

1925

CANADA
LAW REPORTS

Exchequer Court of Canada

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1925

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 F. S. MACLENNAN, appointed, 21st December, 1921; died 18th June 1925—Quebec Admiralty District (now vacant).

DEPUTY LOCAL JUDGES:

do W. A. GALLIHER—British Columbia Admiralty District.

do T. S. ROGERS—Nova Scotia Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE ERNEST LAPOINTE, K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE E. J. McMURRAY, K.C.
THE HONOURABLE LUCIEN CANNON, K.C.

MEMORANDUM

During the period of these reports, namely on the 18th day of June, 1925, The Honourable Mr. Justice Maclellan, Local Judge in Admiralty for the Quebec Admiralty District, departed this life.

CORRIGENDUM

P. 189. The Word "indirectly" in line 24 should be "directly."

ERRATUM

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

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- Attorney General v. Smith* [1924] Ex. C.R. 193. Appeal allowed. Leave to appeal to the Privy Council granted.
- Canadian National Railways, The v. Boland* [1925] Ex. C.R. 173. Appeal allowed.
- Dominion Bedstead Co. v. Gertler* [1924] Ex. C.R. 158. Appeal abandoned.
- Hurlbut v. Hurlburt* [1923] Ex. C.R. 136. Appeal dismissed.
- King, The v. Eastern Terminal Elevator Co.* [1924] Ex. C.R. 167. Appeal dismissed.
- King, The v. Nashwaak Pulp & Paper Co.* (21 Ex. C.R. 434). Appeal dismissed.
- Permutit v. Borrowman* ([1924] Ex. C.R. 8). Appeal allowed. Leave to appeal to Privy Council granted.
- The P. & M. Co. et al & The Canadian Machinery Corporation* [1925] Ex. C.R. 47. Appeal dismissed.
- Schrobounst v. The King* [1925] Ex. C.R. 167. Appeal dismissed.
- Warren v. Ship Perene* [1924] Ex. C.R. 229. Varied ([1925] S.C.R. 1).
- Williamson Candy Co. v. Crothers Co.* ([1924] Ex. C.R. 183.) Appeal dismissed.

The following are still pending:—

- McLeod, Jas. B. v. Minister of Customs & Excise* [1925] Ex. C.R. 105.
- Maunsell v. The King* [1925] Ex. C.R. 133.
- Wright & Corson et al v. Brake Service Ltd.* [1925] Ex. C.R. 127.
- Bergeon v. De Kermor Electric Heating Co.* [1925] Ex. C.R. 160.

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- Donovan, S. S. Co. v. SS. Helen* [1925] Ex. C.R. 114.
- The Pine Bay SS. Co. v. Charles Dick* [1925] Ex. C.R. 203.
- Lakes & St. Lawrence Transit Co. v. Niagara, St. Catharines & Toronto Ry.* (1923 Ex. C.R. 202; 1924 Ex. C.R. 1). Judgment of Trial Judge restored by the Privy Council.

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CASES
 DETERMINED BY THE
EXCHEQUER COURT OF CANADA
 AT FIRST INSTANCE

AND
 IN THE EXERCISE OF ITS APPELLATE JURISDICTION

O'BRIEN & DOHENY.....SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1924

Sept. 19.

Practice—Petition of Right—General allegations—Particulars.

Suppliants filed their petition to recover damages alleged to be due to a fire caused by the negligence of the servants of the Crown on the right-of-way of the Canadian National Railways, and respondent in its defence alleged that if "the fire occurred as alleged it was due to the fact that the suppliants failed and neglected to comply with the provisions of the law."

Held, that the words *failed and neglected* clearly connote acts and deeds on their part amounting to both failure of duty and negligence. The general allegation of irregularities as a means of justification on behalf of the respondent is not sufficient, the facts giving rise to such contention should be disclosed, and suppliants are entitled to obtain particulars thereof.

MOTION for particulars heard this 19th September, 1924.

Paul Leduc for the motion;

Robert Laurier, contra.

AUDETTE J. the same day delivered judgment.

This is an application for particulars of the allegation of paragraph 4 of the Statement in Defense, reading as follows:—

4. That if the fire occurred as alleged, it was due to the fact that the suppliants failed and neglected to comply with the provisions of the law.

This paragraph, which charges the suppliants with want of compliance with the law, also involves acts of negligence on their behalf. These words "failed and neglected" clearly connote acts or deeds on their part amounting to both failure of duty and negligence.

The application for particulars is now recognized by jurisprudence as a regular procedure every time there is occasion in the interest of justice to ask for better information than what is primarily conveyed by the pleadings.

The function of particulars is to limit the generality of the allegation in the pleadings and to define the issues which have to be tried. It would seem that each party is entitled to know the case that is intended to be made against him at the trial and to have such particulars of his opponent's case as will prevent him from being taken by surprise,—the whole without disclosing the names of witnesses.

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Audette J.

The general allegation of irregularities as means of justification on behalf of the respondent is not sufficient. The facts that give rise to such contention must be disclosed.

See 22 Hals., pp. 453 et seq. Beauchamp Rep. Vol. 3—Nos. 2537, p. 1626; 2560, p. 1630; 2633, p. 1640; 2636, p. 1642; 2648, p. 1644; 2651, p. 1644; 2658, p. 1446. *Perreault v. Lacombe* (1); *Connolly v. Baie des Chaleurs* (2).

Having said so much the Court has come to the conclusion to exercise its judicial discretion by ordering the respondents to give particulars of the allegations in paragraph 4 of the said Statement in Defense, within 15 days from the service of this Order. The time for filing a reply being enlarged within 14 days after the filing of the said particulars.

Judgment accordingly.

1920
June 15.
Aug. 12.
1921
Jan. 3.

NOVA SCOTIA ADMIRALTY DISTRICT

JOHN S. DARRELL & COMPANY PLAINTIFFS;

AGAINST

THE SHIP AMERICAN

Shipping—Domicile—Jurisdiction—Action in rem—Owner of cargo—Breach of charter-party—Undue delay to repair—Abandonment of voyage—General average—Elements of damage.

Held, that the domicile of a corporation is its principal place of business, i.e., the place where the administrative business of the corporation is carried on; and, where it is shown that a company has no seal or original records in Canada and no share certificates appear to be held there, it cannot be said that such a company is domiciled in Canada, although such company, owners of the ship, has its registered office in Nova Scotia, where it may be sued.

2. The *A.* was chartered to carry a cargo of coal from Halifax to Bermuda and the freight was paid in advance. She sailed on the 14th January, but on account of weather and the bad condition of her pumps, boilers and machinery, she returned to port on the 15th. Nothing substantial was done to get the ship ready for sea again until January 26. The cargo owners were not notified or consulted as to what was being done with the cargo or the probable repairs necessary, but were informed from time to time that the ship would sail in a few days.

Held, that, upon the facts, the cargo owners were justified in bringing the action when they did against the ship for breach of charter-party.

3. That in the event of such delay being due to the underwriters on the hull, as between the charterers and the owners, the latter were liable therefor.

(1) [1916] 19 Q.P.R. 174.

(2) [1901] 4 Q.P.R. 178.

4. The *A.* by counter-claim asked that the cargo contribute certain alleged average charges and that the same be set off against the plaintiff's claim.

Held, that inward pilotage, tugs, wharfage, cost of unloading cargo, protest fees, were proper general average charges, but that the cargo should not contribute to expenditures for wages and provisions.

5. That the forwarding of the cargo was abandoned by the ship and that she was liable therefor and for damages, and that the cargo owners were entitled to recover the costs thereof, freight paid and insurance, etc.

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ACTION for damages for breach of charter party, motion to set aside warrant of arrest, for want of jurisdiction and hearing on application for assessment of damages and offset by the ship for general average charges.

June 8th, 1920.

Motion now heard before the Honourable Mr. Justice Mellish.

W. C. Macdonald, K.C. for plaintiffs.

C. J. Burchell, K.C. and *J. L. Ralston, K.C.* for the ship.

The facts are stated in the reasons for judgment.

MELLISH L.J.A., the 15th June, 1920, delivered judgment.

By a charter-party dated 24th December, 1919, Caracanda Bros., of New York, therein described as owners of the ship *American* undertook to carry coal in said ship from Halifax to St. Georges, Bermuda.

The plaintiffs have arrested the ship for breach of this agreement under the statute empowering such arrest unless an owner is domiciled within the jurisdiction.

A company called the Steamer American Limited, incorporated under the laws of Nova Scotia, moves as owner, to set aside all the proceedings taken herein, on the ground that this company is *domiciled* within the jurisdiction within the meaning of the statute see (24 Vict., cap. 10, s. 6—Imperial 1861 and The Colonial Courts of Admiralty Act, 1890; Imperial 53-54 Vict., c. 27, s. 2).

I am not satisfied on the evidence before me that this company is so *domiciled*. The domicile of a corporation is a fiction as shewn by Prof. Dicey. And although the company which is said to own this ship has its registered office in Nova Scotia and apparently may be sued here this would

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not appear to be decisive. The company under the evidence has apparently no seal or original records in Canada; and no share certificates appear to be held in Canada. The domicile of a trading corporation is defined (Dicey, Conflict of Laws, 2nd ed., p. 160), to be its principal place of business, i.e., the place where the administrative business of the corporation is carried on; Under the evidence before me such place does not appear to be in Canada.

It was contended on behalf of the company that it might have two domiciles, here and abroad, and that as it could be sued here, it was domiciled here—the purpose of the act being to allow proceedings against the ship only where an owner or part owner could not be sued. I do not agree with this interpretation. The residence of a natural person within the jurisdiction, but who was domiciled abroad, would not, I think, avail to prevent action against the ship even though he might be an owner or part owner of the vessel. Dicey says:

liability to be “sued” does not in the case of a corporation, any more than of an individual depend directly upon domicile. They may each be sued in the courts of this county, if amenable to the process of our courts. On the whole, the better opinion seems to be that a corporation has, following the analogy of an individual, one principal domicile at the place where the head of its affairs is to be found, and that the other places in which it may have subordinate offices correspond, as far as the analogy can be carried out at all, to the residence of an individual.

It does not appear that the directors of the company have anything in fact to do with the employment or management of the ship. On the contrary, whatever their legal powers may be, they appear to have allowed parties out of the jurisdiction to act as ostensible owners. Under such circumstances, it would perhaps not be just to allow the company to deny the ownership as being in the parties representing themselves to be such in the charter-party.

This decision however is based on the other ground which I have dealt with but even if I considered such ground I would not feel justified especially in a summary application in setting aside the proceedings on the facts before me. The application will be dismissed.

July 20th, 1920.

The action was now heard on the merits.

The facts are stated in the reasons for judgment.

MELLISH L.J.A. now this 12th day of August, 1920, delivered judgment.

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On the 24th of December, 1919, Caracanda Bros., of New York, representing themselves as owners of the defendant ship entered into a charter-party with Musgrave & Company, Limited, of Halifax, acting as agents for undisclosed principals the plaintiffs in this action to carry a cargo of coal in bulk from Halifax to St. Georges, Bermuda.

The ship was loaded at Halifax and the freight paid in advance in accordance with this agreement. On January 14, 1920, the ship sailed on her intended voyage. On account of meeting with bad weather the ship returned to Halifax on the following day leaking, with her pumps choked, boilers and machinery in bad condition. On her return to Halifax the ship was listed to port fifteen degrees. She had proceeded about 65 miles on her voyage before turning back.

Messrs. I. H. Mathers & Son, of Halifax, who had been acting as the ship agents I think promptly advised Caracanda Bros. of the ship's return. One of the scrap log books produced as well as the evidence of the master shows that a survey of the ship was held on the afternoon of the 19th when the cargo was ordered to be discharged, with a view no doubt of ascertaining the ship's condition. A second survey seems to have been held on the 25th. Such discharge was not commenced until the 27th January, and finished on the 3rd of February, at Pier 9 when the ship was removed to Henry's wharf. This appears from another log book produced by defendant and marked, J. L. B./E from which it appears that repairs were being done at this wharf on the 4th, 5th and 6th. On February 7th the ship entered the dry dock returning to Henry's wharf on the 10th of February. On the following day it appears from this book that an examination was held on the ship's hull and boilers. The chief engineer's log ends on January 23, and is unsatisfactory. The master says that the engineer's log book was washed overboard but there was one produced at the trial which is not very instructive as to the repairs, which was not completed until after the engineer left the ship. On the engineer's recommendation to the master, a boiler-maker came aboard, and put stoppers in the main

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boiler, apparently an urgent necessity, this was done he says the third day after the ship's return, and the ship's engineers also did some repairs as appears by the engineer's log book. Beyond this, I think I am justified in finding that no repairs were begun on the boilers, pumps or machinery until after the ship was taken to Henry's wharf on February 3. There is no entry showing the ship was under repairs before that date, and the master swears that nothing was done till after the cargo was discharged.

In my opinion there was undue delay in discharging the cargo, and in commencing the permanent repairs, even if they were begun while the ship was discharging. I am unable to determine just what repairs were necessary or the precise dates on which they were effected. I see no reason why the repairs commenced at Henry's wharf apparently on February 4, were not begun at least a week earlier. Practically nothing was done to get the ship ready for sea again from the time of her arrival on January 15 until the 26th, when she was taken to Pier 9, with the exception of what was done by the ship's engineers and the urgent work already referred to which was done at the suggestion of the chief engineer. The treatment of the cargo owners was I think, to say the least, improper and unbusinesslike. They were not notified or consulted as to what was being done with the cargo and were not informed as to what repairs would probably be necessary, if indeed anyone took the trouble to definitely find out, which is not at all clear. They were informed from time to time that the ship would sail in a few days. The captain says that before the survey he expected to be detailed only for a couple of weeks. There is no evidence of any survey which would lead to any contrary conclusion.

It is hinted in the evidence that the owners were delayed in doing what was needful, by reason of the action, or rather the inaction of the underwriters on the hull. As between the charterers and the owners, I think the latter are liable for such delay.

I think the plaintiffs by reason of the delay of the owners were justified in bringing the action when they did against the ship for a breach of the charter-party. I further think there has been shown no legal justification as against the

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plaintiffs for failure to perform the charter-party up to the present time. There will be judgment for the plaintiff for damages to be assessed with costs. On the assessment of damages, the amount to be determined, will depend upon circumstances, taking into consideration the method of handling the cargo, and the question as to whether the voyage was abandoned or such other questions as may be relevant.

November 16th, 1920.

The action now came on before the court on the question of assessing the damages, etc.

MELLISH L.J.A., on the 3rd of January, 1921, delivered judgment.

During the trial of the action the defendant ship was still at Halifax, and after the commencement of the trial, viz: on 3rd August, 1920, the cargo by consent was sold by the Registrar and the proceeds of the sale paid into court. This, after payment of certain storage charges and expenses, amounted to \$4,958.37.

The defendant by leave has filed a counter-claim, claiming against any funds in court in respect of the cargo contribution for certain alleged general average charges, and that the same be offset against any claim of the plaintiffs.

The following are admitted to be proper general average amounts:

Inward pilotage	\$ 43 80
Tugs	105 00
Five days wharfage	47 50
Cost of unloading cargo.....	1,558 40
Protest fees	27 50
	<hr/>
Amounting in all to	\$1,782 20
	<hr/>

It is difficult, I think, to find the precise principles on which general average claims are dealt with in a case of this kind, the ship having come to a port not to repair general average damages; but I think I am within the English authorities in disallowing the expenditures for wages and provisions as claims to which the cargo should contribute. With some doubt I have come to the conclusion that the expenditure for insurance for say one month is probably chargeable to the cargo. I fix this amount at \$100. I

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understood plaintiffs' counsel was willing to concede liability for storage of the cargo for one month. This, I think, an ample allowance; indeed no one could suggest why the cargo was not reloaded into the ship as soon as she was taken from the dry dock. This sum amounts to \$76.20. In addition I think the cargo liable for top charges (wharfage) which I understand is charged in respect of providing accommodation for the cargo irrespective of the time it was to remain there. The side wharfage, \$38 will be allowed in general average. Pickford & Black's claim for wharfage \$95 I allow in general average to the extent conceded, viz: five days. As I have already indicated in my previous findings I think the ship should have proceeded to discharge cargo some days before she did.

The ship has been sold at Halifax and realized \$19,250 which was paid into court.

I find that the forwarding of the cargo was abandoned and that the ship is liable for the cargo and for damages accordingly to the plaintiff, which I assess as follows:—

Cost of coal to plaintiff.....	\$ 7,262 04
Freight prepaid	7,628 19
Expenditure necessary to procure cargo at Bermuda—	
Insurance	118 72
Cables	53 24
	<hr/>
	\$15,062 19
Plaintiffs have also lost the use of their money, or rather their coal, and any possible profit they might make on the transaction. I fix this at.....	700 00
	<hr/>
	\$15,762 19

which will be subject to the deductions hereinafter referred to.

The cargo was sold expressly without prejudice to either of the parties and that circumstance must not, I think, therefore be considered as evidence of the abandonment of the contract or of the acceptance of such abandonment; but I can find no justification for the long delay except on the theory that the undertaking to forward the cargo was abandoned as a business enterprise. The owners may have intended to forward the cargo if they had been financially able to do so, but that circumstance cannot, I think, better their position *quo ad* the plaintiffs the forwarding of whose

coal was I think wrongly given up as a commercial proposition before the coal was sold.

Admittedly the ship was sold after her being repaired for \$19,250. It is difficult under the evidence to determine her value before being repaired but I think for the purposes of this action to place such valuation at say \$12,000 or thereabout, would be right.

There is some evidence that the cargo was damaged by salt water before being discharged. The cargo would also suffer damage from wastage and breaking up of the coal and exposure necessary to its being discharged and reloaded, especially at that time of the year. Having in view the price for which the coal sold, \$5,300, and the market conditions when such sale took place, I think I must hold that if the cargo had been reloaded in a reasonable time and delivered at Bermuda it would perhaps not intrinsically but as a marketable commodity have been diminished in value from the foregoing causes to the extent of one thousand dollars. Placing the damage from sea water before discharging to \$500 leaves \$500 a subject of general average.

As between the parties to this action and having in mind the counter-claim, I think the cargo should contribute in general average on the above valuation of \$15,062.19 less \$500 estimated for damage thereto from salt water,—\$14,562.19. Valuing the ship at about \$12,000 as above stated the contribution will be 55 per cent for the cargo and 45 per cent for the ship.

There must therefore be deducted from the plaintiff's claim:—

Fifty-five per cent of \$1,782.20 admitted as proper subject of general average.....	980 21
One month's storage of cargo.....	76 20
Top charges (wharfage)	228 60
One month's insurance	100 00
Fifty-five per cent side wharfage, \$38 one month.....	20 90
Loss in value of coal which would be occasioned by discharging and reloading... \$500 00	
Less amount which would be chargeable to the ship in general average 45 per cent....	225 00
	275 00
Estimated water damage.....	500 00
	275 00
Total deductions	\$2,180 91

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Taking this from the above mentioned \$15,762.19 leaves a balance of \$13,581.28, for which plaintiffs will have judgment with costs. There should I think be no costs on the counter-claim.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1924
 August 23.

HARBOUR NAVIGATION COMPANY } PLAINTIFF;
 LIMITED }

AGAINST

THE SHIP *DINTEL DYK*

Shipping—Harbour—Collision—Improper displaying of lights—Negligence—Lookout

The *E.*, a small motor ship, was lying at a temporary landing stage, in a crowded harbour of Vancouver, having only moored to take on provisions. She had been displaying navigating lights, which by Art. 2 must be carried "when under way," and neglected to extinguish them when moored, and there was no lookout on her. The *D.*, while proceeding with all due caution and at lowest speed consistent with safety to her allotted berth collided with the *E.* Proper berthing signals were given by the *D.*

Held, that by her conduct in wrongly displaying navigating lights the *E.* was liable to mislead and entrap other vessels, who might properly assume that she was in a position of instant control and able to immediately extricate herself from danger due to an approaching vessel, and that she was victim of her own negligence.

2. That the degree of watchfulness must correspond to the necessity of each case.

ACTION to recover damages due to collision between the ship *Enilada* and the *Dinteldyk*.

Trial before the Honourable Mr. Justice Martin at Vancouver.

E. C. Mayers for the plaintiff;

D. N. Hossie for the *Dinteldyk*.

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

MARTIN L.J.A. now this 23rd August, 1924, delivered judgment (1).

(1) *Note*.—Upon an appeal to the Exchequer Court of Canada from this judgment, Maclean J. dismissed the appeal and affirmed the judgment of the trial judge for the same reasons as given by such judge.

This is an action brought by the owner of the small motor ship *Enilada*, of 57.39 tons, length 64 feet, against the motor ship *Dinteldyk* of 5,814 tons, net register, length 501 feet, breadth 60 feet, for damages, estimated at \$7,000, done by a collision at the C.P.R. wharf in Vancouver harbour on the 23rd of November, 1923, about 5.27 p.m. At the time of impact the *Enilada* was lying at a temporary landing stage formed by a scow (87.4 x 28.5 feet) in front of shed No. 4 at said wharf, with a gangway down to it, her bow being to the east and her stern projecting westward beyond the scow for about fifteen feet, thus being about 560 feet from the intersection of pier D with said wharf at an acute angle, the pier projecting into the harbour 930 feet in a northeasterly direction, as shown in Ex. 3, and the large steamship the *Empress of Asia* (about 500 feet long) was lying at the east side thereof, about 200 feet from the intersection, and other vessels were lying near the landing as roughly shown in Ex. 2.

The *Enilada* had left Gore Avenue slip, a short distance to the east, en route for the said landing, at about 5.15 and on the way in had passed to the starboard a large ship which later proved to be the *Dinteldyk* with her head inside pier D, but which the *Enilada* thought had stern way on and was putting out to sea, so without paying further attention to said big ship the *Enilada* moored herself to the landing scow by a single line with her stern projecting as aforesaid, though there was more than ample room for her to lie wholly alongside of it, the scow being about 30 feet longer than she was. This temporary landing had been placed in front of the wharf to afford facilities to maintain and support certain men employed during a longshoremen's strike then in progress and the *Enilada* went to said landing to get supplies for that purpose and expecting that they would be awaiting her did not take the precaution to extinguish her navigating lights (which she had been properly showing at that dark time of the evening) nor did she take the obviously very necessary precaution of keeping a *good lookout* as she alleges she did in her statement of claim (par. 4) especially when that locality was a *crowded* one as alleged in par. 6. The only explanation offered for these two serious breaches of good seamanship is that she ex-

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pected to get the supplies immediately, but there was some delay about getting them owing to a mistake in delivery thereof, and I have no doubt that she was at the scow for about ten minutes at least before the collision; the master admits seven; her engine, he says, was kept running all the time. Her complement consisted of the master, mate and engineer, and she could be moved by one man; both the master and the mate went off the boat on to the scow and the engineer was below; there is no pretence that a lookout was kept, properly so called. At the time when they became aware of the presence of the *Dinteldyk* she was almost upon them, 50-60 feet away, and, as the master says, with her bow "already beyond us" moving westward towards pier D, her allotted berth along the wharf and touching the inner corner of pier D. Both master and mate say that it was then too late to avert the collision, though the mate tried to haul her ahead with the said bow line, and the master was afraid, he says, to go ahead suddenly with his engine because of two other launches which were in front of him and would have been endangered by that manoeuvre; the master further says that he paid no attention to where he moored his vessel because he only expected to be there a minute. The engineer seems to have been more alert than the other two men, for when he looked out of the cabin and saw the *Dinteldyk* getting close he became apprehensive and at once went back to his engine thinking the captain would need his services but he was not called upon to act. It is impossible, in my opinion, to acquit the *Enilada* from clearly established negligence in displaying improper and misleading lights and in failing to keep a lookout in circumstances created by herself which called for special watchfulness, in regard to which it was long ago laid down in *The Mellona* (1), that the degree of watchfulness must correspond to the necessity of the case, Dr. Lushington saying at p. 13:—

In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed; and I cannot but think that, under all the circumstances of the case, if the master of *The Mellona* found it necessary to go below for the purpose of consulting his chart, he was bound to have called up another of the crew to supply his place on deck.

(1) [1847] 3 Wm. Rob. 7.

The special circumstances here were in particular, that by wrongly displaying navigating lights, which by Art. 2 are only to be carried "when under way" [cf. *The Wega* (1)], the *Enilada* in effect laid a trap for other vessels which could only properly assume from correctly observing her lights that she was in a position of instant control and therefore able to immediately extricate herself from any danger created by an approaching ship. It is very unfortunate for her that she should have formed an entirely erroneous impression of the incoming berthing manoeuvre of the *Dinteldyk*, but the responsibility for that grave initial error which lulled her into false security, is hers alone. The two cases her counsel chiefly relied upon do not assist her upon the particular facts—in the first, *The Hornet* (2), the court found that the absence of a lookout on the barge "had nothing to do with the collision," whereas here it had everything; and in the second, *Bailey v. Crates* (3), wherein the judgment of the Full Court of which I was a member was affirmed, the Supreme Court said:

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Whether any or how many or what class of men should have been kept on board, whether there should have been a watch whether steam should have been kept up or other precautions taken, depended wholly upon the circumstances. The cases which have been cited to show that the absence of certain precautions was regarded as constituting negligence depended upon the particular facts and the respective situations of the vessels.

No one would question these observations, but the facts before me are essentially distinct from those in *Bailey v. Cates*, *supra*, and also from *Bank Shipping Co. v. City of Seattle* (4), and I have to decide what was good seaman-ship upon them alone. Nor is it, in the circumstances, any legal excuse for the *Enilada* to set up that when self-invited danger came upon her she found herself in peril from which she could not save herself because other vessels had later taken a position in front of her at the same landing place, for just so long as she continued to display navigating lights in the manner aforesaid she continued to mislead and entrap other vessels and so should have taken proper precautions to escape from the danger that she should have anticipated as the result of her negligent actions.

(1) [1895] P. 156 at p. 159.

(2) [1892] P. 361 at p. 365.

(3) [1904] 11 B.C.R. 62.

(4) [1903] 10 B.C.R. 513.

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But it is urged on her behalf that however negligent she may "have been, yet the *Dinteldyk* was also negligent" (par. 6) in attempting to dock at a short berth at a crowded wharf without the "assistance of a tug and in attempting to do so at an excessive rate of speed."

As to the first charge, the evidence is overwhelming that in the case of so well equipped and modern a twin screw vessel as the *Dinteldyk*, to enlist the services of a tug in that confined space (only 850 feet between the N.E. end of pier D and Union S.S. Company's Wharf to the eastward) would be quite unnecessary, if not actually detrimental to her making the very good berthing she unquestionably did make.

As to the second, the evidence is equally convincing that she proceeded to her allotted berth with all due caution and at the lowest possible speed consistent with safety, having regard to the proximity of the other vessels already mentioned, to the said confined space; to the fact that the Telephone Company's barge *Twelana* and tug were coming out, to make way for her, from her allotted berth, passing the *Empress of Asia* by about 50-75 feet; to the fact that she was light and that there was a steady breeze about 16-1 knots from the E.N.E. upon her quarter, and to other circumstances not necessary to detail. There can be no reasonable doubt that she twice gave in ample time the proper berthing signals, the latter of which particularly should have been heard by the *Enilada* had she not lulled herself into a state of false security, and later, when the danger became apparent, endeavoured to arouse the *Enilada* by megaphone and shouting, but, as it turned out, it was too late then when she finally awoke to her self-created peril, to avoid it, though if she had been moved only a few feet she would have saved herself.

After carefully considering all the evidence and circumstances I am unable to find any act of negligence against the *Dinteldyk*, and I think she was justified in continuing to believe up to the last moment that the *Enilada* had the power as well, of course, as the intention of moving out of that danger which she should have anticipated she was bringing upon herself by the misleading display of wrong lights, and I do not doubt that when that unfortunate

moment was reached it was then impossible for the *Dinteldyk* to extricate herself with due regard to her own safety, from the position into which she had been in effect entrapped. It follows that the action should be dismissed with costs.

Judgment accordingly.

Solicitor for appellant: *J. H. MacGill, Esq.*

Solicitor for respondent: *Ghent Davis, Esq.*

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EDWARD A. RUSSELL.....APPELLANT;
 AND
 THE COMMISSIONER OF PATENTS...RESPONDENT.

1924
 Oct. 18.

Patents—Foreign Patent—Delay to apply in Canada—Subsection 1 of section 8, 13-14 Geo. V, c. 23

R. applied for a patent in the United States of America in May, 1922, and more than one year later applied for the same patent for Canada. His application was refused here on the ground that more than one year had elapsed since his application for the same in the United States, under the provisions of subsection 1 of section 8 of the Patent Act, 13-14 Geo. V, c. 23.

Held, that the said subsection has no applicability to the present case, inasmuch as such subsection deals only with a case where a foreign patent has actually been taken out.

2 *Held* also that the following words in such subsection “elects to obtain” imply the actual issue of the patent and should be taken to be equivalent to the words “chooses to obtain.”

Reporter’s Note: The effect of article 4 of the International Convention for the Protection of Industrial Property upon the construction of subsection 2 of section 8 of the Patent Act, 1923, considered.

APPEAL from the decision of the Commissioner of Patents by applicant for patent under the provisions of the Patent Act of 1923.

October 14, 1924.

Appeal heard before the Honourable Mr. Justice Audette at Ottawa.

Harold Fisher, K.C. and *R. S. Smart* for the appellant.

O. M. Biggar, K.C. for the Commissioner of Patents.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 18th October, 1924, delivered judgment.

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This is an appeal, under the provisions of section 21 of *The Patent Act* (13-14 Geo. V, ch. 23) wherein the appellant failed to obtain a patent by reason of the objection of the Commissioner—as set forth in the motion by way of appeal—that the appellant had already filed an application for a similar patent in the United States Patent Office, on the 1st May, 1922, more than one year prior to the receipt of the application for a Canadian Patent.

The Patent Act, 13-14 Geo. V, ch. 23, came into force, under proclamation, as provided by section 70 thereof, on the 1st September, 1923.

The whole controversy rests upon the interpretation of sections 7 and 8 of the Act, which sections read as follows: (His Lordship here cites the sections verbatim.)

The application for a patent in the United States was made on the 1st May, 1922. The application for a Canadian patent was made on the 11th September, 1924, and refused by the Canadian Commissioner.

Under the provisions of section 7, set out above in full, *any person* who has invented anything as mentioned therein, has two years within which to make his application for a patent under the circumstances and conditions stated in the section.

By subsection 1 of section 8 he is limited to one year, under the conditions mentioned in said paragraph, and the Commissioner seems to have relied upon the same to refuse to entertain the application, because it was not presented within one year of the date of the American application.

To put such a construction upon the said subsection, is erroneous; because this paragraph which deals with a case where a foreign patent has been taken out, does not apply to the present case where no foreign patent has been issued, but where only an application for the same has been made.

Indeed, that view is the only one that can be arrived at when we examine the natural and grammatical meaning of the wording of the section, which starts by saying: *Any inventor who elects to obtain a patent*. That is to say any inventor who chooses to obtain a foreign patent before obtaining a Canadian Patent.

We are not concerned in this case with a person who has chosen to obtain a foreign patent, but with one who has only filed an application for a foreign patent. The first paragraph of section 8 has no application in the present instance and must be eliminated from consideration in arriving at a final conclusion.

Moreover, if the marginal note may be referred to we find it qualifies the meaning of that subsection 1 of section 8, by stating: "Inventions for which foreign patents *have been taken out*" and not the case where only an application for the same has been made.

In thus referring to the marginal note I am not unmindful of what is said about such note in the latest edition of Craies on Statute Law, at p. 177 and I do not base my reading of the section in question on the marginal note. I refer to it merely to show that it coincides with the meaning I am impelled to give the enactment.

However, in the present case, sections 7 and 8 appear to be mutually repugnant. It cannot be denied that the phraseology used could be improved; but that is only to declare, as I have already had occasion to say in *The King v. Dominion Cartridge Co.* (1) that it is another illustration of the ineptitude and want of care that beset the modern method of drawing our statutes. Another anomaly or irregularity will be found in section 37 with respect to the courts of Alberta and Saskatchewan.

Before dealing with subsection 2 of section 8, it is well to mention that under the *International Convention for the Protection of Industrial Property* signed at Washington, U.S., on 2nd June, 1911—Great Britain, including its Dominions, and the United States of America being parties thereto—it is provided as follows, by Article 4, viz:

(His Lordship here cites article 4, paragraphs (a) to (e) inclusive verbatim.)

That is in order to preserve priority, but priority only, and not the substantive right to obtain a patent, the inventor must make his application, as set forth in Article 4, within twelve months.

Now subsection 2 of section 8, begins by adverting to this Convention and to give effect thereto, and enacts that the

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(1) [1923] Ex. C.R. 93, at p. 102.

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application must be made within one year, i.e. the delay of 12 months mentioned in Article 4; but that part of subsection 2 of section 8 must necessarily and impliedly deal with the question of priority mentioned in Article 4 since it adds, after referring to the Convention and establishing the required delay therein mentioned, *and priority only*:

But no patent shall be granted on an application for patent for an invention which has been patented or described in a patent or printed publication in this or any foreign country more than *two years* before the date of the actual filing of the application in Canada, etc., etc.

This last clause which is in direct conflict with section 8 is absolutely in accord with the general principles enunciated in section 7, respecting this delay of *two years*.

It is the duty of a court to make, if possible, such construction of a statute as shall suppress mischief and advance remedy. And in its endeavour to find the true intent, meaning and spirit of the legislator (section 15 Interpretation Act, R.S.C. 1906, ch. 1) when the apparent meaning of the language seems to fall short of the real object of the legislator, a more extended meaning may be attributed to the words, if fairly susceptible of it. Maxwell on Statute, 6th ed. 123.

And when the legislator has expressed his mind clearly in one section, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it.

It would be irrational for a legislative body to enact a law by one section of an Act, and at the very same time destroy it by the following section. In such cases, is not the function of the court to endeavour to reconcile them? And it is a cardinal principle (Craies, 2nd, 216) in the interpretation of a statute, that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other.

When one regards the history and the object of subsection 2 of section 8 and the manner in which that delay of one year finds its way into the Act, qualified by the final enactment retaining the two years delay, and enacted as a general principle in section 7,—the matter becomes clarified and the blundering manner in which that part of the statute has been drafted is overcome, thereby reconciling the obvious repugnancy and inconsistency which exist be-

tween two sections following one another.

Therefore, there will be judgment, maintaining the appeal and allowing the appellant to file, within two years, his application for a Canadian Patent, to be dealt with upon its merits.

And taking all the circumstances of the case into consideration and more especially as the question before the court is one involving the construction of new legislation, I am of opinion that each party shall bear his own costs. *The Skipwith* (1).

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Judgment accordingly.

Solicitors for appellant: *Murphy, Fisher, Sherwood & Clarke.*

Solicitor for respondent: *O. M. Biggar, K.C.*

J. DAVID GAGNE.....APPELLANT;

AND

THE MINISTER OF FINANCE.....RESPONDENT.

Revenue—Income Tax—Dividends—10-11 Geo. V, ch. 49, sec. 5—Accumulated profits.

1924
 Oct. 25.

A certain company was incorporated in 1911 with a capital stock of \$43,500, in shares of \$100 each and G. was its manager and also the owner of 11 shares of the capital stock from 1912 until 1920. In 1920 he bought the remaining shares, at prices ranging from \$90 to \$200 a share. From 1911 to 1920 the profits of the company were allowed to accumulate, and G., upon becoming the owner of all the shares, declared a dividend of 92 per cent, amounting to \$40,020, paid out of such accumulated profits. It was contended that this was not income but a return of capital, etc., and not subject to taxation.

