated, that the payment of the Malcolm mortgage had not any relation to lot 149, and that the \$22,000 so paid was not to be regarded as applicable to the whole property or treated as a tender for the whole property. In effect the suggestion is that no consideration was given to lot 149 in reaching the amount tendered.

Upon a review of the evidence I am quite satisfied that in reaching the sum tendered for the five lots, due consideration was given to the value of lot No. 149 separately, and the sum of \$22,000 comprised the estimated value of lot 149, and of all the lands taken. The sum tendered was the result of investigation and estimates made by James

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Wardle, chief engineer of the Dominion Parks system. In his evidence he states that he discussed the land value with local residents, ascertained the prices paid in recent years for actual sales by reference to the district land titles office, measured up and checked the values of buildings and improvements, then allowed something additional over the amount so computed, and altogether this amounted to \$10,000; then he allowed \$10,000 for any right or interest of the defendant in the hot springs. It was in this way he reached the total sum of \$20,000 which he regarded as the value of all the property. There is no evidence explanatory of the additional \$2,000, but probably this amount was required to satisfy the mortgagee and thus to end that matter. From this it is clear that the sum tendered comprises an allowance for lot 149 first as to the value of the land and improvements, and then a special amount for the hot springs. While the evidence is not quite clear or precise, I think it may safely be assumed that more than one-half of the total valuation thus arrived at, probably \$14,000 or \$15,000 of the \$20,000 estimated by Mr. Wardle had reference to lot 149, and that chiefly for the water rights and improvements. The land value of all the lots would then be represented by about \$5,000 or \$6,000. The defendant did not in his defence or at the trial plead that consideration was not given to lot 149 in reaching the sum tendered, nor is there any evidence supporting that theory, in fact the evidence is entirely to the contrary. The defendant regarded the whole five lots as one property, this for the reason that there were no building sites on lot 149 which would permit any building of importance there. Hotels, camps, golf, etc., was only possible on the Malcolm lots. Neither did the defendant in his pleadings, or during the trial, urge the point that the discharge of the Malcolm mortgage by the plaintiff was irregular or that he suffered in any way by the procedure adopted in discharging the mortgage in the manner and at the time stated. I cannot see that he can in law object to the discharge of the mortgage by the plaintiff. There is no evidence that the defendant was not liable on the covenants of the mortgage for the principal and matured interest, but I may assume that he was so liable, and had the amount tendered been paid

into court to await the result of this trial, the same would then have been available to the mortgagee by some legal process if the amount was due, and there is no suggestion to the contrary. However, this question was not in issue, and I have only to determine whether the sum tendered for the property taken is sufficient or otherwise.

Accordingly there will be judgment as follows: the lands expropriated are declared vested in the Crown as from April 4, 1922; the compensation for the land so taken and for all damages resulting from the expropriation is hereby fixed at the sum of \$24,200 with interest thereon from April 4, 1922, until June 5, 1922, and interest on \$2,200 from that date till the date of this judgment; upon giving to the Crown a good title free from encumbrances, the defendant Stuart is entitled to recover from the plaintiff the sum of \$2,200 together with interest on \$24,200 from April 4, 1922, to June 5, 1922, and interest on \$2,200 from the last mentioned date to the date of this judgment, the plaintiff having paid the balance of the damages to the mortgagee on account of the defendant; the defendant Stuart shall have his costs of trial, and the defendant the Royal Trust Company will have its costs against the plaintiff as intimated at the opening of the trial and which should be agreed upon between counsel of the parties, and in default of them agreeing, to be taxed.

*Judgment accordingly.**

*The following are the reasons for judgment of Mignault J. in the Supreme Court, concurred in by Anglin C.J., Duff, Rinfret and Smith JJ.

On the 29th of May, 1923, the Attorney General of Canada, on behalf of His Majesty the King, exhibited in the Exchequer Court an information to which Roland Stuart and John Roper Hull and the Royal Trust Company, executors of the estate of William James Roper, deceased, were made defendants. This information was exhibited under section 26 of the Expropriation Act (R.S.C., ch. 143)

in the matter of the expropriation of five parcels of land, to wit: lots 149, 9011, 9565, 9565A and 9566 in group one, Kootenay district, British Columbia, containing an area of 615.97 acres, more or less. It alleged that these lands were taken for the purpose of a public work of Canada, a public park, and that, on the 4th of April, 1922, a plan and description of the land was deposited of record in the land registry office of the Nelson land registration district. The information also states that the defendant Roland Stuart claims to have been the owner in fee simple of the lands at the time of filing the plan

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and description, subject however to the following registered mortgages: (a) a mortgage, dated 11th of December, 1911, over lot 149, in favour of one William J. Roper for \$10,000, the full amount whereof had been paid to the trustees of the Roper's estate, but a final discharge of the mortgage had not yet been registered; (b) a mortgage dated the 11th of February, 1912, over lots 9011, 9565, 9565A and 9566 in favour of William J. Malcolm to secure payment of \$16,230.80, with interest at 7 per cent per annum, "which said mortgage was discharged by His Majesty the King, through the Minister of the Interior of the Dominion of Canada on the 5th day of June, 1922, by the payment to the said William J. Malcolm of the sum of \$22,000, and a formal discharge of the said mortgage has been registered in the said land registry office." It was further alleged that His Majesty the King was willing to pay to whomsoever the court might adjudge to be entitled thereto, in full satisfaction of all estate, right, title and interest, and all claims for damages that may be caused by the expropriation, "the sum of \$22,000, including therein the said sum of \$22,000 paid as aforesaid to discharge the said mortgage held by William J. Malcolm."

The defendant Roland Stuart alone filed a defence to the action. He alleged that the tender of \$22,000 was not a sufficient and just compensation for the lands expropriated and claimed as compensation \$500,000, with interest and costs. No question was raised as to the payment of the Roper mortgage on lot 149.

On lot 149 there is a hot spring known as Sinclair Springs. Its temperature is about 112 degrees and it has a considerable flow. The other lots are about two and a half miles by road from lot 149.

The contention of the defendant Stuart briefly is that all these lots were purchased as parts of one and the same scheme. Lot 149, on which the spring is located, owing to its mountainous character, is not suitable for building purposes, but the other lots it is urged, are an admirable site for hotels, camps and a golf course, the whole in beautiful mountain scenery. The Banff-Windermere Highway passes close to the spring, but is open only for four months of the year. The defendant describes the property as being an ideal pleasure and health resort, and claims that it has a special adaptability as such. He further contends that it is expropriated by the Government for the same purposes as those for which he intended to use it himself.

The case after a somewhat lengthy trial, and production of evidence taken in England under a commission in which the spring and its surroundings were compared to other hot springs in America and Europe, was submitted to the learned President of the Exchequer Court, who also, in company with counsel for the respective parties, visited the property. By his judgment, the learned President declared the lands vested in the Crown, and adding ten per cent for compulsory taking to the \$22,000 tendered, awarded \$24,200 as compensation for the lands and for all damages resulting from the expropriation. He further declared that the defendant Stuart was entitled to recover from the Crown \$2,200, together with interest on \$24,200 from April 4, 1922, to June 5, 1922, and interest on \$2,200 from the last mentioned date to the date of the judgment, the Crown "having paid the balance of the damages to the mortgagee on account of the defendant."

From this judgment the defendant Stuart appeals.

The appellant at the trial relied on some highly speculative features in connection with the expropriated lots, but it appeared to us, after the very full argument submitted on his behalf, that the learned President had duly considered all the elements which can appropriately enter into the valuation of such a property, and that he had placed a value on the lands with any potentialities or special adaptability which they possessed at the date of the expropriation. The defendant's grievance, as alleged, is that this valuation is inadequate, but after considering all the evidence to which we were referred, we do not think we would be justified in disturbing the learned President's estimate of value.

A difficulty however arises in connection with the course adopted by the Crown in paying to the mortgagee Malcolm the \$22,000 it tendered as compensation. Malcolm had a mortgage on lots 9011, 9565, 9565A and 9566. He had no interest in lot 149, and under his mortgage could claim no part of the compensation granted for that lot. Undoubtedly Stuart was entitled to compensation for the compulsory taking of lot 149.

It may be observed that under the Expropriation Act, the compensation money stands in the stead of the land or property expropriated, and any claim to or encumbrance on such land or property is as respects His Majesty converted into a claim to the compensation money, or to a proportionate share thereof, and is void as respects the land or property taken (sect. 22). The information which is exhibited by the Attorney General should set forth, *inter alia*, the persons who, at the date of the deposit of the plan and description of the land or property, had any estate or interest in such land or property and the particulars of such estate or interest, and

any charge, lien or encumbrance to which the land was subject, so far as it can be ascertained, and also the sums of money which the Crown is ready to pay to such persons respectively, in respect of any such estate, interest, charge, lien or encumbrances (sect. 26). The expropriation proceedings, as far as the parties thereto are concerned, bar all claims to the compensation money or any part thereof including any claims in respect of all mortgages, hypothecs or encumbrances upon the land or property, and the court makes "such order for the distribution, payment or investment of the compensation money, and for the securing of the rights of all persons interested, as to right and justice, and according to the provisions of this Act, and to law appertain" (sect. 29). Section 33 adds that the Minister of Finance may pay to any person, out of any unappropriated moneys forming part of the consolidated revenue fund, any sum of money to which under the judgment of the Exchequer Court he is entitled as compensation money or costs.

If the course mapped out by the statute had been followed, the Exchequer Court would have made an order indicating the persons (owners or mortgagees) entitled to the compensation money, or to a proportionate share thereof, and these persons in due course would have been paid by the Minister of Finance. The Crown however paid to Malcolm in advance, and without reference to Stuart, the whole amount which it tendered to the latter as compensation for the expropriation of the five lots. The sum it paid on the Malcolm mortgage no doubt satisfied any claim for compensation in respect of the property covered by that mortgage, to wit lots 9011, 9565, 9565A and 9566, but that payment cannot be applied towards compensation for lot 149. We think therefore that the action should be remitted

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to the Exchequer Court to determine the amount of compensation payable in respect of lot 149. Under all the circumstances, and as the appellant fails with respect to the greater part of his claim, we

think that there should be no order as to the costs of this appeal. The costs of all proceedings in the Exchequer Court will be in the discretion of the judge when disposing of the matter referred back.

1925
 Dec. 31.

HIS MAJESTY THE KING PLAINTIFF;
 AND
 IRWIN PRINTING COMPANY LTD. DEFENDANT

Revenue—Special War Revenue Act, 1915—Job printers—Excise Sales Tax—Interpretation of statute

Held, that job printers are “manufacturers and producers” selling to retailers and consumers within the meaning of paragraph 1 of section 19 B.B.B. of 12-13 Geo. V, c. 47, and are liable to the sales tax provided under the Special War Revenue Act, 1915, and amendments thereto.

2. When, in construing a statute there are words which may appear ambiguous, and there are also express words which are clearly indicative of the intention of the legislator, the court should give effect to such clear intention, rather than to deny the provision any meaning as resulting from the apparent ambiguity. The interpretation which is most consistent with the intention of the legislator should be accepted and acted upon.

INFORMATION exhibited by the Attorney General to recover from defendant the sum of \$1,217.66, excise tax.

Charlottetown, June 16, 1925.

Case now heard before the Honourable Mr. Justice Audette.

George S. Inman, K.C., for plaintiff.

C. J. Duffy, K.C., for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 31st December, 1925, delivered judgment (1).

This is an information exhibited by the Attorney General of Canada, whereby it is sought to recover from the defendant company, a job printer, the sum of \$1,217.66, as excise tax, under the provisions of The Special War Revenue Act, 1915, and amendments thereto.

(1) An appeal was taken from this judgment to the Supreme Court of Canada, but later abandoned.

The period covered by the information extends from March, 1923, to March, 1924, both inclusive, in all, one year and one month.

The period from March to December, 1923, both inclusive, is governed by the statute of 1922 (12-13 Geo. V, ch. 47).

And the period from 1st January to the end of March, 1924, is governed by the statute of 1923 (13-14 Geo. V, ch. 70), which amended the Act of 1922.

Dealing with the first period, it will be found that paragraph one of sec. 19 B.B.B. of 12-13 Geo. V, ch. 47 (1922), by a general text, without any restriction, imposes a tax sale of 4½ per cent on

sales by manufacturers and producers, to retailers or consumers.

However, by paragraph 4 of this same section it is provided that the taxes specified in par. 1 of the same shall not apply to sales or importation of: . . . (p. 183),

job printed matter produced and sold by printers or firms, whose sales of job printing do not exceed ten thousand dollars per annum.

While under the wording of par. 1 of sec. 19 B.B.B. it must be found that job printers are themselves

manufacturers and producers selling to retailers and consumers liable to 4½ per cent excise tax

the matter is by necessary implication, inference and deduction made still clearer by the proviso of par. 4 of this section which exempts job printers from the tax when their business does not exceed \$10,000.

Indeed, when in the construction of a statute which may, under certain reading, appear ambiguous, there are some express words which by implication or deduction are clearly indicative of the intention of the legislator, it would seem that the latter course should be followed in preference to denying it any meaning as resulting from the apparent ambiguity. The interpretation which is most consistent with the intention of the legislator should be accepted and acted upon.

The words in the proviso exempting from taxation job printers "whose sales do not exceed \$10,000" are words that must have an import corresponding with the subject matter of taxation and connoting of the same rather than being meaningless. Parliament in this legislation has in

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view the levy of taxes for the administration of the commonwealth. And as said in the first volume of Blackstone's Commentaries:

The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and the spirit of it; or the cause which moved the legislator to enact it.

There is nothing in the statutes, both of 1922 and 1923, suggesting any intention or intimation of leaving the job printers business out of the field of taxation, under any circumstances.

Moreover, there is in the same section in the 5th par. thereof (p. 183), a second proviso which reads as follows, to wit:—

Provided further that the excise taxes specified in this section shall not be payable . . . on sales of goods made to order of each individual customer by a business which sells exclusively by retail under regulations by the Minister of Customs and Excise who shall be sole judge as to the classification of a business; and provided that the tax as specified in this section shall be payable on sales of goods manufactured for stock by merchants who sell exclusively by retail.

The defendant was selling under a license issued to him as a job printer doing business in excess of \$10,000. This license was in force during the period in question and expired only on the 31st March, 1924. He collected the tax up to January, 1924, paid some in July, 1923. His total yearly business amounted to \$23,000 odd.

Under Regulation by the Minister,—Circular of the 18th August, 1921 (exhibit 7) made under paragraph 5 above recited, a job printer is liable for taxes, as found in the case of *The King v. Crain Printers Ltd.* (1). Is that Regulation by the Minister repealed? It is so contended by circular of the 21st June, 1923, signed by the Commissioner of Customs and Excise, but not by the Minister. If still in force, the result would be the same as the *Crain* case (*ubi supra*).

However, on the 13th July, 1922, the Minister, under the authority of the provisions of the section 19 B.B.B. above referred to, and under which he is made, by the Act, *the sole judge as to the classification of a business*, job printers whose sales of printed matter are \$10,000 per annum or more, are classified as manufacturers and therefore become liable for the tax.

(1) [1925] 3 D.L.R. 291.

Under the last part of the proviso of par. 5 hereof, "goods manufactured for stock," such as legal blank forms are liable for the tax.

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Therefore I find the defendant liable for the tax during the year 1923, subject to such qualification as hereinafter mentioned.

Coming now to the period of January, February and March, 1924, it will be seen that the Act of 1922 has been amended, in 1923, by 13-14 Geo. V, ch. 70,—the latter coming into force on the 1st January, 1924 (sec. 16), in respect of the sections affecting the present case.

By sec. 6 of the Act of 1923, sec. 19 B.B.B. has first been amended by raising the rate of the tax from 4½ per cent to 6 per cent.

Then by subsection (2) (a) of the same section, paragraph 4 of section 19 B.B.B. of 1922 is amended, *inter alia*,

by striking out of the list of articles to which the tax specified in the said section shall not apply the following words:

Job printed matter produced and sold by printers or firms, whose sales of job printing do not exceed ten thousand dollars per annum.

Furthermore, by subsec. 5 of the same section all *manufacturers and producers*, who do not manufacture or produce goods to the value of \$10,000 are exempted from the sales tax.

Therefore, the job printer in 1923 who, under par. 1 of sec. 19 B.B.B. was a manufacturer and producer and who was *eo nomine* exempted from the tax if doing business for less than \$10,000, in 1924, sees this specific exemption in his favour repealed but he falls under the provisions of subsec. 5 which extends this exemption to a manufacturer and producer. That exemption of 1923, the job printer now shares it and it is made common to all manufacturers and producers, as set forth in subsection 5, and he becomes liable when carrying on a business with a turnover of over \$10,000. This is the obvious conclusion by necessary implication and deduction as stated above, with respect to the Act of 1922, which need not be repeated here. The amendment of the 1923 Act leaves the situation the same as before with respect to those who had to pay the tax under the statute of 1922, excepting however that the exemption to pay tax when doing business for less than

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\$10,000 is extended to all manufacturers and producers, instead of being limited to job printers as was done by the Act of 1922. A statute which is ambiguous must be construed in such a way as to lead to a logical and reasonable result. *Elliott v. Glenmore Irrigation District* (1). In construing a section of a statute, that construction must be adopted that gives effect to the whole of the section in preference to one which renders parts thereof meaningless. *Montreal Light, Heat and Power Co. v. City of Montreal* (2).

Before concluding there are a couple of other questions to be disposed of.

What is a job printer? According to Webster's dictionary, it is one who does miscellaneous printing, especially circulars, cards, billheads, etc.; or according to the Imperial dictionary, one who does miscellaneous works as bills, programmes, circulars, cards, etc.

Under the custom of trade, does binding come within the scope of the trade of job printer? I have asked this question at trial and the parties were unable to supply the evidence for such information. The defendant claims he should not be taxed for the binding he did. A statement of what was charged by him for binding has been supplied, but the charges are not for exclusive binding, there was some printing included in these charges for binding.

I have come to the conclusion to treat binding as outside of his trade of job printing; but this finding cannot be used as a precedent in a case where evidence might be adduced showing that, under the custom of trade, binding comes within the scope of a job printer. In accepting as a starting point the statement for binding, I will have to deduct from the same an allowance for the printing it covered. It may be an arbitrary allowance, but it will always be that even if gone into in every detail.

There remains the question as to whether, under the case of *Clay v. Yates* (3) referred to at trial and cited in the case of *The King v. Crain Printers Limited (ubi supra)* the transaction between the defendant, in some instances, for

(1) [1923] 4 D.L.R. 1044.

(2) [1924] 2 D.L.R. 605.

(3) [1856] 1 H. & N. 73; 156 E.R. 1123.

a particular work for an individual customer and useless for any one else, is for work, labour and material.

Apart from a statute which decides the point,—as enacted by the proviso of par. 5 of sec. 19 B.B.B. of 1922, and the regulations made thereunder by the Minister, consideration might be given to the argument; but not in face of the statutes both in 1923 and in 1924, which specially provide for the case and make the job printers liable for the tax,—and this is the view which was practically adopted in the *Crain* case (*ubi supra*).

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From the amount of.....	\$1,217 66
There must be deducted the sum of.....	82 70

The amount of the March, 1923, taxes paid on 18th July, 1923.....	\$1,134 96
There must also be deducted the amount for binding, which in 1923 amounted to \$298.95, as established by witnesses Casey & Earle. That is 4 per cent of that amount was \$13.45 with slight deduction for the printing included in that binding 20 per cent	2 02
	\$1,132 94

With respect to the 1924 period, there is but the evidence supplied by exhibit "A" and that is \$757.85 for those three months. At 6 per cent the tax would represent \$45.47 from which I will deduct a certain amount for printing included in it—leaving the net sum of	36 38
	\$1,096 56

Therefore this court doth order and adjudge that the plaintiff recover from the said defendant the sum of \$1,096.56 with interest (sec. 20) thereon from the date of the service of the information, to the date hereof, and costs.

Judgment accordingly.

1925
Nov. 27.

JORGENSEN PLAINTIFF;

VS.

THE CHASINA DEFENDANT.

Shipping—Seaman—Maritime Lien—Watchman—Jurisdiction

The S.S. *Chasina* was purchased by the A.P.S.S. Co. and was put on the ways of the Marine Repair Co., Ltd., at Vancouver for the purpose of being made ready as a freighter for coastwise service. Upon his own showing, plaintiff remained on the *C.* during the repairs, in the capacity of watchman and caretaker, as part owner on behalf of his "associates and owners to care for her and to oversee her reconditioning, etc." The repairers claimed that they provided all the necessary care and watching during this time. Later plaintiff had the vessel arrested for a claim as watchman and for wages as rigger. Upon motion to set aside the writ and warrant of arrest.

Held, that upon his own showing the the plaintiffs could not properly be deemed to be a seaman, that the services rendered did not entitle him to claim a maritime lien, and that the said motion should be allowed.
2. That, as regards the claim for a lien for wages as rigger, the amount thereof being for less than \$200, this Court had no jurisdiction to entertain and hear the same.

MOTION by defendant to set aside writ and warrant of arrest on the ground that the services rendered did not create a maritime lien in favour of the plaintiff.

The S.S. *Chasina* was purchased by the Alaska Pacific Steamship Co., Ltd., from the Union Steamship Co., Ltd., and was put on the ways of The Marine Repair Co., Ltd., at North Vancouver for the purpose of being made ready as a freighter for coastwise services. While the ship was being repaired the plaintiff who was a shareholder in the Alaska Pacific Steamship Co., Ltd., acted as watchman and slept on the vessel.

In November, 1925, he had the vessel arrested for a claim as watchman and also for wages as rigger and on the 27th of November a motion was made before the Honourable Mr. Justice Martin to set aside the writ and warrant of arrest.

E. C. Mayers for the motion.

J. A. Russel contra.

The facts are stated in the reasons for judgment.

MARTIN L.J.A., now this 27th day of November, 1925, delivered judgment.

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This is a motion to set aside the writ and warrant of arrest to answer the plaintiff's claim for a lien for wages as a rigger and also as watchman, but as to the claim in the first capacity it fails because it is below \$200 and therefore excluded from the jurisdiction of this court. Sec. 191, Canada Shipping Act, and *The St. Alice* (1). As to the claim in the second capacity it is beyond question that the services of a mere watchman are not maritime service—*Brown v. The Flora* (2), wherein the services claimed were at a time when the vessel was dismantled at the dock in the winter and, in addition to a daily visit, “the duties performed were keeping the vessel clear of snow and pumping out any water that accumulated in the hull”; the vessel was not in commission nor even preparing for a voyage. A number of American authorities are cited to which may be added *The Brig. E. A. Barnard* (3), wherein a claim for services as “watchman and shipkeeper” was disallowed as not giving a maritime lien.

In the *Jane and Matilda* (4), the claim of a woman as cook and steward on board that vessel was allowed by Lord Stowell, she having been shipped and hired in those capacities for the voyage in question even though it was unusual to employ a woman for that work, yet nevertheless she was under the captain's orders as a mariner and employed by him, and had in fact upon occasion creditably discharged some of the ordinary duties as a seaman. She also made a claim in another capacity, p. 190:—

. . . . that of shipkeeper for a long space of time, in which the vessel remained in dock or harbour, during all which time she had the business of keeping the ship clean by frequent washing, and of looking to the safe custody of the stores left on board.

and it appeared this was based on a hiring by the captain for wages “so long as she should remain on board,” p. 191, as cook and steward, and during the time the vessel was in the London Docks, being seized when upon the point of sailing for Spain. The captain, visited it occasionally, and it would appear that at all times he had employed her on behalf of the owners in the usual way—195; in these special circumstances her claim was allowed in both capac-

(1) [1915] 21 B.C.R. 540.
 (2) [1898] 6 Ex. C.R. 133.

(3) [1880] 2 Fed. Rep. 712.
 (4) [1823] 1 Hagg. Adm. 187.

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ities and I see no reason for questioning that decision; Lord Stowell, p. 195:—

It was said that the co-owners were ignorant of all this employment of a female. That may be their fault, or their misfortune, in giving their confidence to an unworthy person; but be it one or the other, it would not destroy the legal claim of a third person, who has acquired it.

I note that there is an error in the judgment of Wills J. in the *Queen v. Judge, etc.* (1), wherein he says that the claimant in the *Jane* case “acted as caretaker” only, instead of in the conjoint capacities which are carefully set out by Lord Stowell and hereinbefore indicated, and this oversight has unfortunately created some misunderstanding, because it is clear from the whole case that the claimant was at all times on the ship’s articles or if not a member of the crew, however small. In the *Queen v. Judge* case the claim of a mate was, after consulting the judge of the Admiralty Court, allowed, it appearing that after the vessel reached port and the crew was paid off the mate by direction of the owner and upon the same sea wages, with an addition for victualling money, remained on board superintending the discharge of the inward cargo and the loading of a fresh cargo for the outward voyage, and also superintend repairs, Wills J., observing, p. 343:

It is, of course, a matter of common knowledge that one of the most essential parts of the chief mate’s duty is to look after the cargo, and see that proper care is taken of it. I am of opinion that the services rendered by the plaintiff were maritime service, although the vessel was actually in harbour at the time.

The same element exists in *Connor v. The Flora* (2) wherein the claimant was hired and shipped by the owner direct to take charge of a confectionery stand on board an excursion and passenger vessel and as such the owner had to employ persons in various capacities to enable the ship to successfully carry on the line of business she had entered upon and she was, for the ship’s purposes and in the circumstances, just as necessary as, e.g., a stewardess. The learned judge concludes:

There appears, therefore, to be no reason why this young woman should not rightfully claim a maritime lien for any wages due her. She was engaged by the owner of the boat to perform these services on board the boat, and to the extent of a just amount will be entitled to rank along with the other members of the crew.

(1) [1890] 25 Q.B.D. 339, at p. 342.

(2) [1898] 6 Ex. C.R. 131.

On the other hand the House of Lords decided in *Macbeth v. Chislett* (1) that a dock labourer who had formerly been a seaman but was not on the articles or employed on board as one of the crew, but merely assisted while on board in the performance of a casual and temporary employment in working a vessel by external power from one berth to another in a large dock, was not a seaman because he happened to be a "person employed on board a ship" at the time he was injured, Lord Chancellor Loreburn said, p. 223:—

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I think the court must see, first, whether he is by vocation a seafaring man, and, secondly, whether he is doing work connected with his duties or vocation of a seafaring man. Both of these elements are to be considered. If it were otherwise, then on the one hand a painter painting a ship in a dock or a mechanic called in to mend a valve in a dock or in a harbour would be a seaman, which he obviously is not; but we should have to say he was a seaman, for the duties he was discharging are duties often discharged by sailors and engineers on board ship. On the other hand, if we did not regard both these elements, a seafaring man employed for some work, such as erecting a flagstaff on shore would have to be regarded as a seaman, for that is his vocation. The truth is you have to regard all the circumstances, particularly those to which I have adverted.

I think it is impossible to say as regards this man, who was a rigger and had not been to sea for five years, that his vocation was that of a seaman.

The latest decision is one in this court in its Quebec District, in *McCullough v. The Samuel Marshall* (2), and it was held therein that a person not on the articles nor a member of the crew but who lived on shore and acted there as shore agent of the owners in collecting freights, ordering supplies and performing the usual duties of a managing owner or ship's husband, had no right to proceed against the ship *in rem* as a seaman, and the court said, p. 112:—

The claimant does not pretend that he had been engaged by the master of the ship one of whose duties is to enter into an agreement with every seaman whom he carries as one of his crew; "Canada Shipping Act," sec. 328. Calling himself purser employed by the owners does not give him the status of a seaman.

In the light of these authorities I have considered the evidence in the very conflicting affidavits before me with the result that in the circumstances I am of the opinion he cannot properly be deemed a seaman though he sets up useful services as watchman and caretaker but on his own

(1) [1910] A.C. 220.

(2) [1923] Ex. C.R. 110.

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affidavit, which is loose and unsatisfactory, at most he was one who was on board of her in the said capacity as a part owner on behalf of "my associate owners to care for her and to oversee the reconditioning of the ship while she was being made ready as a freighter for coastwise service" by the Marine Repair Co., Ltd., the manager of which, however denies this and deposes that practically during all the times in question his company was in full control of the repair and reconditioning work and "did provide all necessary protection and watching" for the vessel while she was in their possession at their dock in an unseaworthy condition. Such being the case, I am of the opinion that upon the plaintiff's own showing the motion should be allowed with costs.

Judgment accordingly.

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March 29.

THE THERMOGENE COMPANY LTD. . . . PLAINTIFF;

AND

LA COMPAGNIE CHIMIQUE DE PRO- }
DUITS DE FRANCE LTEE. } DEFENDANT.

*Trade-marks—Infringement—"Thermogene"—Distinctiveness—
Descriptiveness*

Held, that the word "Thermogene," not being in common use anywhere, except as denoting plaintiff's goods; not being descriptive within the meaning of the Trade-Mark and Design Act, and having acquired a secondary meaning as distinguishing the goods of the plaintiff from those of the other traders, was a valid trade-mark.

2. That even if the said word should have reference to, or be suggestive, of the quality or characteristics of the goods, that feature of it is so remote as not to constitute a practical or reasonable objection to its adoption as a trade-mark.
3. That the mark consisting of the words "Ouate Thermogène Le Dragon," applied to medicated wadding, appearing with other matter on the container of the defendant's goods, of which the two first words "ouate thermogène" appear above the other two and are in much more conspicuous type than the latter, and much more readily observed, infringes plaintiffs' mark by the use of the word "Thermogene" therein. That the said word was improperly therein registered, was calculated to mislead and deceive the public, and that defendant's mark should be varied by striking therefrom the said word.

ACTION for infringement of a registered trade-mark consisting of the word "Thermogene."

Ottawa, 8th and 9th February, 1926.

Action now tried before the Honourable the President.

R. S. Smart for plaintiff.

R. Monty, K.C., for defendant.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 29th March, 1926, delivered judgment.

This is an action for infringement of a registered specific trade-mark, consisting of the word "Thermogene" as applied to the sale of medicated wadding, and which was registered by the plaintiff in Canada in 1916. The mark was acquired by the plaintiff from one Vandembroeck & Cie of Belgium, who apparently had registered the same in Europe, as far back as 1897.

There is no doubt I think, that the evidence clearly establishes, that in this country the word "Thermogene" is distinctive of the goods produced by the plaintiff, and as sold to the Canadian public for some twenty years, and which have had a very wide distribution throughout Canada, through the agency of drug stores. Practically all drug stores in Canada carry in stock the medicated wadding produced by the plaintiff. To the drug trade particularly, and to the buying public, this word mark, I find upon the evidence, denotes the medicated wadding produced by the plaintiff. Upon this point I do not think I need say anything further, as the evidence overwhelmingly establishes the fact.

The infringement alleged against the defendant, is the use of the word "Thermogene" in a trade-mark registered in Canada by the defendant in 1924, and consisting of the words "Ouate Thermogene le Dragon," the word "Ouate" being the equivalent of wadding in English, and which trade-mark is applied to a medicated wadding sold by the defendant in Canada. This mark with other matter appears upon the label covering the box or package containing the defendant's goods. The last two words "Le Dragon" appear below the first two words "Ouate Ther-

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mogene," and the latter words appear in much more conspicuous type than the former, and are much more readily observed. The defendant pleads that the word "Thermogene" is descriptive, a common word of the French language, and being descriptive, is not a valid trade-mark, and may be used by any person. I might here say that infringement of the plaintiff's trade-mark has been established in my opinion by the evidence, if the plaintiff's mark is a valid one.

The Trade-Mark and Design Act, contains no statutory definition of a trade-mark, and is quite broad in its effect. It merely states, that all marks adopted for use by any person in his trade or business, for the purpose of distinguishing any manufacture, product or article, shall for the purposes of the Act, be considered and known as his mark. Notwithstanding this very general description, of what under the Act is deemed to be a trade-mark, it is obvious that there must be some limitation in the use of the words for the purposes of a trade-mark, and it has always been held that words descriptive of the goods, or having a direct reference to the character or quality of the goods, are not properly registrable. The purpose of restricting the words capable of being registered was to prevent persons appropriating to themselves words which ought to be open to all, such as words descriptive of the goods, or which have a direct reference to the character or quality of the goods. The Act itself does not, however, impose restrictions, or require particular essentials, in the selection of word marks. This must be kept in view in a consideration particularly, of English decisions in trade-mark cases, and which are inevitably much quoted in trade-mark cases in Canada. There the area of words available as trade-marks, has been increased progressively by successive Trade-Mark Acts; under the Act of 1875 no mere word mark was registrable at all; the Act of 1883 extended the area by admitting "fancy words not in common use"; and the Act of 1888 again extended it by admitting "invented words, or words having no reference to the character or quality of the goods upon which the mark was to be used." The Act of 1905 requires that the word shall have no "direct reference" to the character or quality of the goods, but it particularly

permits of the registration of distinctive words, that is words adapted to distinguish the goods of the proprietor of the word mark, from the goods of other persons, and which is a question of fact to be established by evidence. This was I think merely declaratory of what was the law.

The first point then to consider is whether the plaintiff's word mark is a descriptive word. Many dictionary references were submitted at the trial to establish the meaning of the word mark in question in this case. Many dictionaries, particularly of the French language, establish that the word, of Greek origin, generally has reference to the generation or production of heat, by physiological and other processes. In some dictionaries the word is not defined. I am satisfied that it is not a word in common use anywhere, or in any language, but is rare and practically obsolete so far as ordinary language is concerned. When it was first used by Vandebroek in Europe, or first by the plaintiff in Canada, I have no doubt it was practically unknown except to a select few given to etymology, and did not denote medicated wadding made by any person. To the English or French population of Canada, it may safely be said to be practically unknown to-day, except to denote the plaintiff's medicated wadding. It does not I think when pronounced, convey to the hearer any particular quality of the goods. I do not think the Act or the law requires that a person selecting or searching for a word mark for registration must arm himself with a classical dictionary or an etymologist, or both, lest perchance he select a word which is remotely suggestive of, or has an indirect reference to his goods. As was said by Vaughan Williams L.J., in *Burroughs Wellcome & Co. Trade-Mark* (1), it is not to the interest of any community to deal with any subject-matter which is regulated by statute law, so as to make the rule or law deduced from the statute, impractical, or inconsistent with the practice of mankind. To select words more or less cognate to the articles with reference to which the trade-mark is to be used is natural and to be expected, and is not I think against the statute, but one must be sure that the cognate word does not describe the goods, or seek to appropriate a word which all might

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(1) [1904] 1 Ch. D. 736, at p. 751.