Held, that the dividend so declared in 1920 was "income" within the meaning of section 3 of subsection 5 of the Income War Tax Act, 1917, as re-enacted by section 3 of 10-11 Geo. V, c. 49, and was liable to surtax as provided in said Act; but inasmuch as the Crown only claimed taxes on that part of the profits earned during the taxation period, namely from 1916 to 1920, judgment was rendered accordingly.

APPEAL under the provisions of the Income War Tax Act, 1917.

October 9th, 1924.

Appeal heard before the Honourable Mr. Justice Audette at Quebec.

(1) [1864] 10 L.T. 44.

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OF FINANCE.*Jules Poisson* for appellant.*Louis A. Talbot, K.C.* and *C. F. Elliott* for the respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 25th October, 1924, delivered judgment.

This is an appeal under the provisions of sections 15 *et seq.* of The Income War Tax Act, 1917, and amendments thereto, from the assessment of the appellant's income for the year ending 31st December, 1920, in respect of a dividend of 92 per cent declared and paid to him by the Canadian Rattan Chair Co., Ltd., out of accumulated and undistributed profits since 1911, under the following circumstances.

The Taxing Act was passed in 1917 and counsel for the respondent stated at Bar that while his contention is that the Crown is entitled to tax the income originating as far back as 1911 and distributed only in 1920, yet that the Crown is now only claiming the tax upon profits accumulated since 1916.

The Canadian Rattan Chair Co., Ltd., was incorporated in 1911 with a capital of \$43,500 or 435 shares of the par value of \$100 each, and the appellant has been its manager since 1912. Up to the year 1920 he held eleven shares of the stock of that company. On the 27th April, 1920, he bought 424 shares at figures running from \$90 to \$200 a share, or at an average price of \$152.52, i.e. the remaining entire issued capital stock of the company, thereby becoming the owner of all the shares of the company, and on the same day the company declared a dividend of 92 per cent payable in the month of May following. This dividend amounted to \$40,020. On the portion of the accumulated profits earned since the inception of the Act, namely \$18,936.62, the tax was levied but the balance, namely \$21,083.38, was not taxed.

This dividend is paid out of the accumulated profits as shewn and detailed in exhibit "D."

Now the appellant contends, as set out at p. 2 of his notice of dissatisfaction, that when he made the purchase of these shares, the taxable profits of the company were

apportioned to the former shareholders in the purchase price paid to them for their stock, and the dividend paid to him represented a return of his capital or a refund of the moneys he had so paid, to purchase with the capital, its inherent proportion of accumulated profits as the value of his investment was, by the payment of the dividend, reduced by the amount it represented and that in the interval of, say, less than 30 days, such investment could not have produced such revenue. It is further contended that this dividend is not revenue but a replacement of capital.

With this extraordinary contention I cannot agree finding myself unable to gauge the logic of such view.

The transaction in question is similar to thousands of such sales occurring daily. The shareholders sold their invested capital and it was bought as such. One buys a share or a number of shares of a company at a large premium, because, rightly or wrongly, he has faith in the company and expects large returns and dividends therefrom; but he gets no benefit from this purchase until the company has seen fit or been able to declare and pay a dividend or until he sells again on a rising market thereby realizing profits. The size of the premium or of the dividend has nothing to do with the merits of question of ownership. Moreover I am not unmindful that in the present case the appellant who was and had been for many years, the manager of the company, was very well aware what his purchase meant.

The dividend before being declared did not exist and it is quite a fallacy to contend that before he purchased the shares and before the company had declared their dividend the latter ever existed, or that in this transaction the vendors were realizing the profits that the company had apportioned to them, and that such profits formed part of the price of the stock. How could that be if the dividend did not exist at that time. How also could that be applied when he purchased for \$90 a par value share of \$100, thus establishing a discrimination among the old shareholders.

These *a priori* contentions of the appellant rest neither upon law, upon trade customs or upon sound logic. The unsound principles involved therein are subversive to stable and logical structure, and eliminating them is leaving

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the determination of the question at bar a task free from difficulty.

The appellant's contention is neither equitable nor meritorious and seems to challenge common sense.

The dividend paid to the appellant—although of a large percentage—was declared and paid in the usual course in 1920 and I fail to see any reason to distinguish it from the every day business transactions.

I will give effect to the declaration of the Crown and that is to release the accumulated profits during the pre-taxation period, and direct that the taxation shall only bear upon the profits since 1916,—for the year 1917 the year when the Act came into operation.

The revenue taxed comes clearly within the statutory definition of the word "income."

The case does not come within any of the statutory exemptions. It cannot come within the provisions of subsection 5 of section 3 of the statutes of 1919, since the accumulated profits prior to 1st January, 1917, were not large enough to pay such dividend; but the matter comes within the ambit of section 3 of 10-11 Geo. V, ch. 49 (1920) reading as follows:

(5). Dividends declared . . . after 31st December, 1919, shall be taxable income of the taxpayer in the year in which they are paid or distributed.

This amendment came into force on the 1st January, 1921, and therefore all dividends declared or voted after the 31st December, 1919, are subject to the tax. See Plaxton & Varcoe's Dominion Income Tax, 166.

Having said so much I gather from what was said by the respective counsel at bar that they will adjust among themselves the figures of the assessment upon the principle disclosed by the judgment. Failing, however, counsel to agree upon this point, leave is reserved to apply for further directions.

The appeal is dismissed with costs and the appellant is declared liable to pay the surtax claimed out of the accumulated profits since 1916, as above set forth.

Judgment accordingly.

Solicitor for appellant: *Jules Poisson.*

Solicitor for respondent: *C. Fraser Elliott.*

QUEBEC ADMIRALTY DISTRICT

1924
 Nov. 4.

THE GEORGE HALL COAL AND SHIP- }
 PING CORPORATION } PLAINTIFF;

AGAINST

THE STEAMER *BEECHBAY*

Shipping—Narrow channel—Right-of-way—Currents—Speed—Rules 29 and 38 of the Rules of the Road for the Great Lakes.

The *R.* was coming down with the current, in a narrow channel of the St. Lawrence river, at the entrance to the Galop Canal, and the *B.* was coming up. The *R.* duly gave the required signals and, having the right-of-way under the rules, elected to pass to port next to the north shore. Her signals were answered by the *B.* At a point where there is a bend just outside of the canal the *B.* coming on without reducing speed, failed to give the *R.* sufficient room, and the *R.* in endeavouring to avoid collision with the *B.* grounded.

Held. That the *B.* in failing to reduce speed, and in not waiting in the inside of the canal until the *R.* had passed and neglecting to respect the right-of-way of the *R.* "neglected" some "precaution" which was required "by the special circumstances of the case" and is wholly to blame for the grounding of the *R.* and consequent damage sustained.

2. Where if two steamers keep their speed they would meet at a bend in a narrow channel, three hundred feet wide, it would be bad seamanship for the one navigating against the stream not to wait until the other has passed clear.

ACTION *in rem* for damages to the *SS. Royan* as a result of improper navigation by the steamer *Beechbay*.

Montreal, October 27, 1924.

Case now heard before the Honourable Mr. Justice MacLennan.

R. C. Holden for plaintiff.

Errol M. McDougall, K.C. and Charles Russell McKenzie for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN L.J.A. now, this 4th day of November, 1924, delivered judgment.

This is an action *in rem* for damages suffered by the plaintiff's steamer *Royan* as the result of the alleged improper navigation of the steamer *Beechbay* at the entrance to the Galop Canal, in the River St. Lawrence, on 4th May, 1924.

The plaintiff's case is that the *Royan* grounded on the north bank, damaging her port bilge, in endeavouring to

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avoid a collision with the *Beechbay* while passing her just outside the upper entrance to the canal, and defendant's case is that the vessels met several hundred feet farther upstream, had passed clear and that the grounding of the *Royan* cannot be attributed to the *Beechbay*.

The plaintiff's steamer *Royan*, 250 feet long, 40.2 feet wide, loaded, drawing 14 feet, was coming down the River St. Lawrence with the current, a short distance above the upper entrance to the Galop Canal on the afternoon of 4th May, 1924, when the *Beechbay*, 225 feet long, 35 feet wide, light, drawing 3 feet forward and 12 feet 6 inches aft, was observed coming up the canal. When at a distance of three-quarters of a mile from the latter the *Royan* gave a two-blast signal, which was immediately answered by a similar signal from the *Beechbay*. There is a bend in the north bank of the river above the canal, and it is customary for vessels to keep as near as possible to the north bank in order to avoid a cross current which sets in from the bank across the entrance to the canal. The *Royan*, after having given the first signal of two blasts, was brought close to the north bank and continued her course ten or twenty feet from it. The *Beechbay* still in the canal was keeping close to the north bank and when the vessels had arrived at a distance from each other of five or six lengths a second signal of two blasts was given by the *Royan* and answered by a similar signal from the *Beechbay*. Both vessels were still close to the bank and, when a ship's length apart or less, the *Beechbay* began to change her course slightly to port and her stern began to swing to starboard. The *Royan* was swinging to starboard around the bend close to the bank and, when the bows of the two vessels had cleared by about ten feet, the *Royan* in order to avoid colliding with the *Beechbay* was given a kick ahead on her engines, 20 revolutions, her chief engineer says, with her helm put hard-astarboard, but being crowded she began to ground at her port bow and when the *Beechbay's* stern had cleared the *Royan's* bow, the latter's engines were put full astern so that she would not ground any harder than possible. My Assessor advises me that these movements of the *Royan's* wheel and engines were good seamanship. The stern of the *Beechbay*, if it did not collide with the side of

the *Royan*, came within one foot of her and so close that a deckhand on the *Royan* was able to touch her with his hand. While passing in this manner the *Royan* was aground on the bank and her port bilge was considerably damaged. It is admitted the grounding of the *Royan* happened just outside the entrance of the canal, her master says about 100 feet above the entrance. The width of the channel there and for some distance above and below, including the entrance of the canal, is 300 feet, which afforded ample room to manoeuvre with safety. According to the evidence of the plaintiff's witnesses, the grounding of the *Royan* took place while the vessels were passing. These witnesses were the master, first mate, second mate, watchman and three deckhands, all eye witnesses to what happened. Against their testimony there is evidence for the *Beechbay*, that the vessels passed each other between Red Gas Buoy 138 U on the north side of the channel and a black stake abreast of it on the south side of the channel, nearly a thousand feet from where the *Royan* grounded. If the vessels passed opposite the Red Gas Buoy, it is manifest that the grounding of the *Royan* cannot be attributed to the *Beechbay*. The first mate of the *Royan*, who was steering says that the first signal was given when his vessel was about the second red stake above Red Gas Buoy 138 U, and that place has been marked on the chart by another witness. The vessels were then three-quarters of a mile apart, which would put the *Beechbay* well down in the canal, and the *Royan* would be about 1,450 feet above the Gas Buoy and the *Beechbay* about 2,500 feet below it. The speed of the *Royan* with the current was greater than that of the *Beechbay* and it would be quite impossible for the vessels to meet and pass at the Gas Buoy. The master of the *Royan* has testified that when he passed the Gas Buoy the *Beechbay* had not yet got out of the canal. There is further evidence which shows that the passing could not have occurred there. The mate of the *Beechbay* marked on the chart about 400 feet inside of the canal the place where his vessel was when the second two-blast signal was given, when the vessels were five or six lengths apart. It is to be pointed out that the mate of the *Beechbay* later contradicted his evidence in this respect and stated that the

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point which he marked on the chart as the place of the second signal was where the first signal was given, and that the second signal was given after he had left the canal. The evidence of the first mate, second mate and one of deckhands of the *Royan*, is that the second signal was given while the *Beechbay* was still inside the canal. Five or six boat lengths would be from twelve to fifteen hundred feet and the distance on the chart from where the *Beechbay*'s mate marked the position of his vessel at the second signal to the Gas Buoy is about 1,400 feet. The *Royan* would therefore be at the Gas Buoy while the *Beechbay* was still inside the canal, and this is strong corroboration of her master's evidence to that effect. It is impossible to accept the evidence on behalf of the *Beechbay* that these vessels passed at the Gas Buoy. I therefore find that the vessels passed just outside the entrance to the canal in accordance with the evidence of the *Royan's* witnesses.

The witnesses on board the *Royan*, three of her officers and four members of her crew were in a better position to know at what time their ship went aground than any one on board the other vessel could possibly be, and I therefore find that the grounding did take place while the vessels were passing.

The channel was 300 feet wide, the *Royan*, coming downstream with the current had the right to elect that she would pass to port next to the north bank, gave the proper signal at a proper distance and afterwards repeated the signal, both of which were answered by the *Beechbay*, but the latter failed to give the *Royan* sufficient room and crowded her to the bank, with the result that when the *Royan*, in a very narrow and dangerous place, starboarded to avoid collision, she went ashore.

The plaintiff submitted that the *Beechbay* failed to respect the right-of-way of the *Royan* as the descending vessel, that the speed of the *Beechbay* was improper and, if she had exercised reasonable care, no accident would have happened. Under the Rule of the Road the *Royan* had the right-of-way, the current was with her and was against the other. The *Beechbay* was going full speed against the current making three and a half to four miles an hour as she approached the exit of the canal into a bend of the river

where there was a current of three or four miles which set in as a cross current away from the north bank between the Red Gas Buoy and the entrance to the canal. The cross current is so strong that vessels going up and down at this place usually keep as close as possible to the north bank although the channel there is three hundred feet in width. The *Beechbay* took the chance of meeting the *Royan* in the bend when she could have reduced speed and waited inside the canal until the *Royan* passed clear.

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I am advised by my Assessor that it is an established practice for the upbound vessel at this place to wait in the canal until the downbound vessel is safely inside the cross current at the entrance to the canal and that, according to the ordinary practice of seamen, it would have been wise for those in charge of the *Beechbay* to have taken this precaution and that it would have been good seamanship on their part to have waited in the canal until the *Royan* had passed clear.

Marsden's Collisions at Sea, 8th Edition, p. 421, says:—

It is a prudent rule in a winding tidal river, in the absence of special regulations, for a steamship about to round a point against the tide to wait until a vessel coming in the opposite direction has passed clear, and a steamship was held in fault for disregarding this precaution in the Scheldt.

The case referred to was *The Talabot* (1), tried before Butt J., where it was held that

it is the duty of the steamer navigating against the tide to wait until the other steamer has passed clear.

The same principle was followed and adopted by Bargrave Deane J., in the case of the *Ezardian* (2). See also the *Ship Norwalk* (3), and *Walrod v. SS. Coniston* (4), where the same principle was applied. Rule 29 of the Rules of the Road for the Great Lakes provides that in channels less than five hundred feet in width, when steam vessels proceeding in opposite directions are about to meet in such channels, both vessels shall be slowed down to a moderate speed according to the circumstances, and Rule 38 provides that nothing in the Rules shall exonerate any vessel, or the owner, or master, or the crew thereof from the consequences of a neglect of any precaution which may be re-

(1) [1890] 6 Asp. M.C. 602.

(3) [1909] 12 Ex. C.R. 434.

(2) [1911] P. 92; 80 L.J. Adm. 81.

(4) [1918] 18 Ex. C.R. 330; 19 Ex. C.R. 238.

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quired by the practice of seamen, or by the special circumstances of the case. The *Royan* was proceeding at reduced speed, she had barely steerage way, and to further reduce her speed would have been a menace to her own movements. The *Beechbay* made no attempt to reduce her speed, but continued full speed ahead. It would have been good seamanship, in accordance with the principles laid down in the English and Canadian cases above cited and the advice of my Assessor, for the *Beechbay* to have reduced her speed and waited inside the entrance of the canal until the *Royan* had passed, and she did neglect some precaution which was required by the special circumstances of the case. It was a dangerous and difficult part of the river to navigate and the *Beechbay*, in not waiting for the other vessel, took the chance and risk of crowding the *Royan* on the bank in a channel 300 feet wide.

I therefore find that the damage to the *Royan's* port bilge when she went aground was due to the *Beechbay* trying to pass too close to the *Royan*, to the *Beechbay's* neglect to respect the right-of-way of the *Royan*, her excessive speed and neglect to wait in the canal until the *Royan* had passed clear.

There is no blame attributable to the *Royan* or those in charge of her.

There will therefore be judgment against the *Beechbay* and her bail for the damages claimed and for costs, with the usual reference to assess the damages.

Judgment accordingly.

Solicitors for plaintiff: *Meredith, Holden, Heward & Holden.*

Solicitors for defendant: *Casgrain, McDougall, Casgrain & Stairs.*

THE SECRETARY OF STATE OF }
CANADA } PLAINTIFF;

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Nov. 5.

AND

GREENSHIELDS LIMITEDDEFENDANT.

Constitutional law—Order in Council—Retroactive effect—Treaty of Versailles—Vesting order.

Held, that the Order in Council dated 14th April, 1920, and passed for the purpose of carrying out and giving effect to the Treaty of Versailles was not retroactive, and did not, in any way, affect rights acquired under a vesting order, made under the provisions of the Consolidated Orders respecting Trading with the Enemy, 1916, and obtained from a court of competent jurisdiction on the 21st May, 1919.

2. Held further, that both by the Treaty of Versailles and the Order in Council above mentioned rights acquired under such vesting orders and directions made thereunder are confirmed and remain in full force and effect.

ACTION by the Custodian under the terms of the Treaty of Peace (Germany) Order 1920 against the defendant under the Order in Council of the 14th April, 1920, passed to give effect to the Treaty of Versailles.

Montreal, October 30, 1924.

Case now heard before the Honourable Mr. Justice Audette.

R. Taschereau, K.C. for plaintiff.

J. W. Cook, K.C. and *J. A. Mann, K.C.* for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 5th day of November, 1924, delivered judgment.

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

The defendant firm, at the time of the declaration of war by Germany, on the 4th August, 1914, was carrying on business in Canada and was indebted to one L. S. Mayer, of Berlin, Germany, an enemy, in a sum of 8.107.65 marks and interest.

Acting in pursuance of the Consolidated Orders respecting Trading with the Enemy, 1916 (exhibit 3) the Secretary of State of Canada, on the 21st May, 1919, obtained from the Superior Court of the province of Quebec, District of Montreal, an order which, *inter alia*, vested the said debt in the Minister of Finance and Receiver General of Canada,

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as Custodian appointed by the said Consolidated Orders respecting trading with the Enemy, 1916. Among the directions contained in this Order of the 21st May, 1919, permission was granted the defendant Greenshields Limited, to pay over to the Custodian, if called upon to do so, any amounts payable in marks at the current rate of exchange on the date of payment.

The defendant, upon demand of payment being made upon him (exhibit No. 4) tendered the sum of 8.107.65 marks with interest, from the 5th August, 1914, at the rate of exchange current at that date, namely, 33.66 marks to the dollar. That was the rate of exchange in force at the time of the tender, as admitted both by the Statement of Claim, and at bar by plaintiff's counsel.

That tender was refused by the Custodian who contended that the payment must be made, at the rate of exchange of 4.1901 marks to the dollar, as fixed by subsection 2 of section 24 of the Order in Council of the 14th April, 1920—that is varying the amount as payable under the judgment of the Superior Court rendered more than one year before.

This judgment bears date the 21st May, 1919. The Treaty of Peace between the Allied and Associated Powers and Germany bears date 28th June, 1919, and was ratified on the 10th January, 1920, thereby proclaiming the termination of war.

On the 10th November, 1919, by 10 Geo. V, ch. 30, an Act was passed for carrying into effect the Treaty of Peace between His Majesty and Germany,—and on the 14th April, 1920, an Order in Council reciting the above facts, was passed for the purposes of carrying out and for giving effect to the Treaty and for performing the obligation of Canada arising thereunder, and by subsection 2 of section 24 thereof the rate of exchange, for the payment of any enemy debt, was fixed at 4.1901 marks to one dollar in Canadian currency and the plaintiff relies upon that section to ignore the judgment of the Superior Court rendered one year before and to claim at that rate, instead of the rate mentioned in the judgment.

The Exchequer Court of Canada is given jurisdiction to hear the present case, under the provisions of sections 26 and 41 of the Order in Council of the 14th April, 1920, passed under the War Measures Act, 1914,—the subject-matter coming within the power and attribute of the

Executive—the effects of war conditions still obtaining and remaining. *Re Francis Pulp & Paper Co. v. Manitoba Free Press Co.* (1).

What the plaintiff now seeks is to give retroactive effect to the Order in Council of April 14th, 1920, and thereby find authority to ignore the judgment of the Superior Court. Any legislation to retrospectively affect any substantive right previously acquired, being in the nature of a law of exception, requires to bear that meaning either by an explicit, unequivocal and distinct enactment disclosing that intent or by an unmistakable implication. This Order in Council as I read it neither expressly nor by any irresistible implication has such retroactive effect. If the enactment of the Order in Council was to prevail in preference to the judgment of a court of competent jurisdiction, the defendant's liability would also become ever so much more onerous. The case was brought before the Superior Court under the Order in Council of 1916 and not that of 1920 and had the payment been demanded and made at the date of the judgment, the payment would have been obviously final. This judgment was rendered after hearing both parties and thereby became a judicial contract between the parties and has never been either appealed or set aside.

However, on reference to both the Versailles Treaty and the Order in Council of the 14th April, 1920, we find that the rights acquired under vesting orders and directions made thereunder, are safeguarded, confirmed, and remain in full force and effect. Section 1 of the Annex of the Versailles Treaty, reads as follows:

In accordance with the provisions of Article 297, paragraph (2) the validity of *vesting orders* and of any *other orders, directions, decisions or instructions* of any court or any department of the Government of any of the High Contracting Parties *made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights and interest is confirmed.* The interests of all persons shall be regarded as having been effectively dealt with by any *order, direction, decision or instruction* dealing with property in which they may be interested, whether or not such interests are *specifically mentioned* in the order, direction, decision or instruction, etc., etc.

See also subsection (d) of subsection 4 of Article 296 of the Versailles Treaty.

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(1) [1923] 3 D.L.R. 629.

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Section 34 of the Order in Council of the 14th April, 1920, in almost similar language, validates and confirms all such vesting order and orders giving directions, etc., and directs that such order is to be considered as final and binding upon all persons.

For these considerations to which I have just adverted, I find comfort in arriving at the conclusions, which breathe the spirit of justice, that the vesting orders and directions, etc., given thereby have been fully confirmed both by the Treaty and the Order in Council, and remain in full force and effect, and to order and adjudge that the defendant pay to the Custodian the debt in question at the exchange rate of 33.66 marks to the dollar, in Canadian currency, and furthermore, that the action be dismissed. In compliance with the agreement of counsel at bar, it is further ordered that there will be no costs to either party.

Judgment accordingly.

Solicitors for plaintiff: *Perron, Taschereau, Vallée & Genest.*

Solicitors for defendant: *Cook & Magee.*

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY
 DISTRICT

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 Nov. 19.

BETWEEN:

THE SHIP *PACIFICO* (DEFENDANT) APPELLANT;
 AND

THE WINSLOW MARINE RAILWAY }
 AND SHIPBUILDING COMPANY } RESPONDENT.
 (PLAINTIFF) }

Shipping and Seamen—Repairs—“Necessaries”—Jurisdiction—Interest—Admiralty Court Acts, 1840 and 1861—3-4 Vict., c. 65 and 24 Vict., c. 10 (Imp.)

Held: (Affirming the judgment of the British Columbia Admiralty District (1)) that the purpose of the Admiralty Court Act, 1861, was *inter alia* to extend the jurisdiction of the Court, not to restrict it.

2. That the Exchequer Court in Admiralty for the British Columbia Admiralty District has jurisdiction in actions to recover the price of repairs done to a foreign vessel in a foreign port, even though the ship or her proceeds are not at the time of the institution of such actions under arrest of the Court.

3. That it was not intended by section 4 of the Admiralty Court Act, 1861, to exclude repairs from the definition of "necessaries" as provided in section 5 of the said Act, but that the intention was to give an additional remedy in claims for building, equipping and repairing where the owner was domiciled in Canada, but only when the ship was under arrest.
4. That where the owner contracts to have certain repairs done to a vessel and agrees to pay for the same thirty days from the completion thereof, the court in giving judgment for the price thereof, will, in the exercise of its equitable jurisdiction, allow interest on such amount from the date when the payment thereof should have been made as agreed.

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APPEAL from the decision of the Local Judge in Admiralty of the British Columbia Admiralty District.

September 26th, 1924.

Appeal now heard before the Honourable Mr. Justice Maclean, President of the Court at Vancouver.

N. D. Hossie for appellant.

E. C. Mayers for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now this 19th day of November, 1924, delivered judgment.

The plaintiff (respondent) sued the ship *Pacifico*, of Norwegian registry, for repairs and necessaries made upon and supplied to, the said ship, at Winslow, state of Washington, U.S.A., in the months of February and March, 1923, and this is an appeal asserted by the defendant ship (appellant), from a judgment of Mr. Justice Martin, Local Judge in Admiralty for British Columbia, allowing the plaintiff's action with interest and costs.

[His Lordship here discusses the evidence as to the costs of repairs, and finds that they were duly authorized, and that the judgment appealed from was correct as to the amount claimed, and then proceeds.]

The defendant contends there was no jurisdiction in this court to arrest the ship and thus adjudicate upon the plaintiff's claim. By section 6 of the Admiralty Court Act, 1840, jurisdiction was given to the Court of Admiralty to decide claims for necessaries supplied to any foreign ship or sea-going vessel; but that statute only applied to foreign ships. By section 5 of the Admiralty Court Act, 1861, it was provided that the Court of Admiralty had jurisdiction over any claims for necessaries, supplied to any ship, elsewhere

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than in the port to which the ship belongs, unless it was shewn that at the time of the institution of the cause, any owner or part owner was within the jurisdiction. Section 4 of the same Act gave jurisdiction to the Court of Admiralty over any claim for the repairing of any ship, if at the time of the institution of the cause, the ship, or the proceeds thereof, was under arrest of the court. The defendant's counsel admitted that under section 6 of the Admiralty Court Act, 1840, there was jurisdiction for the present proceedings, and that repairs to a ship there constituted "necessaries." His submission upon the point was, that under the Admiralty Court Act, 1861, where the necessaries supplied are in the nature of repairs to a ship, there is no jurisdiction unless the ship is under arrest at the instance of a third party, and that the plaintiff in this case having lost its possessory lien, and there being no maritime lien, there was no jurisdiction in this court to arrest the ship, and urged in effect that the Admiralty Court Act, 1861, section 4, cut down the jurisdiction of the Admiralty Court in claims for necessaries by way of repairs to a ship, and that repairs under section 4 of the statute, no longer constituted "necessaries" under section 5 thereof, unless the ship was under arrest at the instance of a third party.

The plaintiff's counsel answered before me that the Act of 1861 did not repeal or cut down any of the provisions of the Act of 1840, but extended the jurisdiction of the Admiralty Court according to its professed intention, and gave jurisdiction not only for necessaries to foreign ships but to ships of any nationality subject to the one condition, that the owner must not be domiciled within Canada. He urged that the jurisdiction of the Court of Admiralty was extended by section 4 of the former Act, in that it gave jurisdiction to the Admiralty Court for necessaries like repairs, even though the owner was domiciled in Canada, provided the ship was under arrest. In substance he argued that the intent of the legislation was to extend the jurisdiction in all cases for necessaries supplied anywhere, to any ship, provided the owner was not domiciled in Canada, and that even if the owner was domiciled in Canada, then jurisdiction was given in claims for equipping and repairing a ship, when under arrest of the court, and that was the extension intended to be enacted by section 4 of the Act of 1861.

I think the plaintiff's contention is sound and must prevail. I do not think that it was intended by section 4 of the Statute of 1861 to exclude repairs from the definition of "necessaries" as provided in section 5 of the same statute, but it was intended to give an additional remedy for claims for building, equipping and repairing a ship when the owner was domiciled in Canada, but only when the ship was under arrest. So far as I can ascertain Admiralty Courts have always considered repairs to be necessaries. In the case of *The Riga* (1) Sir Robert Phillimore said he was unable to draw any distinction between necessaries for the ship, and necessaries for the voyage, and quoted approvingly Lord Tenderton in the case of *Webster v. Seekamp* (2), to the effect that whatever is fit and proper for the service in which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term "necessaries" as applied to those repairs done, or things provided for the ship by order of the master for which the owners are liable. I do not think the term "necessaries" admits of so circumscribed a meaning, as contended for by the defendant. I would also refer to *The Albert Crosby* (3); *The Flecha* (4); *Foong Tai & Co. v. Buchheister & Co.* (5); *Victoria Machinery Depot Co., Ltd. v. The Canada* (6).

The plaintiff claims interest upon the principal sum sued upon and found due. The cost of docking, cleaning and painting the *Pacifico*, and for dismantling the old winches and installing new ones, was for the agreed price of \$6,750, the plaintiff stipulating in his offer that the same was to be payable thirty days from completion, and the defendant is I think to be considered as having accepted this condition. The additional work and material, which the master of the ship, and the plaintiff's superintendent thought necessary before the ship should proceed to sea, and which the ship's agent, Mr. Ferrari, apparently agreed to on or about February 23, was a subsequent enlargement

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(1) [1872] 3 Ad. & Ecc. 516.

(2) [1821] 4 B. & Ald. 352.

(3) [1870] 3 Ad. & Ecc. 37.

(4) [1854] 1 Spinks Ecc. & Ad.
438.

(5) [1908] A.C. 458.

(6) [1913] 15 Ex. C.R. 142.

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of the contract, but there is no express stipulation as to the time of the payment of the additional repairs or necessaries. Much of this additional work was to be done on a time and material basis, and doubtless for the reason that it was difficult to predicate the ultimate extent of the work when once commenced, it having to do with the electric wiring, boilers, valves, etc.

On March 22, the plaintiff rendered an account to the *Pacifico* and owners for the materials supplied and the work performed, in the sum of \$12,346.43, upon which the defendant paid on account, the sum of \$7,500, on May 15, 1923, leaving a balance of \$4,846.43. In the formal judgment the learned trial judge allowed interest at the rate of 5 per cent from April 5, 1923, such date being approximately thirty days subsequent to the completion of the work. The written reasons for judgment of the learned trial judge, is devoted entirely to the question as to whether the plaintiff was entitled to interest, and he there discusses the question quite exhaustively.

The defendant's counsel contended that the rule in force here as to interest, is the same as in England, and that there the rule of the Admiralty Court, since under the Judicature Act it became a division of the High Court of Justice, is the same as in the High Court of Justice, and that there it was not the practice prior to the Judicature Act or since, and both before and since the passing of the statute, 3-4 Wm. 4th, c. 42, to allow interest in cases similar to the one under consideration. He referred to *London, Chatham and Dover Railway v. South Eastern Railway* (1) as conclusive of the matter, though I understood him to admit that if this cause had been tried before the Judicature Act, and before the transfer of the Admiralty jurisdiction to the High Court of Justice, that the doctrine of the Admiralty Court as to interest might be applied in this case.

I cannot find any authority for the submission that the Judicature Act has changed the jurisprudence long established by the Court of Admiralty. The Judicature Acts of 1873 and 1875 amalgamated the English Courts and transferred to the High Court of Justice all the jurisdiction

(1) [1893] 63 L.J. Ch. 93; [1893] A.C. 429.

which had been exercised by the different courts, so that every judge of the High Court exercises every kind of jurisdiction possessed by that court, but these changes neither conferred new Admiralty jurisdiction, nor did it take away from that jurisdiction. It does not appear to me that the Judicature Act by intendment or otherwise, changed the substantive law as administered in Admiralty Courts, and in no way affected the powers of such courts, and that they retain all the powers they had before that Act. The point in controversy is one of substantive law I think, and not of practice or rule.

The enlargement of the original contract for repairs and necessaries, made by the letter of February 20, was no doubt intended by the parties to be subject to the same terms of payment as applied to the original agreement; that the repairs to be made and the material and labour supplied, were to be paid for thirty days after completion of the work. It would appear but equitable that the plaintiff having given this period of credit to a ship of foreign registry, unusual in such cases, is entitled to compensation by way of interest for the delay in payment of the principal sum.

The learned trial judge, as I have already said, has dealt very fully with this point, in his written judgment. He discusses with much clarity and conciseness what seems to be the weight of judicial authority upon the point, and I have not been convinced that he erroneously reached the conclusion he did. It is not necessary for me to review his discussion of the law and the authorities cited by him, as that may be found in the case as reported (1), and I do not think I could illuminate the point by any further discussion.

It is true the reported cases referred to by the learned trial judge, are not as to facts quite that disclosed in this cause, and were not actions for "necessaries," but the question remains, is there any settled principle of law as adopted by the Admiralty Court, or of equity as administered in Admiralty Courts, supporting the conclusion reached by the trial judge. The principle adopted by the Admiralty Court in its equitable jurisdiction, as stated by

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Sir Robert Phillimore in *The Northumbria* case (1), and as founded upon the civil law, is that interest was always due to the obligee when payment was delayed by the obligor, and that, whether the obligation arose *ex contractu* or *ex delicto*. It seems that the view adopted by the Admiralty Court has been, that the person liable in debt or damages, having kept the sum which ought to have been paid to the claimant, ought to be held to have received it for the person to which the principal is payable. Damages and interest under the civil law is the loss which a person has sustained, or the gain he has missed. And the reasons are many and obvious I think, that a different principle should prevail, in cases of this kind, from that obtaining in ordinary mercantile transactions.

I think that in the exercise of the equitable jurisdiction of this court, and in view of the fact that the Admiralty Court has always proceeded upon other and different principles from that on which the common law principles appear to be founded, that the plaintiff is in this case entitled to the claim of interest as allowed by the court below, in its formal order for judgment. I cannot see why a person supplying necessaries upon the credit of a foreign ship, should not be placed in as favorable a position as to interest upon a matured obligation, as in cases of bottomry, where the articles allowed to be covered by the bottomry bond, come within the meaning attached to the word "necessaries." In such cases there is usually a stipulation for interest, and interest has been allowed even where there was no stipulation for interest of any kind, as in *The Cecilie* (2).

The appeal is therefore dismissed with costs.

Judgment accordingly.

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY
DISTRICT

1924
Nov. 29.

THE CANADIAN PACIFIC RAILWAY } APPELLANT;
COMPANY (PLAINTIFF) }

AGAINST

THE SHIP CAMOSUN, HER CARGO AND } RESPONDENT.
FREIGHT (DEFENDANT) }

Shipping—Collision—Narrow channel—Doubt—“End on or nearly end on”—“Right ahead”—Regulations 18 and 25.

Held: That the width alone of a channel or the fact that it has lateral extensions in the nature of bays, are not conclusive and need not necessarily be regarded as of importance in the determination of what is a “narrow channel” within the meaning of regulation 25.

2. That, moreover, as the statute did not attempt to define “narrow channel,” whether any particular channel was or was not such, must be determined in a practical way, having in mind every relevant element obtaining in the particular case.
3. That an important point to consider is whether the configuration of the shore lines and the existence of headlands and other considerations so control and predetermine the movements of ships thereon as to make it a narrow channel. In case of any doubt it should, in the interests of navigation, be resolved in favour of the “narrow channel” construction.

4. The respective ships in this case were proceeding the one West by South $\frac{3}{4}$ South and the other North 70° East.

Held: That the words “end on or nearly end on” should have a significance as wide as “right ahead” in article 2; and that the ships herein, in any event, were “end on” within the spirit of the rule, when the above mentioned courses were adopted, or shortly afterwards.

APPEAL from the decision of the Local Judge in Admiralty, British Columbia Admiralty District.

September 24th, 1924.

Appeal now heard before the Honourable Mr. Justice Maclean, President of the Court at Vancouver.

J. C. McMullen and *M. M. Greaves* for appellant.

E. C. Mayers and *J. L. G. Abbott* for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now this 29th November, 1924, delivered judgment.

This is an appeal from a judgment of Martin L.J.A., British Columbia, dismissing an action for damages arising out of a collision, brought by the owners of the ship

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Princess Beatrice, against the ship *Camosun*, and allowing the counter-claim of the defendant ship.

The trial judge in his reasons for judgment very precisely and accurately summarises the main facts as presented in the evidence, and this was the view of counsel engaged in the appeal. It is not necessary therefore that I should restate such facts, except in so far as it may be requisite to make clear my own conclusions in the matter.

The *Princess Beatrice*, a freight and passenger ship, was bound from Vancouver for a port in Northern British Columbia, and en route was obliged to pass through the waters of Fraser Reach, before arriving in McKay Reach, where the collision occurred. The official chart would indicate that Fraser Reach is a narrow channel within the regulations for preventing collisions. This could hardly be questioned. On the other hand, the *Camosun*, also a freight and passenger ship, was proceeding in just the opposite direction, and was bound from a port in Northern British Columbia to Vancouver, and before coming into McKay Reach was obliged to pass through Grenville Channel, which is also clearly a narrow channel. I might here say that McKay Reach is the water separating Gribbel Island from Princess Royal Island, and is the principal connecting water between Fraser Reach and Grenville Reach. This water is irregular in shape, being altogether about seven or eight miles in length and the shore line on either side is mountainous. At Kingcombe Point where the *Princess Beatrice* entered it, it is approximately two miles in width, that is from Kingcombe Point, to Point Pilot on Gribbel Island. Towards the other end of this water, at Trivett Point, McKay Reach is about one mile in width, that is from Trivett Point directly across to Gribbell Island; beyond this it widens out again. Between Kingcombe Point and Trivett Point, McKay Reach is widened in the centre on both sides by bays, particularly on the southern side, the greatest width at this point being from three and a half to four miles. Disregarding these bays, and considering only the water within lines projected from the headlands mentioned, the width of McKay Reach varies from about one mile opposite Trivett Point, to about two miles opposite Kingcombe Point.

The *Camosun* after entering McKay Reach, on the course North 53 East, from Cumming Point, passed Trivett Point about one-half mile off, at almost exactly the same moment of time as the *Princess Beatrice* was off Kingcombe Point Light, where she, the *Camosun*, was put on a course of N. 70 E., and so as to clear Kingcombe Point Light by about three and a half cables. The *Princess Beatrice* rounded Kingcombe Point Light about one-half mile off, and then steadied on a course W. by S. $\frac{3}{4}$ S.

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So at practically the same moment of time, we have the *Princess Beatrice* off Kingcombe Point half a mile abeam the lighthouse, on a course W. by S. $\frac{3}{4}$ S. and the *Camosun* about a half mile off Trivett Point on a course N. 70 E., about three and a half to four miles apart, each steaming about twelve knots, or a conjoint speed of about twenty-four knots. It was a fine night with good visibility, the sea was smooth and there was no wind and comparatively no tide. Each ship had the other's mast light in view when about four miles distant from each other.

To put it briefly from this point of time, until just a few minutes before the collision occurred, the witnesses for the *Princess Beatrice* say the ships were sailing red to red on parallel courses, while the witnesses for the *Camosun* as confidently assert they were sailing green to green. From there on, the story as told by the *Princess Beatrice* is, that when about a mile apart, and the *Camosun* three-quarters of a point on her port bow, she ported a half point for precautionary purposes, and while swinging on this half point and when the ships were about one cable length apart, the *Camosun* blew two whistles indicating she was going to port, and immediately the *Princess Beatrice* blew one whistle indicating she was swinging to starboard. The *Camosun* alleges that the *Princess Beatrice* departed from her course on the starboard side of the *Camosun*, swinging across the course of the latter, which then gave two blasts of her whistle and starboarded. The collision occurred within a few minutes afterwards. I do not propose discussing the reasons given by each ship for their several manoeuvres at this time.

The learned trial judge evidently had great difficulty in reaching his conclusion, and upon the evidence it could not

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be otherwise. At the beginning of his reasons for judgment he states:

“To account for a collision in conditions so favourable to safe navigation, it is obvious that something very unusual must have happened, but what that something really was has not appeared despite the large amount of evidence adduced.”

Then after a statement of the facts, he concludes that the account of the witnesses of the *Camosun* must be accepted as the true one, and finds that ship free from blame.

I propose at the moment, a consideration of the issue, apart from the finding of the trial judge altogether, to enquire if the same may not be properly resolved upon another or other grounds, and whether or not, negligence or violation of the sailing regulations by either or both ships, antecedent to the crucial moments preceding the impact, are the determining factors in ascertaining or distributing the true liability of one or both of the ships.

In the first place is McKay Reach a narrow channel, as contemplated by regulation 25? There is no attempt at a statutory definition of “a narrow channel,” which probably is not unwise, and in fact is hardly possible in general terms. Accordingly, it must be settled in a practical way, having in mind the safety of ships, and every other relevant element obtaining in a particular case. McKay Reach widens out, between Kingcombe and Trivett Points very considerably as I have already pointed out, but I do not think these lateral extensions of McKay Reach in the form of bays, should necessarily be regarded as of importance, in determining whether or not it is a narrow channel within the regulations. For some purposes, possibly it may be an important fact. The important point I rather think is whether the configuration of the shore lines of McKay Reach, the existence of the headlands mentioned, and other considerations, so control and predetermine the movements of ships thereon as to make it a narrow channel. The width of a channel alone is not in my opinion conclusive in determining what is a “narrow channel,” and obviously ought not to be. The fact that Fraser Reach and Grenville Reach are both narrow channels, as are also other channels or waters communicating with McKay Reach, is I think quite

a practical reason why such an intervening and connecting water, if possessing at all the physical elements of a narrow channel, should be so construed. I cannot but conclude after careful reflection, that McKay Reach is a narrow channel, as also are most of the waters between the islands in these parts. They are all for the most part natural narrow channels, they are so designated on the chart and there would appear to be no distinction between "channel" and "reach," and I cannot but feel that such waters, including McKay Reach, must be so regarded by mariners. An occasional widening of any communicating water, like McKay Reach, between recognized narrow channels like Fraser Reach and Grenville Channel, should not throw that water into another category by mere reason of this widening, and particularly when that fact does not enter into serious consideration in the actual navigation and movements of ships in such a water, by reason of other causes. Should there be any doubt about it, that doubt should be resolved in favour of the "narrow channel" construction, in the interests of safe navigation, and the safety of property and life.

As I have already observed, ships entering McKay Reach northward bound, proceed from what is undoubtedly a narrow channel, Fraser Reach, and where regulation 25 must be observed. This properly obliges an up-going ship, such as the *Princess Beatrice* in this case, in leaving Fraser Reach from her starboard side of that water, to round Kingcombe Point at a safe distance, in case another ship were rounding this point at the same time, downwards bound, the latter being obliged to take her starboard side of Fraser Reach. Again the *Princess Beatrice* after rounding Kingcombe Point Light must make for a point off Trivett Point from whence she makes her course for Point Cumming, and to do this she cannot well proceed to a point too far north, for she then could not make her course to Point Cumming. Likewise the *Camosun* after leaving Grenville Channel sails a course from Point Cumming to Trivett Point, from whence she would fix her course for Kingcombe Point Light. The masters of both ships agree that each were on their usual courses in McKay Reach, on the night of the collision, that is to say, the courses of each on

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other occasions would vary but little from that upon the night in question. This all indicates they were sailing within comparatively restricted waters compelled by the physical factors I have mentioned, and whatever the width of McKay Reach, the ships in question I think were navigating within what for practical purposes must be regarded as a narrow channel. I am of the opinion that McKay Reach is a narrow channel, and that regulation 25 was intended to apply thereto.

In *The Ship Cuba v. McMillan* (1), a water with a mean width of about a mile and a quarter was held to be a narrow channel. See also *The Santanderino* (2). In *The Rhondda* (3), the Straits of Messina, a passage nearly two miles wide, was held to be a narrow channel.

I am of the opinion therefore that both ships should have observed regulation 25 and each should have made it clear to the other in ample time, by decisive porting, and by use of the whistle, which is always available and effective for steamers in circumstances of this nature, at the appropriate and practical time or times. There was no reasonable excuse for assuming any risk of collision as there was ample room for each to safely navigate port to port. The *Camosun* was steering for a lighted point and could have early gone to starboard sufficiently to insure safety, and had she even gone off her course she would not have been assuming, in the circumstances, any risk. The *Princess Beatrice* could have early made it undisputably clear to the *Camosun* that she intended passing port to port, and there was ample space to permit of this being done. If both ships had applied regulation 25 which was intended to be literally followed, when safe and practical, as it here clearly was, the collision could have been avoided. I think therefore that upon this ground both ships are equally to blame.

In the next place did art. 18 of the regulations apply to the situation. The ships were sailing opposite to each other between the same ports, and had each to pass the same points of land, Kingcombe Point, Trivett Point and Cumming Point, and at which points, each established new courses, and these physical facts and this necessity obliged

(1) [1896] 26 S.C.R. 651 at p. 657.

(2) [1893] 3 Ex. C.R. 378.
(3) [1883] 8 A.C. 549.

them each, and to the knowledge of each, to sail over comparatively fine courses with reference to one another, in going to and from Vancouver while passing through McKay Reach, particularly between Kingcombe Point and Trivett Point. When the *Princess Beatrice* and the *Camosun* steadied on their respective courses W. by S. three-quarters S. and N. 70 E. they each could easily approximate the distance between each ship. They no doubt knew each other's speed, and about the time within which they should pass each other. Whichever story is true as to the lights shewing to each other, there was no good reason for doubt or confusion at the proper time, as to where each ship should be. The respective courses of W. by S. three-quarters S. and N. 70 E. are identically opposite courses for all practical purposes, particularly on a short course, and if the distance each passed off Kingcombe Point and Trivett Point be correct, and there would appear no good reason for not accepting the evidence upon this point. Conflicting testimony cannot well disturb the mathematical fact established by these admitted courses. "End on or nearly end on" ought to have a signification as wide as "right ahead" in art. 2, otherwise vessels on parallel courses in such a position that each vessel can see both the side lights of the other, might yet not be under the rule owing to each being a little on the other's starboard bow. The ships I think were doubtless "end on" within the spirit of the rule, when these courses were adopted, and it was then or shortly afterwards, when each ship should have concluded to observe this regulation. This regulation applies to steamships only, and when proceeding end on or nearly so, and I would think without doubt should apply in this case, and had each seriously endeavoured in time to observe the rule and avoid the risk of collision, they had ample time and space to get into their proper waters as required by this regulation, and thus avoid the risk of collision.

What constitutes risk of collision is discussed by Marsden, 8th ed. p. 302 and 303, and he there quotes Dr. Lushington to the effect that a chance of collision is not to be scanned by a point or two, and that if there was a reasonable chance of collision that is sufficient, that ships should

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not be allowed to enter into nice calculations in determining measures as to whether risk can be accepted, when long before the collision measures might be taken which would render risk impossible. Again, discussing when the regulation was to apply, this author at pages 300 and 301 quotes Brett M.R. in *The Beryl* (1) as follows:—

“They are all applicable at a time when the risk of collision can be avoided, not that they are applicable when the risk of collision is already fixed and determined.”

I am of the opinion that each ship knowing the other's objective, approximate speed, position and course, and knowing as I think the evidence inferentially establishes, that it was customary here to pass port to port, each should have, immediately upon taking the courses mentioned that would carry them respectively between Kingcombe Point and Trivett Point, observed regulation 18, or as expressed in *The America* (2) both should have “seasonably adopted” this precaution. Precautions required by law, to be taken when there is risk of collision, must be taken in time to be effective against such risk. In any event, in view of their respective courses, which is not questioned, the ships should have made known to each other by the whistle and otherwise, in ample time their intention to observe this regulation then applicable to each. The obligation to observe this rule was all the greater, as McKay Reach, in my opinion is a narrow channel.

I hardly think it is necessary to discuss the finding of the trial judge, in view of the opinion I have expressed as to the applicability of regulations 18 and 25. I think that there is but one fair and safe inference from the evidence, namely that the ships were sailing end on, in narrow waters, and neither ship took sufficient care in time to fix its position in relation to the other with such accuracy as the regulations and prudent seamanship required. It seems to me a reasonable and probable conclusion that neither ship gave serious consideration to the regulations, or with care and deliberation attempted to declare their positions and intentions, and considering all the circumstances I think that nothing but carelessness caused the collision, and this care-

(1) [1884] 9 P.D. 137.

(2) [1875] 92 U.S.R. (2 Otto),
p. 432.

lessness is imputable to each in not avoiding the risk of collision, which each might very easily have done and in good time, and as required by the regulations I have discussed. In this respect I think that both were guilty of a neglect of duty, and that if either had used reasonable care and skill, the collision would have been avoided. If the ships had suddenly found themselves close together, so that there was difficulty in complying with the regulations, the case would then perhaps have to be decided upon other grounds. The negligence on the part of both ships were acts concurrent in time, identical in character and equal in degree of fault. The negligence of both ships in point of time began much earlier than immediately before the *Camosun* blew the two whistles.

Accordingly, and with very great respect, I find both ships to blame, and in equal degree, and to that extent the appeal is allowed. The appellant will have its costs of appeal, each party to bear their own costs of trial.

The case will be remitted to the court of first instance to be there dealt with, as the rights of the parties under this judgment may appear to the said court.

Judgment accordingly.

BETWEEN:

THE P. & M. COMPANY ET AL. PLAINTIFFS;

AND

THE CANADA MACHINERY CORPORATION LIMITED ET AL. } DEFENDANTS.

Patents—Infringement—Mechanical equivalents.

- Held:* That a principle *per se* cannot be the subject of a patent, but that a patent may be taken for a principle coupled with a mode of carrying the principle into effect.
2. Where two devices work under the same principle, both arriving at the same result, but by different and new ways of achieving the end contemplated, there is no infringement.
 3. That a device constructed and operated on mechanical principles and laws of operation distinct, separate and unlike the mechanical principles and laws of operation embodied in another's device does not infringe the same.

Judicial observation on expert evidence.

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In comparing defendants' device with the plaintiffs', the court should guard against being carried away by the testimony of witnesses of theory, who scrutinize with specious ingenuity, sharpened by inordinate desire to discover in it some elements existing in plaintiffs' device, and overlook the positive and striking facts of the case.

ACTION in infringement of patent and for damages.

Toronto, October 20, 1924, and following days.

Case now heard before the Honourable Mr. Justice Audette.

Arthur Anglin K.C., and *R. C. H. Cassels, K.C.* for plaintiffs.

George Wilkie, K.C. and *J. G. Gibson* for defendants.

AUDETTE J., now this 10th day of December, 1924, delivered judgment.

This case narrows itself down to the question of an alleged infringement, by the defendants, of the plaintiffs' Patent of Invention No. 122,715 (exhibit No. 1), bearing date the 21st December, 1909; subject, however, to the following reservation.

The action, as formulated by the pleadings, involves, as recited in the statement of claim, the charge of infringement of three patents; but the plaintiffs have abandoned all issues raised with respect to patents No. 175,551 and No. 180,360, and have elected to narrow the charge of infringement as against their Canadian Patent No. 122,715, relying upon claims one and four thereof.

The defendants, on the other hand, declared at bar, by their council, that they do not press the questions of utility or want of utility, invention or want of invention, public user, usefulness, sale and importation,—all such questions so raised by the pleading now standing aside, but the defendants' counsel contends that claims 1 and 4 of the patent No. 122,715 are invalid because the patent does not fully describe the invention (Par. 6), and because it was anticipated by prior patents and publications, raising the two issues that: 1. The patent is void for want of definiteness, and: 2. The patent is void because of anticipation.

The defendants admit paragraph No. 1 of the statement of claim and the plaintiffs' title to the patent in question as exclusive licensee in Canada.

Now the grant covered by plaintiffs' patent of invention No. 122,715, and alleged to have been infringed, is for an alleged new and useful improvement in anti-creeping devices for railroad rails,

as substantially set out in the said claims Nos. 1 and 4, which read as follows:—

What we claim as our invention and desire to secure by letters patent is:—

1. In an anti-creeping device for railroad rails, the combination, with the rail, of a part engaging one side of the rail foot flange, a cross bar extending beneath said flange, and provided with means on one end thereof for engaging one side of said flange, means on the other end of said bar for engaging said part, the part-engaging means on the bar being held in engaging position by the spring action of said bar in tending to assume a position from which it was sprung, and tie-engaging means acting upon said bar, substantially as described.

4. In an anti-creeping device for railroad rails, the combination, with the rail, of a shoe engaging one side of the rail foot flange, a cross bar extending beneath said flange, and provided with means on one end thereof for engaging one side of the flange, a head on the other end of said bar holding said shoe in engagement with said flange, means on said bar for engaging said shoe, the shoe-engaging means on the bar being held in engaging position by the spring action of said bar in tending to assume a position from which it was sprung, and tie-engaging means acting upon said bar, substantially as described.

The creeping of rails in a railroad track consists of a longitudinal movement—much like the movement of a snake—caused by the wave motion of the rail under moving loads, the pounding of the wheels of the locomotive, the application of brakes on moving trains, the expansion and contraction of the metal rail arising from climatic changes, etc., resulting in side buckling of rails, etc. This tendency to creep varies in different portions of the road depending upon grades, swamps and the various conditions of the road bed and the condition of the traffic over it, and would obviously be different on a single track from a double track,—where in the latter it might to some extent work to correct itself.

In other words at the point where the wheel of the locomotive or other cars pass, the rail is being depressed, with the result of a rise on each side, and the wheels have to climb this rise, as it were, the result being that there is an ironing out or a tendency to shove the rail forward.

This phenomenon of rail creeping, we are told, has been known ever since the first rails were used and inventors were at work endeavouring to face the problem and overcome this creeping.

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Mr. Gutelius, a witness of considerable experience and repute, testified that from the early days, long before 1909, devices of all kinds were submitted to railway authorities by so-called inventors, and that he had personally occasion to examine a number of them. Mr. Haines, another witness of excellent standing, with, in addition, a large experience in patents of invention, testified that after having studied the prior art in respect of creeping devices, he found that a

very large number of patents had been granted on various types and kinds of rail anchors of which he said, he might safely state there were about between 900 to 1,000 patents.

From this extensive field of the prior art witness Haines has condensed the treatment of the prior art by selecting a restricted number of patents going to show that the development of the anchor art, from an early date, naturally divided itself into three important groups:

Group No. 1: The bolted anchor type;

Group No. 2: The wedge type;

Group No. 3: The torsional twist type.

The plaintiffs have filed, as sample of their devices, three exhibits marked respectively, exhibits 10, 11 and 5c. They also filed, as samples of the defendants' devices, exhibits 2, 3 and 4. And in dealing both with the prior art and the question of infringement, it will be necessary to bear these exhibits in mind.

Dealing with Group No. 1 above mentioned, reference may be had for proper understanding, to exhibit S,—a card prepared by witness Haines to illustrate and summarize, by way of samples and demonstration, some of the patents of the prior art which are filed. Neither the devices of the plaintiffs nor of the defendants belong to that first group, yet we find, in these few patents of the early days, some mechanical devices that have been retained in the other groups, such as the cross bar with either one jaw or two jaws gripping the edge of the base of the rail. In the first group, however, are found those anchors which are bolted to the rail and in some cases to the cross tie.

The Smith, Pope and Laas & Sponenburg patents exhibits B., C. and D. display good illustrative examples of the first group. Suffice it to say that exhibit C, the Pope

Patent, shows a cross bar or member extending under the rail, with a hook at one end engaging one edge of the rail base and an abutment extending transversely at the edge of the other end of the rail base.

In dealing with Group No. 2, reference must be had to the large cards, exhibits S. and T.

This second group of anchors is known as the *wedge group* and includes those patents of the prior art wherein the cross member has a hook at one end and a hook of somewhat larger dimension at the other end to engage over the wedge surface of the wedge, one portion of which bearing against the edge of the rail base when the parts are in assembled relation.

The Sponenburg patent, exhibit E. of 1901, may be regarded as an early crude type of the wedge anchor, showing the principle of a wedge action, with a cross bar.

The Stewart British patent of 1886, exhibit Q. shows an early type of pure wedge anchor, having a cross bar type or member with a hook on the base rail at one end, passing under the rail and hooking at the other end by a larger hook, having there a wedge interposed between the hook and the edge of the rail and driven to place to bind the parts together.

The whole of the parts being adapted to be constructed of *steel* or other suitable metal or mixture of metal or alloys,

as recited in the patent. Therefore, we find in this patent a cross bar with double hook, locked into position by means of a wedge, with a cross bar, which may be constructed of steel; three important elements in view of the position taken at bar by the plaintiffs and the several elements entering in the defendants' anchor.

The Sponenburg patent of 1903, exhibit F., has also a cross bar having a hook at one end to engage one edge of the rail base flange, having a larger hook at the opposite end between which and the edge of the rail is interposed a wedge. When the wedge, which is slightly tapered endwise, is driven home in the devide, the clamping action of the cross member is affected by the increasing size of the wedge as it enters the larger hook end of the cross bar which is hooked over it. Figure 3 of the patent also shows the wedge provided with teeth.

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The Dormmuller Patent, No. 716,207 (exhibit J.) of 1902 (not on cards S. and T.), is another device of the type of wedge anchor, which is provided with a cross bar with a hook at each end and a wedge which is introduced between the rail base at each side of the rail, so that two wedges are employed on each side or co-operating with each jaw or hook. The wedge is introduced between the cross bar and the bottom of the rail.

Next is another Dormmuller Patent No. 791,139 of 1905, exhibit K. (shewn on card exhibit S.) which is an improvement on exhibit J. This device can be put on without raising the rail, and has a cross bar with a hook at one end which passes over the edge of the rail base flange. The cross member extends under the base of the rail, and is provided with an enlarged hook at the other end which embraces a wedge member. This wedge member has a downward extending abutment which bears against the face of the cross tie.

The drawings of this patent show a ledge at each side of the rail entering the hook of the cross bar; but in fig. 7 it dispenses with one of the wedges at one side of the rail, thus making the anchor substantially in all respects identical with the hook on the defendants' anchor Exhibit No. 2, and it shows practically the same construction working under the same principle, and with undoubtedly the same elasticity, notwithstanding that the patent does not ask for a steel cross bar, but witness Haines contends that since it has a hook at each end it calls for steel.

Then comes the Murray patent No. 803,776 of 1905 (exhibit G.) for a wedge anchor device composed of a cross bar with overturned ends adapted to hold on the rail base flange and a wedge which is interposed between the edge rail and on the hook of the cross bar, with also an abutment.

The Leighty patent No. 809,193 of 1906 (exhibit I.), is another wedge anchor type substantially identical in all material respects with defendants' exhibit No. 2. It has a cross bar with hook at one end engaging the edge of the rail base, then, passing under the rail, the other end is provided with a larger hook which is engaged by a wedge with a tie abutment portion. The cross bar has also the depressed

portion for forming a space for the lower flange of the wedge which has the same construction and utilized for same purpose, as defendants' anchor exhibit No. 2.

One more patent of the wedge type granted to Lien, bearing No. 816,296 of 1906, exhibit H. has this usual cross bar with a hook at one end to hook over the edge of the base flange of the rail and a larger hook at the other end which takes the wedge with its abutment bearing against the base of the tie. Here again, all the features of the defendants' device exhibit No. 2, are substantially present in this anchor.

This closes the review of the prior art in respect of the second group or the wedge type anchor.

Coming to the third group, which, embodying the plaintiffs' patent No. 122,715, consists of a *torsional spring anchor*. A new anchor by itself, working under this new torsional spring device.

Witness Haines taking the plaintiffs' patent exhibit No. 1, pointed out, both in the specification and in claim Nos. 1 and 4, what belonged to the prior art and what was new.

Dealing with claim No. 1, he contended that using in their broad sense the terms and language of that claim, abstracted from all other considerations, all that is described is to be found in the prior art. That is:

a cross bar extending beneath the flange—provided with means on one end thereof for engaging on side of said flange

and

means on the other end of said bar for engaging said part.

And last

the part engaging means on the bar being held in engaging position by the spring action of said bar in tending to assume a position from which it was sprung.

In dealing with this last sentence, it is quite questionable whether the court could hearken to such view. It has, however, another meaning; but the language is hardly consistent with the article defined.

Claim 4 practically repeats claim 1, with the substantial changes of the word *shoe* for *part* in the second line, and the words "a head on the other end of said bar holding said shoe in engagement with said flange, means on said bar for engaging said shoe." This last sentence is material

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and clearly describes the plaintiffs' anchors exhibits Nos. 10 and 11. I will subsequently deal with exhibit 5c, another of the plaintiffs' devices.

Exhibits Nos. 10 and 11 are practically built alike, with the exception of the difference in the head of the cross bar. The construction of these two exhibits is a fair reproduction of what is described in the Vaughan patent. The rounded cross bar flattened through part of its length, witness Gutelius has never seen, and is not quite as elaborately described in the patent as the bar with the head.

According to the plaintiffs' patent, in exhibit No. 11, the cross bar is provided with a spud engaging on the shoulder of the socket provided with a contracted entrance, and held in position by the torsional spring action of the cross bar, thus locking the bar and the shoe together. The portion of the cross bar which extends through the socket and includes the spud has transverse dimensions in one direction sufficient to prevent it from passing through the walls of that entrance and it has also transverse dimension in another direction which will permit it to pass between the walls of the entrance.

In applying the device a special shoe (that is a shoe quite different from the one used on 5c) is placed into engagement with one side of the rail foot flange and the hook of the cross bar is placed in engagement with the other side of the rail foot flange, then the other end of the bar is sprung into the socket of the shoes by a combined torsional and upward pressure upon the head of the bar, with a wrench or other suitable tool.

Of the type like exhibits Nos. 10 and 11, the plaintiffs manufactured but a very small quantity and the device which they extensively manufacture and sell is similar to exhibit 5c.

Exhibit 5c has been called by the plaintiffs the commercial device and its construction is very different from exhibits 10 and 11 and the construction described in the Vaughan patent as will be readily ascertained on merely looking at it.

At one stage of the trial, after much time and energy had been used in describing and speaking to exhibits No. 10 and 11, exhibit No. 5c was brought to attention and we

were told that 7,900,000 of the same had been manufactured and sold by the plaintiffs, while a very small quantity of exhibits Nos. 10 and 11 had been manufactured and the Vice-President of the plaintiff company stated he had no knowledge of selling devices like exhibits 10 and 11, and that 5c was the only form he had sold. I was so much struck by the difference of 5c with Nos. 10 and 11 that I asked plaintiffs' witness, Mr. Gutelius, whether a mechanic, from the information and description of the devices in the patent, could manufacture a device such as exhibit No. 5c, and his answer was that he could not without some additional instructions, and in that view he is corroborated by witness Haines. Witness Gutelius being shown exhibit 5c and asked:

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Q. Is that a form of the Vaughan anchor?—Answered: I presume it is. I don't know.

This exhibit 5c, the plaintiffs' commercial device, could hardly be said to be within the detailed disclosures and illustration of the Vaughan patent. It would seem quite apparent that the plaintiffs do not in that respect comply with the requirements of section 13 of the Canada Patent Act which enacts that the specification

shall correctly and fully describe the mode or modes of operating the invention, as contemplated by the inventor; and shall state clearly and distinctly the contrivance and things which he claims as new and for the use of which he claims an exclusive property and privilege. * * * In case of a machine, or in any other case in which the invention admits of illustration by means of drawings, the applicant shall also, with his application, send in drawings . . . showing clearly all parts of the invention.

Plaintiffs' counsel at bar, in answer to the question from the court as to how could that exhibit 5c come within the ambit of the patent, contended that claim No. 1 would cover this commercial device 5c if read with the specification at foot of page 6:

The bar 6 (cross bar) may be of any shape and size for its intended purpose and the cross sectional shape of the body of the bar, when the spring action described takes place may be varied to suit different conditions.

But that would be too vague—it would be too indefinite as stated by witnesses Gutelius and Haines. And the latter excerpt seems to apply to exhibits 10 and 11 and not to 5c.

Is not this exhibit 5c, the commercial device, in its somewhat complex aspect as compared with Nos. 10 and 11, an

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afterthought of the plaintiffs and which has not been protected by the patent? However, either course makes no difference in the view I take of the case.

Exhibit 5c differs in great many respects with the constructions disclosed in the Vaughan patent and also shewn in the defendants' anchor. The cross bar is of flat steel which has no part corresponding to the head mentioned in the plaintiffs' patent,—it has but one jaw. The shoe is quite a modified and different device in its structure from what is found in the patent.

Dealing still with the prior art in respect of the third group, we have the Guthridge patent, No. 867,359, of 1907 (exhibit L.), which shows a rail anchor with a cross member having a hook engaging on one side the edge of the rail base and on the other end it is connected to the opposite edge of the rail base by a shoe and a threaded bolt. The specifications, at line 23, state that

as a consequence when the nut is tightened there will be a certain spring or resiliency between the two parts which will act to lock the nut and prevent its loosening in the bolt.

This result found in prior art is also found in the defendants' devices and cannot be claimed by the plaintiffs and if there is any spring or elasticity in the defendants' anchor it is the same spring and elasticity which is present in every cross bar of the wedge type or other types of the prior art and more especially in the British Patent of 1886.

Then the Clawson patent No. 852,927 of 1907 (exhibit M.), at line 75 disclosed also *an elastic steel member*.

All metals regardless of what kind have some elasticity inherent to them, and as put by witness Gutelius there is resiliency in railway rails, fish plates, spikes, etc. There is resiliency in steel no matter in what form it happens to be made. Witness Haines contends further that there is less elasticity in the defendants' device, because it is made of malleable casting wherein the metal is much softer, more ductible than steel.

The new feature disclosed by the Vaughan patent, as compared to the prior art, is to provide a torsional spring cross bar, which by its torsional action through the special shoe brings the device into locking engagement for holding the anchor loosely on the rail, a principle and a mechanical device entirely different from the defendants' device.

Coming to the defendants' device, exhibits 2 or 3, and placing it near any of the plaintiffs' devices, primarily from mere ocular observation, it will appear and convey the notion that they are materially, if not totally, different and that notion will become more and more confirmed as one pursues the examination in detail.

As stated by the plaintiffs' witness, Mr. Gutelius, there is no socket (fig. 11) in the defendants' device. There is no spud (fig. 17), no shoulder (fig. 18) corresponding to the plaintiffs' anchor, no torsional twist or spring action, which has been described as the *meat of the Vaughan patent*. No lock bar and shoe together (bar fig. 6 and shoe fig. 12). He further says that there is nothing in the defendants' devices which can be qualified by the use of the term lock or locking. He adds that the spring in the cross bar has a locking effect, but I would not call it a lock. In the Vaughan anchor, the spud acts like a latch.

The construction and mode of operation of the plaintiffs' anchor rest on mechanical principles and laws of operation distinct, different, separate and quite unlike the mechanical principles and laws of operation embodied in defendants' anchor.

The plaintiffs' cross bar has but one jaw or hook taking the edge of the rail base; the defendants have two and one much larger than the other. Both of these cross bars function differently.

The defendants' device, working under the wedge principle, is entirely different from the plaintiffs' anchor which works under the torsional twist or spring action. The application of each device to the rail is entirely different and done with a different tool. There is no torsional pressure nor twisting, as in the Vaughan, when applying the defendants' device, and no need of anything to prevent it from turning; the defendants' cross bar does not go into a socket, no lock; no wedge in plaintiffs' patent, all of this as stated by plaintiffs' witness, Mr. Gutelius.

The yoke or cross bar in the defendants' device is perfectly straight, whilst in the plaintiffs' device, it is torted before being used.

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The early anti-creeping devices, according to witness Gutelius, produced the toggle effect, mentioned at times in the course of the trial. He said:

the jaws were not opposite, they were fully the width of the jaw apart and the shoe extended down. When a tie pressed against it, it tightened with a toggle effect.

A principle *per se* cannot be the subject of a patent, but a patent may be taken for a principle coupled with a mode of carrying the principle into effect, and it may be carried into effect under several patents operating in different ways and by different means.

I have come to the conclusion that the defendants' device is entirely and totally different from any device of the Vaughan patent belonging as it does to the wedge type or second group while the plaintiffs' anchor belongs to the third group—the torsional type, and that they are both resting on mechanical principles and laws of operation wholly different and distinct from one another. I refrain pursuing any further my review of the multitude of elements showing the different characters of these devices, notwithstanding there are many others than those above mentioned; but they are sufficiently striking for the purpose of arriving at the determination of the present controversy. The plaintiffs' device, it would seem, cannot include the defendants' device, without also including all the prior art.

The defendants' device was at the hand of one learned expert witness scrutinized with specious ingenuity, sharpened by inordinate desire to discover in it some of the elements, distant or apparent, to those existing in the plaintiffs' device. But the present controversy must be approached with a just temper and one must guard against being carried away by the mere witness of theory and overlook the positive and striking facts of the case.

That theoretical and technical evidence has been directed in a learned manner, after scientific experiments, wide of practical results, more especially to find, in the defendants' device, some spring, elasticity, resiliency, toggle effect, some lock (contrary even to witness Gutelius' view), etc.; but if the defendants' anchor did embody any such element, be they inherent to the metal used in its construction or otherwise, it becomes of no importance—it is labouring for

naught—since these elements belong to the prior art, and more especially to the wedge type and they cannot under any conceivable pretence be claimed by the plaintiffs who are limited by the ambit of their patent and the prior art. If such elements are found in both the plaintiffs' and the defendants' devices, they cannot be claimed or appropriated by either, since they belong to the prior art and the public. Were also the two devices working under the same principle, if the defendants' device arrived at the same result by a different and a new way of achieving the end contemplated, there would still be no infringement. *Consolidated Car Heating Co. v. Came* (1).

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The question of infringement is an issue of facts. It has been shewn from the above what was known at the date of the plaintiffs' patent alleged to be infringed. That is the prior art. Then what, having regard to what was then known, is the area of the patentee's monopoly and what finally the defendants have done.

The Vaughan specifications must be construed in the light of the prior art, that is taking it not to be the pioneer patent in that art, but an improvement on the prior art, as stated in the patent itself.

The defendants' anchor does not imitate and does not infringe the plaintiffs' anchor. Even if the forces acting in the defendants' device were similar in principle to the forces displayed in the plaintiffs' device, as stated by one witness—provided that is done in a different manner, it is quite allowable. The defendants' device appears to me to be meritorious, of extreme simplicity, practical, with good grip, working in an easy way and devoid of any torsional twist of spring, spud and shoulder locking device. Is it not better than the plaintiffs'?

One may get spring pressure in several manners, and because by one patent spring pressure is obtained, the way is not closed to an inventor to get a spring pressure or a locking device in a different manner, although arriving at the same result.

In re *Consolidated Car Heating Co. v. Came* (ubi supra), where two couplers of pipes or hose attached to two railway cars were in all material respects the same, but for

(1) [1903] A.C. 509.

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the respondent omitting the use of one particular feature called a "rib" or hinge-joint, it was held that there was no infringement for the respondent's coupler *was shewn to have been a different and a new way of achieving the end contemplated by the appellant's coupler*. If it was so held in that case, *a fortiori* would that law be more applicable to the present case, since the differences between the two anchors are so material and so numerous: the mechanical devices being different and the mode of operating being also different. The defendants have a different and new way of achieving the end contemplated by the plaintiffs' device and even under a different principle. See *Chamberlin Metal Weather Strip Co. v. Peace* (1); *Brooks v. Lampugh* (2); *Maxim-Nordenfelt v. Anderson* (3); *Mitchell v. The Hancock Inspirator Co.* (4).