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use. I cannot make myself believe that "Thermogene" ever denoted, or was ever applied in popular language in Canada by either English or French speaking persons, to any known substance other than the article sold by the plaintiff, at least up to the time when the defendant came upon the market. The plaintiff's counsel urged that medicated wadding does not by itself produce heat, but that it is a counter irritant, producing a congestion of the blood vessels and causing a flow of blood, and thus producing a sensation of heat. If this is correct, and I believe it is, and if medicated wadding apart from the human body generates no heat, it only serves to indicate the remoteness of the suggestion, that the mark is descriptive of the goods.

I do not think the word mark is descriptive of or has reference to the plaintiff's goods at all, but at least not in the sense, or in that degree which invalidates it as a trade-mark. For a word to be really descriptive, it must describe something which is material to the composition of the goods, and that cannot here I think be said. Further it is not a word I think in common use anywhere, and if it has reference to, or is suggestive of the quality or characteristics of the goods, it is so remote as not to constitute a practical or reasonable objection, or a contravention of the statute. As was said by Vaughan Williams L.J., in the *Tabloid Case* (1), if a word mark must not be descriptive it need not be absolutely unsuggestive. See also the *Bovril Case* (2); *The Solio Case* (3). If Thermogene means the plaintiff's product, it is owing to the use made of it by the plaintiff, and his success in making the public acquainted with it, but that is different from saying that the word is a common word, or a descriptive word. The defendant of course may make and vend a medicated wadding, and adopt for it a word trade-mark as others in fact have done. I think therefore the word "Thermogene" is not descriptive and is a valid trade-mark.

The plaintiff also contends alternatively that the word "Thermogene" although it be *prima facie* descriptive, or have reference to the goods, has acquired a secondary distinctive meaning; and that in Canada it distinguishes the

(1) [1904] 1 Ch. 736 (C.A.)

(2) [1896] 2 Ch. 600 (C.A.)

(3) [1898] A.C. 571.

plaintiff's goods; that before it commenced to use the word it was not commonly used to identify anything, and that now it means nothing else but the plaintiff's goods, and is therefore distinctive of the plaintiff's goods. That long and continued use of a word mark may become distinctive of one's goods and may acquire a secondary distinctive meaning, has long been a recognized doctrine of the law of trade-marks. *Reddway v. Banham* (1); *Eno v. Dunn* (2); *Re California Fig Syrup Co.* (3); *Horlick's Case* (4). In the second last mentioned case Fletcher Moulton L.J., said at p. 146:—

The question as to whether a word is or is not capable of becoming distinctive of the goods of a particular trader, is a question of fact, and is not determined by its being or not descriptive. The law has never refused to recognize that this is the case, or to give protection to descriptive trade-marks when once established in fact.

The English Trade-Mark Act, 1905, now makes provision for the registration of distinctive words upon evidence of distinctiveness, and also for the continuance of registration for the same reason. This was really declaratory of what I think had been the law. Section 5 of that Act states that "distinctive" shall mean adapted to distinguish the goods of the proprietor of the trade-mark from that of other persons. In determining whether a trade-mark is so adapted, the tribunal may, in the case of a trade-mark in actual use, take into consideration the extent to which the user has rendered such trade-mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered. Our present Trade-Mark Rule 10 is to the same effect, in the case of primary registration.

Here the evidence proves abundantly that in Canada the word mark of the plaintiff, by extensive usage, has become adapted to distinguish its goods. The word was registered first in 1909, along with other matter, but for some reason the word "Thermogene" by itself was registered again in 1916, and it is upon this registration that the present action is brought. According to the evidence there are about 3,000 drug stores in Canada, and between 2,800 and 2,900 sell Thermogene, the plaintiff's goods. As some witnesses state that they have known of this mark,

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(1) [1896] 13 R.P.C. 218.

(2) [1890] 15 A.C. 252.

(3) [1910] Ch. 130.

(4) [1917] 64 S.C.R. 466.

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as distinguishing the plaintiff's goods for over 20 years, I think it is probable that the goods of the plaintiff were sold in Canada prior to the registration of its first mark by either the plaintiff or Vandembroeck & Cie, its predecessor.

The validity of the plaintiff's trade-mark now being questioned, and long continued and extensive user in Canada being well established by the evidence, and it being clear from the evidence that the mark has become adapted to distinguish the goods of the plaintiff. I am of the opinion that the word has acquired a secondary distinctive meaning, and is now a valid trade-mark, whether or not it is a descriptive word, and whether or not it has reference to the character or quality of the goods in connection with which the mark is used.

The defendant pleads that a judgment of the Court of Appeal of Paris, held, that the word mark here in question was descriptive. No evidence as to what was the French law in respect of trade-marks as for instance whether the doctrine of secondary meaning finds acceptance there, and there being judgments of other French courts, and also a Belgian court, to the contrary, and which were referred to at the trial, I do not think it necessary or desirable that I should discuss that particular decision. For the reasons I have given, I am of the opinion that the plaintiff's mark is a valid mark; I am also of the opinion that the defendant's trade-mark infringes the plaintiff's mark by the use of the word "Thermogene" therein, and that the word "Thermogene" was improperly therein registered because it was calculated to mislead and deceive the public, as in fact the evidence sufficiently discloses. The plaintiff is entitled to the usual injunction; to damages, with a reference to the Registrar to assess the same; and also to an order requiring the defendant to deliver up to the plaintiff all containers, labels, etc., as claimed. The plaintiff shall also have its costs of action.

Judgment accordingly.

HIS MAJESTY THE KING.....PLAINTIFF;

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}

AND

A. B. COLEMAN.....DEFENDANT.

Expropriation—Prospective value—Market value.

Defendant was the owner of an extensive property, near Hamilton, upon which was erected a hotel and several cottages and outbuildings. This was composed of land and water, there being 55 acres of pond and as much marsh land around the same. The buildings and about 7 acres of land on which they stood were expropriated by the Crown, for a hospital. Defendant met the question of compensation by putting forth a scheme by which he would fill in and reclaim the pond at a cost varying from \$195,000 to \$500,000, subdividing the same into building lots, and claimed, among other things, a large amount for damages to such lands arising out of the establishment of a hospital, by plaintiff, in that vicinity.

Held, that the owner of property is not entitled to claim as an element of its market value at the time of expropriation, some prospective value of the property remote in its character and only realizable upon the expenditure of enormous sums of money.

INFORMATION exhibited by the Attorney-General of Canada to have certain lands and buildings described in the Information and which had been expropriated, valued by the Court.

Toronto, October 26th to 30th, November 2nd to 7th, 1925.

Action now heard before the Honourable Mr. Justice Audette.

McGregor Young K.C., E. H. Cleaver and W. A. Chisholm for plaintiff.

W. N. Tilley K.C. and C. F. K. Carson for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. now this 14th of January, 1926, delivered judgment.

This is an Information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands and buildings described in par. 2 of the Information and belonging to the defendant, were expropriated, on the 17th day of July, 1917, for a period of three years, for the purpose of a public work of Canada, viz., a military hospital, by depositing a plan and description of the same in the office of the Registrar of Deeds for the

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County or Registration Division of Halton, in the province of Ontario.

However, subsequently thereto, it having been found that the property, as described in par. 2 of the Information, was not sufficient for the purpose of the public work, and that further and additional lands were required for the purpose of that military hospital—the lands and buildings, described in par. 4 of the Information (which include all the lands and buildings described in par. 2 of the Information) and belonging to the defendant, were taken in fee, for the same purpose, by depositing on the 18th day of October, 1918, a plan and description of the same in the office of the said Registrar of Deeds.

On the 14th November, 1918, the plaintiff paid the defendant the sum of \$120,000 on account of the said lands and buildings described in par. 4 thereof, but now alleges that such payment was made by mistake (par. 6 of the Information).

Therefore, the plaintiff now offers for these lands and buildings the sum of \$99,393.65 in full compensation, asking that the defendant be condemned to pay back to the plaintiff the difference between \$120,000 and \$99,393.65, namely the sum of \$20,606.35.

The defendant, by his statement in defence, claims the sum of \$515,109 on account of which he has been paid the said sum of \$120,000, leaving a balance of \$395,109.

The only question to be determined in the present controversy is the fixing of the amount of the compensation for the said lands and buildings and damages, if any, resulting from the said expropriation.

The evidence adduced at trial is too voluminous for me to attempt to give anything like a general analysis of it, nor would such analysis serve to illustrate the grounds of my decision in any special way. I shall, therefore, confine myself to pointing out in a general way the governing facts of the case.

The property taken covers an area of 6 11/100 acres, upon which are erected the several buildings, fully described on plan No. 10, as well as upon many other plans showing the same.

I have had the advantage, accompanied by counsel for both the plaintiff and the defendant, to view the premises in question on the 2nd day of the trial.

In 1917, the defendant was the owner of a certain tract of land in the township of Nelson, in the county of Halton, and adjacent to the village of Burlington, about 10 miles from Hamilton, upon which was erected the Brant Hotel and the several cottages and outbuildings shown on the plans. The total area of such holdings at that date was about 150 acres composed of land and water—55 acres of pond and as much marsh land around the same.

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The defendant met the question of compensation by the conception of a large scheme by which he would fill in and reclaim the pond at the cost varying, under the evidence, between \$194,940 to something over \$500,000, subdividing the same into building lots and claiming, among other items, a large amount for damages to such lots arising out of the establishment of a hospital in that vicinity.

The inflated estimate placed upon the property by this resourceful conception of a prospective value that might be thought to qualify for larger compensation under the authorities—only physically possible upon the expenditure of enormous sums of money—is not a proper basis to arrive at the market value of the property and compensation for the same; because we are seeking the value of the property as it stood on the date of the expropriation with, however, its potentiality within a reasonable but not remote future. It therefore becomes unnecessary, in the view I take of the case, to decide whether or not this scheme, which is fraught with the greatest optimism, is financially practical or not, without totally ignoring it. *The King v. Bélanger* (1) affirmed by the Supreme Court of Canada on the 26th May, 1921.

Whether a business man would venture into such a scheme in that locality and risk \$500,000 in such an enterprise, taking into consideration the former returns of the Brant Hotel, is a question I need not further consider. The *King v. Carslake Hotel* (2) affirmed by the Supreme Court of Canada on the 13th June, 1916.

Incidentally it is perhaps worth quoting a specimen of the evidence showing how characteristic it is of the whole case.

(1) [1920] 19 Ex. C.R. 423.

(2) [1915] 16 Ex. C.R. 24 at 31.

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The defendant, on the witness-stand, has given expression to these inflated values by placing upon the land taken a value of.....	\$154,800 00
the buildings taken	217,580 50
and the damages to the balance of his property	127,350 00
	<hr/>
	\$499,730 50

These are most extraordinary figures and most unjustifiable.

One of the pitfalls of this exaggerated evidence may be found in the contestation, by the defendant, of the municipal assessment for the year 1916 at \$36,000 for the whole of his property. How inconsistent with these valuations—even granting and fully recognizing that the municipal assessment does not represent the true market value of the property—yet it is always a landmark and a starting point which can hardly in this case be reconciled with a valuation of \$25,000 an acre.

Another pitfall for such contention is the testimony of witness Symond whose demeanour, at trial, has convinced me that, disinterested as he was, he established most honestly and truly what took place between the defendant and himself on the 4th December, 1916, with respect to a fair price either for renting or purchasing the defendant's property described in par. 2 of the Information, when the sums of \$85,000 to \$100,000 were mentioned. The defendant admits part and controverts part of witness Symond's evidence; he endeavours to make of this interview as much of an anodyne as possible. However, the defendant is the most interested party in the case, while witness Symond is absolutely disinterested and is supported and borne out in his testimony by notes taken at that time which appear in pencil notation on exhibit No. 9. A yearly rental of \$5,000 was at the time fixed and that covered the property described in par. 2 of the Information, including the buildings all furnished. A tentative lease was at that time prepared showing the property was to be leased at \$6,000 a year for the disclosed purpose of a Convalescent Hospital and Vocational Training School. No good reason was given why the lease was not signed. It dropped; but it was dropped by the Crown and not by the defendant who kept writing to Captain

Symond, in very guarded language, expecting further news "in keeping with the conversation of the 4th December" (exhibit Z5) and Captain Symond qualifies the matter in his letter of the 20th December, as "the offer of the Hotel Brant which has been kept in abeyance," etc. (exhibit Z7) —when finally in answer to defendant's letter of the 10th January, 1917, he informs him that "the location of the Hotel Brant is not found suitable" (exhibit Z9).

The amount of the claim is so arresting as to make one feel the necessity for serious thought and question the fairness of such high and inflated valuation of half a million dollars. This is unwarranted optimism. The scheme is a by-product too remote from the chief matter. The just price is known by the common estimation of what the property is worth; it is known to some extent by the public opinion as to what it is right to give for that property under ordinary circumstances.

This property must be assessed, as it stood at the date of the expropriation, at its market value in respect of the best uses it can be put to, taking into consideration at that time any reasonable prospective capabilities or potentialities in value it may obtain within a reasonably near future.

And as said in *Cedar Rapids Co.* case (1) the value to the owner consists in all the advantages which the property possesses, present, and future; but it is the present value alone of such advantages that falls to be determined.

The price must be tested by the imaginary market value which would have ruled had the property been exposed for sale at the date of the expropriation.

Again, in *The King v. Trudel* (2) the Court held that the estimation of the compensation to be awarded to the owner of the property should be made according to the value of the property to such owner at the date of the expropriation.

A much abused expression made use of at trial was the term "first class" as applied to the buildings in question. They are clearly of a second class and cheaply built; the type of construction is light and depreciation serious. The site of the hotel is neither pleasing nor attractive, over-

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(1) [1914] 30 T.L.R. 293 at p. 294; [1914] A.C. 569. (2) [1913] 49 S.C.R. 501.

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 —

looking this unsightly pond and marsh upon which grow weeds and vegetation of wild character. Part of the pond is used at present as a dumping ground. There is a railway passing close by at a level with the highway, thereby adding a character of undesirability and danger. There are also those electric towers carrying current at high tension voltage which add nothing to the beauty and safety of the place. All of this has a depressing effect on the value of the property. Moreover, the hotel, built in 1899, was obviously always run at a loss. Most extensive general and necessary repairs were made by the Crown to the building before occupation of the property. The Government having abandoned the use of the property late in the fall of 1923, I suggested to counsel during the trial, that by agreement, the property might be returned to the owner upon the Crown paying for the use thereof since the expropriation; but that view could not be given effect to.

Now, the value of this expropriated property must be approached as a whole as a far-seeing business man would do, without going into a quantity survey-measure of everything that goes into the buildings. *Kendall v. The King* (1) affirmed by Supreme Court of Canada on 29th October, 1912; *The King v. Carlslake Hotel Co. (ubi supra)*; *The King v. Manuel* (2) affirmed by Supreme Court of Canada on 29th December, 1915.

The property must be valued as it stood in 1918, but as equipped in 1917.

For the consideration to which I have adverted and from weighing the evidence carefully I have come to the conclusion to fix, as just and fair, the compensation at \$140,000 for the property expropriated in 1918, to which must be added the sum of \$4,876.60 as set forth in exhibit Z3 and agreed upon by both parties.

In this amount of \$140,000 are included all legal elements of compensation, including damages to a certain part of the property held in unity with the part expropriated; but exclusive of the pond and marsh (which are already a detriment to the property) and also exclusive of Indian Point which was not held in unity and is too far away—such damage being of a too remote nature.

This property was compulsorily taken when the hotel was a running concern and some of the cottages under lease, the owner having to move and find new quarters for himself and family, necessitating the cost of moving, etc. For all these reasons I will allow 10 per cent upon the total amount of compensation.

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Recapitulating:

For the land and buildings.....	\$140,000 00
For the amount of Ex. Z3.....	4,876 60
	<hr/>
	\$144,876 60
10 per cent upon same.....	14,487 66
	<hr/>
Total	\$159,364 26

The use of the property was taken in part in 1917 as above mentioned. With the view of making the award to fully cover everything I will allow the interest upon the compensation moneys to run from as far back as the date of the first expropriation; the interest upon the same between the dates of the two expropriations to represent the value of the occupation of such property by the Crown.

Therefore there will be judgment as follows, viz: * * *

Judgment accordingly.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

H. E. IRWIN.....DEFENDANT.

1926
April 12.

Crown—Constitutional Law—B.N.A. Act—Naturalization Act—Presumption that all formalities re passing of an act have been observed.

Under the Naturalization Act defendant was required to perform certain duties and collect certain fees and account therefor to the Secretary of State for Canada. He collected the fees, retained from the same what he thought he was entitled to personally, and paid the balance to the Ontario Provincial Treasurer instead of so accounting, as required by the Act and Regulations made thereunder. Hence this action. The defence claimed that the said Act was in the nature of a money bill and was not properly introduced into the House and was void; and that, moreover, the Federal Authorities after having appointed the clerk of the Court of General Sessions, this clerk being a provincial officer, was subject to the provincial laws, and by subsec. 14 of sec. 92 of the B.N.A. Act he was bound to apply the moneys or fees so collected for maintenance of the provincial courts.

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Held, that when a statute appears on its face to have been duly passed by a competent legislature, the courts must assume that all things have been rightly done in respect of its passage, and cannot entertain any argument that there is a defect of parliamentary procedure lying behind the Act.

2. That the Dominion Parliament had a clear right to give to the Court of Sessions of the Peace the jurisdiction in question and to assign to the clerk thereof the duties conferred by the Naturalization Act, and to utilize existing provincial officers. That the power of legislation given to the provincial legislatures by sub-sec. 14 of sec. 92 of the B.N.A. Act covers matters within the powers of the provincial legislatures and no more, and does not let in the right to trench upon the federal power and authority. That the act of the federal authority in no way invaded the rights of the local legislature.

Information exhibited by the Attorney-General of Canada to recover certain moneys collected by the defendant in his capacity of clerk of the Court of General Sessions, under the Naturalization Act.

Toronto, March 26th, 1926.

Case now tried before the Honourable Mr. Justice Audette.

G. Wilkie K.C. and *T. Delamere* for plaintiff.

E. Bailey K.C. for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. now this 12th April, 1926, delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it is sought to recover from the defendant the sum of \$11,092.50, as representing monies collected by him, in his capacity of Clerk of the Court of General Sessions of the Peace, Ontario, while acting under the authority and provisions of the Naturalization Act.

Beyond all doubt, the question of naturalization falls under one of the heads of the exclusive legislative authority of the Parliament of Canada, under the provisions of sub-sec. 25 of sec. 92 of The British North America Act, 1867.

Both under the Naturalization Act and the Regulations made thereunder, the defendant as Clerk of the Court of General Sessions is required to perform certain duties, and

to collect fees and account for the same to the Secretary of State of Canada.

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The defendant collected these fees, retained from the same what he thought he was personally entitled to and paid the balance thereof, without beforehand advising the Federal authorities, to the Ontario Provincial Treasurer, instead of accounting for the same, as required by the Act and Regulations made thereunder, to the Secretary of State of Canada. Hence the present controversy.

Stated in a summary way, without going into unnecessary details, the position taken by the defendant is that while granting that the Parliament of Canada has exclusive legislative authority over all matters of naturalization, in as much as sec. 25 of the Act enacts that a *fee* is to be paid to an officer of a Provincial Court, it is dealing with subject-matter that is in the nature of taxation, and as such becomes a money bill which should be introduced in the manner provided by sec. 54 of the B.N.A. Act, that is upon the recommendation of the Governor General.

Now there is not a tittle of evidence showing whether or not such recommendation was made before the passing of the Act. But that is of no importance in disposing of this case, because it is no part of the business of the Court in construing a statute to enquire as to whether the legislature in passing it did or did not proceed according to the *lex parliamenti*.

It is a matter of elementary law that when a statute appears on its face to have been duly passed by a competent legislature, the courts must assume that all things have been rightly done in respect of its passage through the legislature, and cannot entertain any argument that there is a defect of parliamentary procedure lying behind the Act as a matter of fact. It is a case where the maxim *Omnia praesumuntur rite esse acta* applies with great force and rigour. It is for Parliament to decide how they will proceed to legislate and it is only the concrete embodiment of such legislation—the statute itself—that the Court is called upon to construe. The doctrine is well expressed by the learned judges in the following excerpts from pertinent cases:—

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In the case of *Commissioners for Income Tax v. Pemsel* (1) Lord Halsbury L.C. says:

But I do not think it is competent to any Court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a Court of Law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes.

In the case of *Richards v. McBride* (2), Grove J. says:

But we cannot assume a mistake in an Act of Parliament. If we did so, we should render many Acts uncertain, by putting different construction on them according to our individual conjectures. The draftsman of this Act may have made a mistake. If so, the remedy is for the legislature to amend it. But we must construe Acts of Parliament as they are, without regard to consequences, except in those cases where the words used are so ambiguous that they may be construed in two senses, and even then we must not regard what happened in Parliament, but look to what is within the four corners of the Act, and to the grievance intended to be remedied, or, in penal statutes, to the offence intended to be corrected.

In *Lee v. Bude and Torrington Junction Railway Co.* (3), Willes J. says:

It was once said,—I think in Hobart,—that, if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords and Commons? I deny that any such authority exists. If an Act of Parliament *has been obtained improperly, it is for the legislature to correct it* by repealing it; but, so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them. * * * * Having neglected to take the proper steps at the proper time to prevent the Act from passing into a law, it is too late now to raise any objections to it.

The statute here in question is silent with regard to impost and taxation; but it purports to give the Governor in Council, under sec. 25, the power to make regulations for carrying into effect the objects of the Act and in particular with respect to the imposition and application of fees.

This impugned section does no more than provide reasonable means for the carrying into effect of the Act in question which falls within the exclusive jurisdiction of

(1) [1891] A.C. 531 at p. 549.

(3) [1871] L.R. 6 C.P. 576 at

(2) [1881-82] 8 Q.B.D. 119 at
 p. 122.

p. 582.

the federal legislature, and there is nothing *ultra vires* in the power conferred by sec. 25 on the Clerk to collect the necessary fees to defray the administration of the Act. *Toronto Corporation v. C.P.R.* (1).

Neither is there any occasion to confound the meaning of the word "fee" with that of the words "impost" or "tax." Indeed, the word "fee" as used in the Act, means nothing more than a sum which a public officer is authorized to demand as payment for the execution of his official duty, and it is not in the nature of a charge upon the public—while the word "tax" is a compulsory contribution to the support of a government, levied on persons, property, income, commodities, transactions, etc. So, too, the word "impost" is a tax, one that is more especially used in respect of customs duty levied on merchandise.

Therefore the Naturalization Act is not, within the ambit of sec. 5 of the B.N.A. Act, a money bill either *dans son ensemble* or even approached upon the consideration of sec. 25 thereof, and the plea on that ground fails. See May's Parliamentary Practice, 13th ed. 435. Beauchesne, Parliamentary Rules and Forms, Rule 77, No. 621, pp. 165, 166. Todd, at p. 709, states that the British Practice is the guide for Canada.

The defendant, as a second ground of defence, contends that after the Federal Authorities had appointed the Clerk of the Court of General Sessions, this Clerk, being a provincial officer, became subject—under sub-sec. 14 of sec. 92 of the B.N.A. Act, to the provincial laws and was bound to apply the monies or fees so collected under the Naturalization Act for the "maintenance of the Provincial Courts."

With the law or logic of this contention, I am unable to agree.

The Dominion Parliament had a clear right to give to the Court of Sessions of Peace the jurisdiction and to assign to the Clerk thereof the duties conferred by the Naturalization Act, and in doing so to utilize existing judicial officers. The power of legislation given to Provincial Legislatures by sub-sec. 14 of sec. 92, B.N.A. Act, covers matters and subjects within the powers of the Provincial Legislatures and no more. It does not let in a

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(1) [1908] A.C. 54 at 58.

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right to trench, as attempted here, upon the federal powers and authority. See Clement's Can. Constitution, 3rd ed. 511 et seq. See *Valin v. Langlois* (1); *In re Henry Van-cini* (2); *Bruneau v. Massue* (3); Lefroy, Canada's Federal System (1913), 544, 545.

In other words, when once the Parliament of Canada has given certain powers to this judicial provincial officer and has utilized him to perform certain functions and duties in the adjudicating of matters over which such Parliament has exclusive jurisdiction, no provincial legislature can trench upon it; and in doing so the Federal authority in no way invades the rights of the local legislatures.

Moreover, this officer cannot approbate and reprobate the federal authority under which he acted. He cannot deny his power to collect these fees and yet keep some of them for his own purpose. He collects the fees under the Federal Act, puts in his own purse the share which he regards as his own, and then hands the balance to the Province. The attack upon the fees collected under sec. 25 applies as well to his personal fees as to the balance.

Therefore, there will be judgment in favour of the plaintiff against the defendant.

There is no evidence before the Court to enable it to adjust and pass the defendant's account; however, counsel at bar intimated they would, if the case arose, adjust the same among themselves. Failing them to do so, reserve is hereby given to either party to apply, upon notice, to the Court for further direction in respect of the same.

Judgment accordingly.

1 [1879] 3 S.C.R. 1; L.R. 5
 A.C. 115.

(2) [1904] 34 S.C.R. 621.
 (3) [1878] 23 L.C.J. 60.

THE CANADIAN NATIONAL RAIL- } PETITIONERS;
WAY COMPANY }

1926
May 18.

AND

THE TORONTO IRON WORKS, ET AL... RESPONDENTS.

Expropriation—Warrants of possession—Joint Undertaking—Expropriation Act—Canadian National Railway Act (9-10 Geo. V, C. 13)—Toronto Terminal Railway Act (1906).

Held,—That inasmuch as the building of the Toronto Viaduct was authorized to be built under a Special Act of Parliament by the Canadian Pacific Railway, the Grand Trunk Railway, and others, such undertaking could not be said to be that of the Canadian National Railway Company and that the expropriation of land for such purpose should be made under the Railway Act.

(2) That the present undertaking being that of at least two companies, and not that of the Canadian National Railway Company alone, the provisions of the Canadian National Railway Company Act of 1919 permitting it to acquire lands for its purpose under the Expropriation Act, did not apply.

PETITION by the Canadian National Railway Company for warrants of possession regarding certain properties taken by expropriation for the Toronto Viaduct.

Toronto, April 22nd, 1926.

Petition now heard before the Honourable the President (in chambers).

E. Strachan Johnston, K.C., and E. S. Fraser for petitioner.

Hon. W. N. Rowell K.C. for The Toronto Iron Works.

F. H. Snider for C. Richardson, et al.

The facts are as stated in the reasons for judgment.

Maclean J. now this 18th day of May, 1926, delivered judgment.

In these several proceedings, application is made by the Canadian National Railway Company for warrants of possession.

By Chapter 170 of the Statutes of Canada, 1906, the Toronto Terminals Railways Company was incorporated for the purpose of constructing a terminal union passenger station at Toronto, with the incidental facilities, and the Company was empowered to acquire lands, easements, etc., for the purposes of its undertaking. In reality, the under-

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taking was that of the Canadian Pacific Railway Company, and the Grand Trunk Railway Company of Canada, jointly, in the name of The Toronto Terminals Railway Company. Section 17 of this Act states that the Railway Act, 1903, shall apply to the Company, and its undertaking.

In 1914, there was enacted by the Parliament of Canada, The Toronto Viaduct Act, which authorized the Canadian Pacific Railway Company, the Grand Trunk Railway Company of Canada, The Toronto Terminals Railway Company, and the Toronto Harbour Commission, or any of them, to expropriate under the Railway Act, or any other Act then in force, any lands within certain defined bounds, necessary for the purposes of the Toronto Viaduct, and any works incidental thereto, and as and when approved of by the Board of Railway Commissioners for Canada. The viaduct was to be within the area, or nearly so, of the area within which The Toronto Terminals Railway Company would operate. This Act states that the Railway Act should apply, with reference to the expropriation of lands. There was not then in force, any statute enabling any of the bodies herein mentioned to expropriate lands, except under the Railway Act.

Though not chronologically in order, the next important statute in this connection is Chapter 70 of the Statutes of Canada 1924, and which is really in amendment of the Toronto Terminals Railway Act, of 1906, and is entitled An Act respecting The Toronto Terminals Railway Company. It is to be observed that in the meantime, the Canadian National Railway Company had been created by Statute (9-10 Geo. V, c. 13), and had acquired the property of the Canadian Northern Railway and Grand Trunk Railway Company of Canada to which I must later refer. Section 2 of the Act of 1924 enacts as follows:—

In lieu of the viaduct and works provided for by the said orders of the Board and the said agreement, there shall be constructed by the Canadian National Railway and the Canadian Pacific Railway either by themselves or through the Company, a viaduct from a point at or near, etc.

The orders of the Board and the Agreement herein referred to had their origin in the provisions of The Toronto Viaduct Act. Section 3 of Chapter 70, of the Acts of 1924 further provided as follows:—

The whole of the cost of construction of the different bridges and other works to be constructed under the authority of this Act, including the compensation payable for all lands taken or otherwise acquired, and for all lands injuriously affected, whether the property of any of the parties mentioned in this Act or the property of any other person, shall be borne by the Canadian National Railway, the Canadian Pacific Railway, and the Corporation of the City of Toronto in such proportions as the said parties may agree upon, or in default of agreement, it shall be determined by the Board.

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Section 7 provided that the company, that is The Toronto Terminals Railway Company, may within five years of the date of the coming into force of this Act, complete the construction of the works which the company is authorized to construct by its acts of incorporation, and amending acts thereto, including this Act. Section 8 provided that this statute, should come into force upon proclamation, but only when an agreement providing for the construction and completion of the viaduct works, on terms approved of by the Governor in Council, shall have been entered into.

Reverting now to a later date, by Chapter 13 of the Statutes of Canada of 1919, a corporation was created under the name of the Canadian National Railway Company, under which the railway works and undertaking of the companies comprised in the Canadian Northern System was consolidated with the Canadian Government Railway as a National Railway System, and provision was made for the operation of that railway system, under the name of the Canadian National Railway Company. Later, the Grand Trunk Railway was incorporated into the Canadian National Railway Company System.

By section 13 of this Act, it was provided that the Railway Act should apply to the Canadian National Railway Company, with the express exception that in the matter of the location of the lines of this railway company, the making and filing of plans and profiles, and the taking or using of lands, the Expropriation Act (R.S. 1906, c. 143) should apply to the undertaking of The Canadian National Railway Company.

The Canadian National Railway Company in its name, and under the powers of expropriation contained in section 13 of the Act of 1919, expropriated certain parcels of land in the City of Toronto in connection with the construction of the viaduct, and it has petitioned for a war-

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rant of possession in respect of each of these parcels. The owners of the lands in question contend, that there was no authority for such expropriation, under the Expropriation Act, and that proceedings to acquire title and possession should have been taken under the Railway Act. It is common ground I think that neither the Canadian Pacific Railway nor the Toronto Terminals Railway could have proceeded under the Expropriation Act, nor could the Canadian National Railway and Canadian Pacific Railway jointly have proceeded under the Expropriation Act.

After a careful review of the statutes, I cannot avoid the conclusion that it is the Railway Act which applies in these several cases, and that the expropriation proceedings should have been taken under that Act.

The viaduct is a special undertaking of more than one railway, and special legislation being necessary, the same was enacted. Throughout all the legislation, the Railway Act is prescribed as the means of acquiring property for the purposes of the undertaking. In fact it is hardly possible that anything else could have been in the mind of the legislature, at least until the enactment of Chapter 70 of the Statutes of Canada 1924. Even then, as the Canadian National Railway was merely assuming the obligation of the Grand Trunk Railway, in connection with the viaduct, it is difficult to believe that the legislature intended that the power conferred upon the Canadian National Railway by the Act of 1919, to use the provisions of the Expropriation Act for the taking of lands required for its undertaking in general, should be used for the special purposes of the viaduct which was a joint undertaking with other bodies. It is a reasonable construction of the Act of 1924 to say, that as the Canadian National Railway was only put in the place and stead of the Grand Trunk Railway, in relation to the construction of the viaduct, the Canadian National Railway should proceed to expropriate in the same way as the Grand Trunk Railway would have done. If it was intended by the Act of 1924, that the Canadian National Railway should proceed to expropriate under the provisions of the Expropriation Act, that could have been easily expressed and the bearing of previous enactments so modified. Further I do not think the viaduct is an undertaking of the Canadian National Railway.

It is a joint undertaking of at least two railways, and an undertaking directed and authorized by special legislation. I do not think therefore that section 13 of the Act of 1919 applies. The petitioner has not sufficiently answered the allegation of Mr. Rowell, that the Toronto Terminal Railways are constructing a portion of the viaduct. If this is correct, then the position of the petitioner is weaker still. It seems to me the work must be done jointly by the two railways mentioned, or by the Toronto Terminal Railway, and that the expropriation powers of either railway in respect of what is strictly its own undertakings, cannot be severally exercised for a section of the viaduct works, by any one of them.

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Inasmuch as expropriation proceedings have already been taken by the Canadian National Railway, in respect of the lands mentioned in these several applications, and the lands in part entered upon, under the provisions of the Expropriation Act, I should be strongly disposed to affirm and support such proceedings in connection with so important a public work, upon the narrowest possible construction of the statutes, if there was any sanction for doing so. I cannot see, however, that such an inclination receives the slightest support or warrant from the legislation in question.

The petition for a warrant of possession, in the several cases will be dismissed and with costs.

Judgment accordingly.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE CONSUMERS' GAS COMPANY }
 OF TORONTO } DEFENDANT.

Negligence—Damages—Gas Explosion—Evidence, Inference of fact—Responsibility.

The plaintiff was the owner of certain buildings in the City of Toronto and had contracted with the defendant to supply gas for use therein. While the servants of the defendant were connecting the meters in one of the buildings, an explosion took place followed by fire which destroyed this and several other buildings. This operation necessitated reducing a 2-inch pipe to a 1-inch pipe to which was to be added two ½-inch pipe in the form of an elbow, during which time gas would normally escape into the room where the work was being

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done. The evidence establishes that there were no fires or wires supplied with electricity in the buildings which could have caused the explosion. There was no positive evidence of how the explosion happened.