Having regard to the state of the art, the date of the plaintiffs' patent, I find that the defendants have not infringed any part of the substance and essence coming within the ambit of the plaintiffs' patent and that there is no infringement. Nicolas 158.

Of the defendants' patent mentioned in par. 3 of the statement in defence, suffice it to say it is no defence to the plaintiffs' patent.

The action is dismissed with costs in favour of the defendants.

Judgment accordingly.

Solicitors for plaintiff: *Blake, Lash, Anglin & Cassels.*

Solicitors for defendant: *Gibson & Gibson.*

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- (1) [1905] 9 Ex. C.R. 399; 37 S.C.R. 530. (3) [1898] 15 R.P.C. 421 H.L. (E.).
 (2) [1898] 15 R.P.C. 33. (4) [1886] 2 Ex. C.R. 539.

BETWEEN:

1924
Nov. 27.

HENRY K. WAMPOLE & COMPANY, }
LIMITED } PLAINTIFF;

AND

HENRY S. WAMPOLE & COMPANY }
AND FRANK W. HORNER..... } DEFENDANTS.

Trade-Marks—Personal name—Company—Prohibited user.

Held: That the name "Wampole's" having acquired a secondary meaning, was properly registered as a trade-mark and could not be used as such by any other person or company, without the latter clearly distinguishing their goods from those of the owner of the trade-mark.

2. That the distinction between permissible and prohibited user is to be decided upon the special circumstances and facts of each case.
3. That although any person may use his own name for purposes of his trade, and that no one bearing a similar name can arrogate to himself the exclusive use thereof, still he cannot so use it to deceive the public to induce purchasers to buy his wares for those of another.
4. That a company with a name of which a personal name forms a part has not the same natural right as the individual born with such name to trade under it, particularly when there is a possibility of confusion between it and the name of an old established company.
5. That moreover a company cannot, under cover of its name, use the same to justify or excuse an overt act or course of conduct plainly indicative of an unfair and disloyal effort to pass off its goods for those of another.
6. That the court, in deciding whether there is infringement or not, will consider the impression produced by the mark as a whole, and it is not necessary to constitute infringement that the mark used corresponds in all respects to that of another person, and which such person has the exclusive right to use.

ACTION for alleged infringement of trade-mark WAMPOLE'S and counter-claim to expunge same.

Ottawa, October the 2nd, 1924, and following days.

Case now heard before the Honourable Mr. Justice Audette.

R. S. Smart, Louis Cote and H. A. O'Donnell for plaintiff;

E. G. Place and J. T. Hackett for defendants.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 27th November, 1924, delivered judgment.

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This is a case of an alleged infringement of a specific trade-mark.

to be applied to the sale of chemical, medicinal, pharmaceutical and toilet preparations, and druggists' supplies and sundries, and confectionery, and which consists of the word

WAMPOLE'S

registered in Canada, on the 17th September, 1913, under an order of this court of the 3rd September, 1913, as having obtained a secondary or trade-mark meaning through long and continuous user—a ground which has been greatly amplified and corroborated at the trial of the present action.

By the statement of claim the usual injunction is sought as against the alleged infringer and the defendant, Henry S. Wampole & Company, both by his statement in defence and his counter-claim, denies infringement, contends he has a right to use the word "Wampole" as his family name and concludes by asking that the plaintiff's trade-mark be expunged.

[His Lordship here discusses the issue with defendant Horner, and dismissed the action as to him. He also reviews plaintiff's title to the trade-mark "Wampole," and finds there has been continuous use thereof by plaintiff or his predecessors, and that plaintiff is the owner thereof.]

Having said so much I may add that the judgment of this court allowing the registration of the word "Wampole" in Canada upon the well known principle of secondary meaning acquired by long user, must remain in full force and effect. A judgment of a court of competent jurisdiction is an asset in the hands of the parties in whose favour it is rendered, and cannot be lightly interfered with. Moreover, the evidence adduced in this case has added a great deal in support of the contention that the word "Wampole" has acquired a secondary meaning, a trade-mark meaning by long continuous user in Canada, a question which will be hereinafter referred to.

The infringements complained of occurred around August and September, 1923, when for a short time the defendant company, Henry S. Wampole & Company, of Baltimore, entered the Canadian market under the following circumstances. Albert K. Wampole, manufacturing pharmacist under the name of Henry S. Wampole &

Company, at Baltimore, heard as a witness, says that in 1909 he and his brother Henry S. Wampole—who died on 1st June, 1921—bought out the business of Heineman-Evans Company and started business at Baltimore under the name of Henry S. Wampole & Company and that the idea of coming to Canada occurred to him when he saw an advertisement in the Standard Remedies, a drug journal of Frank W. Horner, of Montreal, and that he immediately got in touch with him for that purpose and asked him of the possibilities of doing business in Canada. A protracted correspondence started between them and they also met, at his request, in Baltimore in 1923, when Horner told him that if he did, he would encounter litigation and he wanted to be protected. They then entered into the agreement exhibit No. 21. Horner had protected himself thereby, as he had anticipated an action at law of the kind now before the court.

It is well at this stage to refer to part of that correspondence to endeavour to size up the atmosphere in which the defendant company was manoeuvring. Was that question of doing business in Canada approached with the intention of setting up a fair or an unfair competition to the Canadian dealer?

By exhibit No. 14 Horner is asked to furnish the plaintiff's prices and manner of dealing with the trade and also to send "a full package of the plaintiff's preparation, such as he is putting on the market to-day" and if he is manufacturing a small size. Then in exhibit No. 18 Wampole discusses the relative proportions of strychnine in the American and Canadian preparation and he says:

I believe that we should use the same amount of strychnine in our preparation as our competitor uses in his preparation.

The same question is again discussed in his letter, Exhibit No. 19, and his idea is that if there is the same amount of strychnine, the purchaser

buying our preparation could readily see that our preparation contained the same amount of strychnine as our competitor's product and would therefore not think that our preparation was not the same as theirs.

But this change in strychnine was afterwards abandoned. Then in exhibit No. 20 the question of the label is discussed. He wants a label in French and one in English

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alike the plaintiff's. See also exhibits 16, 24, 27, 28, 29 and 49. Then in exhibit No. 26 he says that his attorney believes that we have a very good case and does not think for one minute that they can stop us, as long as we have absolutely refrained from using the name "Wampole."

However, I may add—as was said in the *Boston Rubber Shoe Case* (1)—it is not necessary to find fraud or fraudulent intent in order to grant relief in a case of this kind.

What the defendant is especially anxious to introduce in Canada is his *palatable preparation of the extract of Cod Liver Oil* similar to exhibit No. 9, much alike exhibit No. 13, the plaintiff's best seller (as mentioned at trial) among his numerous preparations, that is his tasteless preparation of an Extract of Cod Liver so well known in Canada as disclosed by the evidence. The plaintiff's mark has his trade-mark *Wampole's* printed across the top in large type. The defendant's, exhibit No. 9, has also the word "Wampole's" printed across in large type; but it is preceded—if it means anything—by *Henry S.* the letter *S.* being in larger type. The christian name *Henry* is retained in full at top of No. 9. It is a name common to both firms and could or might help in selling one for the other. What strikes the eye, in looking at both together is obviously *Wampole's Extract Cod Liver Oil* and that is what the purchaser is looking for.

The public do not know the difference between the letters *S* and *K*; it is the word *Wampole* that catches their eye and determines their act.

Witnesses Whebby, Griffin, Carnaham and the defendant Horner are all of opinion that the words *Original and Genuine* associated with the words *Henry S. Wampole* on defendant's exhibit No. 9, could only mean, in Canada, the plaintiff's goods from Perth. The average person, the average public and the purchaser would not observe the christian name or initials, and if they did the name *Henry*, a name common to both companies—would determine the final conviction. Therefore confusion would be created in the trade. And as for the red lines at the bottom, the general public will not read that; they will be satisfied with the word *Wampole's*.

The defendant's circular letter advertising his business in Canada was received by the trade with a mixed understanding, and resulted in misunderstandings and in the sending of a number of letters to the plaintiff, which all speak for themselves. See exhibits "A," "B" and No. 40. The plaintiff's prices had been supplied by Horner and the defendant establishes his prices just a little lower.

There seems to have been extant, *in esse*, all through, a want of frankness in the manner in which the defendant chose to come on the Canadian market. Why did he not state in his circular letter he had been carrying on business in the States, selling his father's preparation, and that he was going to sell in Canada, boosting his preparation, if he cared? Then why not select a package entirely different from that of the plaintiff. Display his name in a different manner—and when I say his name I mean either his firm name or his own—the president's, not the name of his brother who died in 1921. Exhibit No. 9, at the top, the most striking place, displays neither the name of the firm, nor the name of the president or any living member of the defendant company. Why not select a package of a colour strikingly different from the plaintiff's so that no mistake could occur? Any change appealing to the eye would have been both welcome and significant.

[His Lordship here reviews the opinion evidence offered and concludes.]

It would result from this review of the evidence that the overwhelming majority of the witnesses, with whom I concur, is of opinion that exhibits 9 and 13 could be confused and might be taken one for the other, and that by a long user, in Canada, the word or trade-mark *Wampole's* has acquired a secondary meaning,—a meaning which by itself distinguishes the goods sold by the plaintiff from all goods sold by any other trader. The word *Wampole's* to the buying public in Canada has a special and distinctive meaning when used in connection with these medicinal commodities.

There is, it is true, some conflict in the opinion expressed on behalf of the witnesses of both parties, but the conflict seems to be fairly explained by the fact that it is perhaps the ally of sympathy or prejudice, because it would seem too magnanimous to call it only erroneous.

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The defendant argues that there is not a person by the name of Wampole in the plaintiff's firm, while the defendant company has shareholders by that name. The answer to this is, as I have already said, the plaintiff is the owner of the trade-mark *Wampole* for having acquired it in due form, and moreover for having used it continually for a period of 35 years. Contending that there are no shareholders of that name in the plaintiff's company, while there are some in the defendant's company and deduct a right therefrom, is not sound argument; because a company can only be known by its corporate name, and, moreover, that the name Henry S. Wampole is the name of one who died in 1921 and that it is not the name of the defendant company, it is only a part of the same, and it is not the name of the company's president or of any of the shareholders. I fail to see any necessity for the defendant company to mark or pack its drug in a manner which may have the effect of passing off its goods for the goods of the plaintiff's; unless attracted by an undue and unfair advantage or gain.

Perhaps the distinction between permissible and prohibited user may be difficult to define, but it is in each case a question of fact. But you may not use your name to deceive the public and induce purchasers to buy your wares for those of another person. Moreover, a new company with a title of which a personal name forms part has not the same natural right as of the individual born with that name to trade under it when there is possibility of confusion with an old company, as in the present case. *Fine Cotton Spinners et al v. Harwood Cash & Co.* (1). A company cannot, under the cover of its name, use the same to justify or excuse an overt act or course of conduct plainly indicative of an unfair and disloyal effort to pass its goods for those of another person or company. By doing so that company exceeds that which it is entitled to.

The question of using one's own name as a description of an article placed on the market for sale by traders has been discussed and resolved in many cases. There, however, lies at the very foundation of that question the recognized rule of law and justice that no man can have any right to represent his goods as the goods of another

(1) [1907] 2 Ch. 184, at p. 190.

person. The defendant company, under the circumstances of the case, has the undoubted right to use its corporate name for all lawful and legitimate purposes; but it cannot exercise that right in a manner that may cause the purchasing public to believe that his goods are those of the plaintiff company. The placing of the word *Wampole's* across the top of their package, embodying thereby the plaintiff's trade-mark, and thereby copying, imitating the plaintiff's package, besides many other ways would almost certainly lead the public to believe that the defendants' goods are goods sold either by the plaintiff himself or by one of his commercial branches.

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The question of using one name—either by a person or a company, has been judicially reviewed in the fully reasoned judgment of the Supreme Court of Canada in the case of *Boston Rubber Shoe Co. v. Boston Rubber Co. of Montreal* (1). The injunction was issued in the case and yet the dissimilarity between the marks,—which are printed at p. 318—was ever so much more pronounced than in the present case. See also *Barsalou v. Darling* (2).

By 35 years of consecutive and exclusive use of the word “Wampole’s,” as applied to the sale by the plaintiff of pharmaceutical preparations, the word *Wampole's* has become in Canada a name or mark distinguishing, in the mind and eyes of the trade and public, the plaintiff's pharmaceutical goods from all other such goods sold or offered for sale in Canada. *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flakes Co.* (3).

This surname, this word “Wampole” having acquired a secondary meaning and being protected by a registered trade-mark, cannot be used as a trade-mark by any other person or company, without the latter clearly distinguishing its goods in a manner that will clearly show to the purchasing public that its goods are not the goods of the owner of the trade-mark Wampole. This trade-mark, which has been in force for 11 years, has been registered upon grounds which have been strengthened in this present case, and is of a surname, uncommon and distinctive as in the Horlick case. *Re Horlick's Malted Milk Co.* (4); See also *Palmer*

(1) [1902] 32 S.C.R. 315 at 327
et seq.

(3) [1923] 4 D.L.R. 543 at p. 554.

(4) [1917] 35 D.L.R. 516.

(2) [1881] 9 S.C.R. 677, at p. 681.

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v. *Palmer-McLellan Shoe Pack Co.* (1); *Teofani & Co. v. A. Teofani* (2); *Barsalou v. Darling* (ubi supra); *Rodgers v. Rodgers* (3); *Thaddeus Davids Co. v. Davids Manufacturing Co.* (4); *Goddard v. Walford Co-operative Society* (5); *Re Coty* (6).

I find that the plaintiff's trade-mark is good and valid and upon this ground the counter-claim is dismissed with costs.

The essence of a trade-mark is distinctiveness and this cardinal requirement is wanting as between the two marks in question in this case.

One has to bear in mind that the danger to be guarded against in a case of infringement is that the purchaser seeing one mark by itself will think it to be the same as another which he has seen before, and that the purchaser will not see the two marks side by side so as to note the differences.

In the present case the two specific marks are used in connection with the sale of the same class of merchandise and that fact alone will greatly add to the possibility of the taking of the goods of one trader for those of another, creating confusion and, therefore, its use will become liable to deceive the public.

Moreover, the general principle to be adopted in deciding cases of infringement is to consider the impression produced by the mark as a whole. The essential characteristics of a trade-mark is the general appearances of the mark as a whole, its get-up and all of its *ensemble*. It is by the eye the buyer judges and by which, if colourable imitations are allowed, he will be deceived. And in the present case we must not overlook the similarity of the display of a similar name on a package of a similar size, with French and English literature written in a similar manner and different in that respect from the defendants' American mark. Then, again, there is this other objectionable feature of the printing on the side of the package: "Original and Genuine, Henry S. Wampole's" which has been referred to in the evidence and which I find is liable

(1) [1917] 37 D.L.R. 201.

(2) [1913] 2 Ch. 545.

(3) [1924] 41 R.P.C. 277.

(4) [1914] 233 U.S.R. 461.

(5) [1924] 41 R.P.C. 218 at 234
 et seq.

(6) 14 Patent & Trade Mark
 Rev. 185.

to deceive among a public so well acquainted with the word "Wampole." This sentence which as I have said at trial may be part truth is not the whole truth and being so is more difficult to answer than if it were a pure and undisguised falsehood. The contents of the package may be the "original and genuine" product of Henry S. Wampole, who died in 1921, but accompanied with the already objectionable package is liable intentionally or not, to convey to the public that it is the original and genuine extract known in Canada.

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The two marks, the two packages applied to the same class of merchandise resemble one another, and to allow such similarity in trade-marks is baneful to trade and it is liable to deceive the public whose interest must be considered before the relative rights of the parties. Moreover, honesty and fair dealing must be maintained and supported in the trade, while disloyal and unfair competition discouraged and condemned. *Congoleum Co. v. Canadian Linoleums, etc.* (1).

Now the world is wide, said once Lord Bowen in a trade-mark case, and there are so many names, there are so many designs, that there really is no excuse to imitate another trader's mark dealing in the same class of merchandise and more especially, when the mark which is imitated belongs to a trader who by years of honest and toiling work and expenditure has built up an enviable reputation and business. Is not the natural inference in such circumstances and in the present case coupled with many questionable manoeuvres—that such a trader is seeking to take undue advantage of the other trader's standing and trade. The denial of such idea having regard to the circumstances of this case and the reading of the correspondence filed of record, is deserving of very little consideration. The defendant company cannot use its name upon its goods on the Canadian market without clearly distinguishing them from those of the plaintiff.

It is not necessary for the purpose of establishing an infringement that there has been the use of a mark in all respects corresponding with one of which another person has acquired an exclusive right to use. No infringer of trade-

(1) [1923] Ex. C.R. 182 et seq.

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mark would be such a blunderer at the work of infringing as to go and take a trade-mark exactly alike the trade-mark of a competitive trader. It is sufficient to show that the resemblance is such as to be likely to make unwary and uncautious purchasers suppose that they are purchasing an article sold by the party to whom the right to use the trade-mark belongs. See Per Lord Chelmsford in *Wotherspoon v. Currie* (1); Sebastian, Law of Trade-Marks, 5th ed. 151.

I have come to the conclusion that while the two marks are not absolutely identical, there is such a close imitation in the design and get-up of the defendant's mark, that the ordinary purchasers could be easily deceived and misled to buy the defendant's goods for those of the plaintiff. On the question of the defendants using their own name, I rely on what I have already said and on the case of the *Boston Rubber Shoe Co.* (ubi supra). The defendants can use their own name only in such a manner as will not lead the public into deception.

[His Lordship then concludes, declaring infringement, granting injunction, and dismissing the counter-claim, etc.]

Judgment accordingly.

Solicitors for plaintiff: *Stewart, Hope & O'Donnell.*

Solicitors for defendants: *Foster, Mann, Place, McKinnon, Hackett & Mulvena.*

BETWEEN:

1924
Dec. 26.

GEORGE HALL COAL & SHIPPING } PLAINTIFF;
CORPORATION

AND

CANADIAN PACIFIC RAILWAY } DEFENDANT.
COMPANY

*Shipping and seamen—Scow and barge—Damages—Seaworthiness—
Watchman.*

Plaintiff had a contract with defendant for coaling of certain of its ships including the steamship *M.* Shortly after the docking of the *M.*, plaintiff's scow *W.* with a coal barge was placed alongside the *M.* When operations were discontinued on Saturday night, with the assent of

(1) [1872] L.R. 5 H.L. (E. & I.A.) 508.

the defendant the scow and coal barge were allowed to remain alongside the *M.* until operations were to be resumed on Monday. At 3.10 a.m. Monday a large volume of water was flowing on the deck of the scow from the sanitary discharge pipe in the side of the *M.* and the scow was in a sinking condition and shortly after sank and became a total loss. The scow was of sufficient seaworthiness for all purposes for which she was required. Defendant contended the scow was unseaworthy, having openings in the deck, without coverings or coamings, and holes in the stern too near the water line, and that the watchman was incompetent and negligent.

Held: On the facts, that as the plaintiff had its scow alongside the *M.* in the capacity of a person on lawful business in the course of fulfilling a contract in which both the plaintiff and defendant had an interest, it was incumbent upon the *M.* to use reasonable care for the safety of the scow, and that the *W.* was entitled to expect that the defendant and its employees in charge of the *M.* would use reasonable care to prevent damage from an unusual danger which such agents and employees knew or ought to have known and that the defendant was liable for the loss of the scow.

2. That the discharge of water as aforesaid was not a circumstance which the plaintiff should have foreseen and guarded against, but that on the contrary it was upon the *M.* to protect the *W.* from the effects of such discharge or to have given plaintiff reasonable notice that it must itself take care and avoid the danger.
3. That the seaworthiness of the scow must be considered in regard to the service in which it was engaged, and if a scow is reasonably fit for the work in which it is used, the suggestion of unseaworthiness must fail.
4. That the necessity for having a watchman on a scow or barge and the degree of vigilance to be exercised by him must depend on the danger to be anticipated and guarded against.

ACTION *in personam* to recover \$50,000 for damage done by the defendant ship *Minnedosa* and the sinking of one of plaintiff's derrick scows in the harbour of Montreal.

Montreal, October 13th to the 16th and 29th, and November 5th, 18th and 29th, 1924.

Case now heard before the Honourable Mr. Justice MacLennan.

Francis King, K.C. and *W. B. Scott* for plaintiff.

A. R. Holden, K.C. and *R. Clement Holden* for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN L.J.A., now this 26th December, delivered judgment.

[His Lordship here makes a resumé of the pretensions of the parties as contained in the statement of claim, the defence and the reply and proceeds.]

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During the navigation season of 1923 the plaintiff had a contract with defendant for coaling certain of the latter's ships trading to the port of Montreal including the steamship *Minnedosa*. This vessel arrived in Montreal shortly after midday on Saturday 17th November, 1923, and docked at Shed No. 8, being moored with her port side to the pier and facing the shore. Very shortly after her arrival the plaintiff placed its derrick scow *Wellington* and a coal barge alongside, the scow on the starboard side of the *Minnedosa* and the barge on the starboard side of the scow, both being moored to the steamer and facing the shore. The *Wellington* was a wooden vessel 132 feet long and 37 feet 6 inches wide, equipped with derrick, boom and the necessary appliances, driven by a donkey engine, for transferring coal from the barge into the coaling ports in the side of the *Minnedosa*. The coaling operations began at once, were continued until 9 p.m. Saturday, when, with the assent of the Marine Superintendent of defendant, they were suspended and the scow and coal barge were to remain where they were alongside the *Minnedosa* until the operations would be resumed at 7 a.m. Monday morning, 19th November. About 3.10 a.m. Monday morning a large volume of water was falling on the deck of the scow from the seven-inch sanitary discharge in the side of the *Minnedosa*; the scow was in a sinking condition and shortly after sank stern first in over thirty feet of water and became a total loss.

What was the cause of the scow sinking when moored alongside the *Minnedosa*? The plaintiff's contention is that those in charge of the *Minnedosa* took no precautions to prevent the water from her sanitary discharge falling over the rail of the scow on the latter's deck and into her hold, which resulted in the scow sinking, while the defendant's main contention is that the scow had a number of openings on her deck, unprotected by hatch-coverings and coamings, through which rain and other water could get into her hold, and a number of small holes in her stern above the water line where there were exhaust and other pipes which did not completely fill these holes and through which water from the harbour could enter, and because of these openings in the deck and stern the scow was unseaworthy and that the sinking was due to this unseaworthy

condition. It may be convenient to deal with these contentions of the defendant before considering the causes put forward by plaintiff for the loss of its scow.

The seaworthiness of the scow must be considered in regard to the service in which it was engaged and if it was reasonably fit for the work in which plaintiff used it as part of its coaling plant in the quiet waters of a sheltered part of the harbour of Montreal, the suggestion of unseaworthiness must fail. It is not relevant to the issue in this case that for other services, in other places, where conditions were entirely different, the scow might not be safe and seaworthy.

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* * * * *

[His Lordship here discusses the evidence as to seaworthiness of the scow *W.* and as to the cause of her sinking and concludes that she sank by reason of the water discharged from the *M.* onto her decks.]

That the discharging of water from the *M.* was not an ordinary peril to which the scow was exposed as part of plaintiff's coaling fleet, but was a most unusual occurrence. Nothing of that character had ever happened during the three years that plaintiff operated the scow. Can it be said that the owners of the scow should have foreseen the sudden and unexpected discharge, without warning, of a large volume of water from the vessel that was being coaled during the temporary suspension of the coaling operations on a holiday, and should a derrick scow like the *Wellington* have been built to withstand the sudden outpouring of tons of water on its deck from a vessel alongside? This appears to me to have been an extraordinary danger which the plaintiff could not be fairly expected to have foreseen and consequently was not bound to so equip its scow that no damage would result from this unusual danger. While some of defendant's witnesses testified that the scow was unseaworthy on account of these openings in the deck, other witnesses equally competent, in my opinion, held that the scow did not require hatch-coverings and coamings for coaling and was fit for the service in which it was engaged. I put this question to my Assessor:—

Was the *Wellington* reasonably fit to meet the ordinary perils which a scow of that kind, doing the work it was doing, might be fairly expected to meet, while alongside the *Minnedosa* at Shed No. 8, in the Harbour of Montreal?

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And his answer is:—

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With the exception that coamings were omitted around the various deck openings, the scow *Wellington* was generally in good condition for carrying out the work. In laying alongside a vessel like the *Minnedosa* it would be expected that at times certain waters might be discharged on to the deck of the scow, from scuppers and discharges from the vessel's deck, and coamings around the deck openings would have diverted these waters to the scow's scuppers and prevented same from going into open hold.

The sanitary discharge system being continuous and not being general in vessels of this class, it was not to be expected that this discharge would come on the deck of the scow and the serious consequences could not be anticipated.

The coamings, in my Assessor's opinion, would divert water which might come at times on the scow from the ship's deck, but as there is no evidence or suggestion that any water came on the scow from that source, the absence of coamings cannot be considered a serious defect for the service in which the scow was engaged. I therefore find that the scow was seaworthy for the service in which it was used in coaling defendant's ship at the time of the accident.

* * * * *

The plaintiff had its scow alongside the *Minnedosa* in the capacity of a person on lawful business in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and on the principle laid down in *Indermaur v. Dames* (1), it is settled law that plaintiff, if it used reasonable care on its own part for the safety of the scow, was entitled to expect that the defendant through its agents, servants and employees in charge of the *Minnedosa* would on its part use reasonable care to prevent damage from unusual danger which such agents, servants and employees knew or ought to have known.

In my opinion defendant was bound either to use reasonable precautions and to put up some safeguard to protect the scow from the danger of the discharge of water on it doing damage, or to give the plaintiff reasonable notice that it must itself take care and avoid the danger. No notice or warning of any kind was given to plaintiff to look out for the safety of its scow. The contention of defendant is that, as the plaintiff had used its scow for coaling the *Minnedosa* on several previous occasions, no protective

(1) [1866] L.R. 1 C.P. 274; 2 C.P. 311.

measures or warning were required on the part of the ship and that, if plaintiff's employees and servants had properly looked after and watched over the scow, they could easily have seen if any danger threatened and have taken the necessary precautions to avoid it. This contention of defendant is supported by the evidence of the Harbour Master and the Shipping Master of the port of Montreal, both Master Mariners having many years experience in many ports, but there is other evidence of Master Mariners, with equal experience to theirs, that it is the customary practice of seamen to safeguard any discharge of running water by a tarpaulin or hatch-cover from doing any damage to anything alongside, and there is further evidence that on a subsequent occasion the sanitary discharge from the *Minnedosa* was protected during a coaling operation in the harbour of Montreal. The officer of the watch on the *Minnedosa* from midnight to 6 a.m. on the morning of the accident testified that he saw the water from the sanitary discharge going against the rail of the scow at 2 a.m., but he was unable to say how close to the top of the rail the discharge came as it was too dark. In the evidence of the master of the *Minnedosa* at the trial the duty of taking care not to cause any damage to the scow is recognized in the following extract from his examination:

[His Lordship here cites from the evidence.]

In *Rylands v. Fletcher* (1), Mr. Justice Blackburn stated the rule of law, that the person who for his own purposes brings on his land, and collects and keeps there anything likely to do mischief, if it escapes, is *prima facie* answerable for all the damage which is the natural consequence of such escape, but that he can excuse himself by showing that the escape was owing to the plaintiff's default. In this opinion Cairns L.C., and Lord Cranworth concurred in the House of Lords, the latter stating:—

If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

(1) [1868] 3 H.L. (E. & I.A.) 330.

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In that case the defendant had collected water on his own land by means of a reservoir and the water escaped through underground shafts in old workings which were unknown to defendant and flooded and damaged the plaintiff's mine and the defendant was held liable for the damage. In the case at bar, the defendant pumped into the sanitary circulating system of its ship large volumes of water which were ejected through the ship's side, without taking any precautions to prevent it escaping to the deck of plaintiff's scow which was moored alongside, in the performance of a contract in which both plaintiff and defendant were interested and without giving any warning or notice to plaintiff that it must take care and avoid the danger.

Counsel for plaintiff also rely upon articles 1053 and 1054 of the Civil Code of Lower Canada.

* * * * *

They also rely upon the interpretation given to this latter article by the Judicial Committee of the Privy Council in *Quebec Railway Light Heat & Power Company Limited v. Vandry & al* (1), and the *City of Montreal v. Watt & Scott Limited* (2). In the Vandry case, high tension electricity found its way into the plaintiffs' houses and set them on fire, and in the Watt & Scott case, water from a street sewer during a heavy rain storm flooded the cellar of plaintiff's warehouse damaging goods stored therein. In each of these cases the Privy Council maintained the actions and applied article 1054 C.C., holding that the article established a liability for damages defeasible by proof of inability to prevent the damage by reasonable means. The evidence establishes that defendant used no means whatever to prevent the water discharged from its ship doing damage to plaintiff's scow and therefore did not bring itself within the terms of the exculpatory paragraph of the article. The same principle was applied in the Circuit Court of Appeals in the case of *Lincoln v. Cunard S.S. Co.* (3), in which the libelant sued for personal injuries sustained as a result of a discharge of steam from the side of a steamship while lying at her pier in the port of New York

(1) [1920] A.C. 662; 89 L.J.P.C. 99. (2) [1922] 2 A.C. 555; 91 L.J.P.C. 239.

(3) [1915] 221 Fed. Rep. 622.

which, suddenly and without warning, discharged steam and hot water from an exhaust pipe upon the master of a barge who was making fast alongside for the purpose of delivering coal to the owner and the latter was held chargeable with gross negligence and liable for the injuries. The Circuit Judge, in affirming the decree of the District Court, said at page 623:—

Libelant was in charge of the barge *Harsimus*, owned by the Berwind-White Coal Company, which was delivering coal to the steamer. The barge was placed alongside of the steamer, made fast as was supposed at the bow, and Fill was engaged in making fast at the stern when some one called to him that his bow line was rendering. He at once hurried along the deck to the forward bitt, and while there engaged with the line, suddenly and without warning, there was thrown upon him out of an exhaust orifice in the side of the steamer a discharge of steam and boiling water, which knocked him down and scalded him, producing severe injuries.

The complaint averred that it was the custom in the port of New York to protect these outlets for steam and hot water in some way, but that is unimportant. The requirements of ordinary care and prudence would impose upon defendant the duty of so managing discharges of such dangerous substances from the side of its vessels as not to throw them suddenly and without warning on the deck of other vessels, brought alongside at respondent's request, endangering persons engaged thereon in legitimate occupations. As the District Judge held, this is a case of *res ipsa loquitur*; and in the absence of any explanation on behalf of the steamship the necessary conclusion is that some one in respondent's employ was negligent—indeed grossly negligent—in thus exposing the libelant to serious injury without warning him of what was to be done.

I find that the proximate cause of the sinking of plaintiff's scow was the discharge of a large volume of water from the *Minnedosa* over the rail of the scow, without warning and without any care or precautions having been taken by those on board the *Minnedosa* to prevent the damage, and on the principle laid down in the cases referred to, as well as under the Civil Code, the defendant is liable for the resulting damages and must be held alone to blame, unless there was negligence or want of care on the part of plaintiff and those for whom it was responsible which contributed to the loss of the scow.

[His Lordship here discusses the evidence as to negligence of those in charge of the barge and scow, and finds the barge was kept alongside the scow until it sank and that no negligence can be attributed to those in charge.]

Counsel for defendant submitted that Brossoit failed to do his duty as watchman and was negligent in not sooner discovering the water from the *Minnedosa* and in not taking

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some steps to save the scow from the water which was coming on it, and they referred to By-law No. 36 of the Harbour Commissioners of Montreal, which is under the heading "Precautions against Fire" and reads as follows:—

* * * * *

The necessity for having a watchman on the scow and barge and the degree of vigilance to be exercised by him must depend on the dangers to be anticipated and guarded against. This principle is supported by authority.

Marsden's Collisions at Sea, 8th Edition, page 448:—

Whether it is negligence to leave craft moored to the shore or other barges in dock or in tidal waters without a watchman depends on the danger to be anticipated having regard to the position of the barge.

MacLachlan's Law of Merchant Shipping, 6th Edition, page 235:—

A vessel is bound to carry a sufficient crew for the purposes on which she is employed. The duty of a barge, when moored, to have a man in attendance has been discussed in several cases. The result of the cases appears to be that it is necessary for a man to be in attendance upon a barge whenever there is any reason for anticipating a danger which is known and so obvious that it ought to be guarded against; but in the absence of any such danger a barge may be left unattended when securely moored in a proper place.

The Western Belle (1); *The Hornet* (2).

The only danger which the watchman had in mind appears to have been the water in the bottom of the scow. He was careful to watch it did not become necessary to require pumping and for that purpose examined the scow every three hours. No trouble or danger from water from the ship alongside had ever been experienced, my Assessor says, *it was not to be expected that the discharge would come on the deck of the scow*, and there was nothing to suggest to the watchman any danger from that source.

I therefore find that Brossoit exercised reasonable supervision and is not chargeable with negligence or want of care in looking after the property of the plaintiff in his charge.

The plaintiff has established its claim and there will be judgment declaring it entitled to the damage proceeded for and the condemnation of the defendant therein and in costs, with the usual reference to assess the damage. The counter-claim of defendant fails.

Judgment accordingly.

(1) [1906] 10 Asp. M.C. 279.

(2) [1892] P. 361.

HIS MAJESTY THE KING.....PLAINTIFF;

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AND

THE MONTREAL TELEGRAPH COM- }
PANY } DEFENDANT;

AND

THE GREAT NORTH WESTERN }
TELEGRAPH CO. OF CANADA, } THIRD PARTIES.
ET AL }

Revenue—Income Tax—Agreement by a third party to pay same.

By agreement between defendant and the Great North Western Telegraph Company, the latter undertook, *inter alia*, for 97 years, to work, manage and operate the defendant's telegraph system, with right to use and occupy all offices, stations, buildings and property of the defendant, except certain rooms, and obliged "themselves to pay all costs and expenses of operation of every description, including municipal taxes and assessments on the property owned by the company * * * " and bound themselves to pay \$165,000 a year out of the proceeds of the operations, the company to receive this during the term whether the earnings amount to that, or less. The defendant claimed that the Great North Western Telegraph Company should pay the income tax upon the same.

Held, that, as between the plaintiff and the defendant, there is nothing in the deed in question which could affect the position of the Revenue, and, even if the third parties had thereby undertaken to pay defendant's income tax, such undertaking could not be pleaded by the defendant in answer to the Crown's claim for income tax under The Income War Tax Act, 1917; furthermore, that the defendant is liable to be assessed upon the sum of \$165,000 aforesaid, less exemptions permitted under the Act.

2. That the covenant by the third parties to pay all "expenses of operation of every description including municipal taxes on the property owned by the company," contained in said agreement, did not bind it to pay the income tax levied on the defendant upon the rental or revenue received from the leasing of its telegraph systems, inasmuch as income tax is imposed on the person and not on the property. (*N.B. and Canada Railway Company v. N.B.R. Co.* (1924) 4 D.L.R. 962, referred to.)

Semble: Any amount which might be paid by the third parties as income tax upon the rental of \$165,000 would form part of defendant's income for income tax purposes.

INFORMATION exhibited by the Attorney General of Canada to recover from defendant the sum of \$16,599.69 as income tax.

Montreal, December 12, 1924.

Case now heard before the Honourable Mr. Justice Audette.