Held, on the facts, that the Court could infer that the explosion and fire was due to the negligence of the servants of the Gas Company in allowing an excessive amount of gas to escape, for which the defendant was liable in damages to the plaintiff.

INFORMATION by the Attorney General of Canada to recover from the defendant damages by reason of destruction of buildings in the City of Toronto due to the negligence of defendant's workmen and servants whilst installing gas connections into the said buildings.

Toronto, February 16th-17th, 1926.

Action now tried before the Honourable the President.

R. S. Robertson, K.C. and *David Henderson* for plaintiff.

W. N. Tilly K.C. and *W. B. Milliken K.C.* for defendant.

The facts are stated in the reasons for judgment.

Maclean J. now this 5th day of May, 1926, delivered judgment.

The plaintiff was the owner of eight buildings situate at Rosedale Heights, Toronto, and which were built for demobilization purposes at the end of the war. At the date of the occurrence later referred to, some of the buildings were being converted into barracks for the accommodation of officers and men of the permanent forces of the Militia of Canada. Upon a plan of the property and buildings, produced as an exhibit at the trial, the buildings are lettered from A to H. The defendant company, a producer and distributor of gas in the City of Toronto, contracted for a supply of gas for use in such of the buildings as were to be occupied, and it had installed a service pipe from the gas main and brought the same into the ground floor of the building C, at the rear end. The plaintiff had installed the gas pipe leading from the ground floor to the upper storey of this building. On February 22nd, 1923, at about 2.30 p.m., servants of the defendant were engaged in installing meters, and making the necessary connections to afford a supply of gas for domestic purposes for the occu-

pants of C, when as the plaintiff alleges, owing to the negligence of the defendant's workmen, a fire occurred destroying the eight buildings, and also the goods and effects of certain officers of the permanent forces of the Militia of Canada, and whose claims for loss and damage were assigned to the plaintiff. The defendant in its defence objected to the assignability in law of such claims, but at the trial this objection was abandoned, upon the plaintiff's undertaking to protect the defendant, against other claims for the same cause. The sole issue raised at the trial was as to the liability of the defendant, for the loss of property which occurred.

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The buildings in question were frame structures two stories high, and the building C, where the fire in question originated, had been converted into living apartments or quarters for married officers of the Militia, and some were actually engaged in moving into these quarters, at the very time the fire occurred. This building was apparently fully ready for occupation, except for the installation of gas. Partitioning between the separate quarters, and the rooms was of light construction, just ordinary studding and beaver board. There were two apartments on the ground floor, and two on the second floor.

The defendant's employees were, at the time in question, making the necessary gas connections to allow a domestic supply for the tenants just moving into C, and installing meters. This was being done in a room on the ground floor at the rear, where a two-inch service gas pipe came up through the flooring, six inches above the floor. In making the connections, it was necessary to reduce the two-inch service pipe to a one-inch pipe, and to the one-inch pipe was to be added two ¾-inch pipes, in the form of an elbow, from each of which an apartment, one on the upper floor and one on the lower floor, would be served with gas. In this operation, though plugs were used to minimize the flow of gas, there were moments when gas would escape, there being no stop-cock in the service pipes, below the ground floor or elsewhere. The witness Cook, who was in charge of the work, had proceeded to the last step in the installation of the meter and making the connections, when, he states, he heard a slight explosion at the ceiling of the room in which he was working, with a

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helper. He states he immediately looked upwards upon hearing the noise and saw a flame, and then instantly looking downwards, where he had been in the act of attempting to complete his connections by putting on a tap, he saw fire coming from the pipe which was in his hand and uncapped. He and his helper were immediately obliged to flee from the building, the clothes of the former having caught fire. The destruction of the building C followed, along with the other seven as well. Cook and his helper say they had not been using fire of any kind in their work, and they both deny smoking, or the use of matches. Cook states that only about a cubic foot of gas would escape in making the connections, though he admitted he had not accurate knowledge upon that point; that the cap or plug would be off the pipes on three separate occasions of about three seconds each, in making the connections, during which periods gas might escape. He had no explanation as to the cause of the happening, and neither did his helper.

I find the following facts to be clearly established. The fire originated in the room where the defendant's employees were making the gas connections. No other persons but Cook and his helper were there. No other work was in progress in that building that day, except that one person was calsoining the walls in the northeast corner of the lower floor, but quite a distance from where the defendant's employees were working. The smoke and flames which first issued from the building came from the rear part of the lower floor of the building, where this work was going on. The first intimation of the occurrence, which the occupants of the two apartments on the second floor had, was smoke coming from below, through the spaces where the radiator pipes came through the floor, in the rear part of the building. The building was heated by steam, and there were no stoves whatever in the building. While the building was wired for electric lighting, the fuses had not yet been put in the fuse box. There was of course no gas in use anywhere in the building. An oil stove had been used for cooking purposes, at about 12.30 p.m. that day at the latest, by Capt. Hodson, one of the occupants of the second floor, but there is nothing to sustain the suggestion of the fire originating from that source.

Major Nordheimer was occupying the other apartment on the second floor, having moved in on the morning of the day in question, and he testifies there was no fire of any kind in his apartment.

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Professor Bain testified that a test was made in his presence on the premises of the defendant just prior to the trial by Cook and a helper, when the several operations performed on the occasion of the fire in making the gas connections were repeated, and the whole test it is alleged was completed in $6\frac{1}{4}$ minutes, and the meter registered a total escape of gas of only $1\frac{1}{2}$ cubic feet. I am not impressed by evidence of this kind, as it would not in fact prove the time occupied by Cook in performing the work which he did in the building C on the occasion in question, nor would it disprove negligence on that occasion in permitting an unnecessary amount of gas to be released. The fact is, that a sufficient amount of gas did escape, which, coming in contact with a flame, caused the fire.

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It is quite clear, that in some way a sufficient volume of gas escaped and became mixed with the air, which, coming in contact with a spark or flame in some way introduced, caused an explosion and a fire. I am irresistably led to the conclusion, that an unnecessary volume of gas was allowed to escape owing to the negligence of the defendant's workmen, and which was the cause of the fire. Whether the introduction of the spark or flame, necessary to cause ignition of the gas, was due to the defendant's workmen, it seems to me matters little, because the real negligence which caused the fire was in permitting so great a volume of gas to escape that when it came into contact with a flame or spark, it caused an explosion followed by fire. The excess of gas and the flame or spark were conditions both requisite for the occurrence. There should not have been permitted such a release of gas as to produce such unfortunate consequences. The presence of a flame or fire, or other ignition means, should always have been considered as possibly existent, or liable at any time to be introduced in some way or other in a building that was occupied, and in any operations necessary and incident to making the gas connections, this contingency should have been effectually guarded against in some way or other, and I do not think it was. It was suggested by

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counsel for the defendant, that some person on the upper floor might have been smoking, and a spark or light might thus have supplied the ignition. Even if any persons present in the upper storey, or any other persons properly in the building had been smoking or using a fire, and gas had escaped through the ceiling into the upper apartments or elsewhere, in such quantities as to become ignited from a light or fire of any kind, I do not quite see that this would change the duty and obligation of the defendant, to ensure that there was no such quantity of gas escaping as to cause ignition, and it should not have been a difficult task for competent mechanics to ensure against this. The essence of the negligence in the circumstances, I should think, was in allowing in an occupied building so much gas to escape that ignition occurred by coming into contact with some fire or flame, whether introduced improperly and negligently by the defendant's workmen or by others who had a right to do so. The facts here exclude negligence on the part of all other persons but that of the defendant's servants. There is absent any intervening agency, which negatives the idea of negligence on the part of the defendant. I am also of the opinion that even if the ignition of the gas was due to a third party that the defendant against whom the action is brought for injury which flows naturally from his wrongful act, cannot be heard to say that but for the intervention of another party the wrongful act might have been prevented.

Finding as I do, that the fire was attributable to the negligence of the servants of the defendant, there would seem to be no occasion for any lengthy discussion of the legal principle generally applicable to causes of this kind. The principle here to be followed, I think, is to be found in the judgment of Erle C.J., in *Scott v. London and St. Katherine Docks Company* (1), in which he said:—

There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or of his servants, and the accident is such as, in the ordinary course of things, would 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.

(1) [1865] 3 H. & C. 596 at p. 601.

The following cases might usefully be referred to: *Rapson v. Cubitt* (1); *Blenkiron v. Great Central Gas Consumers' Co.* (2); *Burrows v. March Gas and Coke Co.* (3); and Lopes L.J. in *Parry v. Smith* (4).

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There will be judgment for the plaintiff together with his costs of action. Should the parties fail to agree upon the amount of damages, there will be a reference to the Registrar to assess the same.

Maclean J.

Judgment accordingly.

Henderson & McGuire, Solicitors for plaintiff.

Mulock, Milliken, Clark & Redman, Solicitors for defendant.

INTERNATIONAL CONE CO. LIMITED, (PETITIONER) } APPELLANT;

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AND

CONSOLIDATED WAFER CO. (OP-POSANT) } RESPONDENT.

Patents—Appeal from Commissioner refusing to grant license—Patent Act, sec. 40—“Reasonable terms”—Trade or industry “unfairly prejudiced.”

Respondent was owner of a patent for a machine for manufacturing cones, and the appellant was carrying on a similar business, manufacturing with a machine of his own make, alleged to be an infringement of respondent's. Rather than fight an action for infringement, appellant applied for a license from respondent, and not being able to come to terms, he applied to the Commissioner of Patents, under sec. 40 of the Patent Act, for a compulsory license, and the Commissioner found that the terms made by the respondent were reasonable and refused to order them to give a license. Thereupon the appellant appealed to this Court.

Held, that the patent in question being upon a machine and not upon a product, the license should be upon the machine, the patented article, and that the respondent by demanding \$25,000 for a machine that cost about \$5,500, or an annual license fee of \$4,000 for the same, failed “to supply on reasonable terms” the patented article within the meaning of the Patent Act.

2. That in deciding whether a certain sum as royalty is “reasonable” within the meaning of the Act, the Court must take into consideration the cost of manufacturing the article and its selling price.

(1) [1842] 9 M. & W. 710.
(2) [1860] 3 L.T.R. 317.

(3) [1872] 41 L.J. Ex. p. 46.
(4) [1879] 41 L.T.R. 93 at p. 95.

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3. That the appellant's business is a trade or industry "unfairly prejudiced by the conditions attached by the patentee" within the meaning of sec. 40, ss. 1 d, ii, and is entitled to ask for an order compelling the patentee to give him a license, at a price to be fixed by the Court.

APPEAL from the decision of the Commissioner of Patents dismissing the appellant's petition for a compulsory license of a patented article on reasonable terms.

Ottawa, March 30th and May 4th, 1926.

Appeal now heard before the Honourable Mr. Justice Audette.

Russell Smart for appellant.

J. A. Macintosh K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now this 19th May, 1926, delivered judgment (1).

This is an appeal, under the provisions of sec. 40 of the Patent Act (13-14 Geo. V, ch. 23), from the decision of the Commissioner of Patents, dismissing the appellant's petition to obtain a compulsory license, on reasonable terms, of the patented machines protected by the Bruckman Canadian Patent No. 145379, for an alleged new and useful improvement in "Automatic pastry making machines." The request made by the appellant's petition is for an order under sec. 40 that the patentees are only entitled to a payment of a license fee on each machine to be operated by the appellant * * * and for the determination of the amount of the license fee, under the circumstances.

It is well to state at the outset the circumstances which lead up to the present application. The appellant does not ask for a license to annoy the respondent; but is led to it by the respondent's conduct.

The appellant is a corporation of very limited means that was carrying on its business of making ice cream cones on a small scale, with a machine of its own, when it was attacked by the respondent by an action for infringement upon its patented machine, under the above patent.

However, it is necessary to bear in mind a very important and significant occurrence, related by witness Hayes,

(1) An appeal has been taken to the Supreme Court of Canada.

and which took place sometime before the institution of the action for infringement.

When the latter was in the employ of the International Cone Company (the appellant) Mr. Dubey, the President and General Manager of the Consolidated Wafer Company (respondent) came to the appellant's office and interviewed him with respect to the price of cones. Witness Dubey asked witness Hayes as representing the appellant company, and in presence of Mr. Hayes' brother, to maintain the prices of cones equal to their own, leaving a copy of the list for such prices. At that time Hayes said they would keep the low prices and the dispute came when the respondent began to cut the prices, a proceeding which appellant had to follow.

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Mr. Dubey on this occasion told Hayes that if the company did not maintain the prices, they, the respondent, would put them out of business.

All what follows seems to be the result of the realization of this threat.

An action was then taken by the respondent, as assignee of the above-mentioned patent, against the appellant for infringement of their patent by the machine under which the appellant was then manufacturing.

The appellant seems to have endeavoured to settle this action by compromise, and in that attempt offered to pay a royalty on the product of the patent, namely 15 cents per 1,000 cones. That was refused. This rejected offer was made because the appellant was unable, under the circumstances, to carry on a litigation to determine whether or not the appellant's machine was an infringement on the respondent's machine. The offer was made, as said by witness Mitchell, with the object of saving any further costs as the company was not financially able to fight the thing out as to whether or not it was infringing. The offer was made under condition of great stress in an effort to avoid a judgment for infringement.

The appellant then consented to judgment against them, a copy of this judgment is to be found in the departmental file filed herein.

These are the circumstances which led up to the present application for a license to use the respondent's machine in manufacturing its cone, since it is now enjoined from using its own machine.

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The appellant's machine costs \$2,000 to construct, without taking into consideration the overhead charges. Witness Dubey testified that the respondent's machine, including pattern, tools, and everything, cost \$6,000, and counsel conceded the cost of \$5,500 during the argument.

It costs appellant \$2.46 $\frac{1}{3}$ to manufacture 1,000 cones, not including overhead charges, and the selling price in the list order was \$2.55 to \$2.85, according to the market. So that from their standpoint 40 cents royalty per 1,000 cones would be prohibitive and unreasonable.

According to Mr. Dubey's evidence, the cost of their cones is about \$2.10 a thousand, including everything. In 1925 they ranged from \$2.60 a 1,000 to \$3.75 according to grade. In 1926, \$2.75 to \$3.75. Average price in 1925 and 1926, \$3. It results also from the evidence that no such machine of its own is leased or licensed in Canada and that in the United States the royalty charged on its machine is 10 per cent of the selling price of the product—and a maximum of 36 cents per 1,000.

It would also appear from the evidence, that the respondent controls between 60 to 75 per cent of the cone production in Canada and it is admitted by Mr. Dubey that operating on a large scale, on large number of machines, as they do, one could operate with a much lower overhead than a person operating only one machine.

When the matter of this appeal came before me, with the object of changing this controversy from a theoretical to an actual basis, I directed that the following questions be put to the respondent:—

1. What will respondent sell a machine for, outright, without royalty?
2. What fixed sum will respondent accept as a license on the machine installed by appellant?
3. What royalty, in lieu of a fixed sum on the machine, is respondent prepared to accept on the product?

Counsel at bar for the respondent desired to consult his client before answering and an adjournment was given for that purpose and counsel subsequently answered the first by stating that his "clients will sell a Bruckman machine outright, without royalty, for \$25,000."

2. In answer to the second question: the respondent will accept an annual license fee or royalty on a Bruckman machine of \$4,000 during the balance of the life of the patent.

3. And in answer to the third question: the respondent will accept a royalty of 40 cents per thousand on the product of a Bruckman machine.

Counsel for respondent adding, however, It does not seem to us the Court has any power to direct a license by which your clients (the appellant) can use their infringing machine and that all questions of compensation must be based on our clients' invention and the machine produced by them under the Bruckman patent. If, however, your clients were willing to use their own machine and to pay a royalty on the product, our clients might be willing to make some small concession so far as the amount of the royalty per thousand is concerned.

Yet by the third paragraph of the respondent's answer to the appellant's petition, the respondent avers that it is prepared to furnish the patented machine or to allow the petitioner to use its infringing machine, etc. And counsel for respondent on the second page of the report of the proceedings before the Commissioners, states: "There is only one question and we are willing to give them a license, and the question is what the terms are."

Now by sec. 40 of the Patent Act, it is enacted that every patent, with an exception not coming within the compass of this case, shall be subject to the following conditions:—

(b) Any person interested may present a petition to the Commissioner alleging that the reasonable requirements of the public with respect to a patented invention have not been satisfied and praying that the patentee be ordered to *supply the patented article at a reasonable price or grant a license for the use of the invention on reasonable terms.*

By sub-sec. (d) of the same section, it is further provided that:—

(d) For the purposes of this section the reasonable requirements of the public shall not be deemed to have been satisfied,—

(i) if by reason of the default of the patentee to manufacture to an adequate extent and supply on reasonable terms the patented article, or any parts thereof which are necessary for its efficient working, or to carry on the patented process to an adequate extent or to grant licenses on reasonable terms, any existing trade or industry, or the establishment of any new trade or industry, in the Dominion of Canada is unfairly prejudiced, or the demand for the patented article or the article produced by the patented process is not reasonably met; or

(ii) if any trade or industry in the Dominion of Canada is unfairly prejudiced by the conditions attached by the patentee before or after the passing of this Act to the purchase, hire, or use of the patented article or to the using or working of the patented process.

In view of all the circumstances above referred to and the above-mentioned section of the Act, I find first that

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the respondent has failed "to supply on *reasonable terms*" the patented article, when he is demanding \$25,000 for a machine that costs about \$5,500, or when asking for an annual license fee of \$4,000 for the same. And secondly I find that he again fails to comply with the statute when he offers to grant a license at 40 cents a 1,000 cones; that these terms are not "reasonable" when one takes into consideration the cost of manufacturing the same and its selling price; and that the trade or industry in which the appellant is working, is thereby "unfairly prejudiced." Indeed, the appellant, under such conditions, is unable to carry on its trade, to the best possible advantage, unless it can manufacture under the patent to compete with the patentee; and that is made impossible by the patentee demanding such an exorbitant price as \$25,000 for the machine, \$4,000 for an annual license, or for a royalty of 40 cents per 1,000 cones,—in view of the cost of production and the market price thereof. *In re Levinstein Ltd.* (1).

"Reasonable terms" means a reasonable price in money. *The Copeland-Chatterson Co. v. Hatton* (2). The patentee must sell or deliver licenses as required by the statute. *The Toronto Tel. Mfg. Co. v. The Bell Tel. Co. of Canada* (3).

The respondent cannot hold its patent for the sole purpose of blocking trade; it must sell or grant a license on reasonable terms. While the object and spirit of the Patent Act is to give a monopoly, yet the statute provides also a remedy to overcome any abuse of such monopoly. The statute provides measures to put a stop to any act which would work as a restraint on business or which would be incompatible with the best interests of trade and commerce.

I find the appellant has made a very strong case for relief.

Moreover, in passing upon the statutory requirements as to reasonableness—which I hold not satisfied—it seems, as said in the *Hulton & Bleakley's case* (4), that the statute left to the Court the power of passing upon it in as wide a measure as possible, because it is always exercised

(1) [1898] 15 R.P.C. 732 at p. 738.

(3) [1885] 2 Ex. C.R. 495 at 523.

(2) [1906] 10 Ex. C.R. 224 at 239;

(4) [1898] 15 R.P.C. 753.

37 S.C.R. 651.

under discretion. In this latter case a compulsory license was ordered upon a royalty of £20 per annum.

The patent in question is upon a machine and not upon a product; therefore the license should be upon the machine, the patented article.

The cost of maintenance of a Bruckman machine amounts to \$1,500 yearly in repairs and that must be taken into consideration in fixing the royalty, because it would militate against a high royalty.

The Bruckman patent bears date the 21st January, 1913, and has therefore five years more to run.

After mature consideration I have come to the conclusion that as a Bruckman machine costs about \$5,500 that 25 per cent of its cost would constitute a fair and reasonable royalty to cover both profit and a reward for the invention. The price demanded for a license must be reasonable, otherwise it destroys the value of the license altogether. *Goucher v. Clayton et al* (1).

Therefore, there will be judgment ordering the respondent to grant to the appellant a license, to take effect from the date hereof, allowing it to make and use a machine constructed under the Bruckman patent, upon the appellant paying to the respondent—on delivery of the said license—the yearly sum of \$275. The appellant acquiring thereby the right to use the said machine for the unexpired residue of the term of the said patent. The amount of royalty payable the last year of the term of the patent shall be ascertained on the basis of \$275, but determined by the number of days embraced in the said unexpired term of the said patent.

If any difficulty arises as to the form and purport of the said license,—this being the first application of this nature made in Canada,—leave is hereby reserved to either party to apply to the Court, upon notice, for further direction in respect of the same.

If the appellant elect to pay the annual sum of \$275 as above mentioned, they will have to give a bond (to the satisfaction of the Registrar of this Court) at the time of the first payment, for the subsequent payments of the royalty for the four remaining unexpired years, as above mentioned.

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If for any reason the said Letters Patent should become void, or should be declared by a court of law to be void, the licensee will be at liberty, with the consent of the Commissioner of Patents, upon notice in writing to the patentee, to revoke the license.

The appeal is allowed and with costs.

Judgment accordingly.

Solicitor for appellant: *R. S. Smart.*

Solicitors for respondent: *Macdonald & Macintosh.*

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SINCENNES-McNAUGHTON LINES, } SUPPLIANT;
LIMITED }

AND

HIS MAJESTY THE KING RESPONDENT.

*Crown—Negligence—Section 20 Exchequer Court Act—Article 1054 C.C.
Res ipsa loquitur discussed.*

The *J.B.K.* was proceeding down the Lachine Canal to Montreal. She had passed through Basin No. 1, into lock No. 1, where she was duly moored to the south bank. The gates between the Basin and the lock had been closed and the water in the lock was being lowered and let out through sluices. When the water in the lock was about on a level with the river below, and when the lower gates were about to be opened to let the steamer through, the upper gates gave way, releasing the water in the basin and causing the steamer to part her moorings and to break through the gates, and this on-rush of water caused damage to the suppliant's tug.

Held, That as it appeared, upon the evidence, that the breaking of the gates could only have occurred on the theory that the gates were not properly mitred by the servants of the Crown in charge thereof, the court should draw such inference of fact and find liability of the Crown for negligence under sec. 20, sub-sec. c of the Exchequer Court Act.

The applicability of Article 1054 of the Civil Code of the province of Quebec in actions such as this one against the Crown, and the maxim *res ipsa loquitur* discussed and commented upon.

Petition of right to recover damages for injuries caused to the tug boat *Virginia* by reason of the alleged fault of the servants of the Crown.

Montreal, March 10th, 1926.

Case now tried before the Honourable the President.

A. W. Atwater K.C., W. L. Bond K.C., and L. Beauregard for suppliant.

Aimé Geoffrion K.C. and J. A. Prud'homme K.C. for respondent.

The facts are stated in the reasons for judgment.

MACLEAN J. now this 16th April, 1926, delivered judgment (1).

This is a Petition of Right, wherein the suppliant seeks damages for injuries caused its tug boat, *Virginia*, by the negligence and fault of the servants of the respondent it is alleged, and in the following circumstances.

On the night of August 29th, 1923, the steamer *John B. Ketchum 2nd*, 190 feet in length, was proceeding down the Lachine Canal on her way to the Harbour of Montreal and onwards. She had passed through Basin No. 1 and into Lock No. 1, which is 270 feet in length, where she was moored in conformity with the canal rules and requirements, on the south bank of the lock. The gates between the basin and Lock No. 1 having been closed, the lock was being emptied of water through the sluices of the lower gates, and when the water in the lock was about on a level with the water in the river or harbour below, and when the lower gates were about to be opened to allow the *Ketchum* to pass out of the lock, the upper gates gave way, releasing the body of water in the basin above which caused the *Ketchum* to part her moorings and break through the lower gates. This in the end caused the damage complained of to the tug boat of the suppliant company. At the time of the accident the water in the basin was from 14 to 16 feet higher than in Lock No. 1. The south upper gate floated down through the lock, the north upper gate hung by the wall of the lock, but had passed over the sill. The suppliant's submission is that the breaking of the gates between the basin and the lock was due to the negligence of the respondent, in lowering the water in the lock, before the upper gates, that is the gates between the basin and the lock, were properly closed or mitred, which the respondent denies.

The gates are made of horizontal beams of heavy timbers tied together with steel beams, tie rods, etc., and each weighs from 40 to 50 tons. The upper gates, which are here particularly in question, each measure 31½ feet in height, by 28 feet in length, horizontally. They are two feet thick at the bottom, and upwards to a distance of 20

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feet, the thickness of the remaining portion being about 20 inches. The mitre-sill consists of heavy timbers, 18 x 17 inches. It is well anchored into the masonry where it is screwed, bolted and concreted, and forms a V-shaped abutment several inches above the floor of the lock, and against which the gates abut when closed. The gates normally are above the flooring of the canal, and do not touch the bottom at any point, except at a point near the canal walls.

The gates are independently operated by electric motors, one on each side of the lock wall, and there is one operator for each motor. The valves at the bottom of the gates are also operated by electric motors, but jointly. The closing or bringing together of the ends of the gates is ordinarily called mitring. The horizontal pieces of timbers forming the gates are bevelled at the ends where the gates come together, and this bevelled end of a gate is usually referred to as the mitre of the gate. When the gates are brought together or mitred, they are not then straight across from wall to wall, but meet in a V-shape, pointing up against the current.

The question for decision therefore is what caused the upper gates to break, and the water to rush from the basin into the lock, if that is capable of ascertainment, and if ascertained whether the same was due to the negligence of the employees of the respondent.

Some of the possible causes of the accident may safely be eliminated. It was suggested, that the *Ketchum* in swinging on her moorings, moved astern and broke the gates. There is not a word of evidence to support this suggestion, and there is positive evidence against it. It could not, in my opinion, have happened without its being well known to several persons; and had it occurred, I have no doubt witnesses would have been available to clearly establish the fact. The captain of the *Ketchum* had just barely passed off the platform of the upper gates, crossing from the north side to the south side to join his boat, when the accident occurred. While on the platform, he was conversing with the lockmaster Sandilands. At the moment of the accident, Sandilands was just about to give the signal to open the lower gates. The upper south gate motorman was close to both his gate and the *Ketchum*.

Had the *Ketchum* swung astern against the gates it could not but have been observed by several persons. I find that there is nothing whatever to justify a serious consideration of this theory, and the suggestion of any such occurrence may be confidently dismissed. Then there is no evidence that the mitre sills were in the least injured; in fact the evidence is to the effect that after the accident they were found to be in good condition. There is no suggestion that the electric motors, operating the upper gates, were not in good order and properly functioning, immediately before the accident.

The gates were I think strongly built, and in good condition. The evidence is all that way. They had been in use for over a year, and had worked successfully. While there may have been slight repairs required during that time, and while at times the gates may not have worked without some minor difficulties, yet this would, I am satisfied, be traceable to the appurtenances of the gates or other causes, and not to the gates themselves. That type of gate had been in use here for fifty years. The suppliant suggested inferences from the fact that the gates in coming together, on the occasion in question, trembled more than usual. I think this was of common occurrence, and by itself would not be evidence of importance, although I do not say it may not have been in this instance, indicative of a condition of affairs, prevailing immediately prior to the breaking of the gates, and prophetic of the disaster.

There is only one remaining possible or probable cause of the breaking of the gates, and that is the improper mitring of the gates, which is claimed by the suppliant as the real cause, and this must be carefully considered. In the first place it should be stated that the foreman carpenter who saw the gates after the accident, says that the north gate which hung to the wall was broken from top to bottom at the mitre end, vertically, every timber being broken. He states also that the pressure must have gone from the south gate against the north gate, breaking the mitring of the latter gate. Col. A. E. Dubuc, Chief Engineer of the Department of Railways and Canals, and at the time of the accident, Superintendent of the Quebec canals, which included the Lachine Canal, gave evidence at the trial, and in a very frank manner. He stated that

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when the mitring is performed perfectly the gates are brought closely together vertically, or as close as masses of that type can be brought together, and rest against the mitre sill at the bottom. He stated that improper mitring, defective mitre sills, or the application of some external force, such as the *Ketchum* striking the gates, could alone account for the accident. With the gates in good condition, he could perceive of no other causes that would account for the accident. Granting that the gates were sufficiently strong to resist the pressure, the mitre sills in good condition, and that the *Ketchum* did not strike the gates, he said there remained only one cause, "something wrong with the mitring." He also testified that if the gates were 3 or 4 inches from coming together, he should be anxious as to the outcome, not only because of the opening between the vertical sections of the gate, but also from the fact that this would mean that the gates would be away from the sills, and with 13 or 14 feet of water against the gates, there would be a tendency for the water to rush under the gates which are three or four inches from the bottom. Both conditions existing, the witness said the effect of this pressure would be to lift the gates and tear them away, and the tendency would be to lift them first. He said also that if one gate was splintered from top to bottom at the mitre end, it would indicate that one gate was forced against the other with tremendous pressure, which could not happen if the gates were properly mitred.

Mr. R. A. Ross, a civil engineer, gave evidence to the effect that imperfect mitring would account for the damage or injury to the gates, and that if one gate overlapped another, the gate which was overlapped would tear the gate that was overlapping, and that in his opinion, the break in the north gate was due to improper mitring, and that the north gate was overlapping the south gate. In supporting this opinion he said:—

We will consider these two leaves (the gates) a barn door, which closes against a sill at the bottom. You have 360 tons pressing at right angles on one gate, tending to close it, and 360 tons at right angles to the other gate. When the angles are properly mitred, the whole of the pressure acts on the mitring and across the whole surface of the whole gate from top to bottom. When the gates are not properly mitred one of them is pressing its sharp corner into the other; still with a pressure of 360 tons in each direction, and therefore one would expect that sharp corner would not only crush in the direction of the opposite gate, but would also tear the fibres of the wood apart.

Mr. Beaubien, another civil engineer, expressed a similar opinion as to the causes producing the breaking of the gates, and I need not enlarge upon the testimony of this witness.

It appears also from the evidence of the captain of the *Ketchum*, that on the night in question, and while crossing the upper gates, he engaged in conversation with the lockmaster, and while doing so, drew the attention of the lockmaster to the fact, that there was a flow of water greater than he had ever seen in his experience, at the mitring and that the latter said "Yes, there is a big leak." The upper gates had apparently not been working satisfactorily for a day or so, and it is clear from the evidence that they were reported the day before the accident, to the Acting Superintending Engineer by one of the lockmasters, and they were to be examined the next day. Some of the evidence would indicate that there was an opening of four or five inches vertically, and two or three inches wide at the top of the gates through which the water was pouring, but it is not clear how far under the water this extended.

After a consideration of the evidence I am of the opinion that the gates, between the basin and Lock No. 1 broke owing to improper mitring, by the servants of the respondent in charge of the same. This is shown, I think, by the fact of an unusual flow of water through the gates on the night in question. While the evidence is not very strong upon this point, yet it could hardly be possible to find the flow of water observed and remarked upon, unless the flow was beyond the usual amount. That there should be some flow might be expected, as it is usual and would cause no comment, but when the flow becomes the subject of remarks as it was here, it is I think a fair inference that the mitring was not reasonably complete. Further it is difficult to understand what else could bring about the breaking of the gates, if there had not been an unusual and improper flow of water between, or under the gates, or both, a condition easily and quickly corrected by re-mitring, and by closing if necessary the sluices of the lower gates. The conclusive evidence, however, in my opinion, that the gates were not properly mitred, inheres in the peculiar fracture or breaking of the mitre end of the north

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gate, which must have been caused by the great pressure of the mitre end of one of the gates, against the other. The vertical fracture of the north gate described by the foreman carpenter of the canal, and as disclosed by the photograph of the same, was only possible in my opinion when the relation of one gate to the other was as described by Ross and Beaubien. Perhaps, no one other condition, or class of evidence, could so effectively prove what caused the gates to break, as the character of the damage to the gates, and particularly the vertical fracture or break at the mitre end of the north gate. I am satisfied that the accident was due to the negligent mitring of the upper gates, and lowering the water in the lock before this was properly done, and that the accident causing the damage complained of, is to be attributed to this. I think therefore the suppliant must succeed.

Finding as I do, that the accident was attributable to the negligence of officers or servants of the respondent, within the meaning of sec. 20, s.s. (c) of the Exchequer Court Act, there would seem to be no occasion for me to discuss in any exhaustive way, legal principles generally applicable to negligence cases. However there were two points raised on the argument that might be mentioned. The first relates to the application of the provisions of Article 1054 of the Civil Code of the Province of Quebec, to cases in this court arising out of the negligence of officers or servants of the Dominion Crown, while acting within the scope of their duties or employment in that province. This point is obviously one of great importance, but as it has already been considered in cases of binding authority, no good purpose would be served by discussing it here, no matter what view I might venture to entertain concerning the conclusions arrived at in such cases. The second point to which some attention might usefully be given is as to whether the common law maxim *res ipsa loquitur* should be applied to the facts of the case before me. I do not think that this or any other maxim has any magical effect in solving difficulties that always occur in relating the facts of any case to the law. I am much impressed by what Erle J. said about the maxim *Sic utere*

tuo ut alienum non ladas in the case of *Bonomi v. Backhouse* (1).

A party may damage the property of another where the law permits; and he may not where the law prohibits; so that the maxim can never be applied till the law is ascertained; and when it is, the maxim is superfluous.

In *Yarmouth v. France* (2) Lord Esher, M. R., speaking of the maxim *Volenti non fit injuria* said:—

Personally I detest any attempt to bring the law into maxims. Maxims are invariably wrong, that is they are so general and large that they always include something which is not intended to be included.

Speaking of the maxim *res ipso loquitur*, itself, Lord Dunedin in the recent case of *Ballard v. North British Railway Company* (3) observed:—

It is not, however, safe to take the remarks which have been made as to the principle of *res ipsa loquitur* in one class of cases and apply them indiscriminately to another class. This leads me to remark that truly there is no such thing as what the Lord Ordinary calls the “principle” of *res ipsa loquitur*. The foundation of all actions of the kind we are considering must be negligence on the part of the defender, and whether the expression *res ipsa loquitur* is applicable or not depends upon whether, in the circumstances of the particular case, the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence.