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C. F. Elliott for plaintiff.
George Montgomery, K.C. and *Aimé Geoffrion, K.C.* for defendant.

G. Barclay, K.C. for Third Parties.

The facts are stated in the reasons for judgment.

AUDETTE J., this 8th January, 1925, delivered judgment.

This is an information exhibited by the Attorney General of Canada whereby it is sought, *inter alia*, to recover against the defendant company, the sum of \$16,599.69, together with statutory interest thereon, as representing the amount of the company's income tax for the year ending the 31st December, 1920.

The defendant company denies any liability for the payment of such taxes and claims to be entitled to relief over against the third parties for the same, under the terms and conditions of a certain deed or articles of agreement, of the 17th August, 1881, between the said defendant (therein called the company), and The Great North Western Telegraph Company (therein called the contractors), and The Western Union Telegraph Company (therein called the guarantors), whereby the contractors (G.N.W. T. Co.), undertook, among other things, for a period of 97 years, to work, manage and operate the system of telegraph of the defendant company with the right to use and occupy all the offices, stations, buildings and property of the company, save and except the board room, with the adjacent secretary's room and part of vault; and furthermore the contractors bound and obliged

(6) themselves to pay all costs and expenses of operation of every description, including municipal taxes and assessments in the property owned by the company, etc.

In consideration of the above, as stated in the operative clauses, the contractors bound and obliged themselves to pay to the company, quarterly, during the continuance of this agreement, the sum of \$41,250 on the first of October, January, April and July in each year from out of the proceeds of the operation and use of the said company's lines and property, which proceeds the contractors thereby warranted should amount to the said sum of \$41,250 per quarter, or \$165,000 per annum. The company is to receive, during the continuance of the agreement, this quarterly payment, whether the earnings and

revenues of the said lines and property shall amount to that sum, or more, or less.

It is contended by the defendant that in addition to this quarterly payment,—this yearly rent of \$165,000—the contractors should also pay the income tax collectible on the defendant upon that amount.

It is by clause 6 of the contract that the contractors assumed the liability of certain taxes. They bound and obliged themselves to pay all costs and expenses of operation of every description, including municipal taxes and assessment on the property owned by the company and occupied by them. The contractors did not assume the payment of all taxes but the municipal taxes and assessment upon the property in question. Under the *ejusdem generis* doctrine that would limit the taxes upon the property alone. The income tax which is of a personal nature (see section 4 of The Income War Tax Act, 1917), is based upon the income of the person or corporation—does not come within the purview of the taxes specifically mentioned in the deed. *Expressio unius est exclusio alterius*. Moreover the liability as to income tax was not contemplated in 1881 by any of the contracting parties. Although that fact alone would not be a sufficient answer to the claim, yet it may be a pertinent circumstance bearing upon the intent of the parties, and a strict text is required, under the circumstances, to support the defendant's view,—and no such text is extant. To make the contractors liable for such tax, some specific text would have to be found. *Sharon Ry. Co. v. Erie R. Co.* (1).

The words “expenses of operation of every description” do not let in the obligation to pay the taxes. The payment of the municipal taxes is added to such expenses by the word “including.” And the taxes payable by the contractors are there clearly defined.

Some stress was laid upon clause 4 of the deed. But that is a clause providing for an increase in the rates, if the contractors have to pay more, and there is no undertaking to pay any taxes of any kind. It is not by paragraph 4, but by paragraph 6 that the question of taxes is settled.

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Some clause, some enactment very clear in its purport would have to be found in the deed in question to relieve the defendant from its liability respecting its income tax. It cannot evade this payment unless there is a specific text to that effect, and on a fair reading of the articles of agreement, I find that the language does not disclose an intention to create such a liability. *N.B. and Canada Ry. Co. v. N.B.R. Co.* (1).

Now looking at the substance of the whole transaction, I must come to the conclusion that the true intent and meaning of the deed (par. 12), is that the contractors shall pay the yearly sum of \$165,000 without any guarantee whatsoever as to any dividend to the defendant company. The contractors have thereby undertaken to pay a specific yearly rent and some taxes, clearly defined, but no more; there is no language in the deed under which the contractors could be made liable for the defendant's income taxes.

Neither from the grammatical reading of the agreement, nor from the tenor of that instrument taken as a whole, can there be found any expression or indication of an intention on the part of any of the parties that the burden of the income tax should be borne by the contractors, or any clause lending itself to such interpretation, as importing a liability for taxes of any nature whatsoever. Indeed the taxes mentioned as being payable by the contractors are taxes on the property as distinguished from all other taxes. This rent of \$165,000 is to be paid without any deduction. No extraneous evidence is required to properly understand the Articles of Agreement. The deed presents no ambiguity and there is no occasion to refer to the resolution passed ratifying the deed. *N.B. & Canada Ry. Co. v. N.B. R. Co.* (*ubi supra*).

The respective position of the parties upon this agreement (call it a lease of real estate, or an emphyteutic lease, or a contract for hire of labour—*G.N.W. Tel. Co. v. Montreal Tel. Co.* (2)—as the contractors have a right to sublet, does not much matter) is defined in unambiguous and clear language and cannot lend itself to the interpretation sought here whereby the contractors should pay the de-

(1) [1924] 4 D.L.R. 962 at pp. 964-965.

(2) [1890] M.L.R. 6 Q.B. 257 at p. 261; 20 S.C.R. 170 at p. 172.

defendant company's income over and above the rent paid. This sum of \$165,000 is a charge, an expense, a liability upon the contractors, while it is a revenue in the hands of the company, and the covenant by the contractors to pay taxes in the nature mentioned in the agreement cannot be extended to cover income tax levied upon the lessor-company on the rental paid by the lessee. *N.B. and Canada Ry. Co. v. N.B.R. Co. (ubi supra.)*

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It cannot be denied, it admits no doubt, that the sum of \$165,000 is a revenue in the hands of the defendant company and is a charge and expense in the hands of the contractors. Their relative position is well defined and there is no partnership between them. Under the provision of sec. 4 of The Income War Tax Act, 1917, the tax is levied upon the income of every *person* (and the word *person* includes company). The tax is a personal tax upon the person or company. Were the contractors remitting, as contended by the defendant company, this sum of \$165,000 together with \$16,599.69 and interest, to cover the defendant's income tax, what would be the position of the defendant? Clearly the defendant would receive a higher revenue and would thereby become liable to pay their income tax upon \$165,000 and \$16,599.69, the amount of their revenue or income. This view is supported by a number of decisions.

In the case of *North British Railway v. Scott* (1) the head-note reads as follows:— * * *

The same principle was recognized in the case where the income tax on salaries was voluntarily paid, as the position of the Inland Revenue could not be affected by such arrangements. *Hartland v. Diggins* (2).

I have therefore come to the conclusion that as between the plaintiff and the defendant, nothing in the deed in question, can effect the position of the Revenue and that the defendant cannot evade the payment of its income tax to the state, which I find properly assessed, as explained at trial.

In respect to the relation of the defendant company and the third parties I have come to the conclusion, without

(1) [1922] 128 L.T.R. 394; 1923 A.C. 37.

(2) [1924] 158 The Law Times 428-429.

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entering into the detailed position of each third party, considering it unnecessary in the view I take of the case, that the defendant has failed to establish any right to relief over against the third parties and the claim against them is dismissed with costs. However, on the question of costs I do not see why the G.N.W. Telegraph Co. of Canada and the Western Union Telegraph Company should sever in their defence, and the costs upon that issue should be taxed as if these two parties had joined in their defence, making due allowance for the additional allegations in the pleadings covering the individual facts relating to each party. The admission filed of record shows the relative position of the third parties among themselves and further that the Great North Western Telegraph Company in its income tax return for 1920 showed a deduction of \$165,000 as a fixed expense.

Therefore there will be judgment as follows:—

1. The court doth order and adjudge that the plaintiff recover against the defendant the said sum of \$16,599.69 with the statutory interest thereon from the 30th April, 1921, until payment as provided by sec. 7 of the Act as amended, and costs.

2. The court doth further order and adjudge that the claims made against the third parties herein be and the same are hereby dismissed with costs against the defendant, treating the two distinct issues or sets of pleadings of the Great North Western Telegraph Company of Canada and The Western Union Telegraph Company as if they had not severed in their defence.

Judgment accordingly.

Solicitors for plaintiff: *C. F. Elliott.*

Solicitors for defendant: *Brown, Montgomery & McMichael.*

Solicitors for third parties: *Lafleur, MacDougall, MacFarlane & Barclay.*

NEW BRUNSWICK ADMIRALTY DISTRICT

1925
Jan. 27.

HIS MAJESTY THE KING BY HIS
ATTORNEY GENERAL FOR THE } PLAINTIFF;
PROVINCE OF NEW BRUNSWICK.. }

AGAINST

THE SHIP *WOLDINGHAM*.....DEFENDANT.

Shipping—Navigable river—Bridge—Authority to erect—Navigable Waters Protection Act—Interference with navigation—Damage to bridge by vessels—Burden of proof.

Held: That the right of navigation can only be extinguished by an Act of the Parliament of Canada, and without such authority no one can lawfully put into tidal waters or maintain there anything which is an obstruction or nuisance to the right of navigation.

- 2. That a bridge erected over a navigable river (the Miramichi), in violation of the provisions of the Navigable Waters Protection Act, and without legal authority, constitutes an interference with navigation and thereby becomes a public nuisance, and further that the owner of such bridge cannot recover the damages caused thereto by a person legally passing through the same in accordance with his rights as one entitled to the use of the river for navigation purposes.
- 3. That in any event, such owner could not recover unless a case of negligence and want of due seamanship was made out against the defendant.
- 4. That in view of the old and well established rule that the King neither gives nor takes costs, no costs ordered.

[*The Minnie Gordon*, [1885] Stockton (N.B. Adm. R.) 95 followed] (1).

ACTION by the Attorney General of New Brunswick to recover from the defendant ship the damages done to a bridge erected in 1913-14, by the province and its property, over the Miramichi river, a tidal river, by reason of the said ship coming into collision with the bridge whilst navigating down the river.

The province commenced to build this bridge without having complied with the provisions of the Navigable Waters Protection Act (R.S.C. 1906, c. 115). No plans were then filed with the Minister of Public Works or the Registrar of Deeds for the county. After certain excavations had been done and the caissons had been put in and pumped out and construction work was started, the attention of the Public Works Department of the Government

(1) *Note:* See Petition of Right Act, Expropriation Act, The Income War Tax Act where special provisions as to costs are made. See also Chitty, Prerogatives of the Crown, p. 310.

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of Canada was drawn to the fact that work was going on without authority of law. Thereupon application was made, and plans were filed with the said Public Works Department, and objection having been taken by certain parties interested in navigation on the river, a hearing was had before the then Minister of Public Works for the Dominion, but nothing final was done. No Order in Council was ever passed approving of the construction of the bridge as required by the provisions of the Navigable Waters Protection Act aforesaid.

St. John, N.B., December 16, 1924, and following days.

Action now heard before the Honourable Mr. Justice Sir J. Douglas Hazen L.J.A.

W. B. Wallace, K.C. and *Wm. Ryan* for plaintiff.

F. R. Taylor, K.C. and *C. F. Inches, K.C.* for the ship.

The facts are stated above, summarized from the reasons handed down by the judge, and also in the reasons themselves which follow.

HAZEN L.J.A., now this 27th day of January, 1925, delivered judgment.

(His Lordship first states the facts herein which are summarized above, refers to the pretensions of the parties and also to the above mentioned Act, R.S.C. 1906, c. 115, as amended by 9-10 Ed. VII, c. 44 and 8-9 Geo. V, c. 33, and then proceeds):

It is not alleged by the plaintiff that any such order ever was passed, and so far as the bridge is concerned it has been constructed without the site or plans being approved of, which are essential to its legal construction, and is therefore as it stands to-day in my opinion an unlawful structure.

Now I think it is beyond question that the bridge as erected constitutes an interference with navigation on the Miramichi River. Before its construction vessels could proceed up and down the river freely and wherever the depth of water would permit them to do so. Since the bridge has been constructed their passage is limited to the two comparatively small passageways in the vicinity of 100 feet wide, and this undoubtedly in the absence of legal authority for the construction of the bridge constitutes an

interference with navigation. It is of course clear beyond question that the right of navigation can only be extinguished by an Act of Parliament, and without the authority of Parliament no one can lawfully put into tidal waters or maintain there anything which is an obstruction or a nuisance to the right of navigation and it has further been decided that it is no excuse that the obstruction only occurs at certain states of the tide. It has been held in England that neither the Board of Trade as representing the unit interested in navigation, nor a board of surveyors—can legally authorize any erection in navigable waters which is a nuisance unless acting under special powers granted by Parliament, and no right to obstruct can be acquired by any length of user. The nuisance to navigation may be an actual erection in the soil as in the present case or it may be the mooring of floating structures with which we have no concern at present. I think it may reasonably be concluded that it was the intention by the Navigable Waters Protection Act that the Dominion Government when it gives its consent to plans requiring a draw-bridge, assumes that it will be available for traffic at all times of the tide, i.e. (as contended by counsel for defendant), that where a bridge is put across a navigable river the draw must be available to be opened at all times, not merely at certain times of the tide, and that the bridge will be designed and protected so that the ordinary navigation of the river should not be held up, and this was the intention of the *Navigable Waters Protection Act* in providing that plans of the bridge should be filed with and approved by the Governor in Council. It was I think as contended by him obviously intended that the parties should provide a construction that would not interfere with navigation, and through which vessels could pass without undue hazard at all times of the tide. The bridge, however, apparently was built without due consideration as to the effect it would have upon navigation. It was constructed at an angle with the current, rendering approach to it much more dangerous than if it had been at right angles and especially dangerous considering the physical nature of the river, as about a mile and a half above two large branches of the river join, the waters running towards the southern shore and then across at an angle of the river to the northern shore.

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causing a dangerous condition at the point where the draw-bridge was provided. Before the bridge was built no readings were made or gauges taken of the current at the point where it was proposed to locate the draw and there was no scientific investigation as to the effect the currents would have on vessels passing through, nor to the efficiency of the width of the draw having regard to the size of the steamers that use the river passing up and down to the lumber mills.

In the case of *James v. Hayward* (1), it was held that if a new gate be erected across a public highway it is a common nuisance although it be unfastened, and that any of the King's subjects passing that way might cut it down and destroy it. Now a river is a highway as a road is, and any person placing a structure without authority from the Crown that interferes with the right of passage that all the King's subjects have along that highway may have the nuisance abated by any person whose right is interfered with. I do not for a single moment wish it to be understood that I am suggesting that any person could go there for the purpose of destroying the bridge, but if a person's lawful right of passage is interfered with, he has the right to abate the nuisance, and the person whose nuisance is abated would have no right of action. In his judgment in *Liverpool & North Wales Steamship Company, Limited v. Mersey Trading Company* (2), Neville J., in delivering judgment, said

I will assume that the defendants could not in a court of law recover anything from the plaintiffs for the use of that which in the eyes of the law was a public nuisance.

And in that case it was held that the pier in question, being an unauthorized structure was an obstruction to navigation and a public nuisance, and consequently no statutory rights arose in favour of either the defendants or the public. See also *Orr Ewing v. Colquhoun* (3). The case of *Wood v. Esson* (4) is in point and I think this case falls within its authority. In that case Ritchie C.J., p. 242, said in the course of his brief judgment:—

There can be no doubt that all Her Majesty's liege subjects have a right to use the navigable waters of Halifax Harbour and no person has a legal right to place in said harbour below low water mark any obstruction

(1) 79 Eng. Rep. 761.

(2) [1908] 2 Ch. D. 460.

(3) [1876-7] 2 A.C. 839.

(4) [1883] 9 S.C.R. 239.

or impediment so as to prevent the free and full enjoyment of such right of navigation and defendant having been deprived of that right by the obstructions so placed by plaintiffs and specially damnified thereby would have a legal right to remove such construction to enable him to navigate the said waters by his vessels and steamers and bring them to his wharf.

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Strong J. stated that the title to the soil did not authorize the plaintiffs to extend their wharves so as to be a public nuisance, which upon the evidence such an obstruction to the harbour amounted to, for the crown cannot grant the right to obstruct navigable waters. Nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance. The person may not have the right to abate a nuisance unless he has shown that he is actually injured by it, but in this case the plaintiff had a steamer above the bridge and he undoubtedly in my opinion sustained special injury as the bridge interfered with his course going down the river. According to the plaintiff's own contention in order to come down in safety he might have to wait for a whole tide before doing so and could not come down at all without going through the comparatively narrow space left as a draw, and if anything happened to the bridge in the act of a steamer going down the river and going through the draw it is not liable in any case unless it went with absolute negligence, running into it without any ordinary care at all.

Something was said with regard to the great benefit the bridge was to the public and that the obstruction might be justified on the ground that the public benefit to be derived from it outweighed the interference it causes. But in the case of the *Queen v. Moss* (1), it was held that an obstruction to navigation constitutes a public nuisance though a very great public benefit and the obstruction of the slightest possible degree.

I am of opinion that the bridge was constructed without legal authority, that it undoubtedly constitutes an interference with navigation and thereby becomes a public nuisance and that that being the case the plaintiff cannot recover where the defendant was legally passing through the draw in accordance with his rights as one entitled to the use of the river for navigation purposes. However, whether

(1) [1896] 26 S.C.R. 322.

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this is the case or not, the plaintiff cannot possibly recover without showing that there was negligence on the part of the defendant.

Counsel for the plaintiff, rested his case largely on the authority of the *Harbour Commissioners of Montreal v. The Ship Albert M. Marshall* (1). This was a case brought against the *Albert M. Marshall* for colliding with a dredge that was lying at anchor in the harbour of Montreal and the judgment referred to was that of the local judge in Admiralty. This case confirmed the general rule that a vessel under way is *prima facie* in fault for a collision with a ship at anchor. But I think there are very obvious differences between a ship at anchor and a bridge permanently constructed for a long distance across a navigable river. In the case of the *Marshall* there was 600 feet of clear space on one side of the dredge and 300 feet on the other. The colliding vessel seeing the dredge's lights might easily have passed to one side or the other, and it seems to me there is no analogy between a case of this sort and the one under consideration, and I cannot, acting on the presumption that a vessel under way is *prima facie* in fault for the collision with a ship at anchor, hold that the *Woldingham* was liable in this case without negligence on its part being proved.

In the case of the *Minnie Gordon* (2) that vessel under command of a pilot was entering the Miramichi and came into collision with a lightship that was placed there for the safety of navigation. It was held on the evidence that no fault was attributable to the *Minnie Gordon*, that it was a case of inevitable accident and the case was dismissed. In the case of the *Bolina* (3) Dr. Lushington says

With regard to inevitable accident the onus lies on those who bring a complaint against the vessel and who seek to be indemnified. On them is the onus of proving that the blame does attach upon the vessel proceeded against.

In the *Marpesia* (4) it was held that where in the case of collision the defence is inevitable accident the onus of proof lies in the first instance on those who bring the suit against the vessel and seek to be indemnified for damage sustained, and does not attach to the vessel proceeded against until a

(1) [1908] 12 Ex. C.R. 178.

(2) [1885] Stockton (N.B. Adm. Rep.) 95.

(3) [1844] 3 Note of Cas. 208.

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

prima facie case of negligence and want of due seamanship is shown.

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I therefore hold that under the circumstances of this case, apart from the legal question which I have previously discussed, the plaintiff could not recover unless a case of negligence and want of due seamanship was made out against the defendant.

Now having heard the evidence and considered it, I am of opinion that there was no evidence of negligence on the part of the defendant.

(His Lordship here gives his reasons for so finding and proceeds.)

It will be seen therefore that in bringing the vessel down from Sullivan's Wharf the pilot pursued the practice that might almost be regarded as the established practice on the river, since the bridge was put in. I cannot find where he was negligent in any respect. After turning the vessel bow on, he headed straight for the opening, and would have succeeded in passing without danger had not the yaw against which I cannot see how he could guard, taken place. He states in his evidence that the vessel was going as straight as an arrow until it came to the bridge, and that he could not put her in the draw, which is very narrow, any better. I am not satisfied myself that the draw opening having regard to the size of the vessels that go up and down the Miramichi River, is sufficiently wide for the purpose, but that is a point which I do not propose to determine in the present case.

To my mind, having regard to the way in which the bridge was constructed, to the manner in which the current ran angling across it, the accident was inevitable and that the negligence of the plaintiff in constructing a fender that was not sufficiently substantial or well fitted for the purpose for which it was intended contributed very largely to the damage which occurred. Had it been substantial enough to resist the impact of the side of the steamer, no harm would have occurred to the bridge.

There is an old and well established rule that the King neither gives nor takes costs. I would, if the case were one between two subjects, dismiss it with costs to be paid by the plaintiff but there is no purpose in my doing so, for payment could not be enforced. In the case of the *Minnie*

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Gordon, ubi supra, Judge Watters suggested that upon the matter being properly represented no doubt the defendant's costs would be paid by the Crown, and I commend this suggestion to the counsel in the present case. The same remarks are intended to apply to the defendant's counter-claim.

Judgment accordingly.

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BETWEEN:

JOHN J. WARREN ET AL. PLAINTIFFS;

AND

THE WATEROUS ENGINE WORKS }
COMPANY, LIMITED } DEFENDANT.

Practice—Patents—Infringement—“First, true and sole inventor”—Particulars.

Plaintiffs by their action claim that the defendant is infringing *W's* patent of invention granted to him by the Dominion Government, and *inter alia* allege that the plaintiff *W.* is the first, true and sole inventor. The defendant, before filing its defence, moved for particulars as to the time when and the place where the invention was made by the plaintiff *W.* alleging that it intends to contest the patent on the ground of prior knowledge thereof by others.

Held, that, inasmuch as the allegation of the plaintiffs as to *W.*, being the first inventor was not necessary and was mere surplusage, and further that as the onus is upon the defendant, attacking the validity of the patent, to prove his allegation that others than the plaintiffs were the first inventors, he is not entitled to the particulars asked, and the present application was refused (1).

2. Moreover, that, as in the pleadings one is only required to generally disclose the outline of his contentions, and not to disclose his evidence, such particulars should not be ordered, being in the nature of evidence.

APPLICATION by the defendant for particulars.

Ottawa, February 11, 1925.

Application now heard before the Honourable Mr. Justice Audette in Chambers.

R. S. Smart for the application.

W. Herridge contra.

(1) NOTE.—See *Cave v. Tore*, 54 L.T.R. 515; *Gibbons v. Norman*, 2 T.L.R. 676; *James v. Radnor Cy. C.*, 6 T.L.R. 240; *Roberts v. Owens*, 6 T.L.R. 172.

Per Curiam: Plaintiffs by their action allege that they are the first, true and sole inventors of certain new and useful improvements in methods and apparatuses for grinding pulpwood and that they have been granted a patent for same by the Government of the Dominion of Canada, being No. 225,541, dated 31st day of October, A.D. 1922. The defendant, before filing its defence, applied for an order that the plaintiffs give particulars of their allegations of their Statement of Claim giving the time when and the place where the plaintiff *W.* made the invention in question. Inasmuch as it was unnecessary for the purposes of their action for the plaintiffs to allege that John J. Warren was the first, true and sole inventor of the improvements for which he obtained a patent and as this allegation was surplusage, he should not be forced to give particulars thereof. Moreover, when the defendant in an action for infringement attacks the validity of the patent in question, he becomes plaintiff as regards that issue and the onus of proving that the plaintiff was not the first inventor is upon him. Moreover such particulars are in the nature of evidence, and it is contrary to the practice to order a party to disclose his evidence before trial. In pleadings one is only required to generally disclose the outline of his contentions. Furthermore, to order the plaintiff to give particulars of the date at which he made the invention would be opening the door to perjury. Therefore defendant's application for the particulars in question should be dismissed.

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Judgment accordingly.

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Patents—Infringement—Equivalency—Patentability—Process and product patents—Knitting machines.

Both the plaintiff's and defendant's patents consisted of improvements, in a circular knitting machine, for the knitting into a stocking of what is known as the tapered high spliced or reinforced heel. In the plaintiff's improvement this is achieved by a mechanically controlled yarn or finger guide, which at a pre-determined point brings the splicing or auxiliary yarn to certain needles in the cylinder, the particular means being the yarn guide which feeds the thread to the needles.

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In the defendant's improvement, certain needles are automatically and progressively raised by means of the inter-engagement of jacks with lateral nibs, above the level of the other needles in the cylinder, to engage the splicing thread and bring it to the knitting. The essence of the mechanism in the defendant's improvement, being the inter-engagement of jacks by means of lateral nibs.

Held: That the latter was not the mechanical equivalent of the former and was not an infringement thereof.

2. That when the diversity of two mechanisms performing the same function and producing the same effect, express different ideas of means, the diversity is one of substance, and each of the inventions is distinct from and independent of the other.
3. That the tests of equivalency are identity of function, and substantial identity of ways of performing that function. Where it is obvious that a person has taken an idea or principle described in a patent, and has simply altered the details to escape suggestion that he has taken the same thing, the inventor is entitled to protection.
4. That a fair test of whether a machine is an infringement of a patent is whether a skilled mechanic, without inventive faculty, could have worked out the former from a knowledge of the patent in question.
5. That a person claiming that his patent is being infringed, will be held strictly to the particular mechanical means claimed in his patent, and those having *bona fide* employed a different system are not guilty of infringing.
6. Whether or not a machine is the reduction to practice of a new process, or whether it is a new instrument for the performance of an old process, is to be determined by the state of the art at the date of the invention, and if it is the former a process may be patentable, though the machine may be new, if the latter, only the machine can be patented.

ACTION by plaintiff to have it declared that certain patents granted to it were valid and were infringed by the defendant.

Toronto, December 1, 1924, and following days.

Action now heard before the Honourable Mr. Justice Maclean, President of the court.

R. S. Smart and *J. L. McDougall* for plaintiff.

A. J. Thomson for defendant.

The facts are stated in the reasons for judgment.

MACLEAN J., now, this 27th day of January, 1925, delivered judgment.

This is an action for infringement of patents. The plaintiff, as assignee of one Paquette, is the holder of three Canadian patents, Nos. 230,598; 256,682, and 230,788. These patents cover respectively an improvement in knitting machines; improvements in the process of knitting

reinforced tubular fabric; and the product, a tubular knit fabric with a tapering spliced area, and all are reissued patents. The original patent covered only improvements in knitting machines, and it was to cover the process and the product, that the claims were broadened in this manner. Divisional applications were filed, and the three patents issued separately. It is claimed that the defendant has infringed claims 12, 13 and 14 of the first mentioned patent, that is the machine patent, and all the claims of the process and product patents. The plaintiff has disclaimed, claims 1 to 11 and 26 to 31, inclusive, of patent No. 230,598, the machine patent.

The plaintiff's machine improvements patent, relates to the knitting of hosiery on what is known as the circular knitting machine, and is a mechanism applied to such a knitting machine. The purpose of this mechanism, is for making what in the hosiery trade is usually known, as the tapered high spliced heel. As the tapered high splice so called, figures prominently in this action, it might conveniently here be explained as a reinforced knitting on the back of the heel in the shape of an inverted V. commencing at the corners of the heel pocket, and then upwards to a point, and is applied chiefly to ladies' hosiery, for the purpose of strengthening the same, and also for ornamental purposes. How this process is executed will be later explained.

It is perhaps desirable here to describe in a very general way the process of knitting hosiery on a circular knitting machine. In such a machine, the knitting takes place in a circular motion, the needles, which are carried in a cylinder rotating at a very great speed, are operated upon by certain instrumentalities to effect the stitching. Commencing at the top, the knitting of the body or leg portion of the stocking proceeds continuously, until the heel portion is reached. Then the machine changes over from a rotary motion, to a forward and reverse motion, usually designated as a reciprocating motion. This is accomplished by a series of controls which are parts of the mechanism, and which put a certain number of needles out of operation at the desired time. When the heel is thus completed, the foot portion is knitted just as was the leg portion of the stocking, by resuming the full circular motion until the

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toe is reached. It is not necessary to describe the operation necessary to complete the toe portion, except to say that it is usually done by the same operation as was required in the knitting of the heel.

Hosiery is also knitted on what is called a flat machine, which produces what is called a full fashioned hose, a flat piece of knitted fabric which must be sewn along the back to make a finished piece of hosiery. During this process of knitting, the hose or fabric can be narrowed, at the ankle say, by taking out of operation certain needles and in this way the hose is knitted to the shape of the leg, or it may be fashioned by sewing to the shape of the leg, whereas when produced on a circular machine, the hose is really stretched to shape. The cost of operation of hosiery is greater from a flat machine, than from a circular machine. The tapered high splice can be produced and is produced on a flat knitting machine, in the full fashioned hose, by the insertion of an extra thread or yarn for a series of courses at the edge of the knitted fabric at the proper points. There is apparently a larger market for stockings knit on the circular machine, owing to a lower production cost and hence a lower price, and the plaintiff claims that until his knitting machine improvement was invented, there was not on the market any machine for producing the tapered high splice on a circular knitting machine. There was however, such a thing as the rectangular or square splicing or reinforcement at the heel, known to the hosiery trade, but it is claimed this occasioned no great problem in the mechanism of a knitting machine, because it was only necessary to throw into the body yarn, a reinforcing yarn, at fixed and definite points, and at the same points in each course of the knitting, until the splicing or reinforcing was finished. Besides, it is claimed that the square splicing is not so attractive in appearance, as the high tapered splicing, and consequently does not possess the same selling qualities.

The plaintiff's improved machine known as the Paquette machine, after the name of its inventor, and as such I shall refer to it, represents a mechanism designed for the purpose of knitting in stockings upon a circular knitting machine, the tapered splicing or reinforcement, at the rear of the heel. In the Paquette machine, when the circular knitting arrives at the point where it is desired that the

tapered reinforcement should begin, certain mechanical controls bring into the knitting the auxiliary or splicing yarn, on what is called a yarn guide or finger with which to knit the tapered splicing. The yarn guide or finger is the immediate means of feeding the additional yarn to certain prearranged needles which are to perform the knitting of the tapered splicing. By certain mechanical controls the splicing yarn guide is brought into position for potential operation at the beginning of the splicing, and then controlled on each course of the knitting of the tapered splicing, because at each course, or every two or three courses, a change is necessary in the supply of needles to widen the splicing as it proceeds downwards. Thus in knitting, a commencement is made on a single needle or a narrow group of needles, at the middle of the back of the stocking where the tapered splicing begins, and then progressively needles are added in the succeeding courses in the knitting of the splicing, so that each successive course is a stitch or so longer than the preceding one, the finger or yarn guide carrying the thread to the needles as they progressively come into operation to knit the tapered splicing. In this manner the tapered shape reinforcement is knitted. The splicing yarn it should be said is carried or fed into needles that carry as well the yarn for the knitting of the main body of the stocking, but the splicing yarn is dropped from the needles as each course of the tapered splicing is finished, while the body yarn goes on in its work. That is to say, when each course of the tapered splicing is finished, the splicing yarn is dropped by the needles, but it is carried loosely inside the stocking as a loose or float yarn, until it is picked up again on the next course on the other side, where the tapered splicing again begins. The float yarn requires to be cut out manually after the stocking is completed. I do not think it is necessary to describe in greater detail the mechanism of the Paquette machine.

The defendant is also engaged in the manufacture of knitted hosiery, and in the manufacture of stockings having the tapered splice, uses a machine, usually called the Lawson machine, after the name of the inventor. It was patented, but subsequently to the Paquette machine, and is manufactured in the United States, by Hemphill & Co., the assignees of the patentee, and was designed for the

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same purpose as the Paquette machine, the knitting of the tapered splice. In a circular knitting machine the needles are placed in grooves in a cylinder, which grooves are of a definite width and there is a fixed spacing between each groove. Below the needles and in the same groove there are what are known as "jacks" their purpose being to lift the needles. These jacks have what are called "butts," being a projection on the jack, and which protrudes through the grooves on the outside of the cylinder, but the "jack" and its "butt" is not new. In the Lawson device, the inventor sought through the jacks the means of moving the needles, so as to bring them up progressively to catch the extra yarn when knitting the tapered splice. To accomplish this he made the jacks with a tail the end of which is called a "nib" and which projects through the groove like the butt, and is then bent over laterally around the cylinder, some to the right and others to the left, of what are called "key jacks," that is jacks with longer butts than the other jacks, and which govern the "jack" control. When the time arrives to commence the splicing operation the key jacks are put into engagement by automatic means, and the nibs on the key jacks are such that they will inter-engage with one more jack on one side, and another jack on the other side. That is to say, when the key jacks are raised from an inactive level by controlled mechanism to an active or upper level, the lateral nibs extend far enough over to come into contact with the butt of the next jack. When the key jacks are thus elevated in order to catch the splicing yarn, the short butt jacks on either side are elevated to another level, and on the next revolution of the cylinder, by the agency of cams they are in turn elevated so as to engage the splicing yarn. In this way two needles, one on each side of the key jacks, enter into the knitting of the tapered splice, then two more are added, one on each side, and so on until the limit of the jacks has been reached, and the tapered splicing finished. In this mechanism then, the needles are directly put into motion by the instrumentality of the jacks which are inter-engaging. The needles are thus by mechanical controls introduced progressively, and moved high enough to catch the splicing yarn suspended above the level of the body yarn, and fed through what is called a silent finger because the eye through which

the thread goes to the needle is in a fixed position, and the needles come down in such a way as to catch the body yarn, as well. The essence of the mechanism is the inter-engagement and control of the jacks among themselves.

In the case of Paquette, the splicing yarn and body yarn needles are on the same level, and the splicing yarn finger, an operative element (19 Fig. 1), carries to and takes from certain needles the yarn during the knitting of the tapered splicing, while the cylinder of needles revolves. In the case of Lawson, the needles which take the splicing yarn are first raised to a higher level than the other or body yarn needles, that is to say certain needles go to the splicing yarn and fetch it to the knitting. In the one case the splicing yarn is carried to the needles, in the other the needles go to the yarn. That is the main distinction between the two machines in actual operation. The plaintiff claims Lawson's is a mechanical equivalent of Paquette's. This is the first point for determination.

It may safely be stated as well settled principles in this field of jurisprudence that there are two tests of equivalency, that is identity of function, and substantial identity of ways of performing that function. It is therefore important to consider what is the principle of the invention of Paquette. If an alleged infringer takes the principle and alters the details, and it is obvious he has taken the idea and simply altered the details so as to escape the suggestion that he has taken the same thing, it is clear the inventor is entitled to protection. If the substance is taken, an infringement is committed even if ingenuity is added. The question here is did Lawson take the idea or the essence and substance of Paquette's prior invention.

It is first necessary to determine the true construction of the specifications in the plaintiff's machine patent, in order to ascertain the real invention claimed. A reading of the specifications will not I think, disclose more than a description of auxiliary yarn feeding means, which feed the splicing yarn to a varying number of needles in successive courses of the knitting in one particular way, and there is also described the means of actuation. It was only for mechanism operating in that way for which the plaintiff claimed invention, and for which he secured a patent. It does not appear to me to be sufficiently broad as to have

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contemplated any other means of accomplishing the same thing, except by means which feed the splicing yarn to a varying supply of needles. Then construing claims 12, 13 and 14, which are alleged to be infringed, it also appears clear to me that the claims in each are limited to an auxiliary splicing yarn feed, and means to operate and control the auxiliary yarn feeding means during the period of knitting. I do not think one would be justified in reading into these claims anything more than this, and I doubt if anything more was intended. There is here a specific mechanical improvement claimed, and as laid down in *Curtis v. Platt* (1) and *Seed v. Higgins* (2) the person claiming must be held strictly to that particular mechanical means which he has claimed for effecting the end he had in view, and if he says it is to be done in one precise and particular way, to that precise and particular way he must be held, and those who have *bona fide* employed a different system and a different way must not be held to have infringed.