Then the language of Mr. Justice Duff in delivering the judgment of the Supreme Court of Canada in the Exchequer Appeal of the *Montreal Transportation Company v. The King* (unreported), is quite pertinent here:—

In the course of this case there appears to have been a good deal of loose discussion about *res ipsa loquitur*, a maxim which, when applicable merely asserts the existence of a presumption of responsibility arising from the state of facts proved—it would be more accurate to say, the existence of a *prima facie* case against the defendant. The provision of the Exchequer Court Act under which the present action is brought comes into play only on proof of negligence of some officer or servant in the execution of his duties “on a public work,” and it may very well be that by reason of the conditions of responsibility expressed in the Statute, to establish a *prima facie* case under the Statute is often more difficult than the task of establishing such a case against a subject in the like circumstances.

On the whole I think it is unnecessary to debate in cases like the one at present before me, the applicability of this maxim when we have an authoritative rule of the common law, plainly and succinctly laid down for us in the well-

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(1) [1858] El. Bl. & El. 622 at p. 643. (2) [1888] 57 L.J. Q.B. 7 at p. 9.

(3) [1923] S.C. (H.L.) 43 at p. 53.

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known case *Scott v. London Dock Company* (1). There the plaintiff Scott sued the defendant company, for personal injuries sustained in an accident, due to the negligence of the defendant's servants, in operating a machine for lowering goods from a warehouse of the defendant company to the street. Erle C.J. delivering the judgment of the majority of the court said:—

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

That undoubtedly is an exposition of the principle to be followed in cases of this kind, and I have no hesitation in adopting it.

There will be judgment for the suppliant on the issue of liability, and a reference to the Registrar for inquiry and report concerning the damages sustained by the suppliant as a result of the accident. The suppliant will have its costs of the action.

Judgment accordingly.

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May 10.

PANYARD MACHINE AND MANU- }
FACTURING CO. } PLAINTIFF;

AND

SIMON BOWMAN, TRADING UNDER THE }
NAME, FIRM AND STYLE OF THREE-WAY } DEFENDANT.
PISTON RING Co. }

Patents—Infringement—Validity—Patentability—Commercial success or failure—Evidence.

Held, that a subsequent patent is no defence to an action of infringement.

2. While there may be, in the device charged with infringement, some slight mechanical variation in the nature of equivalent, as compared with the plaintiff's device, there is nevertheless infringement where the plaintiff's patent bears directly on the defendant's device which does not disclose invention, and which involves the very substance of the invention covered by the plaintiff's device.

Action for infringement of certain patents of the plaintiff.

Hamilton, April 6th, 7th, 8th, 1926.

(1) [1865] 3 H. & C. 596 at p. 601.

Action now tried before the Honourable Mr. Justice Audette.

G. F. Henderson K.C. for plaintiff.

F. B. Fetherstonhaugh and *H. S. Fox* for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. now this 10th May, 1926, delivered judgment (1).

This is an action alleging infringement of certain Canadian patents mentioned in the statement of claim herein, whereby the plaintiff seeks the usual injunction, with damages or profits, against the defendant.

The defendant, by his statement in defence, denies infringement and attacks the validity of the patents, concluding, however, merely for the dismissal of the action.

At the opening of the trial counsel for the plaintiff moved for leave to withdraw the name of Charles Ellvin Bleakney as of one of the plaintiffs,—the motion was not opposed and was granted.

The plaintiff's inventions for piston rings, if patentable, are for combination patents and as such fall within the rule of narrow construction since they occupy a place in a field of the art comprising about one thousand of such patents in the United States alone, due to the rapidly increasing manufacturing of automobiles. However a combination of even old parts to produce a better result in a more useful and beneficial way may properly imply invention, and the primary test of a patent is invention. Success from extensive sales is not the test to a right to a patent, yet it is in itself strong evidence that it is useful.

The primary object of these piston rings is to overcome waste of compression and to procure proper lubrication.

The patents in question describe an invention comprising a pair of wedge ring members so constructed and arranged that when properly seated in the piston groove, one ring member normally projects beyond the other so as to engage the cylinder wall initially and exclusively and wear within a limited period of use, after which both sections of the ring then engage the cylinder wall.

(1) An appeal has been taken to the Supreme Court of Canada.

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These rings, although well adapted for standard equipment, and they have been used as such, are intended primarily to be used as replacement rings; because by such construction they are so fitted to stop the difficulties which are encountered in the inequalities or irregularities in a worn cylinder which are frequently scored by use. The overhang ring section which initially exclusively engages the cylinder wall finds, during its initial period of engagement, its seat within the cylinder and fills all the irregularities in the cylinder. Then there is the oil well formed in the ring.

There is a polygon spring with a flat surface, placed at the bottom of the piston groove which maintains a continuous pressure towards the cylinder wall. And as a result of such spring the co-operating ring members always exert a wedging action against the opposite side walls of the groove, thereby producing a combination giving a new result.

Moreover there is another feature in the plaintiff's rings which seems to be found nowhere else, and that is that the cylinder wall engaging the face of the lower section is located between two bevelled faces. The whole is more fully explained in witness McCrae's evidence, wherein he also explains the difference between exhibits No. 2 and No. 3, working upon the same principle, and it is thought unnecessary to proceed any further into the details of the working of these patents. Witness Durea, a man of unusual skill and experience, approves of the Panyard rings and pronounces them good. The Panyard rings are indeed well known on the market and are distinguishable from all other rings.

On the 26th January, 1923, the parties herein entered into an agreement, filed herein as exhibit No. 20, whereby the defendant became the plaintiff's agent as "seller and distributor" of the piston rings manufactured by the plaintiff under its patents.

In 1924, having heard that the defendant was selling a ring manufactured by himself, with no apparent difference from the Panyard ring, under the name of Three-way piston ring, witness Panyard, the president of the plaintiff company, went to the defendant's place of business in Hamilton, to investigate his stock, and found there circu-

lar boxes with these three-way rings closely imitating Panyard rings. On representation being made to the defendant he agreed to discontinue manufacturing the same, admitting he had made a mistake.

However, Bowman having failed to live up to this agreement, the contract (exhibit No. 20) was cancelled by the plaintiff. In the meantime correspondence was exchanged between the parties, as shown by exhibits Nos. 7, 8, 22, 23, 24 and 25, whereby the defendant admits, among other things, having on the 28th October, 1924, sold about 1,542 of his Three-way piston rings, in infringement of the Panyard rings; and by his letter of the 1st November, 1924, he admits having manufactured just over 2,000 Three-way rings which he says were then nearly exhausted.

Mention must also be made of exhibits 28 and 29 which show a sale by the defendant of rings of which the top portion only was Panyard's, the lower section being his own ring, or a ring supplied by him.

Another significant indication of the defendant's intention to infringe the plaintiff's ring and to practice a disloyal competition against him, although his agent, appears from literature published by him as appears in exhibits 21 and 34 and also in a publication called "Better Automotive Equipment." In the latter publication, at page 70, which was read into the evidence, appears what might be called the clearest manifestation of his intention of infringing since he advertised his Three-way piston ring as "New Panyard rings." And under that title appears the following advertisement to the public:—

NEW PANYARD RINGS.

In addition to the well-known Panyard Piston Ring, the Panyard Piston Ring Co. of Canada, Hamilton, Ont., are now supplying the trade with three other types of rings, which are all of the high standard of the original Panyard Ring. These are known as the Three-Way Ring, the Instant-Seat Ring and the O'Seal Piston Ring.

The Three-Way Ring is designed for use on new or close-fitting pistons and to stop oil pumping and compression leaks without causing extra heat or wall pressure. Instant-Seat Rings are especially made to give extra high compression and will seat to the cylinder walls almost instantly. Pistons to which this type is fitted should not be looser than .006 in. The O'Seal Rings are to help hold excess oil from passing, and should be used on the second ring groove from the top with oil seal towards the bottom of the piston.

The defendant admits this literature as coming from him.

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Exhibits 21 and 34 further display this set intention of acting with disloyalty towards the plaintiff, his employer, by advertising his own ring and taking, in doing so, the advantage derived from the Panyard rings.

There is in this case a deal of evidence that would perhaps be specially applicable to a case of passing off—a class of action over which this Court has no jurisdiction—yet that kind of evidence in a case of infringement certainly goes to disclose the intention of an infringer to use for his own benefit the advantage derivable from a well-known invention.

Notwithstanding the attack made on the efficiency of the plaintiff's rings in a few instances, and that is inevitable in every case (in absence of proof as to whether the rings were properly installed according to instructions), they were rings for which the plaintiff had expended quite an amount of money in advertising, and which had proved a commercial success, as clearly established by the evidence. Undoubtedly the primary test is invention,—but one cannot ignore the consideration of success or failure which goes toward establishing an element of usefulness and novelty. And as said in *Crane v. Price* (1):

If there was any real invention, though a slight one, producing beneficial result, the patent was given.

And, as already said, I find invention in the combination described above. To this may be added the remark of Lord Justice Bowen in the *American Braided Wire Case* (2):

* * * what is, it seems to me, sound and safe, is the practical conclusion that it is a very important element in the consideration whether there has been invention or not, if you see that the thing never was done in the memory of man down to a particular point, and that the moment it is done it is a great success as regards utility, and as regards value in the market. It is not conclusive of the question of ingenuity, but it forces this reflection on one; unless there is some ingenuity in the person who brought out this article, why was it never brought out before?

After careful consideration I have come to the conclusion that the plaintiff's combination patents are valid, as having produced, by their combination, a new and useful result, involving ingenuity of invention. Moreover, with the sale of Panyard's rings the plaintiff gave a guarantee of service for 15,000 miles.

(1) [1842] 1 Webs. P.C. 377.

(2) [1888] 5 R.P.C. 125.

A patent carries with it and secures the right to every mechanical equivalent of the device of the patent.

Apart from the testimony of any other witness, the defendant by his correspondence with the plaintiff and by his conversation with witness Panyard, has absolutely admitted infringement, promised to stop it but did not live up to it. While he was selling Panyard rings at \$1.65 he undersold his at \$1.25.

By his literature in the form of advertisements, he has further disclosed a deliberate intention to infringe.

Witness Wilson says that in October, 1924, he saw, at Cobourg, a ring sold as "an improved Panyard ring" and was closely resembling Panyard's and could be taken for such.

A question was raised at trial that the drawings in the plaintiff's patent were different from the specifications, but that question is settled by the specifications themselves which state that in the drawing the rings are shown in position with both ring sections engaging the cylinder wall—that is after the initial wearing.

The defendant has obtained patents at a subsequent date to the plaintiff's patents, and such patents are no defence to an action of infringement, as already established by numerous decisions.

While, indeed, there may be some slight mechanical variation in the nature of equivalents, in the defendant's Three-way piston ring, as compared to the Panyard rings, the claims of the Panyard patents bear directly on the defendant's rings and they do not disclose a new invention. The Three-way rings indeed involve, in this particular case, the very substance of the invention covered by the plaintiff's patents thereby constituting infringement upon the same.

See *American Dunlop Tire Co. v. Anderson Tire Co.* (1); *Wright and Corson v. Brake Service Limited* (2).

Therefore, there will be judgment in favour of the plaintiff, as claimed by the prayer of the statement of claim, and with costs.

Judgment accordingly.

Solicitors for plaintiff: *Henderson & Herridge.*

Solicitors for defendant: *Fetherstonhaugh & Fox.*

(1) [1896] 5 Ex. C.R. 194.

(2) [1925] Ex. C.R. 127.

1926
 July 3.

CANADIAN WESTINGHOUSE CO., LTD...PLAINTIFF;

VS.

W. W. GRANT LIMITED ET AL.....DEFENDANTS.

Patents—Infringement—Treaty of Peace (Germany) Order, 1920—Section 83—11-12 Geo. V, c. 44

In 1914 one A, a citizen of the United States, obtained there a patent relating to the development of radio, and in 1923 obtained a patent in Canada for the same thing on application filed on July 10, 1920, which was assigned to the plaintiff.

G. knew and made use of the invention disclosed in this patent since 1915, but had no knowledge then of the invention of A., the plaintiff's inventor. During the war he was in the R.F.C., in charge of radio construction, etc. On his return to Halifax, after the war, he continued radio development work, and in 1919 constructed and sold several radio sets containing the subject matter of the plaintiff's patent. Later, after serving with the Canadian Air Board, G. went to Calgary and started in business for himself. In 1922 he organized a company which manufactured radio sets upon the same design as disclosed in the plaintiff's patent. This company was unsuccessful, and in 1925 the W. W. Grant Co. Ltd., was organized for the same purpose. This company did not derive any rights from Grant as agent or licensee.

Held, that the provisions of ch. 44, *Statutes of Canada, 1921*, did not repeal section 83 of the Treaty of Peace, (Germany) Order, 1920, and the patent in question was not granted under the provisions of that statute.

2. That the proviso to sec. 83 of the Treaty of Peace, (Germany) Order, 1920, was intended to protect *bona fide* rights acquired in industrial property prior to January 10, 1920, which were in conflict with the rights applied for by another and who claimed rights of property in respect of them, and that in 1919 G. personally was in *bona fide* possession of rights protected by the said Order, and did not in consequence infringe plaintiff's patent.
3. That, however, the defendant W. W. Grant, Limited, having only come into existence in 1925, and not having derived any rights through G. as agent or licensee, was not protected and had infringed plaintiff's patent (1).

ACTION for infringement of a Patent for invention relating to development of radio.

Ottawa, May 25, 1926.

Action now tried before the Honourable the President.

(1) An appeal has been taken to the Supreme Court of Canada

Russell S. Smart for plaintiff.

F. T. Congdon, K.C., and J. B. Barron for defendant.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 3rd day of July, 1926, delivered judgment.

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This is an action for infringement of Patent No. 216,321 granted on March 7, 1923, to Edwin H. Armstrong on an application filed on July 10, 1920, and is claimed to be a basic patent relating to the development of radio. Armstrong was a citizen of the United States, and in that country in 1914 he procured a patent covering the same subject matter. The Canadian patent was subsequently assigned to the plaintiff. Under the provisions of the Patent Act in force at the date when Armstrong obtained a patent in the United States, any inventor who elected to obtain a patent for an invention in a foreign country before obtaining a patent for the same invention in Canada, might obtain a patent in Canada if the patent was applied for within one year from the date of issue of the first foreign patent for such invention. Legislation was enacted subsequent to the end of the war extending the period for applications for patents, validating patents, etc. It is the proper construction to be placed on this legislation, that is the substantial matter in issue here.

For the purpose of the trial of this action the following admissions were made by the parties:—

1. The defendants, prior to June 4, 1921, commenced to manufacture and sell, and have since continued to manufacture and sell, radio receiving sets embodying the inventions described in the patents referred to in the Statement of Claim.

2. The defendants, prior to and after the issue of the said letters patent, and prior to the institution of this action, have manufactured, used and sold radio receiving sets having the electrical characteristics indicated by the attachment current diagram.

The defendants, while admitting the validity of the patent in suit, claim that it was granted or validated under the provisions of chapter 44 of the Statutes of Canada, 1921, which came into force on June 4, 1921, and that prior to the granting or validating of the patent under that statute, the defendants had commenced the use, manufacture and sale of the invention claimed under the patent,

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and that they are entitled under the provisions of that statute to continue in Canada the manufacture, use and sale of such invention. Alternatively the defendants contend that if this statute does not protect such rights, they have a right to the manufacture, sale and use of the invention under Sec. 83 of the Treaty of Peace (Germany), Order 1920, which I shall hereafter refer to as the Order. Upon the provisions of that statute and Order the defendants rely.

On the other hand the plaintiff contends that the patent was applied for and issued under the provisions of section 82 of the Order and that on January 10, 1920, the defendants had not acquired any rights in the invention protected by the provisions of the Order, Sec. 83 of the Order is as follows:—

The rights of priority, provided by Article 4 of the International Convention of Paris for the Protection of Industrial Property, of March 20, 1883, revised at Washington in 1911, or by any other convention or statute for the filing or registration of applications for patents or models of utility, and for the registration of trade-marks, designs and models which had not expired on the first day of August, 1914, and those which have arisen during the war, or would have arisen but for the war, shall be extended in favour of all nationals of Germany, and of the Powers allied or associated during the war with His Majesty, until the eleventh day of July, 1920.

Provided, however, that such extension shall in no way affect the right of Germany or of any of the Powers allied or associated during the war with His Majesty or of any person who before the tenth day of January, 1920, was bona fide in possession of any rights of industrial property conflicting with rights applied for by another who claims rights of priority in respect of them, to exercise such rights by itself or himself personally, or by such agents or licensees as derived their rights from it or him before the tenth day of January, 1920, and such persons shall not be amenable to any action or other process of law in respect of infringement.

On July 10, 1920, the plaintiff made application for a patent under the provisions of the above section of the Order. Nationals of the United States were undoubtedly entitled to the protection afforded by the Order.

Chapter 44 of the Statutes of Canada, 1921, was assented to on June 4 of that year, and section 7 thereof is as follows:—

7. (1) A patent shall not be refused on an application filed between the first day of August, 1914, and the expiration of a period of six months from the coming into force of this Act, nor shall a patent granted on such application be held invalid by reason of the invention having been patented in any other country or in any other of His Majesty's Dominions

or Possessions or described in any printed publication or because it was in public use or on sale prior to the filing of the application, unless such patent or publication or such public use or sale was issued or made prior to the first day of August, 1913.

(2) No patent granted or validated under the provisions of the next preceding section or of this section shall abridge or otherwise affect the right of any person, or his agent or agents, or his successor in business, to continue any manufacture, use, or sale commenced before the coming into force of this Act by such person nor shall the continued manufacture, use, or sale by such person, or the use or sale of the devices resulting from such manufacture or use constitute an infringement.

The Order and the Statute of 1921 cover much the same field and are doubtless confusing. In is clear that the plaintiff applied under the Order for his patent. The plaintiff's application therefore having been made within the extended period fixed by the Order, it seems to me that it is the Order and not the statute which applies to the patent in question. The right to apply for a patent having been vested in the plaintiff's assignor, he cannot be divested of or limited in the right given him by the Order, except by very clear language. The statute of 1921 could not I think have been intended to repeal section 83 of the Order. I cannot therefore accept the contention of counsel for the defendants that the patent in suit was granted under that statute. The question then arises if the defendants acquired any rights which are preserved by the proviso to article 83 of the Order, and it is necessary therefore to ascertain what the defendants had done prior to January 10, 1920, which might constitute rights which might be so preserved.

The defendant Grant claims to have known and made use of the plaintiff's patent since 1915, and part of it in 1913. The patent may be generally described as a "circuit." During the war he was second in command of the wireless and telegraphic section of the Royal Flying Corps, and he had charge of all the radio equipment used by the flying corps in France in respect of construction, repairing and development. There is no doubt Grant was active in the development of the radio, and during the war much important development work had taken place in connection with this art, to which of course he observed. On his return to Halifax at the end of the war, he states he continued his development work and immediately commenced to look for a market for his knowledge of the art, and for

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the first four or five months he did nothing else. In 1919 he states he constructed three radio sets which contained the subject matter of the plaintiff's patent, and which sets he sold though he was unable to give the names of the purchasers. He was in the same year about to instal a radio equipment on a yacht in Halifax, but the yacht was wrecked before he was able to place the equipment on the yacht. About the same time he erected a broadcasting station at Halifax, the second if not the first in Canada. In April, 1920, he entered the service of the Air Board at Ottawa, and was placed in charge of the radio department of the Board. While in this employ he constructed radio sets for the Board which included the patent in question, and he also erected several broadcasting stations in Western Canada for the Board. In November, 1921, he left the services of the Air Board and started in business himself in Calgary. There he built a broadcasting station with the hope of enlarging the market for radio sets. He organized a company in 1922 which commenced the manufacture of radio sets in a large way from designs made in 1921, and which designs contained the plaintiff's invention. I might here say that Grant states he first heard in 1922 that the circuit involved in the plaintiff's invention was patented in the United States, and he learned of the Canadian patent in 1923. The company referred to was not financially successful and soon ceased to do business. The W. W. Grant Company Ltd., one of the defendants in this action, was later organized for the same purpose and is now doing business, and whatever manufacturing it has done has been since the date of its incorporation. I thought it better to set forth at considerable length the substance of Grant's evidence even though some of it may not be strictly relevant.

The proviso to Sec. 83 of the Order is not clear, but it was evidently intended thereby to protect *bona fide* rights acquired in industrial property prior to January 10, 1920, which are in conflict with rights applied by another and who claims rights of property in respect of them. So far as the facts are concerned I am of the opinion that it is only the manufacture and sale of radio sets by Grant in Halifax in 1919, and which contained Armstrong, which

can avail the defendants, and I exclude the defendant company because it did not come into existence until 1925 and there is no evidence that it through Grant derived any rights as agent or licensee. The remaining question for decision is: Did Grant personally acquire any rights which are protected by the Order. I accept Grant's evidence as to the manufacture and sale of radio sets, containing Armstrong, at Halifax in 1919. It seems to me the test is this, had Sec. 83 of the Order not been enacted in 1920, or at any time, did Grant by user, manufacture, publication or sale in 1919, put himself in such a position that he might have prevented Armstrong from patenting in Canada. In my opinion Armstrong in the face of the facts, could not have obtained a valid patent in Canada, and Grant would have had the right without constituting infringement, to market Armstrong in Canada. Armstrong had the right to a patent in Canada only because he was within the extended period fixed by the Order. It does not follow that Grant was entitled to a patent in Canada. He may not have been the first inventor within the Patent Act, or if he was, he may have failed to apply in time, but nevertheless his user and manufacture in 1919 but for the Order would prevent Armstrong or anyone else I think from obtaining a patent, which means he would have the right to a continued user, and therefore I think it can be fairly said that Grant in 1919 was in *bona fide* possession of rights of industrial property which are protected by the Order. He has not therefore infringed the plaintiff's patent. There is little or no authority upon this point. I observe that Terrel on Patents, 6th Ed., p. 429, states that while the proviso is far from clear, that it probably includes persons who made or used prior to January 10, 1920, an unpatented article. It might also, he states, be held that the protection extends to an invention which was in the possession of a person though not actually used. I would also refer to a discussion of the meaning of article 308 of the Treaty of Peace, which corresponds to Sec. 83 of the Order, by the Comptroller General in the matter of *Armstrong's* application for a British patent (1), which I think is helpful.

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(1) [1922] 39 R.P.C. 146 at p. 153.

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I am of the opinion therefore that the plaintiff must succeed against W. W. Grant Ltd., and is entitled to the relief claimed. The plaintiff's action against the defendant W. W. Grant fails. Inasmuch as the point involved in the action is new, and in view of my conclusions, I feel that a proper disposition of the question of costs would be to direct that each party bear its own costs.

Judgment accordingly.

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 June 18.

GERRARD WIRE TYING MACHINES
 COMPANY, LTD. OF CANADA..... } PLAINTIFF;

VS.

CARY MANUFACTURING CO..... DEFENDANT.

*Patents—Conflict or interference—Date of invention—First inventor—
 Publication*

Held: That a mere conception of anything claimed to be an invention, but which is concealed and not disclosed or published, is not such an invention as will invalidate a patent granted to a subsequent inventor and who has published his invention.

Mere conception is not invention within the meaning of the Patent Act, and a first inventor, in the popular sense, who has not communicated or published his invention is not entitled to priority over a later inventor who has made the same public, and for which a patent has been granted or applied for.

2. What constitutes publication is a question of fact, depending upon the circumstances of each case. There must be publication or use in public of a satisfactory kind, in order to bar the claim of a subsequent inventor who has disclosed the same and who first applied for a patent.
3. That "first inventor" within the meaning of the Patent Act means not the first discoverer of the thing or the first to conceive the same, but the first to publish the same. Such inventor, however, must be the true inventor and must not have borrowed the idea from anybody else.

ACTION by the plaintiff for a declaration that his assignors were the first inventors of the device described in their application for a patent. The Commissioner of Patents having declared plaintiffs' and defendants' applications to be in conflict.

Ottawa, January 18 to 22, and March 8 and 9, 1926.

(1) An appeal has been taken to the Supreme Court of Canada.

Action now tried before the Honourable the President.

Russel S. Smart for plaintiff.

A. W. Anglin, K.C. and *R. C. H. Cassels, K.C.* for defendant.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 18th day of June, A.D. 1926, delivered judgment.

The applications for patents, of the plaintiff and the defendant respectively, are in conflict, and these proceedings are taken under sec. 22 of the Patent Act. The issue for determination is, which of the two parties, Gerrard and Wright, assignors of the plaintiff on the one hand, and Cary, assignor of the defendant on the other hand, was the first inventor, and which is in law entitled to a patent. The question as to whether or not there is invention in either case, is not in issue and was not tried. That there is invention or subject matter disclosed in each application is to be assumed for the purposes of this case.

The plaintiff's Canadian application is dated October 4, 1922, and relates to a wire package binder provided with a deformed or flattened end, and which forms a holding shoulder designed to prevent the wire from endwise slipping, when tensioned, for application to packages or boxes, etc., and which is adapted for use in a wire tying machine. This sufficiently describes, I think what the plaintiff claims as its invention. Claim 9, however, is relied upon by the plaintiff as of particular importance, and as being something different from anything claimed by the defendant in its application, in that the shoulder on the wire is described as "sloping." In the view I take of the case I do not think this claim is of special importance, and possibly not in any view of the case. That claim is as follows:—

9. A tie wire adapted for use in wire tying machines and provided with a deformed end having a sloping holding shoulder substantially as described.

On April 5, 1920, the plaintiff's inventors, Gerrard and Wright, filed an application in the United States Patent Office for a patent of a wire twisting machine, and in that application there is disclosure of a wire package binder, to be used in such machine. The specifications of this

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application frequently refer to a wire with a flattened portion or shoulder, and which flattened portion is to be inserted in the slit of a post in a machine provided for the reception of the wire. Substantially the wire is the same as described in the Canadian application just mentioned, except that there is no reference to a *sloping* shoulder. The application contained the following claims as to the wire:

19. As a new article of manufacture, the herein described wire adapted to encircle a box, and provided with a flattened portion near one end, and a round portion at each end of the flattened portion, substantially as described.

20. The herein described article of manufacture consisting of a wire adapted to encircle a box and provided with a flattened portion and a holding shoulder at one end of the flattened portion, substantially as described.

21. In a wire tying machine, the combination of a holding post provided with a slit, and a wire adapted to encircle a box having a flattened portion to fit said slit, and holding shoulders to contact with the edges of the said slit substantially as described.

The United States Patent Office having required a division of this application, Gerrard and Wright made application for a patent for the wire binder only, on October 21, 1922. What was claimed in this application for the wire is again substantially the same as that claimed in the Canadian application of Gerrard and Wright, except that claim 9 of the latter, does not appear in the claims of this United States application.

Gerrard and Wright claim to have made their invention of the wire package binder sometime between the first of the month of October and the latter part of December, 1919.

Cary's original Canadian application, filed April 27, 1922, was for a wire package binder and a machine or means for applying the same. The specifications make disclosure of a shouldered wire, performing the function of an abutment co-operable with an element or part of a tensioning mechanism for retaining the wire against slipping during the application of the tensioning, and the subsequent operation of locking or twisting the end portions of the wire. The Patent Office concluding that the claims defined a plurality of invention, ordered a division of the application, and thereupon the present application was restricted to the machine, and a fresh application was made

for a patent of the wire only on November 2, 1922, and it is that application that is here in question.

The specifications of this application contain the following description of the wire:—

The wire is used in conjunction with a suitable implement tool, or machine, whereby it is tensioned and locked, and to enable the wire to be used with facility, it is desirable to straighten said wire and cut it to a length suited to the package, and to so fashion the wire that it is held against slipping with respect to the tool, implement, or machine in the operations of tensioning and locking the same.

The wire of my invention is deformed to produce a shoulder performing the function of an abutment co-operable with an element or part of the tensioning mechanism for retaining said wire against slipping during the application of tension thereto and the subsequent operation of locking the end portion of the wire as by twisting the same.

The claims are eight in number and are quite similar. The first claim might be referred to as expressive of the other claims.

1. A Package binder comprising a piece of wire provided with an adjacent end and a portion with a shoulder forming an abutment, adapted to prevent a wire from slipping when tension is applied to said wire.

A reference to the drawings will reveal clearly the character of the shouldered wire. The drawing, fig. 1 indicates a V-shaped wire which shall be later referred to. There is nothing, I might say, disclosed in the drawings which would indicate a sloping shouldered wire, such as is referred to in claim 9 of the Gerrard and Wright's Canadian application, and to which I have already referred.

On March 31, 1922, Cary applied to the United States Patent Office for a patent of a shouldered wire, and the drawings of the wires are exactly the same as appear in the Canadian application of November 2, 1922. It is claimed on behalf of the defendant that Cary's invention was made sometime within the months of January, February or March, 1919.

At this stage, the important dates affecting the position of the parties are as follows: The plaintiff claims that Gerrard and Wright made their invention of the shouldered wire sometime between the first of October and the latter part of December, 1919. On April 5, 1920, Gerrard and Wright made application in the United States for a patent in which the shouldered wire was disclosed, and which was the subject of a separate application in that country, on October 21, 1922. The date of the Canadian application

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of Gerrard and Wright for a patent on the wire is October 4, 1922. On the other hand, the defendant claims that Cary made his invention within the first three months of 1919. The date of Cary's application for the grant of a patent on the wire in the United States was March 31, 1922. In Canada, Cary's application for a patent on a machine and a wire was on May 1, 1922, and on the wire alone on a divisional application on November 2, 1922.

There seems to be no question but that Gerrard and Wright conceived the idea of a shouldered wire sometime during the last three months of 1919, and within that period made it in an experimental way. They disclosed the same to Bauer, who was in the plaintiff's employ as salesman, in December, 1919. It was clearly disclosed on April 5, 1920, in their application for a United States patent on a wire twisting machine, and of course in the divisional application in that country upon a wire only in October, 1920. The application of April 5, 1920, is an important date. While the specifications accompanying an application for a patent may not constitute publication, it at least fixes the date of the plaintiff's completed invention as not later than that date. In 1920 the plaintiff produced the wire in the United States in a limited way, but early in 1921, it was being produced on a substantial scale, and being sold to the public along with suitable tools or machines for applying the wire. The plaintiff has since established a large trade in the wire in many countries of the world. In April of 1921 the plaintiff claims to have shipped wire into Canada. There is nothing in the evidence in my opinion to sustain the suggestion that Gerrard and Wright obtained in any way the invention from Cary, or in fraud of his rights.

Now as to the facts regarding the defendant's claim to invention and the time of the same. It is claimed that Cary conceived of or invented his wire sometime during the first three months of 1919. Cary says that during that period he conceived of the idea of a shouldered wire, and in exhibit X 11 there is to be found several samples of notched or shouldered wire which Cary claims were made by him early in 1919. These are samples of wire only a few inches in length disclosing a variety of shouldered

wire. Cary, so far as I can see, made no disclosure or publication to any persons except McFaul, Ragona and Frech, three men in his employ, all of whom were I think mechanics. He does speak of disclosure to "other persons," but there is no evidence as to who the others were, or when such disclosures were made. He did not apply for a patent on the wire in the United States until March, 1922. There is no evidence that he ever applied a preformed or shouldered wire to any package, even in an experimental way in 1919, and he never manufactured this class of wire until early in 1922. He apparently did not possess a machine for applying such a wire to packages in 1919, 1920 or in 1921. He states that in the early part of 1919 he made a notched wire similar to fig. 1 of his drawings. That was not, however, a wire that was completed with a shoulder ready for sale or use and to be applied by a machine, but was merely a straight plain wire that was placed in a machine for application to a package, and while being so applied a V-shaped notch was made in the wire by the holding grippers which were a part of the machine. This had long been known by other users of other wire tying machines. That was not I think a preformed shouldered wire such as contemplated in the application I am here dealing with, but is another matter altogether.

Cary had in the course of a long business career as a producer of various package tying devices, patented many of such articles, and it is strange that if he invented at the time claimed, he should have allowed about three years to pass before he applied for a patent of the wire in question in the United States. Exhibit X 23 is an application for a patent, filed in the United States in February, 1919, by Cary, for a machine for binding shipping packages, and he makes no reference therein to a preformed wire package binder, but only a wire which would be crimped or shouldered by the grippers, after it was put in the machine or tool which would apply the wire to a package. The shouldered wire in question, by itself, was not difficult of description in an application if it then represented a completed invention. The fact is I think, that until Cary had developed a machine specially adapted for the shouldered wire, he did not consider he had completed that which he

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now calls an invention. In the extract already quoted from his specifications he describes the wire as an article to be used in conjunction with a suitable tool or machine, and that the wire was to be fashioned as described so that it would be held against slipping with respect to the tool or machine. Not having for a long time subsequent any such tool or machine, he no doubt concluded that he had not made anything representing a completed invention and he cast it aside as something about which he had speculated without attaining any practical results. It was I think regarded as nothing more than a suggestion.

Certain correspondence passed between the defendant and the Frank L. Wells Company, of Wisconsin, U.S.A., which reveals matter that does not appear quite consistent with the idea of a completed invention by Cary in 1919, and discloses knowledge by the defendant of a prior user of a shouldered wire in the United States by one of the companies associated with the plaintiff company.

On March 9, 1922, the defendant wrote to the Wells Company asking if they manufactured a machine for straightening wire and cutting it off in certain lengths, to which the latter replied on the 11th day of the same month that the Gerrard Wire Tying Machine Co., of Chicago had in use for that purpose a number of machines in their various plants throughout the country, made by the Wells Company, and which they recommended to the defendant for its purposes.

On March 13 the defendant company wrote to the same firm as follows:—

What we would like to know is whether any of your machines are so arranged that they would put the shoulder on the wire same as Gerrard's is now doing. We do not want you to think for a moment that we are attempting to infringe on any rights of Gerrard. Our Mr. Cary has been in the present line of business for over 30 years and has taken out over 100 patents relating to our line of manufacture both in this country and abroad and would be very loath to tread on any one else's rights.

Then, on March 15, the Wells Company wrote to the defendant company as follows:—

Now we do not know whether the flat spot which is on the wire sample you sent us is patented or not, but we think it is. We had nothing to do with putting these attachments on the machine for flattening this wire. The Gerrard people put the attachments on after they received the machines, and we would suggest that if you were to do this

same thing and find it is not patented, that you also put this device on yourselves, as we would not want to get in wrong with these people by selling machines to someone else with this attachment on them. You will appreciate our position in this matter.

Following this the Cary Manufacturing Company wrote as follows on March 17:—

We note what you say in regard to the attachment for putting the shoulder on the wire and we appreciate very much your position, and certainly would not ask you to do anything that we would not think fair if we were in Gerrard's position.

Another strange circumstance is that in September, 1921, Cary visited the plaintiff's place of business in New York, and while there he states that he then saw one of the plaintiff's wire tying machines, Model B, and that he then learned that the plaintiff was using a shouldered wire as shown in figure 2 of Cary's patent, and also that on this occasion Gerrard personally operated this machine with this form of wire several times in his presence. Cary says he was surprised to find the plaintiff using a shouldered wire of this character on this occasion. He consulted his attorney and apparently the only thing decided upon was an investigation into the prior art in other countries, but nothing was done apparently by Cary in assertion of his alleged rights in the invention. There was apparently some talk between them about some of their respective tying machines infringing one another. Early in 1922 Cary visited the plaintiff's Chicago factory at the latter's request. While there he saw wire bundles which he assumed to be notched wire, and he was shown a large machine which was notching the wire. In this paragraph and in the other parts, for the sake of convenience and clarity, I refer to the American corporations, apparently controlled by Gerrard, as part of the plaintiff company's organization, which strictly speaking is not accurate, as the plaintiff company herein is solely a Canadian corporation, but all are controlled by the same persons so far as I know.

I do not refer to Cary's visit to the plaintiff's plant nor to the correspondence with the Wells Company for the purpose of supporting the conclusion that the evidence of Cary, as to the date when the several wires in exhibit X 11 were made is in error. The plaintiff suggests that the wires in this exhibit were made at a much later date

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than claimed. I do not think it is necessary to make any specific finding upon this point in the view I take of the case. By agreement the evidence of Cary, now deceased, taken in interference proceedings in the United States, was read into the record at the trial and if this decision comes under review by others, they will be in just as good a position as I am to draw conclusions from that testimony. Expert evidence was given on behalf of both parties as to the probable age of these wires. The plaintiff's witness in this regard was in direct conflict with those produced by the defendant. I propose disregarding the whole of it. I do not think any safe conclusion can be drawn from this particular piece of evidence one way or the other.

While the means of applying the wire to packages, such as wire tying machines, is not here in issue, still it must be taken into consideration, and may be looked to for evidentiary purposes. A specially shouldered wire, without a machine or tool designed to accommodate such a shouldered wire would I think lack utility, and Cary had not developed or procured a machine or means to use his wire for a long time after Gerrard and Wright had filed their application in the United States in April, 1920. As utility is a requisite of invention, Cary can hardly be said to have invented anything until a mode of application had been united with the idea of an end so as to produce useful results. That is to say there must be an idea of means as distinguished from an idea of object or end. The conception of a bare wire with a shoulder, with no conception of means or mode of application is not I think an invention any more than the hands for a clock would be invention without the invention of the clock itself, and I do not think it would. If I am correct in this view, then Cary was never an inventor of the wire at the time claimed, and probably it was only after he saw that the plaintiff was winning a place in the market with its wire that he came to look upon it in any other light himself. In 1919, it is safe to assume that Cary could not have described his alleged invention, because he had not sufficiently thought out a means of application, and a thing which cannot be described cannot possibly be invention. Both

parties were in search of a special wire, and a special wire tying machine adopted for this wire which would sell together, the one being the complement of the other, the customer for the machine perforce becoming a customer for the wire and vice versa, each thus hoping to establish a closed trade in their combined wire and machine. I therefore am of the opinion that Cary did not invent in 1919 as claimed. At the most he had merely a suggestion or incomplete conception.

Upon another ground Cary cannot I think, even assuming he did all he claims to have done early in 1919, be held to be the first inventor. Mr. Anglin very ably and ingenuously put forward the contention that a person who conceives an invention, and who is in a position if and when he chooses to produce a physical embodiment of his mental conception, is in law an inventor in this country. Mr. Anglin of course conceded that such a person might have great difficulty in establishing his invention by satisfactory evidence, but in this case he thought that difficulty had been overcome by Cary on the facts already related. This calls for some discussion as the contention is often advanced here. I cannot accept Mr. Anglin's proposition, as expressing the law, even with the evidence of the alleged inventor as to the conception being accepted as proven, nor can I agree that a "physical embodiment" of the conception, which was never disclosed would void the patent of a subsequent inventor who had first and effectively disclosed his invention. It must be conceded I think, without qualification, that a mere conception of anything claimed to be an invention, that is concealed and never disclosed or published, is not an invention that would invalidate a patent granted to a subsequent inventor. To say that mere conception is invention or that a first inventor in the popular sense who has not communicated or published his invention is entitled to priority over a later invention accompanied by publication, and for which a patent was granted, or applied for, would I think throw this branch of our jurisprudence into such utter confusion as to render the law of little practical value owing to uncertainty. If this is the policy and meaning of the Patent Act, an inventor might safely withhold from the public

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his invention for years, while another independent but subsequent inventor of the same thing, who had secured or applied for a patent, and who had proceeded to manufacture and sell his invention without any knowledge of the undisclosed invention, would always be in danger if the prior inventor could secure a patent by merely proving an unpublished invention. The situation should not I think be changed by the production of drawings, plans, etc., evidencing the date of the prior invention, or even a physical embodiment of the invention by the alleged inventor. All this might be done and still be within the knowledge of the inventor alone, it having been kept a secret, and which so far as the public is concerned is no more effective publication than a mere conception uncommunicated to the public. There must be a publication or a use in public of a satisfactory kind in order to bar the claim of a subsequent inventor who discloses the same and first applies for a patent. The latter act is not perhaps necessary. What is publication is a question of fact, and each case must depend upon its own circumstances. In this case Cary did not give the public his invention by any recognized form of publication. The knowledge, whatever its nature or extent, which came to the employees of Cary was not publication because they were each under an obligation of secrecy arising from their confidential relations towards him, and Cary says he kept the wires he claims to have made in 1919 in a drawer in his desk where they were kept until interference proceedings were started in the United States in 1922. Accepting the statement of Cary as to the date of his alleged invention, about three years elapsed before he made any disclosure of his invention.

It seems to me that the first inventor must and should mean in patent law, not the first discoverer or the first to conceive, but the first publisher, and publication is always a question of fact. That person must, however, be a true inventor, that is he must not have borrowed it from anyone else. This principle was laid down in Great Britain by the courts there as early as 1776, and is there still accepted as expressing the law. In the case where a person who was first granted a patent was not in popular

language the first inventor because somebody had invented it before him, but had not taken out a patent for it, it has been decided that the former was entitled to a grant provided the invention of the first inventor had been kept secret, or without being actually kept a secret had not been made known in such a way as to become part of the common knowledge or of the public stock of information. Therefore, the person who was in law held to be the first and true inventor was not so in popular language because one or more people had invented before him, but had not sufficiently disclosed it. *Plympton v. Malcolmson*, Jessel M.R. (1); *Dollonds Patent* (2); *Cornish v. Keene* (3); *Smith v. Davidson* (4); *Robertson v. Purdy* (5) *ex parte* Henry (6). While these general principles may be subject to qualification, depending upon the facts involved in any particular case, it seems to me they should be applied in this case.

The decisions to which I have just referred, I apprehend, proceed upon the principle that until disclosure, or an application for a patent is made, a person cannot be heard to say he is an inventor as against one who first discloses his invention and applies for a patent; and also upon the principle that the consideration which the patentee gives for the monopoly granted by the patent, is that he first gave the invention to the public. The latter ground is well stated in *Smith v. Davidson* already cited by the Lord President of the Court:—

When a patent is validly granted, that is, is held in law to be a valid patent, then I think that the party who obtains the patent is held to be the owner of that invention disclosed in the Letters Patent. It is held in law to be his invention, a monopoly of it is given to him as being his invention because he is the party who has given to the public that invention. He has given to the public under the condition that he shall obtain a monopoly and so it comes to be his invention in that sense. The discovery is not the thing the public have an interest in. What they have an interest in is that they shall have the benefit of that invention. A party may live and die taking the knowledge of his invention with him, but disclosure of invention and the means by which he obtains a monopoly of it from the public, and the party who comes

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(1) [1876] 3 Ch. Div. 531, at pp. 555, 556.

(2) [1766] 1 W.P.C. 43.

(3) [1835] 1 W.P.C. 501.

(4) [1857] 19 Court of Sessions 691 at p. 698 (2nd Series).

(5) [1906] 24 R.P.C. 273 at p. 290.

(6) [1872] 8 Chan. App. 167.

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forth and complies with that condition being himself the true inventor, gets the right to the monopoly of that invention. It becomes his invention in law.

In *ex parte Henry* already cited, Lord Selborne in discussing this point, said:—

I apprehend that it would be no answer to a *bona fide* applicant for a patent, who has himself, by his own ingenuity made a useful invention, and has applied for a patent before any one else claiming to have made the same invention—it would I say, be no answer to him, assuming the absence of fraud or communication, to allege that experiments had been going on, or even drawings made, by another inventor. One person, being a *bona fide* inventor comes first to ask for a patent for his invention and such allegations are no answer to him. If a patent be granted to him, it would date from the day of his application. If he were the true inventor, the circumstance of something having taken place somewhere else, which was not disclosed to the world, and as to which no prior application was made, would be no answer to him, even if it were shewn that the two inventors were travelling very much upon the same lines, and that their minds were going very much to the same point at the same time.

I observe nothing in our Patent Act which warrants the inference that there can be but one inventor of the same thing, and that a patent can issue only to a first inventor. The invention of a subsequent but true inventor is still “new” if the other has not been published; in fact it is the only invention to which the term “new” can be strictly applied. A thing, undisclosed and unknown except to the mind of an inventor, can hardly be described as “new and useful art.” It is in fact not “new” because not being known it cannot be compared with any pre-existing art, and it is “useless” because it is unknown, and it therefore should not be a bar to one who has disclosed or published in some way, or to one who comes forward and says he has something new and describes it in writing and asks for a patent. The Act says any person who has invented a new and useful article may apply for and obtain a patent upon compliance with the terms of the Act. The applicant must be an inventor, you need not say the inventor, because someone else may have invented it and concealed it. I know of no authority however, directly upon the point under discussion, in our law reports. In *Smith v. Goldie* (1) so often referred to here in cases of this kind, there was no question as between a first and a

(1) [1883] 9 S.C.R. p. 46.

subsequent inventor; there was only one inventor, Smith, and others were attempting to make piratical use of his invention. In the *Queen v. Laforce* (1), another frequently cited case, the facts are quite distinguishable from the facts disclosed in this case, and a comparative study of these cases would be hardly profitable or useful.

Upon the trial reference was made to many American decisions. There, many statutory provisions prevail which are not to be found in our Patent Act. It seems to me, however, that the law as interpreted by the courts of the United States is in effect the same as here as applied to the facts of this case. In a recent case, *Millburn Co. v. Davis-Bourninville Co.* (2), Mr. Justice Holmes in rendering the judgment of the Supreme Court of the United States, and in discussing the statutory defence that the "patentee was not the original and first inventor or discoverer of any material and substantial part of the thing patented" observed:—

Taking these words in their natural sense as they would be read by the common man, obviously one is not the first inventor, if, as was the case here, somebody else has made a complete and adequate description of the thing claimed before the earliest moment to which the alleged inventor can carry his invention back. But the words cannot be taken quite so simply. In view of the gain to the public, that the patent laws mean to secure, we assume for purposes of decision that it would have been no bar to Whitford's patent (the subsequent applicant) if Clifford had written out his prior description and kept it in his portfolio uncommunicated to anyone.

It is really the last few lines of this citation to which I wish to refer as to the effect in law of an uncommunicated invention as against a subsequent inventor and patentee, and which would appear to conform to the principles laid down in the decisions of the courts of Great Britain which I have cited. The real point of decision however in the case was that a description in a patent application was publication even if there was no claim for the thing described.

Again I would refer to the American case of *Mason v. Hepburn* (3). Hepburn's date of invention was confined to his date of application, April 3, 1894. Mason conceived of the invention and made a complete drawing of it on

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(1) [1894] 4 Ex. C.R. p. 14.

(2) [1926] 46 S.C. Rep. 324 (U.S.)

(3) [1898] Decisions of Com. of Pat. 510.

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June 28, 1887. He reduced the invention to practice soon after. The device was then stored away in the model room of his company and it was not produced until the institution of interference proceedings. No devices of the kind were manufactured for any purpose, and no exhibit of the device was made to the public, and no one saw it except Mason and one or two other employees of his company. It was held by the Court of Appeals of the District of Columbia that Mason had abandoned his invention and priority was awarded to Hepburn. An American text writer says that this opinion has since been favourably cited in one hundred and twenty-two cases in the United States. In the reasons for judgment, the court made the following observation:—

Considering, then this paramount interest of the public in its bearing upon the question as presented here, we think it imperatively demands that a subsequent inventor in a new and useful manufacture or improvement, who had diligently pursued his labours to the procurement of a patent in good faith and without any knowledge of the preceding discovery of another shall, as against that other, who has deliberately concealed the knowledge of his invention from the public, be regarded as the real inventor and as such entitled to his reward.

The learned judge of that court, rendering the decision, further observed that in some of the decisions in the United States, the first inventor is regarded as having abandoned the field to other inventors, while in other cases he is held to have lost his right by sleeping too long upon it. After stating that abandonment after the completion of an inventive act, more strictly speaking, applies to the case where the right of the public to the use is involved, and not to the case where the contention is between rival claimants merely of the monopoly, he proceeds to say:—

The true ground of the doctrine, we apprehend lies in the spirit and policy of the patent laws and in the nature of the equity that arises in favour of him who gives the public the benefit of the knowledge of his invention who expends his time, labour, and money in discovering, perfecting, and patenting in perfect good faith that which he and all others have been led to believe has never been discovered by reason of the indifference, supineness, or wilful act of one who may, in fact, have discovered it long before.

An interesting discussion of the doctrine of abandonment is to be found in Robinson on Patents, Vol. 1, pages 509, 510 and 511, Vol. 2, p. 159 et seq, and particularly

in the notes to be found on these pages. The author there discusses the question of abandonment, which rule he states rests upon the principle of equitable estoppel, and he states that abandonment in fact may be inferred from unreasonable delay in patenting the invention or from any other circumstances which render the inventor chargeable with bad faith towards the public or voluntary negligence in the assertion of his rights. Whether or not I correctly apprehend the state of the law in the United States upon the point under discussion, it seems to me that the principles laid down in the authorities I have just referred to are sound and quite applicable here.

In the United States by some means or other not necessary to discuss here, Cary was the first to secure his patent, although his application was about two years subsequent to that of Gerrard and Wright. In fact I understand the plaintiff's application has not yet been dealt with owing to interference proceedings being taken and still outstanding, and perhaps something should be said upon this fact. I do not propose resting my decision upon the ground that an application for a patent is in law a publication, and that the plaintiff is entitled to priority in the grant of a patent by reason of such prior application. It is not necessary that I should do so in this case, and the point was not discussed during the trial. In this country an application until dealt with is not open to public inspection, but it at least should have as a matter of proof as to priority of invention, as much effect as a caveat filed under the statute. In the judgment of the Supreme Court of the United States, *Millburn Co. v. David-Bourninville Co.* already cited, Mr. Justice Holmes would appear to have there held that the application of the first applicant for a patent was a publication as against a subsequent applicant though the former had not claimed the thing described. I need not, however, now trouble myself upon this point, as in the case before me there was publication by use and sale in public on the part of the plaintiff long before Cary applied for a patent, and I need not enlarge upon this.

Invention without publication, in my opinion, is of no effect as against another inventor who discloses the invention and who applied for a patent. Whether this rule

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rests upon the principle of estoppel or laches, or for want of consideration for the monopoly inherent in a patent, or whether it is a rule of evidence which presumes against invention in law when undisclosed, it seems to me to matter little. It is a safe rule to follow. It imposes no hardship or injustice upon any person, it appears well within the letter and spirit of the statute and seems to have the support of weighty authority. It is a bar to the fabrication of evidence and other objectionable practices, and will render assurance to many whose position ought to be secure.

There is another point to which I must briefly refer. Mr. Anglin contended that there was not joint invention by Gerrard and Wright of the invention claimed by the plaintiff because an important part of the invention claimed was made by one of them only, and that the claim to joint invention in fact failing the application for a patent cannot in law be considered. The evidence satisfies me that both Gerrard and Wright had constantly been conferring together on the development of the shouldered wire and the appropriate machine with which to use it. I think the proper view in this connection is well stated in Walker on Patents, 5th Ed. at Sec. 46, which is as follows:—

Nor is a patent to joint inventors invalidated by the fact that one of them only first perceived the crude form of the elements and the possibility of their adaption to complete the result desired. In fact the conception of the entire device may be attributed to one, but if the other makes suggestions of practical value, which assist in working out the main idea and making it operative, or contributes an independent part of the entire invention which helps to create the whole, he is a joint inventor even though his contribution be of minor importance.

I am of the opinion that Gerrard and Wright contributed jointly to the development of the wire for which a patent is now claimed, and that the several contributions, whatever the degree, cannot be assigned to any particular claim in the patent, but to the whole of them. I think therefore this contention fails.

My finding is, that as between the parties before me, the plaintiff's assignors were the first to invent. The plaintiff will have its costs of action.

Judgment accordingly.

CANADIAN RAYBESTOS CO., LTD.....PLAINTIFF;

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AND

BRAKE SERVICE CORPORATION }
LTD. ET AL } DEFENDANTS.

Patents—Infringement—Date of invention—Conception—Publication

Held, that the date of a patentee's first conception of a thing patented is not necessarily to be taken as the date of his invention, and where an inventor had conceived the outlines of an invention, but required the time to bring it to perfection, he was held not entitled to a patent over one who in the meanwhile had invented the same thing, and given it to the public.

ACTION for infringement of patent of invention relating to a machine for applying brake lining.

Ottawa, April 6th and 7th, 1926.

Action now tried before the Honourable the President.

R. S. Smart for plaintiff.

W. L. Scott, K.C., for defendants.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 22nd day of June, 1926, delivered judgment (1).

This is an action for infringement of a patent, the invention of one McBride of the State of California, U.S.A., who assigned the same to the plaintiff, and which relates to a machine for applying linings to brake bands.

In the cause of *Wright and Corson v. Brake Service Limited* (2), in which the plaintiff in the present action was prior to the date of trial added as a plaintiff, and which action was for infringement of the invention of Wright and Corson, being a mechanism for drilling and applying brake band linings, I found there was infringement of the patent and upheld the validity of the patent. In the report of this case there will be found a description of the mechanism constructed under the patent of Wright and

(1) An appeal has been taken to the Supreme Court of Canada.

(2) [1925] Ex. C.R. 127.

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Corson and of the infringing machine which is also the infringing machine in the present case. The description of these two machines adequately outlines McBride as well.

Later, the judgment in *Wright and Corson v. Brake Service Ltd.*, was opened up, and the production of further evidence was allowed upon the point of alleged anticipation by one Cady of the State of New York. Subsequently, I found that there had been anticipation by Cady, and thereupon the plaintiff's action was dismissed. Since then the plaintiff in the present action, acquired the patent of McBride, which relates as I have already said to a brake band lining machine, and the present action is for infringement of the McBride patent by the defendants. The evidence taken in the case of *Wright and Corson v. Brake Service Ltd.*, is by agreement also evidence in this case.

There can be no doubt I think but that McBride, the infringing machine of the defendants, and Cady are mechanical equivalents the one of the other. I think it unnecessary to further elaborate this point as I think it is beyond controversy.

In the action in reference to the Wright and Corson patent, I found that Cady had invented his brake lining machine late in 1918. In the reasons for judgment, I said:—

I am entirely satisfied that Cady produced the machine referred to in the defendant's amended particulars, in the manner and at the time related by him. His evidence has been confirmed in too many particulars by other evidence oral and documentary, to cause me to doubt his veracity. In regard to the other witnesses who gave evidence at this trial on behalf of the defendant, my conclusion is that they were reliable and their evidence is to be believed. On the whole I have no doubt whatever that Cady produced the brake band lining machine in question late in 1918, and that he has since used the same with some slight modifications, in his garage at Canastota.

McBride, it is here contended, was invented prior to Cady. The evidence of McBride upon this point taken under commission is about as follows. McBride claims to have conceived his invention in April, 1916. He states he then made sketches upon a blackboard in his machine shop, and upon paper, of different forms of machines comprising the main elements later disclosed in his patent. He disclosed the outline of what he had in his mind to several men working in his shop whom he states he took

into his confidence for advice before commencing the construction of the machine. Early in 1917 he began making patterns of the machine which he worked upon at odd times until the latter part of 1918 when the patterns were completed for the drilling and countersinking portions of the machine. His original conception of the machine he states was to include a riveting device to be a part of the same machine. He states in this connection that in the meanwhile he was doing considerable experimental work with different kinds of hammers, a hammer being a necessary element in the riveting means. From the completed patterns he had castings made in the latter part of 1918. Some work was then done on the castings, and then they were laid aside till March, 1919, when the work was taken up again. In July, 1919, a machine was partially completed and put into use in drilling and countersinking brake band linings. McBride continued to experiment with hammers for the riveting device and eventually concluded to adopt an air hammer of a conventional type, and it was not till October, 1919, when he concluded his machine was perfected and completed. To use McBride's exact words:—

This hammer functioning perfectly, I decided that the machine was O.K. and ready to shoot and then I next took steps to take out patent papers in the United States.

His application for a patent in the United States was in November, 1919.

The evidence of McBride and others taken under Commission in California was evidently brought out upon the theory that a machine having been completed and put into use in 1919, and a patent applied therefor, that the date of invention was the date of McBride's first conception of the machine, provided he showed in the interim diligence in perfecting his invention. This doubtless is explained by the fact that such a rule or principle is recognized by the courts of the United States. There is not, however, in my opinion, any acceptance of such a principle in our law. In April, 1916, McBride lost two of his workmen because he criticized the quality of some work they had done in lining brake bands. This incident impelled him to think of some mechanical device to perform this class of work. Instantly, according to his evidence, he conceived the outlines of his invention which required

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three years and more to bring to perfection. Whatever he conceived of and was doing all the while, he is not in my opinion entitled to a patent over one who in the meanwhile has invented the same thing and given it to the public.

The evidence of McBride which I have summarised does not support invention prior to Cady whose machine was completed and put into use late in 1918. McBride's own evidence is I think an admission of an incomplete invention until July, 1919, when he commenced using a machine without the riveting means, and which really was not the complete machine he conceived or had in mind. In fact he states that it was only in October, 1919 that he decided his machine was completed, and thereupon he applied for a patent. I do not think it is open to serious contention that there was invention if at all earlier than July, 1919. Prior to that date, had McBride been asked if he had invented a brake band lining machine, he would I think have answered in the negative, because he had not yet practically realized what he had in mind. Everything was I think experimental up to the date when he commenced to use a machine for drilling and countersinking brake band linings. There was no publication of any sort of the invention so far as I can see at any time till about this date. Any disclosure was largely to his own workmen, and as McBride states, was confidential, and because he had confidence in such employees. This was not therefore a publication or disclosure. The evidence of disclosure to persons other than his own workmen is unsatisfactory and cannot be given any weight whatever. He states with commendable frankness in his evidence that he could not disclose the invention until he had at least nearly perfected it mechanically. I have no difficulty whatever in concluding that the McBride alleged invention was not a complete invention at any time in 1918 but was merely an incomplete suggestion. I think this was the opinion even of the inventor himself. For this reason McBride must be held to have been anticipated by Cady. It would be a strange principle of law that would concede to McBride priority in invention over Cady in view of the facts which have been related. When I leave the sugges-

tion that there may have been invention by McBride in July, 1919, when he put into use a partially completed machine, I have not given consideration to the point as to whether there could be invention as of that date when the end reached is not wholly what the inventor conceived or sought to accomplish, but a lesser thing.

Another brake band lining machine was introduced into the evidence and was I think referred to at the trial as the Vancouver machine. I refer to this machine not for the purpose of showing it was an anticipation of McBride, because that is not now necessary, but for other purposes. This was an alleged invention of one Gerry now of Seattle. Gerry claimed invention as far back as August, 1918, in Providence, Rhode Island, and he states that he there made a machine which was actually used for lining brake bands from about the first of September, 1918, to May 26, 1919, the date on which he left his employment at Providence, in which employment he was shop foreman in a truck service department. After locating in Seattle he had other machines made of the same type, several of which were sold and used in Vancouver two years prior to the application for patent by McBride. Mr. Scott urged that this was fatal to the patent of McBride under section 7 of the Patent Act. Mr. Smart replied to this contention that this part of section 7 only applies where it is the inventor's own invention which has been in public use or sale for two years, and I agree that Mr. Smart's view of the statute is the correct one. If in fact McBride was a prior inventor to Gerry, I apprehend that the sales made of Gerry in Canada would not prejudice McBride if he took out a patent in Canada within the period by statute provided.

The defendants also contend that McBride is void for want of invention. This contention is very substantial. In the action involving the Wright and Corson patent, I held the patent to be valid upon the evidence then before me. Since then the McBride and Gerry inventions have appeared in addition to Cady, all originating from independent inventors. Evidence was given at the trial by Maurice Caron, a patent solicitor of Ottawa, who testified that he relined brake bands on three or four occasions,

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using an ordinary lathe, first as early as 1914, and he illustrated the lining of a brake band in court upon such a lathe, with rapidity and I think accuracy. The end accomplished was the same as would be done by the machines of the plaintiff and defendants. Once knowing that this class of work could be done upon a lathe, I think any skilled or experienced mechanic could easily produce either the plaintiff's or defendants' machines or their mechanical equivalent. The evidence of Caron, the additional evidence as to previous methods of lining brake bands, and the fact of several inventions coming along all about the same time, all involving substantially the same arrangement of mechanical means evolved by shop mechanics, not particularly skilled so far as know, has convinced me that McBride lacks invention. I am satisfied that the development of all the brake band machines disclosed in this case were readily suggested by the lathe or other well known tools or mechanisms to experienced mechanics. Gerry states that in making his Providence machine he used an ordinary blacksmith's drill into which he inserted new tools, etc., and apparently it required little time and involved no difficulties of any kind. He states that he regarded the machine rather as an experiment, but it seems to have worked quite well and involved the basic idea to be found in McBride and the others. He did not for some time regard himself as an inventor. McBride states that when he conceived of that which he now claims to be an invention he had no thought of patenting the idea. This was probably true of Cady. The necessity for a convenient tool or machine of this kind for ensuring rapidity and accuracy of work evidently enabled mechanics not particularly skilled to conceive and construct machines all of one type, and all involving practically the same combination of old devices. It has frequently been held that if skilled workmen could produce any particular mechanical device without difficulty, when their attention has been called to the need of it, there can be no invention. That principle I think may safely be applied here. The additional evidence now before me since the trial involving Wright and Corson compels me now to the conclusion that the

plaintiff's patent is void as it involves no invention, and upon this ground also this action must fail.

There will accordingly be judgment for the defendants with their costs of action.

*Judgment accordingly.*

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GERRARD WIRE TYING MACHINE } PLAINTIFFS;  
CO. LTD. ET AL ..... }

VS.

LAIDLAW BALE-TIE COMPANY LTD... DEFENDANT.

1926  
July 7.

*Patents—Infringement—Combination—Particular arrangement of old parts—Equivalency—Colorable evasions*

*Held*, that where an invention relates to the production of an old result by means of a novel combination of old parts, or to a machine utilizing an old principle or system, the patentee is protected only in respect of the particular means specified and set forth in his specifications and claims; and in such circumstances it may be no infringement to achieve the same result by the use of well known equivalents, provided it is not a mere colorable evasion. A new mode of construction or operation of a machine may constitute a means different from that patented, and not be an infringement of the latter (1).

ACTION for infringement of four patents for invention relating to wire tying machines.

Ottawa, January 26, 27, 28 and 29, and Feb. 1, 2 and 3, 1926.

Action now tried before the Honourable the President.

*Russell S. Smart* for plaintiff.

*George F. Henderson, K.C.* for defendant.

The facts are stated in the reasons for judgment.

MACLEAN J., now the 7th day of July, 1926, delivered judgment.

This is an action for infringement of four Canadian Patents registered in the name of the plaintiffs. They are as follows: Patent No. 229,260 to run from August 19,

(1) An appeal has been taken to the Supreme Court of Canada.

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1919, known as Hatch and described as an improvement in bundling machines; patent No. 204,793, dated October 12, 1920, described as a portable wire tying machine and known as Boening; patent No. 215,134, dated January 17, 1922, described as an improvement in wire stretching and tying machines and known as H. Model; patent No. 215,103, dated January 17, 1922, described as an improvement in wire tying machines, and known as Little Giant. Infringement of another patent was alleged in the statement of claim but that was abandoned at the beginning of the trial. The plaintiffs claim that a machine used by the defendant and known as Tie-It, infringes all of the patents of the plaintiffs referred to.

All of the patents claimed to be infringed relate to a machine or tool designed to apply wire binders around a bundle, package, or box. In Hatch, the bundle or package had to be brought to the machine as this machine was not a portable one as originally designed. In the case of the machines constructed under the other three patents, they were much smaller, lighter and portable. It is claimed that the purpose of the several inventions or improvements was to solve the problem of quickly placing an effective wire tie around a package. The specifications of each patent describe means for holding the wire, means for tensioning the wire around the package or box, means for twisting a knot in the wire when the desired degree of tension is obtained, and means for severing the wire at the end of the operation. All the patents said to have been infringed clearly reveal the several means which I have mentioned and which are the substantial elements in each. In the case of three of the patents I think claim is made for a smooth bottom on the machine frame, the claim being that a machine with a smooth bottom will more readily slide over a box or package. Then forward and rearward extensions of the bottoms of the frames of some machines, sometimes referred to as fulcrums, are also claimed as part of the inventions. These two classes of claims in respect of some of the patents in question I do not regard as of any importance whatever or as representing any part of the invention. The fulcrums so called are merely extensions of the bottom or base of the

machine designed to give a workable base to the machine, and are employed only because they were obviously necessary and readily suggested in any attempted use of such machines. The claim for the smooth bottom is I think untenable. Neither represents invention or part of an invention and neither is, in my opinion, an element in the case requiring consideration. They relate merely to the structure of the frames of the machines and not to the means or mode of operation and fall within the field of the mechanic rather than that of the inventor.

The modes of applying a wire to a package under the plaintiffs' several patents are quite similar, and the following will apparently describe the method employed in applying a wire binder to a package. There is in the first place means to grip one end of the wire, which then is passed through two holders one on each side of what is called the twister pinion which is slotted where the wire goes through. The wire is then placed around the package or box and again through the holders and slotted pinion, and then by varying means is attached to a tensioning member. The slotted pinion holds two bights of wire in parallel relation, and its conformation is such that there the wires cannot twist, but between the holders on each side of the slotted pinion the wires may be twisted into a knot, that is to say the twisting is on either side of the slotted pinion, and as far as either holder, but not beyond. A lever or tensioning member solely devised for the purpose is then applied to tension the wire firmly around the box. Then by another lever or means the twister pinion is rotated which knots the wire, and on the completion of the twisting of the wire it is cut by suitable means. Then the machine is removed from the box. This does not precisely describe in detail all of the operations or all the elements of the several machines constructed under the plaintiffs' patents, but it in a general way discloses the main elements of the machines and generally the method of operation. It is admitted that the plaintiffs' patents are combination machines and the elements all old.

The defendant claims that the plaintiffs' patents alleged to be infringed are void for want of invention, because they were anticipated by previously existing combinations,

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and were in principle and substance known to the prior art. There is much to say in support of this contention as is true of almost any combination machine. In Steiner, a machine designed to tension and knot wire when applied to bales of hay contains substantially all the principal elements of Hatch or any other of the plaintiffs' machines. We find there holding means, the tensioning means, the slotted pinion or gear wheel contracted laterally so that two wires cannot turn therein past each other, and the means to rotate the gear to knot the wire on either side of the pinion. It did not however have a cutter or severing means which was apparently performed by hand. It would have required alterations in the structure of its frame in order to be used for applying wire to a wooden package or box. The specifications of Hatch specifically claim improvements over Steiner by reason of the provisions for cutting means and means to secure a more ready release of the wire from the receiving slots. Then in Merryweather we find means for holding, tensioning, twisting and severing. Instead of a pinion there is what is called a chuck to effect the twisting. Then there is the group of Lowery patents, one of which is described as relating to machines for binding or tying with wire articles such as shipping boxes. Here in some or all of this group of patents we find tensioning, twisting and severing means, but the mechanical construction varies considerably from Hatch. Numerous other patents were put in evidence with the view of proving anticipation of Hatch.

I am of the opinion, however, that the improvements in Hatch were substantial and represented an advance over any of the prior art, the combination was new and useful and was not anticipated at the date of the invention as a particular combination, and must be held to be valid as a combination machine of a known class or type. It was not, however, a pioneer patent or what is sometimes called a master patent. The art was gradually advancing towards the thing desired. Hatch according to the evidence laboured long in bringing forth his invention; I think he improved upon the prior art sufficiently to say he produced a new thing and was entitled to a patent for the improvements. It has utility not to be found in Steiner

and others, and was more adaptable to its intended purpose and apparently met a want and was a labour saving device. It is much more doubtful if improvements representing invention are to be found in Model H. and Boening. The only difference between Boening and Hatch is that the former is portable. It was a mere carrying forward of the idea of Hatch changed only in form or degree and involved nothing more than mechanical skill. That patent is void I think for want of invention. I have reached the same conclusion respecting Model H. If the action for infringement was by Hatch against the inventors of Boening and Model H. I would feel obliged to hold there was infringement on the ground that there was no substantial difference in the machines or their means and method of operation. Even if I am wrong in my view as to the validity of these two patents, the most that could be said for them I think is that they are particular means for achieving an old result. The other patent, Little Giant, is of a different class, the tensioning means being quite different from Hatch and is I think another combination machine.

It is well settled that when an invention relates to the production of an old result by means of a novel combination of old parts, or to a machine utilizing an old principle or system, the patentee is protected only in respect of the particular means he sets forth in the specifications; and in such circumstances it may be no infringement to achieve the same result by the use of well known equivalents. In other words when the invention claimed is the particular arrangement of old parts previously used in combination, the doctrine of infringement by the substitution of equivalents is not applicable, and the patentee cannot complain of the use of different mechanical appliances in lieu of one or more of the parts. Mere colourable evasions would not of course afford a defence. I would refer to the well known case of *Curtis v. Pratt* (1).