I do not think the Lawson machine can be said to be the mechanical equivalent, or that it embodies the substance or the idea of the Paquette machine. It is altogether a different means of producing the same result, and there is not room in my opinion for comparing them as they represent two different conceptions of means to a common end. The defendant's counsel Mr. Thomson put it: Lawson received no aid or suggestion in working out his invention from the Paquette improvement, and that no skilled mechanic without the inventive faculty could have worked out the Lawson from the Paquette. That I think is an appropriate way of testing the matter. They are two different mechanisms altogether, and this difference in structure and operation, is evidenced by seeing each in operation as I did. Each in my opinion is a particular agent or means for attaining a certain though common end, and it is not necessary to say which is the better or which expresses the greater degree of invention.

When the idea of means in both inventions is essentially the same, the variation either indicates a different development of this idea by which the latter invention becomes an improvement on the earlier, or is a simple alteration in the

(1) [1866] L.R. 1 H.L. 337.

(2) [1860] 8 H.L.C. 550.

form of its embodiment. The legal doctrine of equivalency should perhaps be further discussed. One text writer discussing this subject states that when the diversity of two mechanisms performing the same function and producing the same effect, express different ideas of means, the diversity is one of substance, and each of the inventions is distinct from and independent of the other. The purpose of a machine may be to produce a fabric of a certain kind, and it may well transpire that in the progress of invention several inventors may have invented different machines producing the fabric by different modes of operation, and in that event each successful inventor might be entitled to his patent. It is not therefore I think correct to say, that because two or more devices operating to the same end or producing the same result, are mechanical equivalents, unless they effect the same substantial purpose by substantially the same mode of operation. The material question therefore, is not whether the same elements of motion or the same component parts are used, but whether the given effect is produced substantially by the same means or mode of operation and the same combination of powers in both machines. If it were otherwise, it seems to me a patentee would have a monopoly of more than he invented. This is I think a fair statement of the principles established by the courts in reference to mechanical equivalents.

With this statement of the law as to mechanical equivalents, and taking also into consideration the construction of the three claims of the plaintiff's patent which it claims to be infringed, and what I deem to be the disclosed differences in the two mechanisms before me, I am of the opinion that the Lawson machine used by the defendant, is not the mechanical equivalent of the plaintiff's. They are different mechanisms and represent different improvements, although the ultimate purpose is the same. Nor is Lawson a mere improvement of Paquette in my opinion.

The plaintiff has also a process patent. The process claimed is described as the automatic knitting of circular knit seamless stockings, consisting in knitting successive courses of circular work for the body of the tubular fabric, and automatically feeding by circular knitting, a single splicing thread to a gradually and automatically varying number of master cam controlled needles, in different

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courses, as the knitting of the body above the heel proceeds, thereby forming a tapering high splice, and floating portions of this splicing thread across the back of the fabric from edge to the other of the tapering high splice at successive courses. In the specifications of this patent it is also stated that any mechanism found suitable may be devised to effect high spliced heels of this type; and any form of auxiliary yarn feeding means may be employed that is capable of intermittent actuation of varying periods of duration, such as the yarn means described in the plaintiff's machine patent. The plaintiff's process patent is therefore much broader than his machine patent. If the process patent is valid it would seem to destroy the usefulness or value of the Lawson patent even though it is not the mechanical equivalent of Paquette, which would be a strange result. The question is not without its difficulties, and it is always difficult to decide, what is a process, which may be the subject of a patent.

Whether or not a new machine is the reduction to practice of a new process, or whether it is a new instrument for the performance of an old process, is to be determined by the state of the art at the date of the invention, if it is the former the process may be patentable, though the machine may be new, if the latter, only the machine can be patented. If a process exists which consists of different steps created by machinery, and there is an improvement in that process caused by a new element added to or taken from the machinery, then, the process existing and being known, the party who added to or took away the part of the machinery might if it were useful, be entitled to a patent, not for the process which formerly existed and was well known, but only for that which had been added to or taken from the mechanism. These principles are to be found in many decisions almost verbatim; and they appear to me to be sound. An illuminating discussion upon the point as to whether it is the machine or the process that is patentable is to be found in Robinson on Patents, and which I think supplies the proper reasoning to be applied to cases of this kind, and I venture to quote it in its entirety. There the author says in a note to be found at page 256:—

Where a process consists entirely in the operation of a machine or other instrument, it approaches so nearly to the function of the instru-

ment employed that several decisions have been rendered identifying it therewith, and hence denying its patentability. But the process and the function are, after all, two entirely separate entities, both in intellectual and physical contemplation; the former being capable of conception apart from any object acted on, the latter not so. The difficulty is another form of the old confusion between the end and the means, and is to be avoided by defining sharply the end to be accomplished, and determining whether the machine or the operation performed by it is the actual means. For if the operation performed by the machine is now in reference to the object upon which it is employed, a new process has been invented; and this is no less true if the machine or instrument employed is new than if it were old, or if the process can be performed in no other known way than by this particular machine. While on the other hand, if the operation is known in reference to the object, the invention of a new machine for performing it does not make a new process, but only a new instrument for applying it. Thus in the art of planing lumber, if the end to be accomplished were the smoothing of the boards and there were no known methods of attaining this end, the process of smoothing by removing inequalities would be a means, and the inventor of this process would be entitled to a patent for it, no matter what method he may have employed. But it being once apparent that smoothness could be effected by removing inequalities, the removal of inequalities becomes the end, and a process for removing them the means; and if the process now invented for that purpose be the cutting of the surface by a group of knives applied in a certain speed or order of succession, this also, as a new means is a new invention. This peculiar excision of the surface now becomes an end, and every machine devised for performing it a means, and at this point invention passes from process into instrument, and every subsequent invention for the same end is only as broad as the new character of the instrument produced. Whether or not a new machine is the reduction to practice of a new process, or is a new instrument for the performance of an old process, is therefore to be determined by the state of the art at the date of the invention. If it is the former, the process is patentable, though the machine be new. If the latter only the machine can be allowed the protection of the law.

It is to be noted that in both the Paquette and Lawson machine patents, the same were improvements in knitting machines, and cannot I think in any sense be said to be pioneer or primary patents. There was not any invention in the conception of the tapered splicing or reinforcing itself, that was old. As a figure or design it was comprehended in the Beers design patent referred to in the evidence, and now expired. Again this form of reinforcing was known to be made on a flat machine, and also in a modified form at least by the reciprocating method. It was also anticipated by other patents, notably the British patent to White and Mills. The ultimate purpose of both Paquette and Lawson was by mechanical means to introduce an auxiliary yarn into needles progressively in a circular knitting machine, and was nothing more than a means

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to an end well known, or instruments for the performance of process that had been disclosed in the prior art. In neither case can it be said that the machine reduced to practice a new process, and in both cases the process is identical with the *modus operandi* of the machine, which alone, may be regarded as subject matter for letters patent. I am of the opinion, therefore, that the plaintiff's patent relates to mechanism, and any process involved therein is subsidiary to mechanism. The machine was the primary conception. The idea of the act to be performed was well known, was known to both Paquette and Lawson, the evidence is clear upon this; the idea of special means to be employed in performing a well known end was what concerned them. In each case, it is the machine and not the operation performed by it, that constitutes the actual means. I am therefore of the opinion that the plaintiff's process patent No. 230,788 cannot be sustained.

With the process patent thus disposed of, it logically follows I think, that the product patent falls. If a product is known to the trade, its production by a new process or new instruments cannot make it new. A manufacture is not new and patentable until the creative act in which it originated, is distinct from that required to invent the process or apparatus by which it is made. *Union Paper Collar Company v. Van Dusen* (1); *Kopp v. Rosenwald* (2). The stocking with the tapered splice was not unknown prior to the plaintiff's patent, though produced by a different means. It was disclosed in the full fashioned machine product to which I have already referred, and making the same product on a circular machine does not, I think, make it a new product. Place, (U.S. 466 372) disclosed means for making a high splice with a reinforcing thread, by reciprocated knitting on a circular machine. Mettler, (U.S. 862,575) discloses and describes a stocking with a tapered high splice. White and Mills (British 13,755), very clearly disclosed the tapered high splice where the reinforcing thread is broken in each course and reintroduced on the next course. These patents may not have attained commercial success, but they nevertheless disclosed the idea of

(1) [1874] 90 U.S. (23 Wall.) 530,
 at p. 563.

(2) [1900] 19 R.P.C. 205, at p.
 211.

the tapered splicing. In this case I do not think the product can be said to be the result of the exercise of an art invented by the plaintiff's assignor. I am therefore of the opinion that the plaintiff's patent as to product is invalid.

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With the conclusions I have already reached there is not I think any necessity of dealing with other points that were discussed during the trial of this cause. The plaintiff therefore fails in his action for infringement and the defendant shall have his costs. The patents as to process and product shall be disposed of in conformity with this judgment.

Judgment accordingly.

Solicitors for plaintiff: *Fetherstonhaugh & Co.*

Solicitors for defendant: *Tilley, Johnston, Thomson & Parmenter.*

IN RE THE INCOME WAR TAX ACT, 1917,

AND

JAMES B. McLEODAPPELLANT;

AND

THE MINISTER OF CUSTOMS AND
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Revenue—Contingent interests—10-11 Geo. V, c. 49, sec. 4—Tax free bonds—Carrying on business.

C. died in 1912, and by his will left all his property to trustees to sell and convert the same into money. He directed that after payment of debts, etc., the residue and income therefrom, be accumulated for 21 years following his death, in the interval certain annuities to be paid to his children, one son and two daughters, out of this income. At the expiration of this term the accumulated trust fund was to be equally divided among the said children, and in the event of any of them having previously died, his share was to be distributed among the grandchildren, if any, as the trustees thought best. The son died in 1920 without issue, and one sister, unmarried, resided in the United States. The other sister had three children under 21, who would be entitled to the one-third share of the estate which fell into the trust on the death of the testator's son, and, in the event of no other grandchildren being born would receive the whole of this one-third share, etc.

Held, That the income of this accumulating fund was "income accumulating for the benefit . . . of persons with contingent interests" within the meaning of The Income War Tax Act, 1917, as amended by 10-11 Geo. V, c. 49, sec. 4 and was taxable under the said Act.

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2. That there is no principle of law defining what is the carrying on of a trade or business, this being always a question to be decided on the facts in each case. That the sale by trustees of lands in an estate, under the provisions of a will, was a mere accrual of capital and possessed none of the elements of a business, and no part of the proceeds can be called "annual net profit or gain."
3. Dividends from tax-free bonds must be fully deducted and as a class of income cannot be charged with any fractional proportion of other authorized deductions.

APPEAL from the decision of the Minister assessing certain accumulated revenues of estate of the late John Curry.
 Ottawa, January 8, 1925.

Appeal now heard before the Honourable Mr. Justice Maclean, President of the Court.

A. C. McMaster, K.C. for the appellant.

C. F. Elliott for the respondent.

The facts are stated in the reasons for judgment.

MACLEAN J., now, this 4th day of February, 1925, delivered judgment.

This is an appeal from an assessment made against the appellant, surviving trustee of the estate of John Curry, deceased, for the year 1921 under the provisions of The Income War Tax Act, 1917.

John Curry, of Windsor, Ontario, died in 1912, and by his last will and testament devised and bequeathed all his real and personal property wherever situate, to three trustees, to sell and convert into money, and after the payment of his debts, funeral and testamentary expenses, and various pecuniary legacies, directed that the residue of his estate and all the income arising therefrom be accumulated for a period of twenty-one years from the date of his death, and out of such income he directed that certain annuities be paid to his three children, Charles Francis Curry, Verene May McLeod and Gladys A. Curry, during the said period, and at the expiration of such period that such accumulated trust fund be equally divided amongst his three children, and in the event of the death of any of them during such period, the share of the one so dying be distributed among his grandchildren, if any, at the time of the division of the estate, and as the trustees should think best.

The testator's widow died in October, 1912, and his son Charles Francis Curry died in March, 1920, leaving him

surviving as his only heirs and next of kin, his widow, and his two sisters, Verene May McLeod and Gladys A. Curry. The latter Gladys A. Curry is now a resident of the United States, living in the city of New York since 1915, and is still unmarried. Verene May McLeod has three children, namely: John C. McLeod, Frances V. McLeod and Gladys E. McLeod, all infants under the age of twenty-one years, who will be entitled to the one-third share of the deceased's estate, which fell into the residuary trust fund on the death of the testator's son Charles Francis Curry, and at the time of the division of the estate, and in the event of no other grandchildren being born during the accumulation period, will be entitled to receive the whole of the one-third share in such proportions as the trustees may decide.

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The principal question involved in this appeal is whether or not the income of this accumulating fund is subject to the income tax, and also whether the latter portion of sec. 3, ss. 6 of the Income War Tax Act, as enacted by Chap. 49, sec. 4, 1920, is here applicable.

Every person residing or ordinarily resident in Canada is liable to the income tax (sec. 4), and *person* is defined as

any individual or person and any syndicate, trust, association or other body or any body corporate * * * and their heirs, executors, administrators * * * or other legal representatives of such person,

sec. 2, ss. (d). The only incomes excepted from taxation are to be found in sec. 5. Under sec. 3, ss. 1, *income* includes the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks or from any other investment, and whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source; including the income from, but not the value of property acquired by gift, bequest, devise or descent. Sec. 3, ss. 6, is as follows:—

The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period. Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests, shall be taxable in the hands of the trustees or other like persons acting in a fiduciary capacity, as if such income were the income of an unmarried person.

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The appellant claims: (1) that the assessment wrongfully assesses him for all the accumulating income in his hands for the year 1921, after the payment of the annuities, mentioned in the deceased's will, as if such income were given to an unmarried person on the grounds that the bequest to the said Verene May McLeod and Gladys A. Curry are vested in the said beneficiaries subject only to be defeated by their death before payment over and, that the income accumulating in trust cannot be said to be for the benefit of unascertained persons nor for the benefit of persons with contingent interests, within the meaning of subsection 6 of section 3 of the Income War Tax Act, 1917: (2) that the one-third share of such accumulated income to which the said John C. McLeod, Frances V. McLeod and Gladys E. McLeod, children of the said Verene May McLeod, will be entitled at the end of the accumulation period, is going to parties who are now in being, and who will receive the whole of such one-third share in such shares as the trustees may appoint, and that such accumulated income cannot be said to be so accumulating for the benefit of unascertained persons, within the meaning of the said section; (3) that in order to make the trustees of a will liable for income being accumulated in trust, the provisions of the will, or other instrument, should be for the benefit wholly for unascertained persons or wholly for persons with contingent interests, and that the provisions of the deceased's will are not for unascertained persons nor for persons with contingent interests; (4) that as such bequests are not wholly for unascertained persons, or wholly for persons with contingent interests, the provisions of sec. 3, ss. 6, should be strictly construed against the Crown and in favour of the subjects sought to be taxed.

Mr. McMaster placed much reliance on *Taylor v. Graham* (1) as to what constitutes a vested interest and what a contingent interest. The ruling principle in the construction of testamentary deeds is the testator's intention, and that is to be gathered from the words used in the instrument, and that rule applies to the construction of statutes, but an intention must not be assumed apart from the language of the instrument or the statute itself. In

(1) [1878] 3 A.C. 1287.

Taylor v. Graham an estate was held to be vested because such was presumed to be the testator's intention, and there was nothing in the testamentary deed to rebut that presumption. Upon that ground a particular interest was held to be a vested interest. I doubt, however, if that decision assists in determining whether the Income War Tax Act makes the income of this fund liable to taxation, that depends upon the proper construction of the whole Act itself. At first I was of the impression that Mr. McMaster's contention as to the construction of sec. 3, ss. 6, was correct, but after consideration I have reached the conclusion that the fund is liable to taxation although I realize that the other view is not without force. The general scheme of the Act is clearly to tax all incomes except such as are by the statute specifically excepted. The question then is, does the statute clearly provide for the taxation of this income. Every person ordinarily resident in Canada is liable to the income tax. "Persons" according to the interpretation clause of the Act includes "trust." It is clear therefore that a trust, such as is here in question, is a "person" within the statute. Disregarding altogether sec. 3, ss. 6, the Act would seem to cover the income of a trust, such as is found in this case. There would not appear, as a matter of policy, any reason why it should be excepted, and there is no statutory provision excepting it. What then was the purpose of sec. 3, ss. 6? Before a tax may be validly assessed there must be a person certain against whom it may be clearly levied. Where income accrues to the credit of a beneficiary of a trust, an ascertained person, he or she is clearly taxable. The first part of sec. 3, ss. 6 was enacted so as to make it clear that the beneficiary was liable even if the income was not received by the beneficiary during a taxation period. It was necessary, however, to provide for the case where the income did not presently accrue to the credit of a beneficiary of a trust, or where it was accumulating for unascertained persons, or persons with contingent interests. It seems to me that the latter part of this section was designed to designate where in such cases the income should be taxed. The section does not, I think, purport to initiate or impose fresh taxation upon a new class of income. A reading of the section would indicate a presumption that this had already been done elsewhere in

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the Act. The Act, prior to this amendment was defective in that it did not provide where the income should be taxed in such cases as the one at bar, and in order to make a valid assessment, it was necessary to designate by statute where the income in such cases should be taxed. This section was meant to make clear where income should be taxed when it was accumulating for unascertained persons, or for persons with contingent interests, or in other words where it was not accruing annually to the credit of known beneficiaries. I think the words "contingent interests" was intended to cover the case where no person had a present and ascertained interest, in the income for any taxation period. It seems to me that all the beneficiaries are persons having a contingent interest in the fund. The surviving children must live until 1933 before they will have a determined interest in the fund. This is a contingent interest. If any of the children of the testator die before 1933, or at the time of the division of the estate, their interest is divided among the grandchildren, the number of which is contingent, as it may be added to by birth or cut down by death, and the manner of division among the grandchildren is even contingent upon the decision of the trustees, who are directed to divide the same among the grandchildren as they see fit. The manner of division among the grandchildren is not controlled by the terms of the will. If the income is vested subject to be divested, as Mr. McMaster contended, this necessarily imports I think, a contingent interest, as contemplated by the statute. I think this is a case of persons holding "contingent interests," within the meaning and intention of the statute, and the section directs where the income shall be taxed, namely in the hands of the trustee, and also that it shall be taxed as if it were the income of an unmarried person.

Further the words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment, and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion in which they are used, and the object to be attained. If there are circumstances in the Act showing that the phraseology is

used in a larger sense than its ordinary meaning, that sense may even be given to it. Maxwell on Statutes at page 95. In dealing with matters relating to the general public, statutes are presumed to use words in their popular sense. If the object of an enactment had reference to the subject of wills, or the distribution of property, the word "contingent" might possibly be construed to have a different meaning than the same word would have in a general statute, such as is under consideration, where it should, I think, be construed in a popular and not technical sense.

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Altogether I am of the opinion that this income is taxable, and in the manner and at the rate provided in sec. 3, ss. 6.

The testator described himself in his will as a banker. He carried on a private banking and insurance business at Windsor. This would appear to have been his chief business. During his lifetime he bought large tracts of land in or near the city of Detroit, in the state of Michigan, U.S.A., and had contracted from time to time for the sale of lots comprised within such tracts, under articles of agreement for sale, by which the purchase money and interest were payable in monthly or other periodical instalments over a period of years. For the purpose of properly conducting and managing this part of his affairs, the deceased opened an office in the city of Detroit, and the trustees under his will having taken out ancillary letters probate, in the state of Michigan, continued such office, but with a much reduced staff of employees, for the purpose of collecting the purchase money and interest derivable from the lots so sold by the deceased in his lifetime, and for the purpose of effecting the sale of lands unsold at the time of deceased's death. For the purpose of accelerating the sale of some lots of land, the trustee built a few houses, and he also built sewers and sidewalks for the same purpose. A considerable number of lots of land and some buildings still remain unsold, but I am satisfied the trustee is disposing of the same as rapidly as purchasers are found for the same.

The Crown contends that in connection with these lands the trustee is carrying on a business, and the annual net profits arising therefrom are taxable. Under the provisions of the will the trustees are not bound to sell the property coming into their hands immediately, or within any particu-

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lar time, but it was left to their discretion to sell from time to time, as they deemed prudent and in the financial interest of the estate. They are permitted to sell for cash or credit, or to take mortgages on account of the purchase money and which may be held as investments to form part of the accumulating fund. They are permitted also to improve any real estate either by building or other improvements on the land, or by repairing existing structures on the land, or by altering the character of the property so as to maintain the value or prevent depreciation thereof.

Since the property came to the trustees by bequest, with the general directions to sell and convert the same into money, and at the end of a stated period to distribute the estate, I do not think it can be said that the trustee is carrying on a business with a view to profit. The business of the trustee is to close and distribute the estate, and he is thus required to dispose of the real estate, as quickly as possible and as prudence dictates. There is no principle of law defining what carrying on a trade or business is, and it is always a question of fact to be decided by the particular facts of each case. It appears to me that the sale of the testators' lands is a mere accrual of capital, and possesses none of the elements of a business and no portion of the proceeds from sales of land can hardly, in the circumstances, be called annual net profit or gain. According to the evidence the properties sold are usually paid for by instalments, with interest, and these instalments can hardly be claimed to be in part profits or gains, but merely the payment of a debt by instalments, or payments of money due as capital, and the Act has made no provision for such a case. Neither has the Act made any provision for computation of profits for the case where capital is found in company with profits, if any, such as in this case. *Foley v. Fletcher* (1). Whatever might be said in support of the Crown's contention if the testator were still alive, and doing in this connection what the trustee is now doing, it can hardly be said that it is part of the business of the trustee, to deal in lands for profit. I am not sure that even in the lifetime of the deceased it could be said that it was part of his business to deal in lands or that the annual profits

(1) [1858] 3 H. & N. 769, at p. 777.

from the same could be regarded as annual income, and taxable. It looks more like an investment of capital by the deceased, and the profits on appreciation of capital. The trustee is not making further investments in real estate, and any expenditures made as already stated, with the view of accelerating the sale of lands cannot in view of all the facts of the case, be said to modify the essence of this statement. *Tebrau v. Farmer* (1); *Inland Revenue Commissioners v. Korean Syndicate Ltd.* (2); *Von Baumach v. Sargeant* (3). Therefore I am of the opinion that profits, if any, arising from the sale of these lands are not taxable.

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Certain Canadian Government Victory Bonds, which are tax free, are among the assets of the estate, the annual dividend from which amounts to \$1,650. The trustee has not been allowed a deduction for the full amount of such dividend, but only for \$1,335.82. This result is produced by apportioning the two annuities of \$8,000 each paid to Verene May McLeod and Gladys Curry, among the three classes of income received by the estate, that is to say, from the tax free bonds, from shares held in Canadian corporations and where the normal tax is paid by the corporation, and all other income where the normal tax and surtax is paid by the taxpayer. The manner in which the proportions are worked out need not be explained. The appellant claims he is entitled to a deduction for the full amount of income received from the tax free bonds. In the method of apportionment adopted, a deduction of \$314.18 is made from the full amount of this income. This is clearly wrong. The appellant is by statute entitled to the full deduction, and any attempt to cut it down in this way is manifestly against the explicit provisions of the statute.

It was agreed upon the hearing of the appeal, that I need only decide the three foregoing points. If the remaining points raised in the appeal cannot be agreed upon between the parties, the right is reserved to refer the same to me later.

There will be no order as to costs.

Judgment accordingly.

- (1) [1910] 47 Sc. L.R. 816 at p. 819. (2) [1920] 1 K.B. 598, Rowlet J. at p. 603.
 (3) [1917] 242 U.S. 503, at p. 516, par. 2.

BRITISH COLUMBIA ADMIRALTY DISTRICT

1924
 Dec. 15.

THE WM. DONOVAN STEAMSHIP }
 COMPANY } PLAINTIFF;

AGAINST

THE SHIP *HELEN* DEFENDANT.

Shipping—Collision—Narrow channel—Apprehension of danger.

The *D.* and the *H.* were both going out to sea, down the north channel of the Chehalis river, the *D.* preceding. When the *D.* was between 600-700 yards ahead, the *H.* going at 8 knots over ground slightly faster than the *D.* she signalled her intention to pass to port, which was answered by the *D.* The *H.* had not "passed" the *D.* at any time before collision, though 45 minutes elapsed between her signal and the collision, though she could have done so if she chose. Both were on the wrong side of the channel, viz., the south side, (Art. 25). At buoy 6, they were practically abreast, running parallel courses with no danger of "crowding," the channel being here 2,200 feet wide, but quickly narrowing, being only 1,200 feet, $\frac{1}{4}$ of a mile away. The weather had become "misty," and from here both made for the same point to clear No. 4 on the north, and they came into collision almost immediately before said buoy. Each blames the other for bearing down upon her.

Held: On the facts, that the collision herein was due to the unseamanlike conduct of both vessels in misconceiving, instead of promptly appreciating the dangerous position that had come upon them when abreast and about to enter a quickly narrowing channel, but primarily to both being on the wrong side of the channel, and that both vessels were equally to blame.

ACTION for damages by the owners of the *Wm. Donovan* arising out of a collision between the *Wm. Donovan* and the ship *Helen*.

Vancouver, August 20, 21, and 22, 1924.

Action now tried before the Honourable Mr. Justice Martin L.J.A.

E. C. Mayers for the plaintiff.

W. M. Griffin and *Sydney Smith* for the ship *Helen*.

The facts are stated in the reasons for judgment.

MARTIN L.J.A., now, this 15th day of December, 1924, delivered judgment.

This is an action for damages brought by the owners of the U.S. motorship *Wm. Donovan* (length 243 feet twin screw, Malmgren, Master), against the Norwegian SS. *Helen* (length 413 feet, Ommunsden, Master), arising out of a collision between the two vessels near Point Chehalis

Gray's Harbour, state of Washington, U.S.A., on the 10th of April last about 5.15 in the afternoon.

It appears that both vessels were going down the north channel of the Chehalis river out to sea, the *Donovan* preceding and at about 4.15 the *Helen* gave the proper signal to the *Donovan* then about 600-700 yards ahead, that she intended to pass her on the port bow, which signal was properly responded to, and the *Helen*, which was going at a speed of about 8 knots over the ground, slightly faster than the *Donovan*, did overtake the *Donovan* at No. 2 red buoy upon rounding the spit, but the exact position of the vessel then is so much in dispute, though not very material, that all I am satisfied of is that the *Helen* at most had not in the meaning of Art. 18 "passed" the *Donovan* at any time before the collision, despite the fact that she had given the passing signal about 45 minutes before, and could have done so if she chose, which is one of the two outstanding and material peculiarities of this case, the other being that for some unexplained reason both ships were on the wrong side of the narrow channel, i.e., the south instead of the north as required by Art. 25 (Vide *Bryce v. Canadian Pacific Ry. Co.* (1), and although neither of the ships attacked the other on this breach of the regulations, during the course of the trial, probably because it was mutual, yet it has a very important bearing upon the solution of the difficult question which has arisen.

At the time the vessels were at No. 6 red buoy their position was that they were practically abreast, the *Helen* being within 40-50 feet of the buoy and the *Donovan* about 300 feet further out in the channel and running on courses practically parallel, and that situation was beyond question, without danger to either ship. Up to that time no "crowding" had occurred on either side and none was even complained of. But there then arose the apprehension of danger because the channel at a short distance ahead, about $\frac{3}{4}$ of a mile, at No. 3 Can buoy, became greatly contracted narrowing down to 1,200 feet from 2,200 at No. 6 and so continuing till No. 4 buoy (a $1\frac{1}{2}$ m. from No. 6) and greater caution would have to be observed, emphasized by the fact that the weather had become "misty" as the defendant

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(1) [1909] 13 B.C.R. 96 & 446; 15 B.C.R. 510; 13 Ex. C.R. 394.

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says, or "hazy with rain" according to plaintiff, in their respective preliminary acts, to such an extent that the *Donovan's* officers assert that they could not see No. 4 buoy as she passed No. 6 buoy, and she had on account of the haze, been on a course S.W. by W. $\frac{1}{2}$ W. after passing Can buoy No. 5, which was altered to W.S.W. about $\frac{1}{3}$ of a mile after passing No. 6, when No. 4 was at least clearly seen, which course, if laid, would bring her clear to the north of No. 4 and of the *Helen*; but from the *Helen*, in a more southerly position, her officers assert that No. 4 could be plainly seen from No. 6, and so their ship was held persistently steady on a course for that buoy but so as to clear it on her port side.

It will be thus seen that both vessels being on the wrong side of the rapidly narrowing channel were admittedly heading for the same point the situation being complicated by the fact that while the *Helen* had assumed the obligation of a passing ship she was not discharging it, and was pursuing a course which, if both ships maintained their speed, would bring her into dangerous proximity at least to the *Donovan* if they both continued to keep to the wrong side of the channel, though by Art. 24, it was her (the *Helen's*) duty to "keep out of the way of the overtaken vessel." On the other hand, the *Donovan* could not in the circumstances of the constantly varying courses of the narrow channel properly insist on keeping her original "course" as well as her speed (which latter she was doing), within the true meaning of Art. 21 as regards the other technically, though not actually a "passing vessel," under Art. 18, Rule VIII even though she was placed in a position of uncertainty by her strange conduct; the truth is that by a common violation of Art. 25 the ships had created a situation not contemplated for or provided for by the articles.

Each side attributes the collision to the other ship bearing down upon her suddenly almost immediately before No. 4 buoy was reached, the collision occurring almost abreast of it and about 280-350 feet to the north, and, after a careful study of the evidence I find it impossible to attempt to reconcile the conflicting body of testimony given in support of the respective contentions or to accept in entirety either of the irreconcilable accounts of what occurred. The case is a very unusual and perplexing one which has caused

me corresponding consideration with the result that the only conclusion that I can arrive at, satisfactory to myself at least, is that the collision was caused by the unseaman-like conduct of both vessels is misconceiving instead of promptly appreciating the dangerous position that had quickly come upon them at No. 6 buoy, primarily caused by their being on the wrong side of the channel, and the other circumstance above mentioned, and in not having promptly taken proper steps to avoid such danger which there was ample time for both parties to take, by *e.g.*, slackening speed and sheering off adequately or otherwise as the circumstances might require, and it is incomprehensible to me why they were not so taken, instead of continuing to blunder along towards obvious danger till too late for extrication, the belated attempts to accomplish which, while not then open to criticism, unfortunately came too late. In such circumstances the only appropriate decree to make is that both vessels are equally in fault and consequently should bear the damage thereby occasioned in like proportion, as well as the costs of this action.

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Judgment accordingly.

BETWEEN:
 W. J. ROWE ET AL.....PLAINTIFFS;
 AND
 H. S. THOMAS.....DEFENDANT.

1925
 Mar. 7.

Practice—Security for costs—Patents—Conflicting applications.

Plaintiffs and defendant each applied for a patent of invention in the Patent Office, and the Commissioner having declared there was conflict, plaintiffs brought action before this court to have the matter of this conflict decided and to have it declared who was the first inventor.

Held: that, as in such an action each party is seeking affirmative relief and as such each party is as much plaintiff as the other, therefore, the defendant becoming quasi plaintiff, if he resides out of the jurisdiction may be ordered to give security for the plaintiffs' costs.

APPLICATION by plaintiffs for an order that defendant give security for costs of the plaintiffs.

Ottawa, March 6, 1925.

Application now heard before the Honourable Mr. Justice Audette in Chambers.

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Livius Percy Sherwood for plaintiffs.

R. S. Smart for the defendant.

The facts are stated in the reasons handed down.

AUDETTE J., now this 7th March, 1925, delivered judgment.

This is a case of conflicting applications for a patent of invention, wherein the plaintiffs have taken,—under the provisions of section 22 of the Patent Act—proceedings in this court, instead of going to arbitration, for the determination of the conflict.

The statement of claim and the statement of defence are both filed and the plaintiffs now make an application for an order directing the defendant to give security for the plaintiffs' costs.

There is no hard and fast rule as to what are the circumstances under which an order for security for costs should be given (25 Hals. 515). And it is well recognized that in ordinary actions a defendant is not to be compelled to give security for costs, because as a general rule he is compelled to litigate.

However, the substantial and not the nominal position of the parties must be looked at carefully before arriving at any conclusion. Indeed in some cases, when the defendant becomes quasi a plaintiff, as in replevin, and he resides abroad, he may be compelled to find security for costs, as was ordered in *Selby v. Cruchley* (1). The defendant may also be compelled to give security in an interpleader issue. Chitty's Arch. Practice, 14 ed. 398. In *La Compagnie Générale d'Eaux Minérales et de Bains de Mer* (2) both parties being resident out of the jurisdiction, both were ordered to give security for costs, in an application for the rectification of the register of trade-marks.

If the present plaintiffs had not, by being more diligent, instituted this action, the defendant might have done so himself and become plaintiff, while claiming absolutely what he is now claiming by his defence. The defendant's position to-day cannot, under any principle, be distinguished from an ordinary plaintiff; he is, alike the present plaintiffs, seeking affirmative relief by his plea. Each party in the present action is as much plaintiff as the other

(1) [1820] 1 B. & B. 505.

(2) [1891] 3 Ch. 451 at 458.

and each is asking to be declared the first and true inventor of the invention in question and that a patent issue therefor.

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See also *Canadian International Mercantile Agency v. International Mercantile Agency* (1); *Sinclair v. Campbell* (2); *Williams v. Crosling* (3); *Knickerbocker Trust Co. v. Webster* (4).

Therefore, it is hereby ordered that the defendant do, within four weeks from the service of this order, give security on his behalf in the sum of \$400 to answer the plaintiffs' costs of the action, and that all proceedings be in the meantime stayed.

Ordered accordingly.

BETWEEN:
THE SALADA TEA COMPANY OF } PLAINTIFF;
CANADA LIMITED }
AND
ANNE KEARNEY DEFENDANT.

1925
Feb. 16.

Trade-Marks—Infringement—General appearance—Deception—Fraud—Intention to deceive.

The defendant adopted for the sale of her tea a wrapper of the same material and size as that of the plaintiff, with a label identical in design and colour thereto and with practically the same literature, save *inter alia* that the word "Imperial" was substituted for the word "Salada."

Held, that where the general appearance of defendant's trade-mark and label taken as a whole may lead the unwary and uncautious purchaser to take the defendant's goods thinking they were the plaintiff's, notwithstanding the substitution of the word "Imperial" for that of "Salada," the defendant's trade-mark and label will be adjudged to be an infringement of the plaintiff's.

2. That in a case of infringement it is not necessary that improper motives or fraudulent intention be made out; the only question is whether or not the alleged infringing mark is likely to mislead and deceive the public.

Quære: Is not the fact that a person in adopting a trade-mark deliberately copies another's, as in this case, in itself evidence of an intention to obtain unfair trade advantage and to profit by the other's reputation.

ACTION by the plaintiff for an injunction against the defendant.

(1) [1904] 4 Ont. W.R. 338.
(2) [1901] 2 Ont. L.R. 1.

(3) [1847] 3 Com. B.R. 957.
(4) [1896] 17 Ont. P.R. 189.

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January 28, 1925.

Action now tried before the Honourable Mr. Justice Audette at Montreal.

A. R. McMaster, K.C. for plaintiff.

A. Vallée, K.C. for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 16th day of February, A.D. 1925, delivered judgment.