The question then arises if what was sought by Hatch and Little Giant was an old result. In *Merryweather* the inventor stated that the object of his invention was the manufacture of a machine for tying bundles and packages

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(1) [1863] L.R. 3 Ch. D. 135; L.R. 1 H.L. 337.

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with wire. This patent discloses means for tensioning the wire after it was passed around the package by hand, means for twisting the wire, and finally means for cutting the wire. In Lowery No. 799,174, patented September 12, 1905, the invention related to bundling machines and had for its object, the inventor states, to provide a simple, strong and efficient apparatus for binding bundles of laths, etc., with wire. In another of the Lowery inventions, dated April 1, 1913, the invention was said to relate to machines for binding or tying by wire articles such as shipping boxes, whereby the unauthorized and undetected opening of such boxes during shipment might be prevented. The invention included tensioning, twisting and severing means.

I refer particularly to Merryweather and the Lowery group for the reason that Mr. Hintz, the expert witness for the plaintiff stated that the Lowery machine had been made a standard wire or binding machine, and was manufactured in New York. He further stated that this machine was no longer being sold because of the competition which the Gerrard and the Tie-It machines had given it. He also states that Merryweather was used years ago and that possibly one here and there might still be found, and again he stated that wherever the plaintiffs' or defendant's machines are brought into the market, Merryweather is displaced because of the amount of wire it uses. This evidence I accept as proof that Merryweather and Lowery were produced and performed the results claimed for them, that is, tying packages or boxes by wire and knotting the same, though not perhaps in the same way or as expeditiously or as satisfactorily as Hatch. These were therefore not merely paper anticipations as might be said of much of the prior art cited at the trial by the defendant. Hatch was therefore I think a particular mechanical device for effecting a result which was an old result. The question remaining to be dealt with then is whether the defendant's machine is merely a colourable imitation of Hatch and the other machines of the plaintiffs', or whether the defendant's machine employs a different means or is another particular mechanical device for obtaining the same result. After a careful consideration of the defendant's machine, I have reached the conclusion that Tie-It



obtains the same result but by a different means, and does not therefore infringe the particular means disclosed in the plaintiffs' invention to obtain that result.

In the first place, Tie-It is operated by a single lever which tensions, twists and severs the wire as distinguished from the two separate levers which are to be found in all the plaintiffs' machines. The tensioning means in Tie-It is effected by the forward movement of a lever which actuates a circular member with a cam surface and which in turn, briefly stated, extends outwardly two arms holding the ends of the wire which thus tensions the wire. On the return movement of the lever the twisting and severing takes place. In all the plaintiffs' machines the tensioning is performed by one lever designed for that purpose only. The twisting mechanism is also operated by another lever designed only for that purpose.

One can hardly view any one of the plaintiffs' group of machines and then compare them with Tie-It, and say that the latter is the same as any of the plaintiffs' machines. Tie-It is, I think, a good illustration of a combination machine. While it necessarily has the means of performing the principal operations of tensioning, twisting and cutting, still the operating mechanism or actuating means producing that end are very easily distinguishable from that of any of the plaintiffs' machines, and I think represents a new and particular means of achieving the same result. The evidence would indicate that it works more rapidly than any of the plaintiffs' machines. Another thing which in a very important way distinguishes Tie-It from some of the plaintiffs' machines is the fact that the former can be used in any position upon the package or box which is to be tied with wire. Model B for instance, which is said to be constructed under Hatch and to contain every element of Hatch, cannot be used on any part of a box by reason of the twisting arm or handle limiting the distance it can be placed from the edge of the box. There is nothing in the plaintiffs' machines corresponding to the mechanism in Tie-It whereby a single lever will actuate the tensioning, twisting and cutting means. The mechanical construction of Tie-It in my opinion is quite different from that of Hatch or Little Giant and cannot

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be read from the specifications or drawings of those two patents. To the general observer interested in that particular mechanism, Tie-It has not the same appearance as either Hatch or Little Giant. The defendant in Tie-It has produced a new mode of construction and a new method of operation quite different from any of the plaintiffs' machines. It has been said that that which is protected is that which is specified, and that which is held to be an infringement must be an infringement of that which is specified. Particularly is that true of combination machines where the elements are old and have been used before in combination to achieve the same or analogous results. The patent is limited to the particular means specified. I am of the opinion therefore that the plaintiffs' action for infringement fails.

The defendant also claims that the plaintiffs' patents, or some of them, are void by reason of failure to manufacture the same in Canada, and also for importation, contrary to the provisions of the Patent Act.

When the patents in suit were granted it was required of the patentee by the Patent Act, ch. 69, R.S.C., 1906, that he should commence and continuously carry on in Canada the construction or manufacture of the invention patented in such a manner that any person desiring to use it might obtain it, or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada, otherwise the patent should become null and void at the end of two years from the date of grant. The Act also provided that if after the expiration of twelve months from the granting of the patent, the patentee or his representative imported into Canada the invention for which the patent was granted, that it should become void.

By Ch. 44 of the Statutes of Canada, 1921, it was provided that no patent in force on the first day of August, 1914, or subsequently granted, should be void through failure to construct or manufacture, or by the importation thereof, between the said date and June 10, 1922. The present patent Act came into effect on September 1, 1923, and its provisions in respect of manufacture are altogether different from the preceding Act, and no mention is made

of importation. Therefore, between June 10, 1922, and September 1, 1923, the former Patent Act was in force and I think applied to the plaintiffs' patents.

Mr. Smart contended that section 68 of the present Act, which enacts that all patents issued prior thereto should cease to be subject to the provisions of the Patent Act, Ch. 69, R.S.C., 1906, here applied and that the patents in suit are now subject only to the provision of the present Act. That section, however, expressly provided that nothing in the present Act should be construed to revive or restore any patent that was void when that Act came into force. Therefore if the plaintiffs' patents or any of them became void between June 10, 1922, and September 1, 1923, by reason of non-manufacture or importation, it would appear that section 68 of the present Act would hardly restore any patent which in that interim had become void. There is, however, very much to say in favour of Mr. Smart's contention, particularly when one realizes that the present Act contains fresh provisions in respect of manufacture quite different from that found in the preceding Act, and the provisions in reference to importation are entirely dropped. It may well be argued that the intention of Parliament was to enact that a patent which was voidable under the former Act for such reasons, but not having been on such grounds judicially or otherwise declared void before September 1, 1923, became wholly subject to the present Patent Act. However, I think I may dispose of this particular defence without determining the effect of Section 68 of the Act.

Hatch was not manufactured in Canada precisely as patented. A portable machine known as Model "B" was however manufactured in Canada, and Mr. Smart claims that it contains all the claims and disclosures mentioned in Hatch and was therefore a manufacture of Hatch. In fact and in law I think this contention is sound. It was only the frame of this machine that was manufactured in Canada while many of the parts were imported, but nevertheless I think this was a manufacture sufficient to meet the requirements of the Act. In respect of Boeing and H. Model, having found them void, the question of manufacture or importation need not be dealt with. In

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respect of the machine known as Little Giant no manufacture was required within the period in question, but there is said to have been importation. The evidence upon this point is not satisfactory or clear and I do not think I would be justified in finding there was importation upon such evidence.

I therefore find there was no infringement and the plaintiff's action fails. The defendant will have its costs of action.

*Judgment accordingly.*

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ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY  
 DISTRICT

H. M. WRANGEL AND COMPANY A/S }  
 (PLAINTIFF) ..... } APPELLANT;

AGAINST

THE SHIP *STEEL SCIENTIST* (DE- }  
 FENDANT) ..... } RESPONDENT.

*Shipping—Collision—Crowded harbour—Tide and fog—Ship at anchor—  
 Burden of proof—Inevitable accident.*

The *A.* entered Vancouver harbour at 8.30 A.M. bound for B. pier, but it being then not clear, she was forced to anchor between 250 and 300 yards off. She complied with all the precautions prescribed by the regulations, and was duly and properly anchored. There was a flood tide running and the weather was foggy and misty. A little later the *SS.* with pilot, entered the harbour at reduced speed. She had heard the bells from the *A.* and when about 800 or 900 feet away sighted the *A.* She stopped her engines and drifted forward at four knots, heading across the *A.*'s bow. Her master admitted that she could have then stopped and backed, but decided to go ahead intending to cross the *A.*'s bow about 200 feet ahead of her. The *SS.* then hearing three whistles on her starboard side and a starboard and port bell and seeing a ship loom up out of the fog, put her engines astern. Her headway being taken off she drifted with the tide towards the *A.* and a collision occurred. The *SS.* pleaded inevitable accident.

*Held* (reversing the judgment of the Local Judge in Admiralty), that the introduction of another ship as aforesaid should have been anticipated by the *SS.* and was one of the accepted risks in attempting to proceed as she did, in the fog. That it was upon the *SS.* to show that no other course was open to her; and having failed to do so, and having failed to use the proper precautions open to her to prevent danger, she must be held solely to blame for the collision.

2. That in a case of collision in daylight, between a ship under way and one at anchor in a proper place, the burden is upon the former to show she was not in fault. It is the bounden duty of a vessel under way to avoid, if it be possible with ordinary care and with safety to herself, any collision with an anchored ship.
3. It is an "inevitable accident" where one vessel doing a lawful act without any intention of harm and using proper precautions to prevent danger, happens to run into another vessel.

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APPEAL from the decision of the Local Judge in Admiralty dismissing plaintiff's action for damages due to a collision with plaintiff's ship.

Vancouver, September 28th, 1925.

Appeal now heard before the Honourable Mr. Justice Maclean assisted by Commander W. Dixon Hopcraft, R.N.R., and Captain A. R. Bissett, as nautical assessors.

*S. A. Smith* for the appellant.

*E. C. Mayers* for the respondent.

The facts are stated in the reasons for judgment.

MACLEAN J. now this 27th November, 1925, delivered judgment (1).

This is an appeal from Hon. Mr. Justice Martin, Local Judge in Admiralty for the District of British Columbia, dismissing the plaintiff's action for damages ensuing from a collision with the defendant ship.

The appeal was heard by me at Vancouver with two nautical assessors, Commander W. Dixon Hopcraft, R.N.R., and Captain A. R. Bissett.

The plaintiff's steamer *Augvald*, of Norwegian registry, and of 4,811 net tonnage, en route from an American port on the Pacific Coast to the Orient, came into Vancouver harbour at about 8.20 a.m. on November 29th, 1923, bound for the west side of Ballantyne pier, there to complete her cargo. On approaching this pier, and at about thirty yards distance, she was advised that the berth intended for her was not clear, and she then backed out and anchored from 250 to 300 yards off the north end of Ballantyne pier, or possibly abreast of the Great Northern pier, which is immediately east of the former pier. The evidence is not

(1) Affirmed by the Privy Council on July 16, 1926. For full text see end of this report.

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quite clear upon the point, but it is immaterial I think. She swung with the tide, parallel to both of these piers, and pointing in a westerly direction. There was a flood tide running at the time of from two and a half to three knots an hour. That the weather was foggy or misty in the harbour is not seriously in dispute. The precautions prescribed by the regulations in such circumstances were complied with by the *Augald*, an anchored ship in foggy weather, insofar as the ringing of the bell and lookout were concerned.

The defendant ship, the *Steel Scientist*, of United States registry, 3,741 net tonnage and 442 feet in length, was later observed approaching the *Augvald* at a distance according to the plaintiff, of about 1,000 yards, about four points on her starboard bow, and on a course to cross her bow. The speed of the defendant ship at this point is in controversy, though perhaps not in a material degree, but it may be said that the master of the *Augvald* states that speed to be five or six knots; generally the evidence would fix it at about four knots. With the flood tide on her starboard quarter, the plaintiff's evidence is to the effect that the *Steel Scientist* was proceeding ahead and when about 500 yards distant she stopped her engine, but with her headway proceeded until she was about 200 or 300 yards from the *Augvald*, on her starboard bow. Then the defendant ship reversed her engine, in the meanwhile drifting sideways, east and northeast, towards the bow of the *Augvald*. The next manoeuvre of the *Steel Scientist* was to put her engine ahead and starboard her helm, but this was apparently too late, and she drifted down on the bow of the *Augvald*, causing the latter damage. Just what happened subsequent to the impact is not in my opinion important as to the issue, and need not here be related, though it may be briefly stated that the defendant ship passed down on the port side of the *Augvald*, around her stern, and anchored on her starboard side.

The plaintiff's case is that the *Steel Scientist* was navigating at too great a speed considering the fog or mist, and was not under proper control at the time of sighting the *Augvald*; that had she kept her course after first observing the *Augvald* she would have passed the bow of the *Augvald* at a distance of about 200 to 250 feet; that she should

not have stopped her engines which caused her to drift sideways down upon the *Augvald*; and that the *Steel Scientist* should not have attempted in the circumstances to cross the bow of the *Augvald* in view of the strong flood tide, but should have gone to anchorage on the starboard side of the *Augvald*.

The *Steel Scientist* entered Vancouver harbour with a pilot, under orders to proceed to anchorage, just a little later than the *Augvald*. Her master states that when he passed Brockton Point at the entrance to Vancouver harbour, at 9.33 a.m., the weather set in hazy and foggy, and speed was reduced to half speed, then to slow. He heard a ship's bell after he had reduced to slow, about a point and a half or two points on his port bow and saw a ship looming up, which proved to be the *Augvald*. He states that he could see some 600 to 700 feet towards the shore, when he was west of the *Augvald*. After first actually sighting the *Augvald* at a distance of 800 or 900 feet, he stopped his engines, which permitted the *Steel Scientist* to drift forward at about four knots, and heading across the bow of the *Augvald*, and he states that he had hoped to cross the *Augvald* at about 175 to 200 feet ahead of her. At this point, the master says he could have stopped his ship and backed if he had decided so to do, but his decision was to cross ahead of the *Augvald*. He categorically admitted upon the trial that other courses were open to him. He could have stopped and backed; he could have proceeded forward under the ship's momentum; he could have ported his helm and kept farther off from the *Augvald*; he could have starboarded his helm and proceeded around the stern of the *Augvald* to anchorage, or he might have anchored his ship. He elected to go ahead, and his manoeuvres up to this point were as I have already stated, namely, slow ahead and then engines stopped.

The only further point that should here be mentioned, is that the master of the *Steel Scientist* states, that just as he was in line with the *Augvald* and presumably steering to cross her bow, though the engines were stopped, he heard three whistles out of the fog on his starboard side, and a starboard bell and a port bell, and at the same time saw two lighters with a gasoline launch on his port bow about 325 feet inside the *Augvald*. Upon hearing the

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three whistles, the *Steel Scientist* replied with three whistles, and then put her engines astern, this being done because he says he saw a ship looming out of the fog, and apparently backing out of a dock on his starboard bow, at a distance of 600 to 700 feet. This ship turned out to be the *Princess Ena*, which apparently was docking at the Great Northern Pier, and it is suggested that she had ported her helm and was backing out in order to straighten up, prior to landing at her berth. While her engines might be going astern it is suggested she was not making sternway. The evidence is not clear about the movements of the *Princess Ena*, but this hypothesis was not controverted upon the hearing of the appeal, and would appear to be quite possible. In the meanwhile the headway being taken off the *Steel Scientist* by her stern movement, she drifted towards the bow of the *Augvald*, and the collision occurred at 9.55 A.M. Just prior to the collision, and when the sternway was taken off, the order full speed ahead with a starboard helm was given by the *Steel Scientist*. This was merely to diminish the impact, her master states.

There are contradictions in evidence as to distances, visibility, and movements of ships, but on the salient point, whether the action of the *Steel Scientist* after sighting the *Augvald* at anchor, was prudent and in accord with good seamanship, the variations are not in my judgment of prime importance.

It is a well established principle of maritime law, that in the case of a collision in daylight between a ship under way and another at anchor in a proper place, the burden is upon the other ship to shew she was not in fault. It is the bounden duty of a vessel under way, to avoid if it be possible with ordinary care and with safety to herself, any collision with an anchored ship. Such principle hardly needs any reference to authority, and appears indeed quite obvious.

It is conceded that the *Augvald* is blameless and did everything in the circumstances that the regulations required, or practical seamanship might suggest. Has the *Steel Scientist* then displaced the *prima facie* evidence of negligence on her part? The defendant ship pleads inevitable accident by reason of the described and unex-



pected movements of the *Princess Ena*, and that no other course of action was available to her than that adopted. Inevitable accident is where one vessel doing a lawful act, without any intention of harm, and using proper precaution to prevent danger, unfortunately happens to run into another vessel.

I think the real question for decision is whether the *Steel Scientist* in the circumstances prevailing at the time, exercised proper and reasonable precaution in her movements.

The whole conduct of the *Steel Scientist* in crossing so closely the bow of the *Augvald*, and in heading towards the line of the piers into a restricted area of water where there was always at least the liability of encountering other ships or crafts of one kind or another, seems strange indeed. The introduction of the *Princess Ena* or any other ship into the situation was something that should have been contemplated, and was one of the accepted risks in attempting to proceed to the anchorage grounds by passing between the *Augvald* and the piers, and under unfavourable atmospheric conditions. Such a manoeuvre required the utmost control of the *Steel Scientist*, and the most careful navigation. It appears to me that in all the circumstances and with the manifest risks attending such a course of action, the defendant ship must shew practically that no other course was open to her in order to sustain the defence of inevitable accident.

My assessors most unequivocally advise me that the *Steel Scientist* is clearly to blame for the collision. In the first place they advise that she failed to reduce speed sufficiently and in time, considering the prevalence of fog, the numerous fog signals around her, the probable traffic, the narrow waters into which she was moving, and her proximity to the piers. They advise me that there were several courses open to her, some one of which she could and should have pursued. When she first heard the bell of the *Augvald* she should have slowed down to steerage way only, and should have made ready to let go her port anchor at any moment. Then when she sighted the *Augvald*, her helm should have been placed hard astarboard, and her engines put full speed ahead, or at half speed as seemed

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necessary, and if she did not promptly respond then to drop anchor under foot.

My assessors also advise me that the *Steel Scientist*, having decided to cross the bow of the *Augvald*, should have maintained more speed and stood in readiness to adopt the same action in the use of the anchor, after crossing the bow of the *Augvald*, if necessary, thus turning sharply to port and avoiding a collision with the *Princess Ena* or any other craft that she might unexpectedly encounter, in the area between the *Augvald* and the piers. They advise me also that there can be no doubt that the *Steel Scientist* could have passed on the starboard side of the *Augvald* and to anchorage, and thus have avoided any risk of collision. Again it was open to the *Steel Scientist*, my assessors advise, to stop and anchor when first hearing the bell of the anchored ship, or after first sighting her.

I think it is quite clear that all such courses were open to the *Steel Scientist*, in fact the master of that ship has conceded this, and that in all the circumstances bad judgment was exercised in the navigation of the defendant ship, and I have no difficulty whatever in adopting the views and advice of my assessors as I have just expressed them, and it is needless for me again to repeat the same in any other form, or at greater length. In fact I see no other view which can reasonably be sustained. Attempting to cross, as she did, the bow of an anchored ship, with quite a tide and fog prevailing, the *Steel Scientist* assumed the risk of navigating in restricted waters and in close proximity to the piers, and in which waters she should have anticipated the possible or probable movement of other ships or craft. In such circumstances every available precaution should have been exercised against every possible risk of collision. Having decided upon following the course that in the end produced the collision, namely crossing the bow of the *Augvald*, and having encountered the unexpected movements of the *Princess Ena* as she did, the use of the anchor was one line of action at least that might reasonably be expected, and which in my opinion would have avoided the collision. Other courses were also earlier open to the *Steel Scientist* to adopt and which would have avoided the collision. I think that upon no ground what-

ever is the defence of inevitable accident open to the *Steel Scientist*.

I am of the opinion that the defendant ship disregarded article 16 in not exercising the proper degree of caution in approaching the anchored ship in foggy weather. She disregarded also articles 22 and 23 and articles 27 and 28.

I am therefore very respectfully of the opinion that the *Steel Scientist* is to blame for the collision and accordingly I allow the appeal with costs here, and the plaintiffs' action with costs below.

The case will be remitted to the court of first instance to be there dealt with as the right of the parties under this judgment may appear to the said court.

*Judgment accordingly.*

JUDGMENT OF THE LORDS  
OF THE JUDICIAL COM-  
MITTEE OF THE PRIVY  
COUNCIL DELIVERED THE  
16TH JULY, 1926.

*Present at the Hearing:*

THE LORD CHANCELLOR.  
LORD PHILLIMORE.  
LORD JUSTICE WARRINGTON.

*Nautical Assessors:*

ADMIRAL SIR R. NELSON OMMAN-  
NEY, K.B.E.  
COMMANDER C. A. SMITH, C.B.E.,  
R.D., R.N.R.

*Delivered by LORD PHILLIMORE.*—  
In this case, in which the ship *Steel Scientist* came into collision with the steamship *Augvald* in the Harbour of Vancouver on the morning of the 29th November, 1923, the Lord Judge in Admiralty absolved the *Steel Scientist* from liability, but the President of the Exchequer Court, who heard the case with the assistance of two nautical assessors, reversed this decision, and found the *Steel Scientist* alone to blame for the collision. It is from this decision that the present appeal is brought.

Their Lordships, after hearing counsel for the appellant, are of

opinion that the decision of the Exchequer Court cannot be disturbed. As was pointed out by the President, there were several matters in respect of which bad navigation could be charged against the *Steel Scientist*, and on which his assessors advised him that she should be held to blame. Some of these charges may have been displaced, but, broadly speaking, the assessors whose advice their Lordships have had agree with the assessors in the court below; and, independently of such advice, their Lordships are of opinion, as was the President of the Exchequer Court, that the *Steel Scientist*, if properly navigated, need never have come into collision with the *Augvald*. Indeed, those who defend her action are in a dilemma. If the conditions of the foggy weather and tide and the proximity of other vessels navigating made it in any degree dangerous for the *Steel Scientist* to come into the anchorage ground for which she was making, she ought either to have stopped and waited outside, or to have come in with great precaution at a slow speed, with a vigilant look-out and her anchor ready to drop at any moment. If, on the other hand, it was safe for

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her to approach the anchorage, then nothing supervened for which she ought not to have been prepared. Making all allowances for the mist and the smoke from the factories, she saw, or ought to have seen, the *Augvald*, and made out that she was riding to her anchor, in time for her to elect which of two courses she should take: either she could starboard her helm and pass down the starboard and outer side of the *Augvald*, or she could cross the bows of the latter as she was riding to the tide; and inasmuch as in their Lordships' opinion she could easily have taken the former course, and as the latter course was a risky one, she must be held responsible for any supervening incident which terminated the risk unfavourably.

It is said on her behalf that if the third ship, the *Princess Ena*, had not unexpectedly appeared and backed astern, she would have been in no difficulty. Here again her owners were on the horns of a dilemma. They do not say that the *Princess Ena* was wrongly navigated or was herself to blame. If, then, the state of the atmosphere towards the shore and on her starboard hand was such that vessels might be moving in it without being observed, and in such a manner as to make the manoeuvre of crossing the bows of the *Augvald* dangerous, the *Steel Scientist* ought not to have been taken by those in charge of her in such a danger-

ous direction. If, on the other hand, it was possible to discover in time and to act for the movements of the *Princess Ena* and yet avoid collision with the *Augvald*, it follows that those navigating the *Steel Scientist* did not take proper steps.

It may be that when the *Princess Ena* was observed it was too late to take any steps to avoid the collision, or it may be that if, instead of reversing her engines, the *Steel Scientist* had held on and starboarded her helm, she would have swung herself clear of the stem of the *Augvald* without thereby bringing herself into collision with the *Princess Ena*. But in truth there was no consistency in her navigation; she started by preparing to cross the bows of the *Augvald*, she reversed her engines in order to keep to the north and outside the *Augvald*, and then she put her engines on again, while the tide was all the while carrying her down upon this anchored vessel.

No fault being alleged against the *Augvald*, the burden was upon the *Steel Scientist* to excuse herself for coming in daylight into collision with an anchored vessel duly ringing her bell as a precaution for fog; and this burden has not been discharged.

Their Lordships will, therefore, humbly recommend His Majesty that this appeal should be dismissed with costs.

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THE MATTHEWS STEAMSHIP COM- } PLAINTIFF;  
 PANY . . . . . }

AND

THE ONTARIO SAND AND GRAVEL } DEFENDANT.  
 COMPANY . . . . . }

*Shipping—Collision—Negligence—Observance of Rules—Preliminary Act—Admissions therein.*

Held, that the failure of the Master of a ship with plenty of sea room, to move out of instead of into danger is not merely an error of judgment but bad navigation. This is applicable where a ship is on

the wrong side of the channel and is faced with the choice of endeavouring to put herself right by crossing the channel, or of using the sea room available in the opposite direction.

2. That the statements of fact in a Preliminary Act are statements which must be presumed to be made after the most careful examination and consideration, and where a pleading differs from the Preliminary Act the admissions made in the latter and their bearing upon the evidence adduced must be given very great weight in coming to a decision.

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ACTION brought by the plaintiffs against the defendant for damages by reason of collision between a ship owned by the plaintiff, and a barge, while under tow, owned by the defendants. The defendants counterclaimed for damages in respect of the said collision.

Toronto, the 17th, 18th and 19th days of March, A.D. 1926.

Case now tried before the Honourable Mr. Justice Hodgins, L.J.A.

The facts are fully set out in the reasons for judgment.

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

*J. H. Rodd, K.C.*, for defendant.

HODGINS L.J.A., now (April 14th, 1926), delivered judgment.

Action arising out of a collision between the *Yorkton* owned by the plaintiff, a steel vessel of 1,136 tons and 250 feet long, and the defendant's barge *Badger*, 140 feet long, 36 feet beam and drawing 1½ feet, while in tow of the tug *Tees*. The *Tees* is a vessel 86 feet long, 16 feet beam and drawing from 6 to 9 feet, and was towing the *Badger* by a towline 150 feet long. The accident happened near the entrance of the south channel in the St. Clair River just above Russell Island. The river is split into two channels, north and south, by Russell Island and the shoal to the northward of it. The south channel is about 750 feet wide.

The *Yorkton*, loaded and drawing 13 feet, was descending the river, while the *Tees* towing the *Badger* (light) was coming up the south channel. The *Yorkton* entering the south channel came on the *Badger* while the *Tees* was endeavouring to draw her towards the Canadian or east side of that channel. The tug had given a one-blast signal previously, indicating that the *Yorkton* should pass the tug and

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tow port to port. Just why the collision happened and how it came about are matters of some difficulty.

There are certain things in which the Masters of the *Yorkton* and the *Tees* agree, or which are shown by uncontradicted evidence. There is a gas buoy with a flashing light at the north end of the shoal, which extends north from Russell Island for about 3,000 feet, and this buoy had, before the accident, been moved a distance of 200 feet to the westward of its position as shown on the large chart, Ex. 1. Dredging had removed a large part of the shoal south and west of where the gas buoy was originally stationed, for a distance of 1,700 feet south of the buoy by its entire width from east to west.

The *Yorkton* was about 750 feet or about three lengths of that ship north of the gas buoy when, after a one-blast signal from the *Tees* she changed her course, and turned rapidly to starboard. The collision occurred to the west of the center line of the south channel and somewhat south of the gas buoy.

The *Tees*, after blowing her one blast signal, headed diagonally upstream for the North Walpole Light, which is off the Canadian or east shore of the channel, gradually straightening up towards port to avoid the Canadian bank. This movement enabled the master of the *Yorkton*, during her movement to starboard to see her green and red lights over the *Yorkton's* starboard bow. The *Yorkton* came far enough round to starboard to clear the tug, but struck the barge *Badger* a glancing blow about amidships with her port bow, at an angle stated by the opposing parties on the one hand to be about 45 degrees and 3 to 3½ points on the other. The tug hauled the *Badger* toward the shoal and grounded her there, where she sank.

So far this describes happenings which are not disputed, or are clear, but the difficulty occurs in determining just whether the account given by each ship accurately describes the way in which they came upon one another, and their previous courses, and the true reason for the collision.

I now come to what is controversial, and I may say that there is an absolute contradiction on almost every essential question which is in issue. Guesswork also enters into many of the answers made during the trial.

The course of the *Yorkton* down stream is given by her master, second mate, and wheelsman, as being steadied on the flashing white light gas buoy at the head of the shoal north of Russell Island, when a mile above it, and passing the Snye River (The Chenal Ecarté) marked X on chart. Then when about half a mile (or a little less) above the gas buoy she swung slightly to port (about 1 to 1½ points) at a position marked ⊕ on the chart, and steadied on a course midway between the lower red light on Walpole Island (Canadian side) and the gas buoy. The *Yorkton's* progress had been checked, opposite the Snye River to one-half speed, i.e., 6 miles to which is added two miles of current—8 miles over the ground, and this speed was maintained until the *Tees* had blown one blast, when after blowing a danger signal, the wheel was put hard to port, the engineer put full speed ahead to get the current on the rudder to start a swing. As she started to swing, the engines were put full speed astern and the wheel put amidships. The version of the Master of the *Tees* and others is that the *Yorkton* was heading for the north channel on a cluster of lights on a dredge then moored at Dana dock on the American shore. Dana dock is shown on the chart as bearing almost northwest of the gas buoy, and about 1,600 feet west of it. The *Yorkton* is then said to have suddenly changed her course to port when three ship lengths above the buoy, and two lengths to the west of it, and to have headed across the river above the buoy, pointing across the entrance to the south channel. This puts the *Yorkton* the same distance to the north of the buoy as her Master says she was when she heard the *Tees* one-blast signal. It is impossible to reconcile these two stories. In examining them I think the assertion on behalf of the *Tees* that the *Yorkton* was 500 feet or two ship lengths to the west of the gas buoy and that she then turned sharply to port heading across for the east side of the channel is not one that can be accepted. It is not consistent with the defendants pleading, though it is with their preliminary act which however says that the turn to port continued sharply. It is based on a theory which seems to be rather far fetched, and probably proceeds from some knowledge gained before the trial that the Master of the *Yorkton* thought when he saw the cluster of lights which proved to be the tug and

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tow, that they were those of the dredge which on his up trip he had seen working on the shoal. To lend probability to it, evidence was given that when the *Yorkton* was first sighted her so-called range lights were open and that she therefore seemed to be steering into the north channel and had to make a sharp turn to port when she discovered her mistake in direction. Added to this was the fact that the dredge had moved over to Dana dock as I have mentioned, and was lit up. If the *Yorkton* had got 750 feet north of the gas buoy and two ships lengths (500 feet) to the west of it, she would then have got almost ahead of the Dana dock before making the turn, and certainly was not pointing for it. It is rather incredible that a large ship with a full cargo, when intending to make for the south channel, should have steered on a cluster of lights more than one-quarter of a mile west of the flashing light of the gas buoy which was in full view.

It is also quite inconsistent with the idea that if she was on the course described by the Master of the *Tees* she could have got herself within 500 feet west of the gas buoy when she made a turn to port.

The Master of the *Yorkton* is somewhat confused as to the exact position, in relation to the gas buoy light, of the cluster of lights which he saw. If he came down on the course he states the position of the lights on the tug and barge in relation to the gas buoy as seen from the *Yorkton* would depend largely on just where the tug and tow were, for it must be borne in mind that the gas buoy had been moved approximately 200 feet west of its former position. If the *Yorkton's* course was midway between it in its new position and the lower Walpole light, it would be further west of the centre line of the south channel than is shown on the chart, and the lights of an upcoming craft might appear to him to be on the left or right of this gas buoy, depending on whether that craft was either well up or lower down the channel. He finally fixed on the cluster of lights being to the left of the gas buoy from his point of view, and practically in line with the lower red lights on Russell Island, and this coincides with the evidence on behalf of the *Tees* as to her own distance below the gas buoy about that time. It is of course quite evident that the Master of the *Yorkton* did steer in the direction of



some cluster of lights, but he puts them as showing over the flashing gas buoy light, and extending behind it, and whether properly described as a cluster of bright white lights, or not, they were evidently those carried by the tug and tow.

The course of the *Tees* and her barge is given as being about abreast of the head of Russell Island and in or near the middle of the south channel, when the *Yorkton* was 1½ miles away. The tug was over 2,500 feet or nearly half a mile below the gas buoy then. As to when she saw the *Yorkton* change her course, her Master says

When I got within about half a mile as near as I could judge, the *Yorkton* swung sharply to port \* \* \* within about half a mile of the *Yorkton*, that is, in a direct line, she swung sharply to port.

On cross-examination he says,

I would figure that we were about a mile apart when she altered her course to port, or about half a mile, pardon me \* \* \* we would be about 1,300 feet—1,200 feet, I couldn't just say exactly—

I have come to the conclusion that these last figures are incorrect and that his distance from the *Yorkton* was further than the quotation indicates. The *Tees* is not admitted to have changed her position in relation to midchannel till she saw the *Yorkton* change her course. It is quite probable, however, that as the position of the gas buoy had shifted 200 feet west, the *Tees* would be rather over in the west half of the channel and not in mid channel. It is stated by her Master that the down current sets towards the Canadian shore, so that getting close to the Russell Island side would be a natural thing to do, though he denies doing so. Crossen, the second mate of the *Yorkton*, and others, say that the *Tees* was on the Russell or west half of the channel, and McLeod, the Master of the *Badger*, gives her position just before the collision as in the west half of the channel. Duff, Master of the *Superior*, called for the defendants, says that when he saw the tug and tow they were pretty close to Russell Island, as though they intended to cross between the buoy and the island. Though this witness very clearly showed his unreliability, the defendants cannot complain if his early statement to Mr. Theodore Robinson, Ex. 3, is used against them, especially as he adduces a reason for his belief which discloses an interest in their position in relation to his ship. The

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evidence of the Master of the *Tees* that the tug got within 200 feet of the Canadian shore while towing the barge across is important. The barge with her tow line must have extended 290 feet (140 plus 150 feet) behind the *Tees*, and adding 86 feet, the length of the tug, would leave only about 175 feet of channel behind the barge or say one-quarter of the entire width of the channel. From this position in the channel the barge must have started. This conclusion is strengthened by the evidence as to where the collision took place. The evidence on the part of the *Yorkton* is that the tug and tow, when first seen in relation to the gas buoy, as well as when the collision took place, were comparatively near it. They are not agreed as to exact distance, but put it within such a distance as to show that the *Tees* and tow were in the western half of the channel. Those called for the *Tees* and *Badger* on the same point, are almost all equally positive that the tug and tow were in the middle of the channel when they began to go to starboard across it, and that the collision took place near the Canadian shore.

The probabilities, if not the certainties, are wholly in favour of the tug and tow being to the west of midchannel at both periods of time.

There is one witness, McLeod, Master of the *Badger*, who may be supposed to know where she was before and after the collision, and he puts the *Badger* in the west half of the channel, and as only going her own length, 140 feet, before she was struck. The tendency of the tow at the end of so long a line would be to swing. The position of the *Badger*, when sunk, seems to me upon the whole evidence, reasonably certain—she was off the shoal and not far from the buoy and when struck went under the stern of the *Yorkton* which was then certainly not in the east half of the channel. I am forced to the conclusion that the tug and tow were in the west half of the channel when they commenced to move across it. This would be her wrong side and she must bear whatever consequences flow from this finding. Rule 25 governs. Speaking of it, Marsden, 8th Edn., p. 415, says:—

Any person in charge of a ship who navigates her on the wrong side of a narrow channel, besides being guilty of a misdemeanour, will in

most cases subject himself and his owners to liability for any collision occurring when he is on his wrong side.

This rule in Canada has been dealt with in *C.P.R. v. SS. Camosun* (1) (which I have considered on other points in connection with this action). *SS. Coniston v. Frank Walrod* (2), and *Tucker v. SS. Tecumseth* (3), which last case refers to the rule which the President of this court has repeatedly emphasized, that the risk of collision, and not only the imminent collision itself, must be considered and dealt with.

I have come to the conclusion that what the master of the *Yorkton* saw beyond the gas buoy light were the lights of this tug and tow; that the *Yorkton* was on the course described by her Master, and that the *Tees* and her tow were somewhat more than half a mile from the *Yorkton* when the signal was given by the *Tees*. And if I had been able to accept the account of the *Yorkton's* course sworn to by the *Tees*, it would put that vessel in the position of having given a signal requiring an immediate right angled circling turn to avoid the tug, a very difficult manoeuvre to be demanded in the situation then existing.

In the position, as described by the *Tees*, the *Yorkton* would have been a crossing ship and bound to keep out of the way of the *Tees* without any signal required, except possibly an alarm. See *The Seacombe* (4).

In the view I have taken of the relative positions of the vessels when the one blast was blown by the Master of the *Tees*, the question arises whether this was a proper thing for him to have done under the circumstances.

The down-coming loaded ship had the right of way and the current was with her, setting in towards the Canadian shore. Her master had seen the lights on the tug and tow to his left, and to the left of the gas buoy, and though he was under the impression that they represented a dredge at work, he would feel safe in keeping his course until he was near the gas buoy where he would be bound to turn into the South channel. When he came near enough to see what the lights indicated it would have been a natural thing to turn somewhat to port to avoid them, and this

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(1) [1925] Ex. C.R. 39.

(3) [1905] 10 Ex. C.R. 44.

(2) [1918] 19 Ex. C.R. 238.

(4) [1911] 81 L.J. Adm. 36, 37,  
59 & 64.

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would bring him into the eastern half of the channel. Such a course was adopted and approved in *U.S. Steel Products v. Sincennes McNaughton Lines* (1), when the *Steel Motor* was about 250 feet distant from the upward-bound tug and tow. The Master of the *Yorkton* says that he had his hand on the rope to blow two blasts indicating such a course which according to the witness Solery would have been the proper action to take then. But he was anticipated by the *Tees* which blew one blast, and then started at full speed diagonally across the channel so as to get out of the way of the *Yorkton*, and afterwards accelerated when the alarm signal was heard. The Master of the *Tees* says that two minutes elapsed after he started across before he heard the alarm. This would show that the *Tees* had moved, even at her previous speed of five miles an hour, some 350 feet in a minute. This one blast and the consequent action of the *Tees* led to a very difficult situation, whether the *Yorkton* was more than half a mile away or something less. The questions naturally suggested are whether the Master of the *Yorkton* should have persisted in his intention, and so signalled, instead of attempting what proved to be the impossible, or whether the action of the *Tees* in giving the signal to pass to port gave him no reasonable option in the situation then developed. This was that the *Tees* immediately attempted to haul a heavy barge against the current and across the path of the descending vessel. There was good water on the port side of the *Tees* owing to the shoal having been dredged away for 1,700 feet south of the gas buoy, a fact which the Master of the *Tees* admits he knew. As pointed out by the late Mr. Justice McLennan in *Export SS. Ltd. v. SS. Icoma* (2).

It is not necessary for meeting ships to change their course from the centre of their respective sides at a very great distance from each other and that in fact, they can approach each other with safety to a comparatively short distance and that then with proper manoeuvring they pass without difficulty.

Naturally their relative positions, speed, current, and character of the vessels are all ingredients in the solution of what can be called "proper manoeuvring," but notwithstanding these factors I see nothing impossible in the situ-

(1) [1925] Ex. C.R. 154.

(2) [1923] Ex. C.R. 119.

ation had the Master of the *Tees* dealt with it differently.

On the best consideration I can give this difficult case I have come to the conclusion that whether the *Yorkton's* course as asserted by her, or that put forward by the *Tees*, is adopted, the result must be the same.

If the *Yorkton's* course was what I find it to be then that steamer had the right of way, and if it had recognized the lights as those of an upbound vessel was bound to signal its course before coming within half a mile of her. The evidence of the *Tees* shows that this right—a most important one—was anticipated by the *Tees*, and that the signal given by her greatly complicated the situation. She was on the wrong side of the channel, and her signal was no doubt prompted by a desire to get into her proper position to pass as provided in Rule 31. Her burden was increased thereby as I held in *Canadian Sand and Gravel Co. v. SS. Keywest* (1). I cannot credit what is stated by some of the witnesses for the defendants that the *Yorkton* answered accepting the *Tees'* first signal with one blast. It is denied by all the witnesses for the *Yorkton*. It would be a rather inconsequent proceeding for the *Yorkton* to go in the face of Rule 22, and to accept the signal and then immediately to sound an alarm. That she did sound the alarm signal is not denied, and I find she did so on getting the passing signal from the *Tees*. There being plenty of water on the port side of the tug to enable her to go to port if she had left the *Yorkton* free to go to starboard, the collision would have been avoided. The situation was forced by a vessel on the wrong side of the channel and became a dangerous one when coupled with the movement to starboard instead of to port. The position in respect to the freedom to move out instead of into danger, having plenty of searoom, is like that in the case of the *Glencova v. Soward* (2), and may be contrasted with that involved in the *SS. Fryer v. SS. Westmount* (3).

The failure of the *Tees* to do this, instead of attempting to cross over, was I think not merely an error of judgment but bad navigation.

(1) [1917] 16 Ex. C.R. 294.

(2) [1925] Ex. C.R. 217.

(3) [1924] Ex. C.R. 109.

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If her own evidence was taken at its full value the situation would be much worse, for it exhibits the *Yorkton* actually crossing the channel to the east side, met with a signal requiring her to turn abruptly to starboard, thus making her converge on the course of the *Tees*, and her tow, which with the length of the towline would stretch out 350 feet in a channel not much over twice that width.

The evidence satisfies me that the *Yorkton* did all that could be done, and all that proper seamanship and navigation demanded in the circumstances, and this is affirmed by Williams and Solery, who were called as expert witnesses. Any other course seems to be forbidden by Rule 22, which provides what shall be done in case of a signal given erroneously. This was, in substance done, having regard to the provisions of Rules 25 and 27. There was no lookout on the tug. How far this contributed to the accident I have no means of saying. Had there been one he would most probably have agreed with the other tug witnesses whose evidence I have rejected—*de nihilo nihil fit*.

There was a strong effort made at the trial to show that the lights on the tug and tow were in fact a cluster of bright white lights, in fact that the working lights of the *Badger*, three clusters of six lamps each, were lit up while the vessel was being towed up the river, thus misleading the *Yorkton* and preventing her from seeing the navigation lights of the *Tees*. The *Tees* did carry more lights than is allowed by Rules 1 and 2 (c). I regard these rules as meaning that such a vessel as the *Tees*, 86 feet long, should not carry the additional light mentioned in 2 (c). In the barge there were also lights in excess of those required and permitted by Rule 5. The lights carried were given by McLeod, the captain of the *Badger*, as being the red and green lights and four deck lights—two on the port, and two on the starboard side, one on each cabin, of which those on each side of the aft cabin were not screened. Adding the lights of the *Tees* and the *Badger* together they appear to make up (so far as white lights are concerned) from five to ten, excluding the cluster lights 18 bulbs in all. Whatever the real number was, they were enough to attract attention and may have obscured the navigation

lights as asserted by those on the *Yorkton*. They were seen through binoculars one and one-half miles away where Crossen, the second mate of the *Yorkton*, says he saw three bright lights. Their importance is said to be that they were mistaken for lights indicating a stationary vessel such as a dredge at work, when they were in fact moving, though moving not laterally, but almost dead ahead so far as the *Yorkton* was concerned. I understood McLeod, captain of the *Badger*, to say that he turned on the cluster lights when the anchor of the barge went down after the collision. The fact that they were burning earlier is a matter of doubt upon the evidence owing to the absolutely conflicting accounts given by each side. But what Crossen (second mate of the *Yorkton*) said indicates that three bright lights were seen, and considered when 1½ miles away. These should have created in his mind and that of the Master some lively interest, and I cannot understand why they were not examined from time to time through the glasses in order to make sure what they really indicated. If the cluster lights were, as is alleged, all lit up, they would have disclosed some portion of the barge in time for the *Yorkton* to have determined what she should do. But not having taken the precaution to examine them more closely on the way down as I have mentioned, I should have difficulty in exonerating the *Yorkton* from contributing to the complication had she kept on her course under the impression that they were on a stationary craft, and then edged in too close in passing the buoy. But the signal from the *Tees* and its immediate start eastward precipitated matters and found the *Yorkton* confronted with a vessel crossing her course and hauling a large barge with a long towline. I do not, therefore, attach as much importance to the lights carried by the *Tees* and *Badger* as counsel did. I think their influence was spent when the *Tees* blew her whistle and started eastward. The *Yorkton* on getting near the buoy on her course into the south channel had time to sheer off on identifying the meaning of the lights. The vessels when the *Tees* signalled were at least one-third of a mile apart.

There is one matter which lies apart from the indications inherent in the situation as far as they can be extracted, that to my mind is of importance where the stories told by

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each side are in some important respects absolutely irreconcilable. In the defendants' preliminary act it is stated that the *Tees* had range lights, towing lights and sidelights brightly burning, and the same expression is used as to those on the *Badger*. It is also stated that the *Tees* and *Badger* were in midchannel, or slightly to the east of it, and that

When the *Yorkton* changed its course to port the tug gave one blast, passing signal which was similarly answered by the *Yorkton*, and as the *Yorkton* continued sharply to port the tug and tow proceeded as fast as possible to starboard and went full speed ahead in the hope of passing safely. There was also an answering alarm signal given by the tug.

This omits any change to starboard on the part of the *Yorkton* before the tug hauled to the eastward, and confirms the *Yorkton's* witnesses that she changed course to port above the buoy.

In the statement of defence the tug and tow are placed on the Canadian or east side of the South channel, and in paragraph 6 appears the following:

A short distance below the gas buoy known as Russell Island Shoal Light the *Yorkton* coming at full speed of about ten miles an hour, twice that of the speed of the tug and tow, turned sharply to starboard, whereupon the tug *Thomas E. Tees* blew a one-blast passing signal and was similarly answered by the *Yorkton*. The sharpness of the turn made by the *Yorkton* brought it into the channel at a very sharp angle, and apparently being unable to straighten down the channel quickly enough gave a danger signal answered by the *Thomas E. Tees*.

It was urged during the trial that the statement of defence should be amended to conform to the preliminary act, but I refused the application as the evidence was practically all in and the plaintiff had the right to comment on the discrepancy, and no evidence had been disallowed on account of the difference in the two statements. The importance of it is that what is said in the defence exactly corresponds with the story told by the *Yorkton* witnesses in this particular that after the change of course from the gas buoy to a course between it and the lower Walpole light there was no change except to starboard in response to the signal of the *Tees*, and in that the statement of defence asserts that the change of the *Yorkton's* course was made south of the gas buoy and not to the north of it. The importance of the statements in the preliminary act and when the privilege of changing them arises, are well set out in *Seacombe* (ante). In it Fletcher Moulton (then



L.J.) says in respect to what is contained in the preliminary Act, p. 60:—

They are statements of fact made under such circumstances that they rank as formal admissions of fact, binding the party making them, perhaps as strongly as any admissions of fact can do. An admission of fact, as such, does not constitute an estoppel. It may be shown that it was made under mistake, and the Court may be satisfied that such was the case. But it is evidence against the party making it, its strength varying according to the conditions under which it is made. An admission under circumstances which necessitate that it must have been made after full consideration has an evidential value far higher than a casual admission made without any opportunity of reflection or verification. The statement of fact in a preliminary act are statements which must be presumed to be made after the most careful examination and consideration. To my mind they carry such weight, from the nature of a preliminary act and from the circumstances under which it is made, that I should doubt whether otherwise than under the most special circumstances, and with the special leave of the Court, a party would be allowed to depart from the admission in its preliminary act; at all events as far as evidence in chief is concerned.

As the statement of defence differs from the preliminary act, it shows the necessity in this case for the due weighing of the admissions therein made, and their bearing upon the evidence adduced when coming to a decision. It is with this in mind that I have found the facts and from them flow the consequences I have indicated.

I cannot part from this case without emphasizing the complete divergence in the accounts of the events of the night leading up to the accident not only as to the positions of the respective vessels, but as to the signals exchanged, the courses set, and the changes in them, as well as to the lights upon the tug and tow. This throws a heavy burden upon a trial judge, necessitating a close examination of the probabilities of the case and of the veracity of the various witnesses. It has proved a rather tangled problem, necessitating considerable thought and study before arriving at a conclusion.

The result is that I cannot find the *Yorkton* to blame, and attribute the collision in this case to the course taken by the *Tees* which I find to have been wrong and negligent. While I have not discussed several points put forward on each side, I have considered them all as presented by the very full and exhaustive arguments submitted after the trial by counsel on each side.

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MATTHEWS  
STEAMSHIP  
Co.

"  
ONTARIO  
SAND &  
GRAVEL Co.

Hodgins  
L.J.A.

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SAND &  
GRAVEL CO.

Judgment will be entered for the plaintiff and the counterclaim will be dismissed, and there will be a reference to the Registrar of this Court to assess the damages to the *Yorkton*.

The defendants must pay the costs of action, counterclaim and reference.

Hodgins  
L.J.A.

*Judgment accordingly.*

Solicitors for plaintiff: *King & Smythe.*

Solicitors for defendant: *Rodd, Wigle & Whiteside.*

1926  
Sept. 14.

BRITISH COLUMBIA ADMIRALTY DISTRICT

JANSEN ET UX..... PLAINTIFFS;

v.

THE "TEX" ..... DEFENDANT.

*Shipping—"Steamship"—Interpretation—Canada Shipping Act—Master*

The defendant ship was a gas boat of registered gross tonnage of 21.02 tons, and was used chiefly in towing barges.

*Held*, that, as the ship in question did not come within the exceptions mentioned in section 100 of the Canada Shipping Act [R.S.C. (1906) ch. 113] as amended by section 1 of c. 51 of 2 Geo. V, she was a "steamship" or "steamer" within the meaning of section 72, ss. (c), and was required to have a certificated master.

ACTION for wages by plaintiffs against the defendant ship.

Vancouver, September 8, A.D. 1926.

Action now tried before the Honourable Mr. Justice Martin.

*C. M. Woodworth* for plaintiffs.

*Roy Ginn* for the defendant.

The facts are stated in the reasons for judgment.

MARTIN L.J.A., now this 14th September, A.D. 1926, delivered judgment.

This is an action for wages, the male plaintiff claiming \$668 as master, and his wife \$161.33 as cook on the defend-

ant ship which is a gas boat of the registered gross tonnage of 21.02 tons, and used chiefly in towing barges.

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 Martin  
 L.J.A.

The matter was fully gone into and much of the evidence is of a conflicting nature, and the only point of general importance is the submission advanced by plaintiffs' counsel that it was not necessary for a ship of this kind, not being a sailing ship or steamship, to have a master who "possesses a valid certificate" under sec. 96 of the Canada Shipping Act, cap. 113, R.S.C. It is clear, however, that the interpretation of sec. 72 (c) is wide enough to cover vessels of this class because it declares that "unless the context otherwise requires"—

(c) "Steamship" or "steamer" includes any ship propelled wholly or in part by steam or motive power other than sail or oars.

There being nothing in the context to exclude this definition from applying to this vessel, she therefore, not being within the exceptions mentioned in sec. 100 as amended by sec. 1, cap. 51, of 1912, should have had a certificated master which the plaintiff was not, though he acted in that capacity, and there is not sufficient evidence to establish the charge that he was negligent in the performance of those duties.

The owners allege that he represented himself to be a duly certified master at the time his services were engaged at \$4 per day and his keep, and the view I take of what happened at that time is that he did express himself in such a way that the managing owner, Ragan, did derive that impression, but I also find that shortly thereafter, when Ragan clearly understood the true position, he elected to waive the disqualification and the said plaintiff continued in his employment without objection till he received sufficient notice upon New Year's day that his active engagement would forthwith terminate, pending an improvement in the owners' business affairs, but that he and his wife could remain on the vessel at their own charges in the meantime; therefore he is not entitled to wages after the 2nd of January.

I allow the owners' set-off according to their statement, less \$5, thus leaving it to stand at \$122.

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 THE *Tex*  
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 L.J.A.

As to the wife's claim as a cook, I find that it has not been established, because not only is the direct evidence in support of it unsatisfactory, but having regard to all the circumstances of the case the account of the matter given by the owners is more in accord with the probabilities.

There will be judgment in pursuance of these findings with costs for the master, the claim of the wife being dismissed with costs.

The costs of the motion to re-open the judgment will go to the defendants; while it is true that the motion was irregularly made in chambers yet no objection was taken to it on that account and the irregularity was cured when it was, at its conclusion, transferred into court for formal adjudication.

*Judgment accordingly.*

1926  
 March 26.

NOVA SCOTIA ADMIRALTY DISTRICT

WALTER W. HÖDDER CO. INC. . . . . PLAINTIFF;

AGAINST

THE SHIP *STRANDHILL* . . . . . DEFENDANT.

*Shipping—Maritime Lien—Foreign Law—Jurisdiction*

W. W. H. Co. Inc., carrying on business at Boston, in the United States of America, sought, by action *in rem*, to recover the price of necessaries furnished to the defendant ship, in an American port, under a contract made there, and at the request of the owner, and to enforce a maritime lien for same against the ship, which lien was created and recognized by law of the United States where contract was made. The owner at the time of the contract was domiciled and resident in the United States, and the ship, then called the *Lincolnland*, was registered there, but later, before action, she was sold, her name changed, and she became of British Registry.

*Held*, that even though by the laws of this country, a person might not have a maritime lien for necessaries supplied under like circumstances, where such a maritime lien is created under the foreign law, the Exchequer Court of Canada, in Admiralty, can enforce such an action *in rem*, under the Colonial Courts of Admiralty Act, 1890, sec. 2, ss. 2.

This was an action *in rem* for the recovery of the price of certain necessaries furnished to the defendant ship in

the port of Boston. Upon motion of the defendant it was ordered that the question of law arising from the pleadings, to wit: that the court was without jurisdiction, be set down for argument before the trial on the merits.

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 INC.  
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Halifax, October 29, A.D. 1925.

Action now came on for argument on questions of law aforesaid.

*Alfred Whitman, K.C.*, for plaintiff.

*W. A. Henry, K.C.*, for defendant.

The facts and questions of law set down for argument are stated in the reasons for judgment.

MELLISH L.J.A., now this 26th March, 1926, delivered judgment (1).

This is an action *in rem* for necessaries supplied to the defendant ship in the United States. It is alleged that under the law of the State where the necessaries were supplied the plaintiff's claim is secured by a maritime lien on the ship.

As a preliminary point of law it is set up on behalf of the defendant ship that even assuming the facts as set forth in the Statement of Claim, the lien cannot be enforced in this court, and this for the reason that by the law of this country the plaintiffs would not have a maritime lien for necessaries supplied here under like circumstances.

Upon consideration I think that the point must be decided in plaintiff's favour. It is true that this court can only administer our own law. But if there is a maritime lien on the ship under foreign law, it is a maritime lien here, and it is only the local law which is being invoked to enforce an existing right between the parties. The action

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(1) An appeal was taken to the Supreme Court of Canada, and on the 5th October, 1926, this judgment was unanimously affirmed by that court, the court referring to the decision of Hodgins L.J.A. in *Pittsburgh Coal Co. v. The Belchers* (1926) Ex. C.R. 24, distinguishing it from this case, and pointing out that in that case, the defendant ship was of Canadian Registry, and the owners were domiciled here.

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 —

*in rem* is peculiar to this court and I think it is within the powers of this court when the parties are within the jurisdiction to proceed with such an action, no matter by what law the rights of the parties may have arisen. In adopting such a course the court is not administering foreign law, for it is by local law that the rights of parties before the courts are guarded no matter in what way such rights may have been acquired.

A maritime lien binds the ship not only in the hands of the owner on whose behalf the debt giving the rights to the lien was contracted, but also when in the hands of any person whomsoever.

A judgment *in rem* obtained against a ship in a foreign country creates a maritime lien—which will be enforced by an action *in rem* against the ship wherever found.

Dacey on Conflict of Laws, 3rd ed., p. 283.

It is true that there is a statement in the same volume at p. 822, that “the court has jurisdiction to entertain an action” *in rem* for the enforcement of any maritime lien if the case is “one in which, according to English law, a maritime lien exists.”

From this statement it is suggested that the learned author left it to be inferred that such an action would not be entertained in a case like the present, because under English law the supplying of necessaries does not give rise to a maritime lien. In my opinion, however, the passage quoted should not be so construed because “according to English law a maritime lien exists,” when created in accordance with the law of another jurisdiction, even though the circumstances might be such as not to create such a lien if they occurred within the local jurisdiction.

That this is the “most proper sense” in which to interpret the words “English law” is apparent from pages 6 and 7 of the volume above quoted from. Any other interpretation would make the passage misleading.

See the *Gaetano and Maria* (1), in which the Court of Appeal held, reversing the decision of Sir Robert Philli-

(1) [1882] 7 P. 137.

more, that a maritime lien would be enforced by the English Admiralty Court even though the facts were such as not to create a maritime lien by English as distinguished from foreign law.

In this case, at p. 143, Brett L.J. uses the following language:

Now the first question raised on the argument before us was, what is the law which is administered in an English Court of Admiralty, whether it is English law, or whether it is that which is called the common maritime law, which is not the law of England alone but the law of all maritime countries. About that question I have not the slightest doubt. Every Court of Admiralty is a court of the country in which it sits and to which it belongs. The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by Act of Parliament or by reiterated decisions and traditions and principles has adopted as the English Maritime law, and about that I cannot conceive that there is any doubt.

This is not merely an action for necessaries, it is an action to enforce a maritime lien said to be such under the law of the State of Virginia. If it exists, even by virtue of such a law, this court in my opinion has power to enforce it in an action *in rem* under "The Colonial Courts of Admiralty Act, 1890," sec. 2 (2).

*The Gaetano and Maria* (1), and *The City of Mecca* (2).

If a maritime lien exists it cannot be shaken off by changing the location of the *res*. A foreign judgment *in rem* creates a maritime lien and even although such a judgment could not have been obtained in the courts of this country, it will be enforced here by an action *in rem*. But a maritime lien may be created by foreign law otherwise than by a judgment *in rem*; and if it be so created I think it can be equally enforced here in the same way. If the plaintiffs have lawfully acquired the right to the *res* even under foreign law, it would be strange if they had not the liberty to enforce it here in the only court providing relief *in rem*. As between parties before the court, the court should I think have power to adjudicate upon their rights however and wherever arising provided these have to do with matters over which the court has jurisdiction. This

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(1) [1882] 7 P. 137.

(2) [1881] 6 P. 106.

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L.J.A.

brings me to the consideration of the question raised by the defendant as to whether this is an "Admiralty action" —a prerequisite to jurisdiction.

Dicey, 3rd ed., Rule 61, p. 280.

I am of opinion that it is. The jurisdiction clearly I think cannot depend upon whether or not the plaintiff's claim to a maritime lien exists by virtue of a foreign judgment but rather upon whether in fact it exists at all. Admittedly for the purposes of this argument it does exist and therefore I cannot decline jurisdiction.

There will be an order accordingly.

*Judgment accordingly.*

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See CUSTODIAN OF ALIEN PROPERTY.

**CONSTITUTIONAL LAW** — *Crown* — *B.N.A. Act* — *Naturalization Act* — *Presumption that all formalities re passing of an act have been observed.*] Under the Naturalization Act defendant was required to perform certain duties and collect certain fees and account therefor to the Secretary of State for Canada. He collected the fees, retained from the same what he thought he was entitled to personally, and paid the balance to the Ontario Provincial Treasurer instead of

## CONSTITUTIONAL LAW—*Concluded*

so accounting, as required by the Act and Regulations made thereunder. Hence this action. The defence claimed that the said Act was in the nature of a money bill and was not properly introduced into the House and was void; and that, moreover, the Federal Authorities after having appointed the clerk of the Court of General Sessions, this clerk being a provincial officer, was subject to the provincial laws, and by sub-sec. 14 of sec. 92 of the B.N.A. Act he was bound to apply the moneys or fees so collected for maintenance of the provincial courts.—*Held*, that when a statute appears on its face to have been duly passed by a competent legislature, the courts must assume that all things have been rightly done in respect of its passage, and cannot entertain any argument that there is a defect of parliamentary procedure lying behind the Act. 2. That the Dominion Parliament had a clear right to give to the Court of Sessions of the Peace the jurisdiction in question and to assign to the clerk thereof the duties conferred by the Naturalization Act, and to utilize existing provincial officers. That the power of legislation given to the provincial legislatures by sub-sec. 14 of sec. 92 of the B.N.A. Act covers matters within the powers of the provincial legislatures and no more, and does not let in the right to trench upon the federal power and authority. That the act of the federal authority in no way invaded the rights of the local legislature. THE KING v. IRWIN ..... 127

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**CONVEYANCING** — *Transfer* — *Description* — *Surplusage* — *Maxim Falsa demonstratio non nocet.*] Claimant's son and one W. purchased a property from the Soldier Settlement Board, each getting half, which they farmed in partnership for a time. Later W. abandoned farming and placed his half of the property on the market for sale. The claimant then applied for the purchase of W's interest in the property, stating that without it his son would be handicapped in his farming operations. The Crown agreed to sell this to him and submitted an agreement of sale in which the property was described as "the east half o. that part of lot 12, Range 13, Credit Indian Reserve, Township of Toronto County of Peel, described in deed from C. J. Conover to His Majesty the King

CONVEYANCING—*Concluded*

represented by the Soldier Settlement Board of Canada." Before signing the same the claimant requested the insertion of the words "being 8 and  $\frac{1}{2}$  acres" which was done. Upon later making a survey it was found that there was only 7.4 acres in the parcel. In the meanwhile claimant had made payment to the Board but declined to accept a conveyance of the land unless a deduction in price were made. Hence this action.—*Held*, that as the description in the agreement as submitted was an adequate and sufficient description of what the Crown was selling, and the claimant was buying, the inaccurate statement of the number of acres contained in the parcel subjoined to the description should be treated as *falsa demonstratio* and rejected as surplusage. WILSON v. THE KING..... 8

**CROWN** — *Returned Soldiers' Insurance Act — Beneficiaries—Proof of Marriage—Presumption.*] P., a returned soldier, was insured under The Returned Soldiers' Insurance Act, the beneficiary named being "Elsie Proud, wife of the insured." Upon P's death, payment to suppliant was refused because of the absence of certificate of marriage or of other satisfactory proof of marriage. No certificate was produced at trial, but the uncontradicted testimony of suppliant and others established that she had been married in New York by one said to be a clergyman, that they co-habited until P's death, as man and wife, that children were born to her by P., that P. had in various ways acknowledged her as his wife, and that she was generally reputed and known as such in the community. The Act allows insurance to be made in favour of the wife, or wife and children only.—*Held*, that the suppliant had discharged the burden of proof upon her and had established a strong presumption of her marriage to P., which the Crown had failed to rebut; and that she was entitled to recover the amount of the insurance sued for. 2. That even if the marriage had been performed by an unauthorized person, and was impossible according to the place where it was performed, nevertheless, the presumption of marriage must prevail on the facts proved. PROUD v. THE KING..... 1

2—*Contract—Breach of contract—Damages—Wharfage.*] By an order in council passed in 1906 the Crown rented to a steamship company for \$1,000 per annum the use of the wharves "between Quebec and Chicoutimi." By subsequent order in council of 1917 a similar arrangement was made for the consideration of the annual sum of \$2,000 as commutation of wharfage for the use "of government wharves at which the steamers of the

CROWN—*Continued*

company call on the River St. Lawrence below Quebec." The wharf at l'Anse Tadoussac was built in 1912, after the first but before the second order in council. Following upon a lengthy correspondence between the company and the Crown, the Crown repaired this wharf early in 1923. It had been used by some of the company's steamers previous to 1923 and by the R. for five trips in 1923. On July 7, 1923, while the R. was landing passengers at such wharf, the slip upon which the passengers were standing collapsed precipitating several of them into the water. This slip was old and in a rotten and dangerous condition, to the knowledge of the Crown, and no warning was given. The steamship company was forced to settle with these passengers for the damages sustained, and presented a petition of right to recover from the Crown the amount so paid.—*Held*, that under the order in council of 1917 it was clear that the wharf at l'Anse Tadoussac was one of the wharves which the company had a right to use and was one of those for the use of which it was paying \$2,000 per annum. 2. That on the above facts there existed between the Crown and the company a contract whereby the company for a yearly consideration, could, as of right, use for its vessels the Government wharves "between Quebec and Chicoutimi," which included the wharf in question. 3. That, inasmuch as a person who invites another to come onto his premises upon a business in which both are concerned, or a lessor who, for consideration, grants the use of certain premises to a lessee, is bound to take care that his premises, and all appliances provided by him as incident to the use thereof, are safe for that person to come upon and to use them as required, or to give warning, the Crown in not keeping the wharf or slip in safe and proper condition for the use for which it was intended, was guilty of a tortious breach of contract and liable for the damages suffered by its lessee. CANADA S.S. LINES LTD. v. THE KING..... 13

3[—*Petition of Right — Negligence of servant—Fraud.*] Suppliants desiring to obtain 600 tons of hay from Indian Lands, made out a joint statement of their respective holdings of horses, cattle, etc., and the amount of hay required by each, duly sworn to, which document contained the following: "We, the undersigned hereby appoint the bearer, Jack Ryggs, to act in our behalf." R. proceeded to G. with this document, where he saw the Indian Agent, but was unable to get definite assurance that hay would be available. When there he met one McL. bent on the same errand for others,

CROWN—Continued

and, as McL. was remaining on, R. then and there endorsed on the document aforesaid the following: "I have instructed Mr. McLarnon with my power to act for the above," which document he left with the Indian Agent. He then returned home and reported to his associates. Some time later being advised by McL. that he had returned to Medicine Hat, R. and some of his associates there called on McL., who claimed to have arranged for hay for the suppliants, and stated that the price would be \$1.50 per ton. Suppliants shortly after gave McL. a draft for \$900 payable to the order of the Indian Agent, to be handed to him for the hay. Under the regulations a deposit of 50 cents per ton was to accompany application for hay, and the price charged for the hay in the year in question by the Department of Indian Affairs was \$1 per ton. Arriving at G., McL. saw the Indian Agent, handed him the draft, and represented that the amount of the draft exceeded the amount required to be deposited, and that the suppliants had been put to much expense, and suggested that a portion of the proceeds of the draft be handed back to him. Thereupon the agent cashed this draft, deposited \$400 to the credit of the Indian Department, and handed back \$500 to McL. as requested. This amount McL. never returned to suppliants. Hence this action to recover from the Crown the sum of \$500 on the ground that the Indian Agent acted improperly in so returning the money to McL. who, they allege, was authorized only to hand over the draft, but had no authority to receive the refund. As a matter of fact no permits were ever allotted to the suppliants, and no hay ever became available to them.—*Held*, that even if the facts disclosed negligent conduct on the part of the agent, a petition of right would not lie against the Crown to recover damages therefor; and that the \$500 in question not being and never having been in the possession of the Crown, in fact or in law, the petition of right herein should be dismissed. 2. That where one of two innocent parties must suffer from the fraud of a third, the loss should be borne by him who has enabled such third party to commit the fraud, and that, as it was the conduct of the suppliants which misled the Crown's agent as to McL.'s powers and which made possible the train of events leading to their loss, their action must fail. *KENDALL v. THE KING* ..... 34

4—*Indian lands—Lease by Indians—Royal Proclamation, 1763—Tenant-at-will.*—*Held*, that as by the Royal Proclamation of 1763, which has the force of a statute, and the several Indian

CROWN—Continued

Acts since passed, lands forming part of Indian Reserves could not be alienated or otherwise dealt with by the Indians, a contract of lease made in 1817 by certain chiefs of the Indian tribe then in occupancy thereof, of a certain island (part of the St. Regis Indian Reserve) for 99 years with right of renewal, was null and void. That the Indians never had such an interest in lands reserved for their occupancy that they could alienate by lease or sale. That the Crown could not itself lease or ratify a lease made by the Indians of such land at any time save upon a surrender of the same by the Indians to the Crown. 2. That the right of the Crown to recover possession of the lands in question, improperly in possession of the defendants, is one incident to the control and management of such lands given it by the British North America Act, and is not to be confused with a claim on the part of the Crown asserting title thereto either in right of the Dominion or of a province. (*Mowat, Attorney General v. Casgrain, Attorney General* (1897) Q. O.R. 6 Q.B. referred to. 3. That the lease being void, the tenancy acquired by the defendant, from those charged with the control and management of Indian lands, under the Indian Act, was that of a tenancy-at-will, or that of a yearly tenant, which could be terminated by notice to quit and to deliver up possession. *THE KING v. MCMASTER*.... 68

5 — *Negligence — Section 20 Exchequer Court Act—Article 1054 C.C. Res ipsa loquitur discussed.*] The *J.B.K.* was proceeding down the Lachine Canal to Montreal. She had passed through Basin No. 1, into lock No. 1, where she was duly moored to the south bank. The gates between the Basin and the lock had been closed and the water in the lock was being lowered and let out through sluices. When the water in the lock was about on a level with the river below, and when the lower gates were about to be opened to let the steamer through, the upper gates gave way, releasing the water in the basin and causing the steamer to part her moorings and to break through the gates, and this on-rush of water caused damage to the suppliant's tug.—*Held*, that as it appeared, upon the evidence, that the breaking of the gates could only have occurred on the theory that the gates were not properly mitred by the servants of the Crown in charge thereof, the court should draw such inference of fact and find liability of the Crown for negligence under sec. 20, sub-sec. c. of the Exchequer Court Act.—The applicability of Article 1054 of the Civil Code of the province of Quebec in actions such as this one against the Crown, and the maxim *res ipsa loquitur* discussed and commented upon.