This is an action to restrain the defendant from infringing the plaintiff's

specific trade-mark to be applied to the sale of tea, and which consists of the word

SALADA

The trade-mark, as per the application for registration and the labels (blue, gold, red and green), annexed thereto, consists of a package preferably put up in the form of a paralleloipedon, prism, or prismoid, having a label on which is printed in *block* type the fanciful or arbitrary word "Salada" in quotation marks and surrounded by an inner border of gilt, and an outer border of colour, the labels of different qualities of tea or different priced tea being printed in different colours on a white background. The essential features of the trade-mark are:

1. The arbitrary or fanciful word *Salada*.
2. The quotation marks.
3. The label having the arbitrary or fanciful word "Salada" printed in block type in coloured ink on a white background, and surrounded by an inner border of gilt, and an outer border of colour.
4. The general appearance of the package above described and the labels of the different qualities of tea or priced teas printed in different colours.

This trade-mark was registered in Canada on the 15th June, 1897.

The plaintiff ever since 1897 has been carrying on a very extensive tea business and has built up a considerable trade and good-will with his trade-mark *Salada* which has acquired a substantial trade reputation. To the buying public in Canada this trade-mark has a special and distinctive meaning when used in connection with tea and in the mind and eyes of the public has become a name or mark distinguishing the plaintiff's tea from all other teas sold or offered for sale.

The plaintiff's total sales for last year amounted to approximately \$7,000,000, after having expended, in nine years, for advertising, the sum of two millions and a half dollars.

The plaintiff's tea sales are exclusively by packages, none in boxes and the price is always marked on the package.

Now, the plaintiff's trade-mark is unquestionably very valuable and the defendant is charged with infringing it. Did the defendant by using her mark attempt to sell her tea as that of the plaintiff or did she think of gaining a trade advantage by adopting and using a label which, in shape, colour, form, and general "get up" and dressing, resembles that used by the plaintiff, though distinguishable from it by the word "Imperial" and other small details?

The question is whether the uncautious, the unwary purchaser will be confused by the defendant's mark, thinking it is the plaintiff's, with resulting loss of business to the latter and gain and trade advantage to the former through disloyal competition. (*Liebig's Extract of Meat Co., Ltd. v. The Chemists' Co-Operative Soc. Ltd.* (1)).

A sample of the plaintiff's trade-mark has been filed as exhibit No. 2 and that of the defendant as exhibit No. 3.

The essence of a trade-mark is distinctiveness and this cardinal requirement is wanting as between the two marks.

One has to bear in mind that the danger to be guarded against in a case of infringement is that the purchaser, the public,—as distinguished from the wholesale and retail dealers—seeing one mark by itself might be confused thinking it to be the same as another which he has seen before and that the purchaser will not see the two marks side by side so as to note the differences.

An observation of the two labels will reveal the marked similarity between them, not only in general effect but in the detailed designs.

The presentation of exhibits Nos. 2 and 3 will reveal to the observer that both packages are wrapped in absolutely the same manner, in tin-foil, that the very words "Salada" and "Imperial" are both in block letters of the same size, and colour, the blue being similarly disposed and surrounded by a band or stripe of gold of the same colour, the whole on a white background. The same quotation marks on each, of blue surrounded with gold.

The three words *Black—Tea—Black*, are also of the same type and colour, surrounded with a white line similarly dis-

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tributed. These three words are in both cases placed at the foot of the face, at identically the same spot or position. The whole face is surrounded by a blue stripe or scroll all around, exactly of the same colour and hue and a golden band or line following this stripe or scroll.

Now, in addition to these conspicuous similarities on what is called the face of the package, the same plagiarism and imitation is maintained on the back of the packages whereas the identical literature is to be found in both cases in the French language and the identity of disposition of the same is maintained as well in type, colour and size. The words *Noir, Thé, Noir* are with due servility copied and placed in both cases at the top. On the right end of the package the words and figures $\frac{1}{2}$ *lb. net, Black Tea* together with the quotations, are also in the same small type and colour. On the left end the words *Demi livre, Thé noir, Poids Net* are also copied; they are of the same type and colour and placed in identical position. One cannot refrain mentioning the special scrolling under the words *poids* and *net*. Insignificant by itself, this scrolling, under these two words becomes, under the present circumstances, most significant; with all the other similarities above mentioned, it is a due confirmation of the obvious fact that the defendant's trade-mark was made and built up while the plaintiff's trade-mark was absolutely before the eyes of the designer. There is a concurrence of similarity maintained all through.

Is it not apparent that this egregious imitation and this plagiarism amount to a disclosed desire or scheme to deceive and confuse the public, the consumer, whereby a trade advantage may be gained at the detriment of the plaintiff who has succeeded in building up such an enormous and profitable trade with his mark? Is not the defendant clearly endeavouring to appropriate the benefit of the plaintiff's business? Is she not trenching upon private rights? Is the defendant's mark calculated to injure another firm which has its own mark? Is it legitimate trading or is it disloyal competition?

However that may be it is not necessary in a case of this kind that improper motives or a fraudulent intention should be made out; the only question is whether or not the use of the defendant's mark is likely to lead the uncautious

and unwary customer to confusion. The resemblance must be such as would be likely to cause the one mark to be mistaken for the other. This question as defined in *The Upper Assam Tea Co. v. Herbert Co.* (1) is not whether the defendant's mark is deceptive but whether there is a strong probability of its causing deception. Kerly on Trade-Marks, 5th ed. 472; Sebastian 5th ed. 134 and 144.

Every case must be dealt with by itself and this is especially so where the fundamental question is one of fact and where it is for the court to exercise judicial discretion and decide upon the facts of the case as presented.

Before arriving at a final decision it may be well to cite authorities; but they are so numerous in trade-mark cases that it is impossible to cite more than a few.

Re: *Barsalou v. Darling* (2); *DeKuyper v. Van Dulkin* (3); *Canadian Rubber Co. v. Columbus Rubber Co.* (4); *Boston Rubber Shoe Co. v. Boston Rubber Co. of Montreal* (5); *Lever v. Goodwin* (6); *Liebig's Extract of Meat Co. Ltd. v. The Chemists Co-Operative Soc. Ltd. ubi supra.* In the case of *Coleman v. Farrow* (7) an injunction was granted and yet the similarity of labels was not nearly as pronounced as in the present case; but it was found that the approximation of the defendant's label was close and treated as a matter to be judged simply by the eye and that there was reasonable probability of deception. *Upper Assam Tea Co. v. Herbert & Co. ubi supra.* In the case of *Enoch Morgan's Sons Co. v. Whittier Coburn Co.* (8), the plates at page 659 show the two marks with similarity in the "get-up" but very dissimilar as to the literature which is entirely different. *McLean v. Fleming* (9). In the case of *N. K. Fairbanks Co. v. R. W. Bell Manufacturing Co.* (10), the "get-up" of the package presents similarity; but the names, the design and literature are entirely different, and yet an injunction was granted. The conspicuous names were "Buffalo" and "Fairbanks" and in this case "Imperial"

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(1) [1889] 7 R.P.C. 183, at p. 186.
 (2) [1881] 9 S.C.R. 677, at 681 & 709.
 (3) [1894] 24 S.C.R. 114.
 (4) [1913] 14 Ex. C.R. 286.
 (5) [1902] 32 S.C.R. 315.
 (6) [1886] L.R. 36 Ch.D. 1.
 (7) [1897] 15 R.P.C. 198.
 (8) [1902] 118 Fed. Rep. 657.
 (9) [1877] 96 U.S. 245; 24 L. Ed. 828.
 (10) [1896] 77 Fed. Rep. 869.

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and "Salada." *Hattingh's Yeast Ltd. v. Friedlin* (1); *Glenton & Mitchell v. Ceylon Tea Co.* (2); *Henry K. Wampole & Company, Ltd. v. Henry S. Wampole & Company et al* (3); *Glenton & Mitchell v. Keshadjee* (4).

Among other things, the evidence discloses that the packages, exhibits Nos. 2 and 3 appear alike, excepting for the words "Imperial" and "Salada," and that some customers are in the habit of asking "Blue Label Tea" without mentioning the word "Salada" when exhibit No. 2 is handed to them, and that there is no other blue label for tea on the market. Witness Sinclair, a grocer and butcher for 12 years in business, testified that exhibits Nos. 2 and 3 resemble one another enough to be himself deceived at first glance.

There is some conflicting evidence on behalf of the defendant. Witness Powis, service manager for an automobile concern, who has been buying Salada for 15 years testified he could not be confused, and witness Desroches, Manager of the Olympic Club, who has been buying Salada for 18 years also said he could not be deceived; but that class of witnesses, educated to the special knowledge of that tea for such a long period is not the test;—it is the uncautious and unwary customer. If the evidence could throw any doubt—which it does not—as to this servile imitation, the examination of the samples would make it disappear.

The photographs exhibits C. and D. present a display of of the plaintiff's and defendant's packages, piled up together, in a similar manner as was done at trial, and it must be conceded that at first glance, the packages are to the eye so much alike in their general appearance, that they appear to be all alike. All of that is due to the similarity in the get-up and the dressing of the packages. It is only on taking a second glance and scrutinizing each package carefully that the difference can be ascertained. And yet the packages are side by side, which is not the test.

It is indeed possible and quite easy to sell tea in packages similar in size and even packed in tin-foils, without copying the plaintiff's trade-mark in a manner calculated or leading to deceive and confuse the uncautious and un-

(1) [1919] S.A.L.R. 417.

(2) [1918] S.A.L.R. 118.

(3) [1925] Ex. C.R. 61.

(4) [1918] S.A.L.R. 263.

wary customer and make him take the goods of the defendant for those of the plaintiff.

Exhibits Nos. 20 and 22 establish that contention beyond peradventure. The get-up and the dressing of these two exhibits are distinct, special and unequivocal. The most characteristic one is exhibit No. 22, Lipton's Tea. Although the packing and wrapping are similar to both the plaintiff's and the defendant's packing, yet it is easily distinguishable from them. It is true the reputation of Lipton's Tea is so well established that it is not necessary for him to copy or imitate any mark to gain a trade advantage,—while it is the converse with the defendant who is just starting her tea trade.

According to the evidence of the defendant's manager a certain person was given instructions to devise the trade-mark; but that person was not brought to testify and the testimony of the manager with respect to how the trade-mark was devised and the excuse of undesigned coincidence are both about equally deserving of the same respect. There is no excuse for the present imitation which can only be explained by a desire to appropriate the benefit of the plaintiff's business. That is the only inference and explanation.

The two specific marks in the present case are used in connection with the sale of the same class of merchandise and that fact alone will greatly add to the probability of the goods of one trader being taken for those of another creating confusion. To allow its use would give an opportunity to deceive the public, a practice that would be baneful to trade generally.

Now, distinctiveness is of the very essence of a trade-mark, which is used to distinguish the goods of one trader from the goods of all other traders. Distinctiveness means adoption to distinguish. Sebastian, 5th ed. 55.

It cannot be denied that exhibits Nos. 2 and 3, seen side by side (see display of exhibits C. and D.) show a certain resemblance to one another and that it creates confusion; but that is not the test. One has to bear in mind that the danger to be guarded against is that the person seeing one mark by itself will take it to be the same as another which he has seen before, and that the purchaser will not see the two marks side by side so as to note the differences.

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For the purposes of establishing a case of infringement it is not necessary to show that there has been the use of a mark in all respects corresponding with that of which another person has acquired an exclusive right to use. No infringer would be such a blunderer at the work of infringing as to go and take a trade-mark exactly alike the trade-mark of a competitive trader. It is sufficient to show that the resemblance is such as to likely make unwary and uncautious purchasers suppose that they are purchasing an article sold by the party to whom the right to use the trade-mark belongs. See per Lord Chelmsford in *Wotherspoon v. Currie* (1). Sebastian, *Law of Trade-Marks*, 5th ed. 151.

Moreover, the general principles to be adopted in deciding cases of this kind is to consider the impression produced by the mark as a whole, *dans son ensemble*. It is the appeal to the eye which is to be considered. In this case the imitation is in the "get-up," in the dressing, in the colour of the package to catch the eye, confuse and deceive. It is the eye (as said by both Lord Westbury and Lord Herschell—Audette's *Practice*, 322), by which the buyer judges, and by which, if colourable imitations are by law allowed, he will be led to be deceived and defrauded. The trade-mark does not lie in each particular part of the label, but in the combination of them all. *Pinto v. Badman* (2). The size and dimension of the package each considered separately is not the test.

Colour alone may be of a very material consideration. The defence in this case that the word "Imperial" is different from the word "Salada" is not a sufficient distinction, having regard to all the other imitations. Sebastian, *Law of Trade-Marks*, by Bray, etc., 2nd ed. 30; Sebastian, 5th ed. 151. There can be no doubt that an unfair competition in trade is created by the use of the defendant's mark, in violation of the rights of a rival trader in the same class of goods.

For the consideration to which I have adverted I have come to the conclusion that, while the two marks are not absolutely identical, there is such a close imitation in the design and the get-up of the defendant's mark that the uncautious and unwary purchaser could be easily confused,

(1) [1872] L.R. 5 H.L. 508.

(2) [1891] 8 R.P.C. 181.

MEMORANDUM

RE WRIGHT & CORSON *v.* BRAKE SERVICE LIMITED, P. 127

This judgment was since set aside, and upon the evidence given on the new trial plaintiffs' action was dismissed, but without the court altering its opinion on the law.

deceived and led to purchase the defendant's goods for those of the plaintiff, and that infringement has been proved and established.

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Judgment accordingly.

BETWEEN:

WILLIAM A WRIGHT & CHALON E. } PLAINTIFFS;
CORSON }

1925
Feb. 24.

AND

BRAKE SERVICE LIMITED.....DEFENDANT.

Patents—Invention—Combination—Equivalency—Patentability.

Held: That in regard to combination patents, if a new combination or arrangement of known elements produces a new combination, or if it forms a new machine of distinct character or formation due to the co-operative action of all the elements, or if the several elements produce a new and useful result, or an old result in a cheaper or entirely advantageous way, such combination shows invention and may be the subject of a patent.

- 2. That invention is not capable of exact definition and is always a question of fact. That, *inter alia*, the fact that skilled workmen have failed to produce it or that it satisfied a long-felt want, are important facts in the determination of whether or not there was invention.
- 3. That a device constructed on the same principle, having the same mode of operation and accomplishing the same results as another, by the same means or by equivalent means, is the same device; and one cannot escape infringement by adding to or subtracting from a patented device or machine by changing its form or making it more or less efficient, while retaining its principle mode of operation.

ACTION to have it declared that the defendant is infringing the patent referred to in the statement of claim; and counter-claim to have plaintiffs' patent annulled.

Ottawa, December 15, A.D. 1924.

Action now heard before the Honourable Mr. Justice Maclean, President of the Court.

R. S. Smart and *J. L. McDougall* for plaintiffs.

W. L. Scott K.C. for defendant.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 24th day of February, A.D. 1925, delivered judgment (1).

(1) NOTE:—See "Memorandum" to this volume.

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This is an action for infringement of a Canadian Patent granted to the plaintiffs on June 26, 1923, the patent being for improvements in methods and mechanism for drilling and applying brake band linings. The plaintiffs do not seriously allege infringement of all the claims of their patent, but only in respect of claims 1, 2, 3, and 4, and have disclaimed from the scope of claims 3 and 4, any drilling mechanism not used for the application of brake linings to brake bands. The defendant pleads the usual defence.

The purpose of the patent is to apply a lining to a curved apertured brake band by mechanical means. The important element disclosed in the patent is a drill in a rotatable tool holder, having a cylindrical portion for drilling a hole for a rivet, and a tapered portion for countersinking, and all in the same operation. In actual operation the drill operates upwards through the lining, until it reaches the hole in the brake band. The first part of the drill makes a round hole for the rivet, the latter part does the countersinking so as to enable the head of the rivet to be sunk well below the surface of the lining so that it will not come in contact with any hard surface when the brake band is being applied. The band with the lining inside in the workman's hands rests on a lever, the end of which is bifurcated so that it may straddle the tool, and which has a spring which normally elevates the lever. The principal function of the lever is to give the operator a steadier and better control of the work while he presses it downwards to engage the drill, and while drilling the hole in the lining. When the hole is drilled, the lever returns to its original position, and other holes are subsequently drilled in the same manner. It being important that the countersinking be sufficiently deep as to depress the head of the rivet below the surface of the lining, and yet not so far as to leave an insufficient thickness of the lining with which to firmly hold the rivet, a screw, which is adjustable, limits the downward movement of the lever, thus limiting and controlling the penetration of the countersinking tool. In applying a new lining to a brake band the lining is of course, without holes, but the band has, and as the drilling of the lining commences on the blind side, or from its face opposite the band, it is obviously important and necessary that the holes drilled on the blind side shall be in exact registration with the

holes in the band. To provide for this the mechanism has an aligning device, a pointer or finger, which is always in alignment with the drill and if the drill is in line with the pointer on the band side, the drill would necessarily be in line with the hole on the lining side. The mechanism is contained in a frame, and there is the necessary shafting gearing, etc., to drive the same by motor.

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It might be convenient here to say that in the lining of brake bands for use, say in automobiles, up to the time of Wright and Corson the same were usually applied by hand. The lining is usually of fine brass or copper wire with asbestos spun around the wire, and then woven into a fabric, and is not easily drilled. In applying the lining it was the usual practice to bore the hole in the lining from the outside of the brake band, that is to say by first going through the hole in the brake band and then through the lining. The countersinking was done with another tool and was a second operation, and while usually done manually it might also be done by a power countersinking drill. It is admitted that all the elements of the mechanism are old, but it is claimed they have been brought together in a new combination, and by which linings may be applied to brake bands. It is conceded also that such a machine facilitates such an operation. Manually, it requires according to the evidence, from an hour and a half to two hours and a quarter, to do what is done on Wright and Corson machine in from twenty to thirty minutes. It is also conceded that the workmanship is much superior to that manually performed.

The defendant's machine has a drilling and countersinking tool similar to that used in Wright and Corson. It has an adjustable plate which limits the degree of penetration. There is a gauge brake which determines the location of the hole inwards from the rim. If the hole in the brake band is one-half inch in from the rim, the gauge plate is adjusted so that there will be half an inch from the rim of the gauge plate to the point of the drill. This enables the operator to align the hole in the band with the tool. There is a vertical rib or line on the gauge plate, which permits the tool to be sighted by the operator. Then, the band may be placed against the gauge plate which would enable the operator to steady the brake band while in his hand during the drilling process. The defendant contends

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that this is not done in actual practice by experienced workmen. The machine operates in much the same way as Wright and Corson.

The plaintiffs' mechanism, if patentable, is a combination, as distinguished from a simple patent. According to long established principles, a combination may be composed of elements wholly new or wholly old, or partly new and partly old. In each case the combination is a means distinct from the elements, whether new or old. It is an instrument or operation, formed by uniting two or more subordinate instruments or operations, in a new idea of means. It is the combination of individual functions, so as to constitute a common function. A combination in a mechanism must consist of distinct mechanical parts, having some relation to each other, and each having some function in the organism. When these elements are so united that by their reciprocal influence upon each other, and by the joint and co-operating action of all the elements with respect to the work to be done, or in furtherance thereof, new or additional results are obtained, the union is a true combination. Altogether the authorities seem to support the proposition, that if in a new combination, an arrangement of known elements produces a new combination, or if it forms a new machine of distinct character or formation due to the co-operative action of all the elements, or if the several elements produce a new and useful result or an old result in a cheaper or entirely advantageous way, this is evidence of invention and fit subject matter for a patent.

The statute grants a patent to any person who invents a "new machine." Upon the evidence presented, novelty, which is the conventional name of "new" as used in the statute, has not been negatived. The plaintiffs' machine was a new one, when the patent was applied for, according to the evidence produced at the trial. There is no evidence of anticipation. There can be no question as to the usefulness and utility of the machine. For many years the lining of brake bands, prior to the plaintiffs' machine, was performed by hand. The time required in applying the lining to a brake band, with the plaintiffs' machine, is conceded to be enormously less, and with an improved quality of workmanship. If there has been a want for a long time, the satisfaction of that want should go a long way to show

invention. The machine is also compact and quite portable, which is also a valuable feature. Altogether there can be no doubt as to the usefulness and utility of the machine. This is proven by the reception it has received from the public. Its merit is that it does its work with speed, accuracy and quality.

There may of course be novelty and utility without invention. The statute requires that there be invention. The amount of ingenuity required to grant a patent is called invention. Invention is hardly capable of exact definition, and is always a question of fact. It is usual to settle the point by negative rules, which operate by a process of exclusion. For instance it is not invention, if there be evidence that skilled workmen could effect the invention in question, without difficulty, whenever required to effectuate the same. The fact that skilled workmen have failed to produce it, is proof of ingenuity, or at least affords very strong evidence of it. If there has been a want for a long time, the satisfaction of that want, should go a long way to show invention. Again this is not a case I think, where the doctrine of equivalency can be urged. It is clearly not a case where the mechanism is a mere aggregation, and I do not think that exception need be discussed. I quite confess that my first impression of the mechanism was, that it did not represent invention, and it may be that it is quite near the border line. But considering the immediate demand for such a machine, its conceded usefulness and utility, and there not being so far as I know, any established principle or rule, applicable to combination patents, which would exclude it as fit subject matter for a grant, I have after careful consideration reached the conclusion that the patent represents invention. Patent rights are intended as the reward for the introduction of a new machine, etc. True the elements are old, and perhaps it did not require much ingenuity to place them together. But, as Mersey L.J. observed in *British Vacuum Cleaner Co. v. London and S.W. Railway Co.* (1) not only are the elements placed side by side, but they are fitted and worked together in combination, in such a manner as to produce one machine which is both novel and useful. The combination does its work well and the machine is admittedly a practical suc-

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(1) [1912] 29 R.P.C. 309, at p. 333.

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cess, and is capable of achieving an end in a more advantageous way than was known prior to the invention. It has developed fresh advantages and overcome disadvantages. Invention lies not only in the competent use of the parts but in the appropriate advantages of adaptation for such uses. In the case of combination patents, the ingenuity disclosed is to be found altogether in the idea of putting old elements together, and even though it may require no great exercise of the inventive faculty, *Vickers Son & Co. v. Siddell* (1) I am therefore of the opinion that the plaintiffs' patent is valid.

One who claims a patent for a new machine thereby necessarily claims and secures a patent for every mechanical equivalent of that device, because within the meaning of the patent law every mechanical equivalent of a device is the same thing as the device itself. A device which is constructed on the same principle, which has the same mode of operation, and which accomplishes the same results as another by the same means or by equivalent means, is the same device. One cannot escape infringement by adding to or subtracting from a patented device or machine by changing its form, or making it more or less efficient, while he retains its principle and mode of operation. There is a wealth of authority for this proposition. That the idea, principle, and mode of operation of defendant's machine or mechanism is the same as Wright and Corson is particularly clear and not open to serious discussion. One has only to see the both machines to be convinced of this. The variants are such that any mechanic might have devised and adopted. The president of the defendant company, manufacturers of the defendant's machine, was once in the employ of the plaintiffs as a salesman, and in that capacity sold the plaintiff's machine. After leaving them, he decided to make and sell a brake lining machine, and ultimately developed and manufactured the machine now sold by the defendant company. In his evidence, Mr. Davis admitted that he got from Wright and Corson the idea of having the drill press upside down so that the drill came from the bottom instead of from the top. I have no hesitancy whatever in finding that the defendant's machine is the mechanical equivalent of Wright and Corson.

(1) [1890] 7 R.P.C. 292, at p. 304 et seq.

Accordingly, I find the defendant has infringed the plaintiffs' patent and the plaintiffs are entitled to the usual judgment in the case of infringement. The plaintiffs shall have their costs.

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Judgment accordingly.

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Crown—Contract—Lease—Grazing lands—Breach of contract—Constructive eviction—Interpretation of contract.

M. Bros. were in possession of certain grazing lands in Alberta under the usual grazing lease obtained from the Crown.

Held: that the act of the Crown in dispossessing and evicting the lessees from the leased premises, contrary to law and to the terms of the contract of lease, is such a breach of contract for which a petition of right will lie to recover the damages resulting therefrom.

2. That, where upon receiving notice from the Crown that their leases had been cancelled or were to be cancelled, but which notices were admittedly void because of informalities, the lessees vacate the premises, it cannot be said that they have voluntarily abandoned the same, especially, as in this case, where said cancellation was ultimately approved of by Order in Council and acted upon by the Crown.
3. That whether there has been constructive eviction is always a question to be decided upon the facts in each case, and if the acts of the lessor indicate a clear intention on his part to dispossess the tenant and terminate the lease, such acts constitute constructive eviction.
4. That the following clause in the lease "that no implied covenant or liability of any kind on His Majesty's part is created by the use of the words 'demise and lease' herein, or by the use of any other word or words herein" refers only to title, and was not intended to exclude, and does not exclude, liability for wrongful entry or eviction by the lessor, nor does it destroy an implied covenant against wrongful entry or eviction by him.

ACTION by suppliants to recover damages due to a breach of contract by respondent.

Ottawa, February 16th and 17th, 1925.

Action now heard before the Honourable Mr. Justice Maclean, President of the Court.

R. B. Bennett, K.C., and *J. D. Matheson* for suppliants.

E. J. Daly for respondent.

The facts are stated in the reasons for judgment.

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MACLEAN J., now, this 18th day of March, 1925, delivered judgment.

It is desirable I think that I should as fully and clearly as possible set forth the principal facts involved in this action. In 1905, Edward H. Maunsell, of MacLeod, Alberta, one of the suppliants, entered into partnership with one John Cowdry, for the purpose of conducting a cattle ranching industry in that province, and a very considerable sum of money was invested by the partnership in the undertaking. In March, 1906, the partnership purchased from The Galway Horse and Cattle Company Limited, a grazing lease containing 60,381 acres, granted by the respondent as lessor in the same month and year, and known as Ranche 2422, and running for the period of twenty-one years from August 1, 1905. This lease was of a class usually known as a "closed lease," because it was not subject to cancellation during its currency by the respondent. In 1906, the respondent granted to Cowdry and others, five other grazing leases, altogether containing 125,978 acres, and which leases were acquired by the partnership. These leases were also for the period of twenty-one years, and were known as "open leases," as distinguished from the "closed lease" to which I have referred, in that they were subject to cancellation by the respondent, at any time upon two years notice.

The cancellation clause contained in the open leases was in the following terms:—

Should the Governor in Council at any time during the term of the lease think it to be in the public interest to withdraw the lands herein described, or any portion thereof, or to cancel the lease for any reason, the Minister of the Interior may on giving the lessee two years notice withdraw such lands or cancel the lease.

This clause is numbered nine, in the printed form of lease then used by the respondent in such cases, but this clause was struck from the closed lease. These leases were issued under the provisions of the Dominion Lands Act, Chap. 54, sec. 50, R.S.C. 1886, which provided that leases of unoccupied Dominion Lands might be granted by the Minister for grazing purposes, to any person, for such term of years, and for such rent as was deemed expedient, and also provided that every lease should contain the condition that the Governor in Council might authorize the Minister at

any time to give the lessee notice of cancellation, and that the lease should cease and be determined at the end of two years from the service of such notice.

The grazing leases contained a number of other provisions, and I should perhaps mention the most important of them. From the leased lands the respondent reserved the right to withdraw from the operation of the lease, lands within the leased area, known and designated under the provisions of the Dominion Lands Act as lands of the Hudson Bay Company, lands which under the same Act had been set apart as an endowment for purposes of education, lands which may have been settled upon and occupied by persons, and who could not be disturbed without the consent of the Minister, lands which might be required for certain purposes under the provisions of the North West Irrigation Act 1898; lands required for railway purposes, and lands required in the future for the use of the Mounted Police Force, all of which were liable to be withdrawn by the respondent from the operation of the lease. In such cases, however, the lessee was entitled to a reduction or abatement of the rent, but was not entitled to any other compensation, for or on account of such withdrawals. The lessee was obliged to place upon the demised lands one head of cattle for every twenty acres of land, and during the whole term of the lease was obliged to maintain live cattle on the premises, in that proportion. The lessee was required in each of the first three years of the term of the lease, to place upon the lands not less than one-third of the whole number of cattle, which the terms of the lease required to be placed thereon. That is to say, the lessee within three years was obliged to place upon the leased lands one head of cattle for every twenty acres of land covered by the lease. The lessee was also required to furnish a return to the Department of the Interior on the first day of July each year, showing the number of head of cattle on the leaseholds. In the event of failure on the part of the lessee to have the requisite number of cattle placed on the premises, the lessee was liable on receiving three months notice, to have withdrawn from his leasehold, an area of twenty acres for each head of cattle less than the number required by the regulations or the lease.

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In November, 1906, the suppliant E. H. Maunsell, and his brother H. F. Maunsell the other suppliant, acquired by purchase the entire interest of Cowdry in these particular grazing leases, and generally the partnership property and assets, the consideration being the sum of \$177,200, the purchasers assuming the liabilities of the partnership. The suppliants thereafter carried on business under the name of Maunsell Bros. Cowdry, however, in the meanwhile, retained the title to the grazing leases here in issue, as security for the payment of the consideration. Later the consideration was fully paid, and the leases were assigned to, and registered in the name of the suppliants. At the time of the purchase of the Cowdry interests in the former partnership, there were about 8,000 head of cattle on the property, and a number of young calves. The suppliants plead, it might here be said, that by the year 1909, when the notices of cancellation of the grazing leases were issued, and to which I shall later refer, they had substantially increased their stock of cattle and had expended large sums of money in planning the composition of the herds, providing for breeding purposes, erecting fences, dipping vats, and buildings.

On June 24, 1909, the respondent notified the suppliants, and Cowdry in whose name the leases were apparently still registered, that all the leases in question had been cancelled. The notice of cancellation of Ranche No. 2,422, the closed lease, was signed by the Secretary of the Department of the Interior, and was in the following terms:—

I beg to inform you that as the lands comprising Ranche No. 2,422 reserved for sale under the Irrigation Act, your lease of the Ranche in question has accordingly been cancelled. You will be further advised regarding the settlement of your account of this ranche in due course.

The notices of cancellation of the five open leases were expressed in the same terms. No Order in Council had up to this time been passed authorizing the notice of cancellation as required by the statute or as required by clause nine of the lease. The suppliants had complied with all the requirements of the lease and the regulations prescribed in the premises.

The suppliant E. H. Maunsell having heard in October, 1908, through the newspapers, that cancellation of these leases was contemplated by the respondent, interviewed the then Minister of the Interior at Ottawa, early in 1909,

who informed him that a large quantity of land in Alberta had been sold, or agreed to be sold, by the Government of Canada to a syndicate who were promoting in that region an extensive irrigation project, that the Department of the Interior for reasons which need not now be mentioned, had found it impossible to deliver to the syndicate the quantity of lands it had agreed to do, and that in order to implement the department's undertaking in this regard, it was proposed to cancel the suppliants leases so as to make these lands available for delivery to the syndicate. This suppliant had a later interview with the Minister and then protested against such proposed action. On October 16, 1909, the suppliant's solicitor protested against the cancellation of the closed lease, and particularly called attention to the fact that the usual paragraph numbered nine, had been struck from this particular lease, and that it was therefore not subject to cancellation on two years notice, or otherwise. On November 8, 1909, the suppliant E. H. Maunsell addressed the Minister of the Interior, protesting against the cancellation of his grazing leases, and urged that if the Department's action was not reversed, it meant absolute bankruptcy to him, and was a practical confiscation by the Crown of his property rights. He complained that he had already suffered heavy losses by the uncertainty of tenure the Department's action had created, that he had been prevented from pursuing those plans for restocking the ranches, which was so necessary in a successful cattle ranching business, that as matters then stood he was without notice deprived of grazing areas for his large and valuable herd of cattle, that valuable assets had been wiped out, and as a consequence his banking credit had been cancelled. On November 8, the suppliants' solicitor, wrote the Secretary of the Department of the Interior, again protesting against the Department's action, and contending that it had acted entirely without right, and that the leases in question contained no provision or authority for such action as the Department had taken. The solicitor asserted that the cancellations could not be made under the provisions of the North West Irrigation Act of 1908, or by reason of the reservation contained in the leases, of such lands as might be required for any purpose under the provisions of that Act, contending that such right was limited

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to irrigation "works" as defined by the statute. On November 22, 1909, the Department of the Interior wrote the suppliant's solicitor, advising him that the notice of cancellation respecting Ranche No. 2422, the closed lease, had been withdrawn and the suppliants reinstated in that lease. This notice also contained the advice that the suppliants would be temporarily reinstated in the five open leases, but that those would terminate at the expiration of two years, from June 24, 1909, which was the date of the notices of cancellation to which I have already referred, and which meant that those leases were to be cancelled in about eighteen months from the date of the last notice, November 22, 1909, thus having a retroactive effect covering about five months.

It is quite clear from the evidence what was the purpose of the Department, in cancelling the leases of the suppliants. In 1906, under the provisions of the North West Irrigation Act 1898, and the Dominion Lands Act, the Robbins Irrigation Company entered into an agreement with the Department of the Interior for the purchase of 380,573 acres of land within a certain tract described in the agreement, for the purpose of irrigating the same. This agreement was approved of by the Governor in Council on June 25, 1906. Subsequently in September, 1908, the Southern Alberta Land Company, Ltd., the successors of the Robbins Irrigation Company, advised the Department that it had learned after surveys had been made of this area, that a considerable portion of the same was so situated as to elevation, as to be impossible of irrigation. The company was obliged for this reason to materially change their original plans of the irrigation project, and applied to have certain changes made in the lands to be acquired under the agreement. That is to say, they wished to relinquish such lands as were unsuitable for successful irrigation, and to receive in lieu thereof certain other lands located in other townships, which surveys would disclose to be suitable for successful irrigation, and which were so situated as to form a reasonably compact irrigation tract. By Order in Council passed on the 9th day of September, 1908, and amended on October 6, 1908, effect was given to this application, and the company was permitted to acquire other lands within certain tracts or areas, described in the said Orders in Coun-

cil, and within which was located the suppliants' leaseholds. The Southern Alberta Land Company, Limited, in 1909, commenced the construction of the irrigation system as required by the agreement, the canals of which in fact passed through two of the suppliants' open leases, and the suppliants open grazing leases were thereafter regarded by this company as lands earmarked for its purposes and uses. The construction of the irrigation works proceeded continuously until 1911 or 1912, when it would appear the same were completed.

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On August 12, 1911, an Order in Council was finally passed, cancelling the open leases under the notice given on November 22, 1909, as and from the date of June 24, 1909. This Order in Council after referring to the cancellation clause number nine in the lease, reads as follows:—

The Minister states that as the lands covered by the leases are within the tract which it was proposed to sell to the Southern Alberta Land Company for irrigation purposes, notices were forwarded to the lessee on the 24th of June, 1909, to the effect that leases would be cancelled at the end of two years from that date.

I refer to this, chiefly because it indicates clearly, that what was in the mind of the Department, and what was its fixed policy when the notices of June 24, 1909, were issued, and that was, to put itself in a position to sell and convey to the Southern Alberta Land Company, the lands contained within all of the suppliants' leases. The evidence makes it clear that this was the settled policy of the Department even in 1908, and before any of the notices of cancellation in question were given.