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*See* NEGLIGENCE.

*See* CONSTITUTIONAL LAW.

**CUSTODIAN OF ALIEN PROPERTY**

*—Consolidated Orders respecting Trading with the Enemy, 1916—Custodian—Dividends—Rate of conversion in U.S. Funds—Interest.]* B., a natural born British subject, was owner of shares in the Canadian Pacific Railway Company, which were registered in the name of the National Bank fur Deutschland, through whom he received his dividends, down to the outbreak of war in 1914. In 1919, these shares with dividends accrued and to accrue, were duly declared vested in the Custodian, but were never paid in to him. At the close of the war, B. applied to the Canadian Pacific Railway Company for payment of his dividends, which forwarded to the Custodian the necessary evidence to obtain release of same, and on the 11th May, 1921, the Custodian released both shares and dividends, relieving the Canadian Pacific Railway Company from the inhibition to pay. On the 3rd March, 1924, the Canadian Pacific Railway Company paid B. the dividends declared during the war, which were payable in U.S. funds, at the then rate of exchange. The rate was then materially lower than when the dividends were declared and B. claims that payment should have been made on the basis of the value of the American dollar on the 1st June, 1921.—*Held:* that the rate for conversion of these dividends is the rate ruling on the date when each dividend became due, and should have been paid to the Custodian, and not the 1st June, 1921 or the 3rd March, 1924. 2. That the claimant is further entitled to interest from the 1st June, 1921, by way of damages for wrongful withholding of money due. L. W. G. BLUCHER *v.* THE CUSTODIAN..... 77

**DAMAGES**

*See* CROWN NOS. 2 AND 5.

*See* CUSTODIAN OF ALIEN PROPERTY.

*See* NEGLIGENCE.

*See* SHIPPING AND SEAMEN.

**DIVIDENDS**

*See* CUSTODIAN OF ALIEN PROPERTY.

**EQUIVALENCY**

*See* PATENTS No. 6.

**EVIDENCE**

*See* CROWN No. 1.

*See* NEGLIGENCE No. 1.

**EXCHEQUER COURT ACT**

*See* CROWN No. 5.

**EXCISE SALES TAX**

*See* REVENUE No. 1.

**EXPLOSION**

*See* NEGLIGENCE.

**EXPROPRIATION**

1—*Compensation—Market value—Prospective value—Mortgage.]* The Crown expropriated lots A, B, C, D, and E, the property of the defendant S., and tendered the sum of \$22,000 in full compensation therefor. Defendant M. held a mortgage on lots A, B, C, and D, amounting with interest to \$22,000, the amount of the tender, which the crown paid off. Defendant S. claimed that as there was on lot E. a hot spring, the whole property being worked together had special value by reason of its prospective advantages and its special adaptability as a health and pleasure resort, when developed and conducted on a commercial basis; and further contended, that in paying the whole amount of the tender to M., in discharge of his mortgage, which had no relation to lot E., no consideration was given to the said lot in reaching the amount tendered. The evidence showed that it would take a very large capital to so develop the property and that the results were problematical. That the amount tendered covered \$10,000 for certain of the lots and another \$10,000 for defendant's interests in the hot spring.—*Held:* That although S. was entitled to compensation not only upon the present market or intrinsic value of the property, but also to any advantage which the property might possess prospectively, or with reference to the probable use which would give him the best return possible, such further advantage must be calculable and calculated at the time of the expropriation. The proper basis of compensation is the amount which a prudent man would be willing to pay for it at that time. 2. That, upon the facts, the Crown in fixing the tender having considered all the properties expropriated including the lot not covered by M's mortgage, the Crown was justified in paying the amount of such tender to M. to discharge part of the property expropriated from such mortgage. THE KING *v.* STUART ET AL 91

2 — *Prospective value — Market value.]* Defendant was the owner of an extensive property, near Hamilton, upon which was erected a hotel and several cottages and outbuildings. This was composed of land and water, there being 55 acres of pond and as much marsh land around the same. The buildings and about 7 acres of land on which they stood were expropriated by the Crown, for a hospital. Defendant

**EXPROPRIATION—Concluded**

met the question of compensation by putting forth a scheme by which he would fill in and reclaim the pond at a cost varying from \$195,000 to \$500,000, subdividing the same into building lots, and claimed, among other things, a large amount for damages to such lands arising out of the establishment of a hospital, by plaintiff, in that vicinity.—*Held*, that the owner of property is not entitled to claim as an element of its market value at the time of expropriation, some prospective value of the property remote in its character and only realizable upon the expenditure of enormous sums of money. **THE KING v. COLEMAN**..... 121

3 — *Expropriation — Warrants of possession—Joint undertaking—Expropriation Act—Canadian National Railway Act (9-10 Geo. V., c. 13)—Toronto Terminal Railway Act (1906).*—*Held*: That inasmuch as the building of the Toronto Viaduct was authorized to be built under a Special Act of Parliament by the Canadian Pacific Railway, the Grand Trunk Railway, and others, such undertaking could not be said to be that of the Canadian National Railway Company and that the expropriation of land for such purpose should be made under the Railway Act. (2) That the present undertaking being that of at least two companies, and not that of the Canadian National Railway Company alone, the provisions of the Canadian National Railway Company Act of 1919 permitting it to acquire lands for its purpose under the Expropriation Act, did not apply. **CANADIAN NATIONAL RAILWAYS v. THE TORONTO IRON WORKS et al.**..... 133

**FALSA DEMONSTRATIO NON NOCET**

*See* CONVEYANCING No. 1.

**FRAUD**

*See* CROWN No. 3.

**GAS EXPLOSION**

*See* NEGLIGENCE.

**IMPEACHMENT OF PATENTS**

*See* PATENTS.

**INDIAN LANDS**

*See* CROWN No. 4.

**INDIANS**

*Lease by*  
*See* CROWN No. 4.

**INEVITABLE ACCIDENT**

*See* SHIPPING AND SEAMEN Nos. 2 AND 6.

**INDUSTRIAL DESIGNS**

*See* TRADE MARKS No. 3.

**INFRINGEMENTMENT**

*See* PATENTS.

**INTEREST**

*See* CUSTODIAN OF ALIEN PROPERTY.

**INTERFERENCE**

*See* PATENTS No. 4.

**INTERPRETATION OF STATUTE**

*See* REVENUE No. 1.

**JURISDICTION**

*See* SHIPPING AND SEAMEN Nos. 1, 5 AND 9.

**LEASE**

*See* CROWN Nos. 2 AND 4.

**LICENSE**

*See* PATENTS No. 1.

**MARITIME LIEN**

*See* SHIPPING AND SEAMEN Nos. 5 AND 9.

**MARRIAGE**

*See* CROWN No. 1.

**NARROW CHANNEL**

*See* SHIPPING AND SEAMEN No. 3.

**NATURALIZATION ACT**

*See* CONSTITUTIONAL LAW.

**NAVIGATION**

*See* SHIPPING AND SEAMEN.

**NEGLIGENCE — Damages — Gas Explosion — Evidence, Inference of fact — Responsibility.**] The plaintiff was the owner of certain buildings in the City of Toronto and had contracted with the defendant to supply gas for use therein. While the servants of the defendant were connecting the meters in one of the buildings, an explosion took place followed by fire which destroyed this and several other buildings. This operation necessitated reducing a 2-inch pipe to a 1-inch pipe to which was to be added two ¾-inch pipe in the form of an elbow, during which time gas would normally escape into the room where the work was being done. The evidence establishes that there were no fires or wires supplied with electricity in the buildings which could have caused the explosion. There was no positive evidence of how the explosion happened.—*Held*, on the facts, that the Court could infer that the explosion and fire was due to the negligence of the servants of the Gas Company in allowing an excessive amount of gas to escape, for which the defendant was liable in damages to the plaintiff. **THE KING v. CONSUMERS' GAS COY.**..... 137

*See* CROWN Nos. 3 AND 5.

*See* SHIPPING AND SEAMEN Nos. 2, 7, AND 6.

**ORDERS IN COUNCIL**

*See* STATUTES AND ORDERS.

## PATENT ACT

See PATENTS NO. 1.

**PATENTS**—*Appeal from Commissioner refusing to grant license—Patent Act, sec. 40—"Reasonable terms"—Trade or industry "unfairly prejudiced."* 1. Respondent was owner of a patent for a machine for manufacturing cones, and the appellant was carrying on a similar business, manufacturing with a machine of his own make, alleged to be an infringement of respondent's. Rather than fight an action for infringement, appellant applied for a license from respondent, and not being able to come to terms, he applied to the Commissioner of Patents, under sec. 40 of the Patent Act, for a compulsory license, and the Commissioner found that the terms made by the respondent were reasonable and refused to order them to give a license. Thereupon the appellant appealed to this Court.—*Held*, that the patent in question being upon a machine and not upon a product, the license should be upon the machine, the patented article, and that the respondent by demanding \$25,000 for a machine that cost about \$5,500, or an annual license fee of \$4,000 for the same, failed "to supply on reasonable terms" the patented article within the meaning of the Patent Act. 2. That in deciding whether a certain sum as royalty is "reasonable" within the meaning of the Act, the Court must take into consideration the cost of manufacturing the article and its selling price. 3. That the appellant's business is a trade or industry "unfairly prejudiced by the conditions attached by the patentee" within the meaning of sec. 40, ss. 1 d, ii, and is entitled to ask for an order compelling the patentee to give him a license, at a price to be fixed by the Court. **INTERNATIONAL CONE CO. LTD. v. CONSOLIDATED WAFER CO.**..... 143

2 — *Infringement—Validity—Patentability—Commercial success or failure—Evidence.* *Held*, that a subsequent patent is no defence to an action of infringement. 2. While there may be, in the device charged with infringement, some slight mechanical variation in the nature of equivalent, as compared with the plaintiff's device, there is nevertheless infringement where the plaintiff's patent bears directly on the defendant's device which does not disclose invention, and which involves the very substance of the invention covered by the plaintiff's device. **PANYARD MACHINE MFG. CO. v. BOWMAN**..... 158

3 — *Infringement—Treaty of Peace (Germany) Order, 1920—Section 83—11-12 Geo. V, c. 44.* In 1914 one A, a citizen of the United States, obtained there a patent relating to the development of

## PATENTS—Continued

radio, and in 1923 obtained a patent in Canada for the same thing on application filed on July 10, 1920, which was assigned to the plaintiff. G. knew and made use of the invention disclosed in this patent since 1915, but had no knowledge then of the invention of A., the plaintiff's inventor. During the war he was in the R.F.C., in charge of radio construction, etc. On his return to Halifax, after the war, he continued radio development work, and in 1919 constructed and sold several radio sets containing the subject matter of the plaintiff's patent. Later, after serving with the Canadian Air Board, G. went to Calgary and started in business for himself. In 1922 he organized a company which manufactured radio sets upon the same design as disclosed in the plaintiff's patent. This company was unsuccessful, and in 1925 the W. W. Grant Co. Ltd., was organized for the same purpose. This company did not derive any rights from Grant as agent or licensee.—*Held*, that the provisions of ch. 44, *Statutes of Canada, 1921*, did not repeal section 83 of the Treaty of Peace, (Germany), Order, 1920, and the patent in question was not granted under the provisions of that statute. 2. That the proviso to sec. 83 of the Treaty of Peace, (Germany) Order, 1920, was intended to protect *bona fide* rights acquired in industrial property prior to January 10, 1920, which were in conflict with the rights applied for by another and who claimed rights of property in respect of them, and that in 1919 G. personally was in *bona fide* possession of rights protected by the said Order, and did not in consequence infringe plaintiff's patent. 3. That, however, the defendant, W. W. Grant, Limited, having only come into existence in 1925, and not having derived any rights through G. as agent or licensee, was not protected and had infringed plaintiff's patent (1). **CANADIAN WESTINGHOUSE CO. LTD. v. W. W. GRANT LIMITED**..... 164

4 — *Conflict or interference—Date of invention—First inventor—Publication.*—*Held*, that a mere conception of anything claimed to be an invention, but which is concealed and not disclosed or published, is not such an invention as will invalidate a patent granted to a subsequent inventor and who has published his invention. Mere conception is not invention within the meaning of the Patent Act, and a first inventor, in the popular sense, who has not communicated or published his invention is not entitled to priority over a later inventor, who has made the same public, and for which a patent has been granted or applied for. 2. What constitutes pub-

**PATENTS—Concluded**

lication is a question of fact, depending upon the circumstances of each case. There must be publication or use in public of a satisfactory kind, in order to bar the claim of a subsequent inventor who has disclosed the same and who first applied for a patent. 3. That "first inventor" within the meaning of the Patent Act means not the first discoverer of the thing or the first to conceive the same, but the first to publish the same. Such inventor, however, must be the true inventor and must not have borrowed the idea from anybody else. **GERRARD WIRE TYING MACHINE Co. v. CARY MANUFACTURING Co.**..... 170

5 — *Infringement — Date of invention—Conception—Publication.*—*Held*, that the date of a patentee's first conception of a thing patented is not necessarily to be taken as the date of his invention, and where an inventor had conceived the outlines of an invention, but required the time to bring it to perfection, he was held not entitled to a patent over one who in the meanwhile had invented the same thing, and given it to the public. **CANADIAN RAYBESTOS Co. v. BRAKE SERVICE CORPORATION LTD.**..... 187

6 — *Infringement — Combination — Particular arrangement of old parts — Equivalency—Colorable evasions.*—*Held*, that where an invention relates to the production of an old result by means of a novel combination of old parts, or to a machine utilizing an old principle or system, the patentee is protected only in respect of the particular means specified and set forth in his specifications and claims; and in such circumstances it may be no infringement to achieve the same result by the use of well-known equivalents, provided it is not a mere colorable evasion. A new mode of construction or operation of a machine may constitute a means different from that patented, and not be an infringement of the latter. **GERRARD WIRE TYING MACHINE Co. LTD. v. LAIDLAW BALE-TIE Co. LTD.** 193

**PATENTABILITY**

*See PATENTS.*

**PETITION OF RIGHT**

*See CROWN No. 3.*

**PRACTICE—Motion to strike allegation of defence as irrelevant and illegal.**—*Plaintiff by his action herein seeks to impeach the validity of certain of defendant's patents for invention. The defendant, by a paragraph of its defence alleges that the Consolidated Mining and Smelting Company of Canada (which is not a party to this action) is estopped from impeaching the validity of the patents in question herein by reason of having*

**PRACTICE—Concluded**

obtained an option to purchase the same from the defendant and that the plaintiff herein being only the apparent or nominal party (*prête-nom*) to this action, and, being in fact the same entity as The Consolidated Mining and Smelting Co. of Canada, it is itself estopped from impeaching the validity of the patents herein.—*Held*, that the facts pleaded do not in law disclose any estoppel between the parties to this action. That the said allegations are irrelevant to the issues raised between the parties herein, and tend "to prejudice, embarrass or delay the trial of the action" within the meaning of Rule 117 of the Practice of this Court and should be struck from the defence. **ELECTROLYTIC ZINC PROCESS Co. v. FRENCH'S COMPLEX ORE REDUCING Co. OF CAN. LTD.**..... 5

*See TRADE MARKS, No. 1.*

**PRELIMINARY ACT**

*See SHIPPING AND SEAMEN No. 7.*

**PUBLICATION**

*See PATENTS No. 4.*

**RESPONSIBILITY**

*See NEGLIGENCE No. 1.*

**RETURNED SOLDIERS' INSURANCE ACT**

*See CROWN No. 1.*

**REVENUE — Special War Revenue Act, 1915—Job printers—Excise Sales Tax—Interpretation of statute.**—*Held*, that job printers are "manufacturers and producers" selling to retailers and consumers within the meaning of paragraph 1 of section 19 B.B.B. of 12-13 Geo. V, c. 47, and are liable to the sales tax provided under the Special War Revenue Act, 1915, and amendments thereto. 2. When, in construing a statute there are words which may appear ambiguous, and there are also express words which are clearly indicative of the intention of the legislator, the court should give effect to such clear intention, rather than to deny the provision any meaning as resulting from the apparent ambiguity. The interpretation which is most consistent with the intention of the legislator should be accepted and acted upon. **THE KING v. IRWIN PRINTING Co. LTD.**..... 104

**SEAMEN**

*See SHIPPING AND SEAMEN No. 5.*

**SHIPPING AND SEAMEN**

Anchored Ship, No. 5.  
Burden of proof, No. 6.  
Canada Shipping Act, No. 8.  
Canal Regulations, No. 4.  
Collision, Nos. 2, 3, 4, 6 and 7.  
Foreign Law, Nos. 1 and 9.

## SHIPPING AND SEAMEN—Continued

Harbour, No. 6.  
 Inevitable Accident, Nos. 2 and 6.  
 Jurisdiction, Nos. 1, 5 and 9.  
 Maritime Lien, Nos. 5 and 9.  
 Master:—  
   Duty of, No. 2.  
   Certificate, No. 8.  
 Moored Ship, No. 4.  
 Narrow Channel, No. 3.  
 "Necessaries," No. 1.  
 Negligence, Nos. 2, 7 and 6.  
 Overtaken Vessel, No. 3.  
 Preliminary Act, No. 7.  
 Priority, No. 1.  
 Seamen, No. 5.  
 "Steamship," No. 8.  
 Watchman, No. 5.

1 — *Shipping — Necessaries — Maritime lien by foreign law—Effect of wrongful seizure.*] The P.C. Co., a foreign corporation, furnished coal to the S.S. B., a vessel of Canadian registry and owned by a company domiciled here. The coal was furnished at an American port, and not being paid, the P.C. Co. seized the vessel within this jurisdiction.—*Held*, that the B. not being a foreign vessel and its owners being domiciled in Canada, this court had no jurisdiction on a claim for necessaries and that the action should be dismissed. 2. A maritime lien for necessaries created by the law of a foreign country and not recognized by the law of this country or by general international law cannot be enforced as such by the Exchequer Court in Admiralty. 3. The seizure of a ship under a claim for the enforcement of which this court has no jurisdiction, is wrongful *ab initio*, and other claimants cannot set it up or rely on it as ensuring to their benefit. *PRRSBURG COAL CO. v. SS. BELCHERS*. . . . . 24

2 — *Collision — Inevitable accident — Duty of Master—Negligence.*]—*Held*, that in a case of collision, in order to succeed under a plea of "inevitable accident" it must be shown that the accident could not possibly have been prevented by the exercise of ordinary care, caution and maritime skill. 2. That a defendant with such a plea must show what was the cause of the accident, and that the result of that cause was inevitable or must show all the possible causes, one or other of which produced the collision, and must further show with regard to every one of these possible causes, that the result could not have been avoided. 3. That careful navigation requires the Master of a ship, in a narrow channel in leaving the bank, with another vessel oncoming, to first test his helm, and if he decides to trust his engines and steering gear, he should make provision for a possible breakdown or unanticipated force or effect of the current from the oncoming

## SHIPPING AND SEAMEN—Continued

ship, and his crew should be so placed as to be prepared to meet the consequences of such a contingency. *POPLAR BAY STEAMSHIP CO. v. THE CHARLES DICK* 46

3 — *Collision — Narrow channel — Overtaking vessel—Duties of overtaken vessel.*] The steamers *D.* and *H.* were at the time of the collision in question, navigating in daylight, on the Chehalis River, in the state of Washington, U.S.A., seaward bound, the *D.* leading. This river has a winding course, and is a narrow channel within the Regulations, with buoys on both sides marking the channel or fairway. The *H.* when six or seven hundred yards behind the *D.* gave the regular signal to indicate her intention of passing the *D.* on the port side of the latter, which signal was properly answered. Before the *H.* had fully passed the *D.*, while the *H.* was on the port side of the channel, and near one of the port buoys, a collision occurred between the *H.* and the *D.* on the port side of mid-channel, and near one of the port buoys.—*Held*, (reversing the judgment appealed from), that the *H.*, in passing the *D.* on the starboard side, could not be said to be on her wrong side of the channel, if in order to so pass she had to go to the port side of mid-channel. 2. That, notwithstanding that Art. 24 provides that an overtaking vessel must keep out of the way of an overtaken vessel, there is a correlative duty imposed upon the leading vessel to keep her course, which is the course reasonably to be attributed to her, and which in the circumstances was on the starboard side of the channel, as required by Article 25, and Rule 8 of Article 18 (U.S. Regulations), and that the *D.* crowding upon the course of the *H.* in violation of Rule 8, was solely to blame for the collision. *THE SS. HELEN v. WM. DONOVAN SS. CO.*. . . . . 59

4 — *Collision — Canal Regulations — Moored ship—Canada Shipping Act.*]—*Held*, (reversing the judgment appealed from), that nothing in sections 24 and 25 of Ch. 35, R.S.C. (1906), under the authority of which the Canal Regulations are made, authorizes the enactment of any by-law making a moving ship liable for damages to a moored ship in a canal, by reason of non-compliance with a canal regulation, and that that portion of the canal regulation No. 19 reading as follows: "And they shall also be liable for any damage to moored vessels resulting from failure to comply with this regulation" is unauthorized by such statute and is void. 2. That sections 916 and 917 of Canada Shipping Act have been specially enacted to cover the principle of presumption of fault by reason of the violation of the regulations with respect



SHIPPING AND SEAMEN—*Continued*

to the sailing, etc., of ships, and any local regulations inconsistent therewith are void. The regulation in question though enacted by the Governor in Council is nevertheless a local regulation within the meaning and spirit of section 914, Ch. 35, R.S.C. 1906. 3. That, although under regulation 19 of the canal regulations, a moving vessel, when passing a moored vessel, is directed to stop her engines, if, by reason of a current against her she would, with engines stopped, be unable to pass without the probability of a collision with the moored ship, she is justified, under rule 37 of the rules of the road for the Great Lakes and by the ordinary rules of seamanship, in not conforming to the said regulation. *THE Charles Dick v. THE PINE BAY SS. Co. LTD.*..... 83

5 — *Seaman — Maritime Lien — Watchman—Jurisdiction.*] The SS. *Chasina* was purchased by the A.P.S.S. Co. and was put on the ways of the Marine Repair Co., Ltd., at Vancouver for the purpose of being made ready as a freighter for coastwise service. Upon his own showing, plaintiff remained on the *C.* during the repairs, in the capacity of watchman and caretaker, as part owner on behalf of his "associates and owners to care for her and to oversee her reconditioning, etc." The repairers claimed that they provided all the necessary care and watching during this time. Later plaintiff had the vessel arrested for a claim as watchman and for wages as rigger. Upon motion to set aside the writ and warrant of arrest.—*Held*, that upon his own showing the plaintiffs could not properly be deemed to be a seaman, that the services rendered did not entitle him to claim a maritime lien, and that the said motion should be allowed. 2. That, as regards the claim for a lien for wages as rigger, the amount thereof being for less than \$200, this Court had no jurisdiction to entertain and hear the same. *JORGENSEN v. THE Chasina.* . . 110

6 — *Collision — Crowded harbour — Tide and fog—Ship at anchor—Burden of proof—Inevitable accident.*] The *A.* entered Vancouver harbour at 8.30 a.m. bound for B. pier, but it being then not clear, she was forced to anchor between 250 and 300 yards off. She complied with all the precautions prescribed by the regulations, and was duly and properly anchored. There was a flood tide running and the weather was foggy and misty. A little later the *S.S.* with pilot, entered the harbour at reduced speed. She had heard the bells from the *A.* and when about 800 or 900 feet away sighted the *A.* She stopped her engines and drifted forward at four knots, heading

SHIPPING AND SEAMEN—*Continued*

across the *A.*'s bow. Her master admitted that she could have then stopped and backed, but decided to go ahead intending to cross the *A.*'s bow about 200 feet ahead of her. The *S.S.* then hearing three whistles on her starboard side and a starboard and port bell and seeing a ship loom up out of the fog, put her engines astern. Her headway being taken off she drifted with the tide towards the *A.* and a collision occurred. The *S.S.* pleaded inevitable accident.—*Held* (reversing the judgment of the Local Judge in Admiralty), that the introduction of another ship as aforesaid should have been anticipated by the *S.S.* and was one of the accepted risks in attempting to proceed as she did, in the fog. That it was upon the *S.S.* to show that no other course was open to her; and having failed to do so, and having failed to use the proper precautions open to her to prevent danger, she must be held solely to blame for the collision. 2. That in a case of collision in daylight, between a ship under way and one at anchor in a proper place, the burden is upon the former to show she was not in fault. It is the bounden duty of a vessel under way to avoid, if it be possible with ordinary care and with safety to herself, any collision with an anchored ship. 3. It is an "inevitable accident" where one vessel doing a lawful act without any intention of harm and using proper precautions to prevent danger, happens to run into another vessel. *H. M. WRANGEL AND COMPANY A/S v. THE Steel Scientist.*..... 202

7 — *Collision — Negligence — Observance of Rules—Preliminary Act—Admissions therein.*—*Held*, that the failure of the Master of a ship with plenty of sea room, to move out of instead of into danger is not merely an error of judgment but bad navigation. This is applicable where a ship is on the wrong side of the channel and is faced with the choice of endeavouring to put herself right by crossing the channel, or of using the sea room available in the opposite direction. 2. That the statements of fact in a Preliminary Act are statements which must be presumed to be made after the most careful examination and consideration, and where a pleading differs from the Preliminary Act the admissions made in the latter and their bearing upon the evidence adduced must be given very great weight in coming to a decision. *MATTHEWS STEAMSHIP Co. v. THE ONTARIO SAND AND GRAVEL Co.*..... 210

8 — *Steamship — Interpretation — Canada Shipping Act—Master.*] The defendant ship was a gas boat of registered gross tonnage of 21.02 tons, and was used chiefly in towing barges.—*Held*,

SHIPPING AND SEAMEN—*Concluded*

that, as the ship in question did not come within the exceptions mentioned in section 100 of the Canada Shipping Act [R.S.C. (1906) ch. 113] as amended by section 1 of c. 51 of 2 Geo. V, she was a "steamship" or "steamer" within the meaning of section 72, ss. (c), and was required to have a certificated master. *JANSEN ET UX v. THE TEX*..... 224

9 — *Maritime Lien — Foreign Law — Jurisdiction*. *W. W. H. Co. Inc.*, carrying on business at Boston, in the United States of America, sought, by action *in rem*, to recover the price of necessaries furnished to the defendant ship, in an American port, under a contract made there, and at the request of the owner, and to enforce a maritime lien for same against the ship, which lien was created and recognized by law of the United States where contract was made. The owner at the time of the contract was domiciled and resident in the United States, and the ship, then called the *Lincolmland*, was registered there, but later, before action, she was sold, her name changed, and she became of British Registry.—*Held*, that even though by the laws of this country, a person might not have a maritime lien for necessaries supplied under like circumstances, where such a maritime lien is created under the foreign law, the Exchequer Court of Canada, in Admiralty, can enforce such an action *in rem*, under the Colonial Courts of Admiralty Act, 1890, sec. 2, ss. 2. *WALTER W. HODDER & Co. INC., v. THE SHIP Strandhill*..... 226

## STATUTES AND ORDERS

1—*British North America Act, 1867-30-31 Vict., c. 33. R.S.C. (1906) p. 3089 and Annotations to R.S.C., App. III 127*  
See CONSTITUTIONAL LAW.

2—*Canada Shipping Act, R.S.C. [1906] c. 113*..... 83  
See SHIPPING AND SEAMEN No. 4.

3—*Canadian National Ry. Act, 9-10 Geo. V., c. 13*..... 133  
See EXPROPRIATION No. 3.

4—*Consolidated Orders respecting Trading with the Enemy, 1916*..... 77  
See CUSTODIAN OF ALIEN PROPERTY.

5—*Exchequer Court Act, R.S.C. (1906), c. 140*..... 150  
See CROWN No. 5.

6—*Naturalization Act, R.S.C. (1906), c. 77*..... 127  
See CONSTITUTIONAL LAW No. 1.

7—*Patent Act, 13-14 Geo. V, c. 23*.. 143  
See PATENTS No. 1.

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8—*Patent Act (Amendment) 11-12 Geo. V, c. 44*..... 164  
See PATENTS No. 3.

9—*Railways and Canals Act, Department of, R.S.C. (1906), c. 35*..... 83  
See SHIPPING AND SEAMEN No. 4.

10—*Returned Soldiers' Insurance Act, 10-11 Geo. V, c. 54*..... 1  
See CROWN No. 1.

11—*Royal Proclamation, 1763*.... 68  
See CROWN No. 4.

12—*Special War Revenue Act, 1915, 5 Geo. V, c. 8; 12-13 Geo. V, c. 47*.... 104,  
See REVENUE.

13—*Toronto Terminal Ry. Act, 1906 6 Ed. VII, c. 170*..... 133  
See EXPROPRIATION No. 3.

14—*Trade Marks and Designs Act, R. S.C. (1906), c. 71*..... 20  
See TRADE MARKS No. 1.

15—*Treaty of Peace (Germany), Order, 1920, (10 Geo. V, c. 30) Stat. of Can., 1920, p. XX XVII*..... 164  
See PATENTS No. 3.

## TENANT-AT-WILL

See CROWN No. 4.

## TORONTO TERMINAL RAILWAY ACT

See EXPROPRIATION No. 3.

**TRADE-MARKS** — *Voluntary Association—Right to object to registration—"Person aggrieved"—"Interest."*] J. filed a petition to be permitted to register a certain trade-mark, and the objecting party was authorized, by order of this court, to oppose such application for the benefit of the Union Garment Workers of America, a voluntary association or trade union. Upon application by petitioner to have the objections filed by Bush dismissed because he was not a person entitled to object, it was *Held*, that section 42 of the Trade-Marks and Designs Act applied only where a person is seeking to have a trade-mark expunged, varied or rectified, in which case such person must be a "person aggrieved," but that in the present case any person "interested" may oppose the registration, and that the objecting party herein was a person entitled to so object to the registration asked for, under rules 34 et seq. of the Rules and Orders of this Court. *JACOBS v. BUSH*..... 20

2 — *Expunging — "Chicken haddies" — Distinctiveness—Descriptive.*] *Held*, that the words "chicken haddies" having been in use in the trade for a long period prior

## TRADE MARKS—Continued

to the respondent's trade-mark, and such words forming part of the English language and thereby having become *publici juris*, could not be appropriated by any one as his trade-mark, and, further, that such words being descriptive of the character and size of the goods did not distinguish the goods of the proprietor of such trade-mark from those of other persons, and a trade-mark for the same was fundamentally null and void and should be expunged. *J. W. WINDSOR, LTD. v. MARITIME FISH CORP.* . . . . . 31

3 — *Industrial design — Trade variance — Novelty of invention.*] Plaintiff registered two industrial designs which were the outline or representation of an overshoe. The means of fastening the flaps thereof being the usual metal buckle arrangement on the lower part and cross straps on the upper part to which dome fasteners are applied. One design shows two straps with buckles and two straps with dome fasteners. The other, one strap with buckles and three straps with dome fasteners. The only description given is "the said industrial design consists of the novel configuration of overshoes or goloshes as shown."—*Held*, that the form or configuration of the overshoe and the fasteners, whether with buckles or dome fasteners or both, is old and discloses no originality, and that the addition of buckles or straps with dome fasteners, whether concealed or exposed, or the substitution of one for the other, or the variation in the respective numbers of each, all well known, can not render a design new or original. Such variations are mere trade variants, without invention, originality or novelty, the introduction or substitution of which in a design, is not sufficient to make the design new or original, and that the industrial designs in question are not proper subject matters for registration within the spirit and intentment of the Trade-Marks and Designs Act. 2. That a design to be registrable must be some conception or suggestion as to shape, pattern or ornament, applied to a particular article, and is judged solely by the eye, and does not include any mode or principle of construction. It cannot be an article of manufacture, but something to be applied to an article of manufacture or other article to which an industrial design may be applied, and capable of existing outside of the article itself. *KAUFMAN RUBBER CO. LTD. v. MINER RUBBER CO. LTD.* . . . . . 26

## TRADE MARKS—Concluded

4 — *Infringement — "Thermogene"—Distinctiveness—Descriptiveness.*]— *Held*, that the word "Thermogene," not being in common use anywhere, except as denoting plaintiff's goods; not being descriptive within the meaning of the Trade-Mark and Design Act, and having acquired a secondary meaning as distinguishing the goods of the plaintiff from those of the other traders, was a valid trade-mark. 2. That even if the said word should have reference to, or be suggestive, of the quality or characteristics of the goods, that feature of it is so remote as not to constitute a practical or reasonable objection to its adoption as a trade-mark. 3. That the mark consisting of the words "Ouate Thermogene Le Dragon," applied to medicated wadding, appearing with other matter on the container of the defendant's goods, of which the two first words "ouate thermogene" appear above the other two and are in much more conspicuous type than the latter, and much more readily observed, infringes plaintiff's mark by the use of the word "Thermogene" therein. That the said word was improperly therein registered, was calculated to mislead and deceive the public, and that defendant's mark should be varied by striking therefrom the said word. *THE THERMOGENE CO. LTD. v. LA CIE CHIMIQUE DE PRODUITS DE FRANCE, LTEE.* . . . . . 114

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## VOLUNTARY ASSOCIATION

See TRADE MARKS No. 1.

## WARRANTS OF POSSESSION

See EXPROPRIATION No. 3.

## WHARFAGE

See CROWN No. 2.

## WORDS AND PHRASES

"Person Aggrieved."

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"Reasonable terms."

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"Unfairly Prejudiced."

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"Res ipsa loquitur."

*SINCENNES-McNAUGHTON MINES, LTD., v. THE KING.* . . . . . 150