I should perhaps here say that negotiations were carried on between the suppliants, and the Department of the Interior, subsequent to the second cancellation notices, with a view apparently of composing the differences resulting from the cancellation of the leases. The suppliant E. H. Maunsell states that the respondent made different proposals of settlement of compensation, by way of granting leases of other grazing lands to the suppliants, the latter abandoning any claims they might have against the respondent for the cancellation of the leases. One proposal was to grant to the suppliants a closed lease, covering a tract of land in another locality for a period of sixteen years, and according to the evidence of E. H. Maunsell this proposal was accepted. The suppliants state that after

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considerable trouble and expense they located 40,000 acres south of the Red Deer River. In April, 1911, the respondent directed the usual inspection of such lands, and in July, 1911, instructed the suppliants to post the usual notices of application for the lease, for the period of thirty days, and to comply in every respect with the departmental regulations in such cases made and provided for. This arrangement or proposal was not carried out. E. H. Maunsell states that in the end the respondent issued the usual open lease for this selected area, that is to say a lease subject to cancellation upon two years notice, and not a closed lease for sixteen years as stipulated, which the suppliants did not regard as satisfactory and declined to accept. I have no hesitation whatever in accepting as correct the evidence of E. H. Maunsell upon this point, for whatever it be worth. In fact it is not contradicted.

The suppliants continued in possession of the closed lease after the reinstatement in 1909, until 1918, when they disposed of the same. They continued also in possession of the five open leases apparently until June, 1911, and paid the prescribed rentals for the same until their occupation terminated. The suppliants claim that the rentals were paid because they required the use of the lands while closing out their cattle business, and also because they felt obliged to do so until they had fully paid Cowdry, in whose name the leases, and I think other properties, were still registered.

It is perhaps convenient here to refer briefly to the legal effect of the several notices of cancellation, given by the respondent to the suppliants. I am relieved of a discussion of this point because the respondent pleads that they were all entirely unauthorized, ineffective and inoperative, and did not effect a cancellation of the leases. Again, counsel, for the respondent, took the position at the trial, that the notices cancelling the open leases were ineffective and invalid, because there was no declaration by the Governor in Council to the effect that it was in the public interest to withdraw the lands from the operation of the leases, or that they be cancelled, and that the notices were ineffective also for the reason that they did not give the two years notice required by paragraph nine of the leases, there being only about eighteen months notice. He also contended that

the Order in Council of August 12, 1911, approving of the cancellation of the leases was ineffective, because the notice of cancellation had not been preceded by the declaration of the Governor in Council as required by paragraph nine of the leases. As to the closed lease, counsel contended that there could only be cancellation by the respondent of this lease upon the ground of failure to comply with the terms and conditions of the lease, and that the notice of June 24, 1909, was ineffective, invalid and of no effect. He argued that the suppliants should have disregarded and resisted all of the cancellation notices, but instead, he urged, the suppliants voluntarily left the lands, and that there was a constructive abandonment of the lease. Clearly I think the cancellation notices of June 24, 1909, were all void, as also were the notices of November 22, 1909, in that the same were not first authorized by the Governor in Council as required by clause nine of the leases. Neither do I think that the respondent can be heard to say that the notices of cancellation were unauthorized, on the ground that they were issued by officials of the Department. The Orders in Council of 1908 brought the grazing leases of the suppliants within the irrigation scheme. Clause 19 of the leases themselves provided that any notice or demand which His Majesty or the Minister might require or desire to give or serve upon the lessee, might be validly given by the Secretary or Assistant Secretary of the Department of the Interior, and such provision was observed in this case. In any event the notices of cancellation of the open leases were ultimately approved of and acted upon by the Governor in Council.

Assuming the suppliants were dispossessed of, or evicted from the premises, and that there was no such abandonment by the suppliants as would afford a defence to the action, does a petition of right lie for damages resulting from a breach of the contract by the respondent. One of the leading authorities upon this point is the *Windsor and Annapolis Railway v. The Queen and the Western Counties Railway* (1), affirmed on appeal by the Privy Council (2), and in which the question as to the liability of the Crown on contract was distinctly raised and clearly and exhaustively discussed, and the principle there established

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(1) [1883] 10 S.C.R. 335.

(2) [1886] 11 App. Cases 607.

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has since been followed both in England and Canada, and is I think conclusive in this case. I need not discuss this case at any length. The facts were as follows:—

The Government of Canada by an agreement dated the 22nd day of September, 1871, undertook to give the Windsor and Annapolis Railway Company the exclusive use of the Windsor Branch Railway, and also running powers over the trunk line from Windsor Junction to Halifax for the term of twenty-one years. The company in pursuance of that agreement entered upon and worked the Windsor Branch Railway until the 1st of August, 1877, when the Government Superintendent of Railways took possession of the line and put an end to the occupation of the company, subsequently leasing it to another company.

One of the questions for the decision of the Privy Council was, whether the Crown was liable for this breach of contract; upon this point the Judicial Committee said as follows (p. 612):—

Their Lordships are of opinion that it must now be regarded as settled law, that whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown. Section 8 of the Canadian Petition of Right Act (39 Vict., c. 27, Dom. Parl.), contemplates that damages may be recoverable from the Crown by means of such a petition; and the reasons assigned by Lord Blackburn for the decision of the Court of Queen's Bench in *Thomas v. The Queen* (1) appear to their Lordships necessarily to lead to the conclusion that damages arising from breach of contract are so recoverable. A suit for damages in respect of the violation of contract is as much an action upon the contract as a suit for performance; it is the only available means of enforcing the contract in cases where, through the act or omission of one of the contracting parties, specific performance has become impossible. In *Tobin v. The Queen* (2), Chief Justice Erle whilst affirming the doctrine that the Sovereign cannot be sued in a petition of right for a wrong done by the executive, took care to explain that "claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs."

Again:—

Another argument submitted on behalf of the respondent was to the effect that the Crown is only liable in respect of breaches of contract occasioned by the omissions of Crown officials, and is not liable in respect of breaches due to their positive acts even when these acts are done under direct authority from the Crown. Upon this point it is sufficient to say that, in the opinion of their Lordships, there is neither authority nor principle for recognising any such distinction.

An important question therefore to decide is whether the suppliants were dispossessed of or evicted from the lease-

(1) [1874] L.R. 10 Q.B. 31.

(2) [1864] 16 C.B. (N.S.) 310, at p. 355.

holds and was there here a constructive eviction. The doctrine of constructive eviction grew out of that class of cases, in which the tenants' rights were as effectually determined, and his enjoyment of the estate granted as effectually prevented by other means, as through a judgment, or an actual putting out of possession. An eviction is either actual or constructive and in either case whether there has been an eviction, depends on the circumstances of the case. As a rule if the tenant is deprived without his consent of the beneficial use or enjoyment of the demised premises, by some intentional and permanent act of the landlord, that constitutes an eviction. The tenant must be dispossessed, or he must abandon the premises because of the landlord's acts, and for no other reason. It is necessary also in order to constitute a constructive eviction, that the landlord materially interfere with the beneficial enjoyment of the demised premises. There may be some acts of interference by a landlord with the tenants enjoyment of the premises which do not amount to an eviction, but which may be either merely acts of trespass, or eviction, according to the intention with which they are done. If these acts amount to a clear indication of intention on the landlord's part, that the tenant shall no longer continue to hold the premises, that would constitute an eviction. There would appear to be no reason why a tenant should lose the right to assert a constructive eviction by attempts to remedy the acts complained of, or by an attempted settlement of the controversy. The settled rule seems to be that in order to constitute constructive eviction, the acts of the landlord must indicate an intention on his part that the tenant shall no longer continue to hold and enjoy the demised premises. A man is presumed in law to intend the natural and probable consequences of his acts, and therefore the acts of the landlord calculated to make it necessary for the tenant to remove from the demised premises, constitutes a constructive eviction. *Upton v. Greenlees* (1); *Upton v. Townend* (2); Kent Commentaries 13th Edition, Vol. 3, note p. 464; *Hall v. Burgess* (3); *Burns v. Phelps* (4); *McLean v. The King* (5); Corpus Juris, Vol. 36, sec. 988, 989, 990; *Skally v. Shute* (6).

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(1) [1855] 17 C.B.R. 51.

(2) [1855] 17 C.B.R. 30.

(3) [1826] 5 B. & C. 332.

(4) [1815] 1 Starkies Rep. 94.

(5) [1907] 38 S.C.R. 542.

(6) [1882] 132 Mass. 367.

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If this be a correct statement of the law as to what constitutes constructive eviction, do the acts of the respondent disclose an intention to dispossess and materially interfere with the beneficial enjoyment of the demised premises by the suppliants and without their consent, and such as to constitute a constructive eviction of the suppliants? I think they clearly do. I have already related the facts relevant to this phase of the case, but I might here summarize the evidence upon the point. In the first place, the evidence of E. H. Maunsell which is not disputed, indicates that even in 1908, the then Minister of the Interior advised that suppliant, that the leases were to be cancelled for the purpose of conveying the same to some persons or company, and the reasons for so doing were given. In June, 1909, notices of cancellation of the leases were issued, and the notices disclosed the fact that the cancellations had relation to some irrigation project, undoubtedly that contemplated by the Robbins Irrigation Company. By Order in Council dated September 9, 1908, and as amended by Order in Council dated October 6, 1908, the demised premises were placed within a designated area of land, from which the Southern Alberta Land Company, the successors of the Robbins Irrigation Company might select an acreage of lands equivalent to an acreage to be relinquished from the former area mentioned in the agreement of 1906, on account of their unsuitability for irrigation purposes. Notices of cancellation of the leases were given on June 24, 1908, and again for the open leases on November 22, 1909. The Order in Council of August 12, 1911, terminating the leases upon the notices of November 22, 1909, stated that the cancellations were made in order to sell the lands of the Southern Alberta Land Company. The respondent thus intended to re-vest the property in himself, before conveying the same to the Southern Alberta Land Company. In 1914, the Government of Canada made an advance of \$354,684 to the receiver and manager of the Southern Alberta Land Company, and which advance according to the terms of an agreement, became a first charge upon all the lands agreed to be sold to the Southern Alberta Land Company, or its predecessors, including the lands contained within the five open grazing leases. The Southern Alberta Land Company had prior to this entered into possession of a portion

of the demised lands in question, and thereon constructed irrigation works for the purpose of later irrigating and selling the lands in question. Since 1911, the leaseholds in question, excepting the closed lease, have been in the undisputed possession and control of the Southern Alberta Land Company, or its successors the Canada Land Company. The respondent acted upon the notices of cancellation. These facts I think indisputably reveal the intention and policy of the respondent to terminate the leases of the suppliants, and amount to nothing less than an eviction, or re-entry by the respondent or its assigns, and it was thus clearly intended to deprive the suppliants permanently of the beneficial enjoyment of the premises. I entertain no doubt whatever in reaching the conclusion that there was here a constructive eviction. The chain of events I have mentioned were brought about with deliberation and for an avowed purpose, and can only mean that the suppliants were dispossessed of their leases, and intended so to be by the respondent, and this cannot in my opinion be changed into an abandonment of the leases by the suppliants.

By agreement, the only issue to be disposed of at the present time, is as to whether the respondent is in law liable to the suppliants for any damages suffered by them, by reason of the void cancellations of the leases. That the suppliants suffered damage is not I think subject to serious doubt. It was evidently public policy to encourage the breeding and grazing of cattle, upon lands leased for such purposes, and which were lands believed not to be desirable for homestead purposes, but yet quite suitable for grazing purposes, owing to the natural grasses there to be found. As I have already pointed out the lessee was bound by the terms of the lease to place and maintain upon the premises, cattle in numbers proportioned to the acreage, and to yearly maintain that proportion. It required a substantial amount of capital to carry on the cattle ranching business, and in this case the suppliants required a substantial banking credit annually. It is obvious that certainty of tenure of the grazing leases was the real basis of advances of banking credit, for without the grazing lands there could be no cattle business. When the suppliants received the first notice of cancellation they immediately found themselves restricted as to banking credit, according

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to the evidence of E. H. Maunsell. They felt obliged between June and November, 1909, to abandon the purchase of young steers, to maintain the required number of cattle upon the leaseholds, after making the customary annual sales of finished cattle. They also felt compelled to commence the gradual disposal of some of their stock of cattle, principally the cows and calves, immediately following the first notices of cancellation. It is to be remembered that the notices of June 24, 1909, peremptorily cancelled all the leases. Apparently the suppliants did not take legal advice in the matter up to this time, but even if advised by counsel that the cancellations were void, that would not necessarily convince their bankers that their credit should be continued, nor would it in all the circumstances necessarily justify the suppliants in resisting the cancellations. Their class of business was of such a character that any contest as to the title of the leaseholds, quickly reacted upon their credit, and compelled them to consider the policy of immediate though gradual liquidation. After the notices of November 22, 1909, the suppliants endeavoured to obtain a lease of other lands for a period of sixteen years, but this did not materialize as I have already stated. It was but natural therefore that the suppliants should proceed to liquidate their business, which they did, and they say at a loss. The loss of banking credit alone, due to the action of the respondent, they allege, did not permit of the liquidation being carried out except at a financial loss. The temporary cancellation of the closed lease, they allege also caused them to suffer damages. I think there can be no doubt that the suppliant suffered damage by the several cancellations, all of which the respondent admits were illegal and void. The suppliants at least were entitled to two years notice of the termination of the leases, as required by clause nine of the same, which they never received. It is my opinion that the respondent is liable in law for damages suffered by the suppliants, and also that in fact the suppliants did suffer damage.

As I have already stated, reservations were contained in the leases, by which lands might be withdrawn for various purposes from the leaseholds, and the respondent probably for this reason sought by clause 18 of the same, to exclude the implication of implied covenants as to title, being

created by the use of the word *demise* or words of the same import. Clause 18 reads as follows:—

That no implied covenant or liability of any kind on His Majesty's part is created by the use of the words "demise and lease" herein, or by the use of any other word or words herein.

A covenant for quiet enjoyment either expressed or implied, is essential where eviction by title paramount, that is by title paramount and adverse to the lessor, is the subject of a claim for damages, but here eviction by title paramount was hardly possible, or if possible was not deemed probable or imminent, and in fact did not occur. This clause has reference only to title and I think was not intended to exclude, and does not exclude liability for wrongful entry or eviction by the lessor, nor does it destroy an implied covenant against wrongful entry or eviction by the lessor. The provisions of the leases provided for the conditions under which re-entry might be made by reason of the failure of the lessees, to perform the terms and conditions thereof. In all other cases entry by the lessor would be illegal, except after a proper cancellation, and for which the lessor would be liable to the lessee in damages. If the lease as qualified by this section means anything else, the result would be that there would not in reality be a lease or contract at all. It might be ended by the lessor the moment it was made, a principle which finds no support in law or reason. The lease is a contract, the terms of which the respondent must observe and carry out, except for good cause.

There will be judgment for the suppliants for damages to be assessed, etc.

Judgment accordingly.

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QUEBEC ADMIRALTY DISTRICT

THE PINEBAY STEAMSHIP COMPANY LIMITED

PLAINTIFF;

VS.

THE MOTOR SHIP *STEELMOTOR* DEFENDANT.

Shipping—Canal—Narrow channel—Moored ship—Burden of proof—Suction—Canal Rule 19

The *P.* down bound, was moored on the east side of the Welland Canal, at Welland. Observing the *S.* coming up, the *P.* gave three short blasts, as a notice to the *S.* to check her speed. The *P.* was properly

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and well moored and at a safe place, and as the *S.* passed she was drawn by suction from her mooring damaging her "winch." The *S.*'s engines were not stopped.

Held: On the facts, that the *S.* by her breach of Canal Rule 19, without valid excuse, and the failure to stop her engines while passing the *P.*, which increased the suction and the force operating on the *P.*, was the sole cause of the accident, and the *S.* was wholly liable for the damages caused.

2. That the burden rests upon the vessel under way, to exonerate herself from liability for an injury to one which was stationary, to show that it was not in her power to prevent the injury by adopting any practicable precautions, and in shallow waters she is bound to know and guard against the effect of the swell and suction caused by her movement. (The *Rotherfield*, 123, Fed. Rep. 460 referred to.)

Judicial Observation:

"Suction is a force which has been recognized time and again in close navigation in shallow waters, and speed and too close approach are factors which contribute to it."

ACTION *in rem* for damages suffered by plaintiff's steamer *Pinebay* by reason of the alleged negligence of the navigation of the defendant ship.

Montreal, March 25, A.D. 1925.

Case now heard before the Honourable Mr. Justice MacLennan L.J.A.

E. Languedoc, K.C. for the plaintiff.

R. C. Holden for the defendant.

The facts are stated in the reasons for judgment.

MACLENNAN L.J.A., now this 11th day of April, A.D. 1925, delivered judgment.

This is an action *in rem* for damages to plaintiff's steamer *Pinebay* due to the negligent navigation of the SS. *Steelmotor* in the Welland Canal.

Plaintiff's case is that about 10.15 p.m. on 24th October, 1923, the *Pinebay* down bound was moored at Beatty's dock on the east side of the Welland Canal, at the town of Welland, when the *Steelmotor* was observed coming up the canal. Three short blasts were blown by the *Pinebay* to have the *Steelmotor* check her speed. This signal was answered but disregarded and the *Steelmotor* passed the *Pinebay* at an excessive rate of speed, with the result that inordinate surge and suction followed the passage of the *Steelmotor* causing the *Pinebay* to strain outwards so heavily upon her moorings that her after winch was torn

out and damaged; that the *Steelmotor* broke among other rules Canal Rules 14 and 19, and that if she had exercised reasonable care no accident would have occurred and the plaintiff claims for the condemnation of the *Steelmotor* and its bail and in costs and to have an account taken of such damages.

The defence is substantially that the *Steelmotor* passed the *Pinebay* slowly and any damage sustained by the *Pinebay* was not due to any fault or negligence on the part of the *Steelmotor* and those on board her, but was due to the fact that the *Pinebay* was not properly moored, handled or equipped; and defendant prays for the dismissal of the action.

The evidence establishes that the *Pinebay*, which was loaded drawing 13 feet 6 inches, was moored forward with two five-inch manila lines and a three-quarter-inch wire cable, and aft by two similar manila lines and two wire cables, when the *Steelmotor* was seen approaching several hundred feet down the canal a three-blast signal was given by the *Pinebay* and answered by a similar signal by the *Steelmotor*. It is established that this signal is a call for reducing speed. The *Steelmotor's* officers claim that they did reduce her speed before she passed the *Pinebay*. The first mate of the *Pinebay* swore that her speed when passing was very fast and the watchman of the *Pinebay* says that her speed was faster than is usual for steamers passing a moored vessel. The distance between the two steamers as the *Steelmotor* passed up was put by witnesses at from twenty to thirty-five or forty feet. As the *Steelmotor* passed, the *Pinebay* surged and broke some of her aft lines, but not all. These aft mooring lines were made fast to the winch which sustained serious damage. Another steamer had passed up in the early morning of 24th October when the *Pinebay* surged and broke some of her mooring lines, but caused no damage to the winch. The *Pinebay's* log contains an entry that at 10.15 p.m. the *Steelmotor* went by too fast and carried the after winch away, and the evidence at the trial, in my opinion, clearly establishes the plaintiff's claim.

The *Pinebay* surged under a powerful external force; there is no other way for accounting for the damage to her winch. Suction is a force that has been recognized time and

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again in close navigation in shallow waters, and speed and too close approach are factors which contribute to it. Canal Rule 19 provided that "the engines of steamers passing vessels moored to a wharf, pier, or the bank of any canal shall be stopped while so passing." The *Steelmotor* did not stop her engines while passing the *Pinebay* and her speed must have been greater than her witnesses admit. There is no valid excuse for the master of the *Steelmotor* having refused to observe that Rule.

My assessors advise me that the *Pinebay* was properly and well moored and at a safe place; that the *Steelmotor* could have passed with her engines stopped and that the *Pinebay* could not be expected to have had men standing by to ease her lines as other vessels passed up.

The burden rests upon a vessel under way, in order to exonerate herself from liability for an injury to one which was stationary, to show that it was not in her power to prevent the injury by adopting any practicable precautions, and in shallow waters she is bound to know and guard against the effect of the swell and suction caused by her movement; *The Rotherfield* (1).

In my opinion the failure to stop the engines of the *Steelmotor* while passing the *Pinebay* increased the suction and the force which operated on the *Pinebay* and contributed to the accident which damaged her winch. The *Pinebay* was properly moored in a place of safety and the *Steelmotor* should have passed without causing her damage. No blame is imputable to the *Pinebay* or those in charge of her. My assessors concur in all these conclusions.

There will therefore be judgment for the plaintiff against the *Steelmotor* and her bail for the damages to the winch and for costs, with the usual reference to the Deputy Registrar to assess the damages.

Judgment accordingly.

QUEBEC ADMIRALTY DISTRICT

THE STEAMER *LIVINGSTONIA* COMPANY LIMITED } PLAINTIFF;

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AND

THE DOMINION COAL COMPANY LIMITED } DEFENDANT.

Shipping—Navigation in harbour—Responsibility of wharf owner.

The *L.*, under charter to the defendant, arrived at Montreal with a cargo of coal, and on defendant's instructions docked at its dock and commenced discharging the cargo. Upon the defendant's instructions the steamer was moved astern about a ship's length to make way for another ship, and later, again on defendant's instructions, returned to the dock to discharge the balance of the cargo. When returning, a wire cable attached to the boom of one of the defendant's coal towers fouled the ship's fore top mast causing damage. The *L.* had neglected to keep one of her lines attached to a back snubbing post.

Held: That the conditions of the berth being fully known to the officers of the ship they needed no warning of the danger, if any existed, and, moreover, had they used ordinary care and maintained adequate lookout in returning to their berth, which she should have done, the accident would not have happened, and she was victim of her own negligence. [The case of *The Grit* (1924) P. 246; 94 L.J. Adm. 6, where a dock owner was required to use reasonable care to see that the berth was safe for use by vessels he invited to enter it, compared and distinguished].

2. That even if the wire in question was a source of danger, its presence being known to the officers of the ship, and as by the exercise of ordinary care the accident could have been avoided, no action lies against the defendant for the damages suffered.

ACTION to recover damages by reason of a collision of plaintiff's boat with certain wires attached to the boom of one of the defendant's coal towers in Montreal Harbour.

Montreal, April 6, 1925.

Action now heard before the Honourable Mr. Justice MacLennan.

R. C. Holden, Jr. for plaintiff.

G. Gordon Hyde K.C. for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN L.J.A., now this 11th day of April, 1925, delivered judgment.

The plaintiff's steamer *Livingstonia*, while under charter to defendant, arrived at Montreal on a voyage from Sydney, N.S., with a cargo of coal on 11th October, 1924, and on defendant's instructions docked at the defendant's dock

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and commenced discharging her cargo. Next morning, on defendant's instructions, the steamer was moved astern about a ship's length to make way for another ship and, two days later, on defendant's instructions, returned to the dock in order to discharge the balance of her cargo, and when so returning a wire cable attached to a boom or crane on one of defendant's coal towers fouled the ship's fore top mast causing it to buckle and doing considerable damage. The plaintiff claims that the defendant is responsible for this damage, as it failed to maintain its berth in a safe and proper condition and improperly failed to warn those on board the *Livingstonia* that the berth was not safe, and plaintiff claims damages in the sum of \$1,328.45, with interest and costs.

The defendant denies that the berth was not safe and alleges that the coal tower was an ordinary one; that its boom at the time of the accident was canted up as high as possible; that the accident complained of was caused solely by the improper and negligent navigation of the ship in failing to keep a good lookout, in being brought too close to the wall of the dock and at too great a speed without having the necessary means of checking the speed of the vessel in case of necessity, and defendant prays for the dismissal of the action with costs.

The four coal towers on the dock belonged to defendant. The boom of each projects outwards over the vessel which is being discharged and three of these booms, when not in operation, are moved back horizontally, the fourth operates on a hinge and the outer end cants upwards at an angle of about 45 degrees. Attached to the latter boom is a wire which, when the boom is not operating, is tied up close to it and within probably seven or eight inches. This was the wire which fouled the steamer's mast. It is proved that the towers are of the ordinary type, have been in operation for at least twenty-five years and that no accident of this nature has ever occurred before. The defendant's dock runs parallel to the harbour and when plaintiff's ship left her berth to make room for the other vessel, she simply moved astern alongside the dock and then tied up. When she returned, the day of the accident, the ship's master and a licensed pilot were on her bridge. The first officer, boatswain, the carpenter and three men were on her

foe'sle head, and the second officer with four men were on her poop, and she was moved forward by the combined action of a tug and a winch heaving on lines which ran forward. The stern lines and the back spring had been cast off and were handled on the dock by men supplied by the company defendant and who would place them on the snubbing posts on the dock when ordered so to do. The first officer admits that he had seen the wire on the boom before the ship moved; that he knew that it was there; that there are always wires on a coal tower such as this, and that he was supposed to be on the lookout and to watch for any obstruction of any kind while the ship was being moved; but neither the first officer nor the master, nor any one else on board the ship appear to have paid any attention to the wire, or to see if there was any danger of the mast fouling it while the ship was being moved. As all lines leading aft had been taken off the snubbing posts, there was nothing to check the forward movement of the ship until these lines were placed on one or more of the posts and the slack hauled in and made fast on the ship. My assessors advise me that it was not in accordance with good seamanship not to have had one of the lines leading aft attached to a snubbing post, so that it could be eased on the ship as she went forward and in case of necessity her forward movement checked. It appears to me that, if an efficient lookout had been maintained, this accident would not have occurred. The officers on the ship had full knowledge of the boom, its position and the wire attached to it. They knew the height of their mast, and it was their duty to see that in returning to the berth they did not allow their mast to come into contact with the boom or the wire.

Counsel for plaintiff invoked the familiar principle of which the case of *The Grit* (1) is the latest example, that a dock owner is required to use reasonable care to see that the berth is safe for use by vessels which he invites to enter it, and, if not safe and if he has not taken such reasonable care, it is his duty to warn vessels about to come into the berth that he has not done so. These cases all have reference to obstructions under water which could not be seen by those in charge of a vessel coming into the berth to load

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(1) [1924] P. 246; 94 L.J. Adm. 6.

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or unload cargo. Here the conditions of the berth were fully known to the officers of the ship, who needed no warning of danger, if any existed, and they should have used ordinary care and maintained an adequate lookout in returning to the berth, and in this view my assessors concur.

Even if it could be held that the wire on defendant's boom was a source of danger, and in my opinion it was not, its presence was known to the officers of the ship and they could, by the exercise of ordinary care, have avoided the accident, and on the principle laid down in the House of Lords in *Spaight v. Tedcastle* (1); *Cayzer Irvine & Co. v. Carron Co.* (2), and *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* (3), the ship alone is to blame.

There will therefore be judgment dismissing plaintiff's action with costs.

Judgment accordingly.

Solicitors for plaintiff: *Meredith, Holden, Holden & Heward.*

Solicitors for defendant: *Markey, Skinner & Hyde.*

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QUEBEC ADMIRALTY DISTRICT

UNITED STATES STEEL PRODUCTS COMPANY	}	PLAINTIFF;
vs.		
SINCENNES McNAUGHTON LINES, LIMITED	}	DEFENDANT.

Shipping—Collision—Canal navigation—Preliminary act—Rule 13 of Canal Regulations—Duty of tug master.

The *S.M.*, was proceeding down the Soulanges Canal when she sighted a tug with tow coming up. When over half a mile apart the *S.M.* sounded one blast of the whistle which was answered by the tug. The *S.M.* started to port her helm when about a ship's length from the tug proceeding slowly to the south side of the centre. The tug continued her course in the centre of the canal until after the *S.M.* had sounded the danger signal, and when about 125 feet from the steamer started to port her helm, with increased speed, to go across to the north side. The effect of this sudden movement by the tug swung the barges to port into the water of the *S.M.*, and both barges came into contact with the *S.M.*, crowding her until she struck the south bank damaging her starboard bilge.

(1) [1881] 6 A.C. 217, at p. 226. (2) [1884] 9 A.C. 873.
 (3) 1924 A.C. 406; 93 L.J. P.C. 182.

Held: That the *S.M.* in no way contributed to the collision and that the collision was solely due to the unseamanlike manoeuvre of the tug (1) in waiting too long to turn out; (2) By her master failing to instruct the captains of the barges of the manoeuvres to be adopted; (3) By his breach of Rule 13 as to the length of tow.

2. That the *S.M.* had the right of way and it was the duty of the tug and tow, after passing signals had been given and understood, to have gone to her own side of the canal in proper time and allowed the other half to be free and unobstructed for the passage of the *S.M.*
3. That a statement in a Preliminary Act is evidence against the party making it. (*The Seacombe*, 81 L.J. Adm. 36 referred to).

ACTION *in personam* for damages sustained by the plaintiff ship by reason of a collision with tug and tow in the Soulanges Canal.

April 1, 1925.

Case now heard before the Honourable Mr. Justice MacLennan at Montreal.

A. R. Holden, K.C. and *A. H. Elder, K.C.* for plaintiff.

F. Germain, K.C. and *E. Languedoc, K.C.* for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN L.J.A., now this 11th day of April, A.D. 1925, delivered judgment.

This is an action *in personam* for damage alleged to have been sustained by plaintiff's motor ship the *Steel Motor* from a collision with the barges *Melrose* and *Dunmore* in tow of the tug *Virginia* in the Soulanges Canal on 9th November, 1923.

[His Lordship here gives the pretensions of the parties and proceeds.]

The *Steel Motor*, of 1,695 tons gross and 973 tons net register, had a length of 258 feet, her beam was 42 feet 9 inches and her draft at the time of the accident was 13½ feet forward and 13 feet 4 inches aft. On the afternoon of 9th November, 1923, according to the evidence of her master who was on the bridge, she was coming down the Soulanges Canal with the current when she met the tug *Virginia* having in tow the barges *Melrose* and *Dunmore*. A passing signal of one blast was given and answered at a distance of over half a mile. Both the steamer and the tug and barges were then in the middle of the canal and when they got to between 200 and 300 feet of each other the steamer's helm was ported to bring her to the south

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side of the canal. The tug still kept in the middle and when approximately 150 feet from the tug the master of the steamer blew the danger signal and checked his speed to double slow and, when at a distance of about 125 feet, the tug started to port, increased her speed and the barges began to swing over to the south side in the steamer's water, the stern of the rear barge coming to about 25 feet from the south bank. Under the port helm the *Steel Motor* approached to about within 25 or 30 feet from the bank when her engines were put full speed ahead and her wheel hard-a-starboard, but before she had time to swing both barges collided with her port side and her starboard side came against the south bank of the canal and her engines were immediately stopped. This is substantially the evidence of the master of the *Steel Motor*, which in its essential features is corroborated by the wheelsman, mate, watchman and other members of the crew.

It is established that the canal at the place where this accident happened is 96 feet wide at the bottom; that the banks slope outward one in two; that the depth of the water was about 16 or 17 feet, which would give the width of the canal at the surface of the water 160 to 165 feet. The tug was 90 feet long and 23 feet wide; the *Melrose* was 183 feet long by 36 feet 5 inches beam, and the *Dunmore* 183 feet long with a beam of 35 feet. The tow lines between the tug and the *Melrose* and between the *Melrose* and the *Dunmore* were about 6 feet, so that the total length of the tug and tow was 468 feet. The length of the canal locks is 280 feet between the gates, but they cannot accommodate vessels of more than 255 feet in length.

The evidence on behalf of defendant is very lengthy and very contradictory.

[His Lordship here discusses this evidence and proceeds.]

There is a marked difference between the evidence on behalf of the plaintiff and defendant, and it is for the court to decide which is to be accepted. It is quite impossible to reconcile the varying statements of the different witnesses. Plaintiff's case is supported by an apparently consistent story by the master and crew of the steamer, free from serious contradictions, while the evidence on behalf of the defendant is a mass of contradictory, inconsistent and improbable statements by members of the crews of the tug

and barges. The outstanding allegations of the pleaded defence are, first, that at a suitable distance the tug and tow moved over to the north side of the canal and remained there while passing the steamer, and second, that the steamer delayed too long in the centre of the canal until as she passed the first barge she put her helm hard-a-port which swung her head towards the south bank, and before the effect of this port helm could be checked she took ground against the bank. The wheelsman of the *Dunmore*, the second barge, admitted that the steamer went on the bank opposite his barge when within six feet of her. This, when taken in conjunction with the plaintiff's evidence, destroys the assertion that while passing the steamer the *Dunmore* with the tug and the other barge was close to the north bank, and confirms the evidence of the plaintiff's witnesses that the *Dunmore* came over into the water of the steamer and crowded her to the bank when her starboard bilge was damaged. It is stated in defendant's Preliminary Act

that the *Steel Motor* when just about to meet the tug and tow . . . suddenly put her helm hard-a-port, throwing her head to starboard, etc. and the mate of the tug swore that the steamer sheered towards the south bank when passing the tug. Any statement in a Preliminary Act is evidence against the party making it. In *The Seacombe, The Devonshire* (1), Fletcher Moulton L.J., at page 60, in speaking of statements in the Preliminary Act, said:—

They are not mere pleading allegations. 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.

These admissions by the tug's mate and in the Preliminary Act show that the steamer did not remain in the centre of the canal until she was opposite the first barge as alleged in the defence, and it is reasonable corroboration of the evidence of the steamer's witnesses that her helm was ported about a ship's length from the tug when she began to move to the south side of the canal.

Having heard some of the witnesses at the trial and having examined very carefully the other evidence previously taken, I have come to the conclusion that the evidence on behalf of plaintiff should be accepted and I

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find as findings of fact, (1) that the *Steel Motor* started to port her helm when about a ship's length from the tug and proceeded slowly over to the south side of the centre of the canal; (2) that the tug continued her course in the centre of the canal until after the *Steel Motor* had sounded the danger signal and when at a distance of about 125 feet from the steamer started on her port helm with increased speed to go across to the north side of the canal; (3) that the effect of this sudden movement swung the barges over to port into the water of the *Steel Motor*; (4) that both barges came into contact with the *Steel Motor* and crowded her until she fetched up on the south bank damaging her starboard bilge.

Among the questions which I submitted to my assessors with their answers are the following:—

Q. Was there anything wrong with the helm movements of the *Steel Motor* as she approached and tried to pass the tug and tow?

Ans. No. It would appear that the *Steel Motor* was navigated with every appearance of good seamanship. Porting her helm at about a ship's length apart, considering the passing signals had been understood was consistent with good seamanship.

Q. If the tug and tow continued in the middle of the canal until about 125 to 150 feet from the *Steel Motor*, did they delay too long and, if so, when should they have started to move over the north side of the canal?

Ans. It would have been good policy to have taken the north side of the canal much sooner than they did, especially in view of the shallow draft of the vessels and the light wind on the starboard side not interfering with their movements.

I find also that the master of the tug gave no instructions whatever to the captains on the barges as to what manoeuvres should be adopted when meeting the down bound steamer. The master of the tug was the only certificated officer. The men on the barges from the evidence appeared to have had a very confused idea of what they should do from the different movements of porting, starboarding, hard-a-porting and hard-a-starboarding, which they adopted. I am advised by my assessors that there being only one navigator on any tow, namely the master of the tug, it follows that the captains of the barges look to the master of the tug for orders, and that the master of the tug in this case should by some method of signals have directed the movements of the two barges. He admits he did nothing in that connection and left the men on the barges to their own devices. This, in my opinion,

was a neglect of a precaution required by the ordinary practice of seamen which contributed to the accident.

The master of the tug also broke Rule 13 of the Canal Regulations in having a tug and tow of the combined length of 468 feet without the necessary permission. The part of the Rule applicable states:—

Except with the special permission, in writing, of the Superintending Engineer, or Superintendent, no steamer shall tow more barges on the canals of the River St. Lawrence and the Welland Canal than she can lock with.

The limit of the locks is proved by one of the engineers of the Department of Railways and Canals to have been 255 feet. In addition, the length of the tow made it more difficult to handle. I asked my assessors what effect the combined length of the tug and tow had on their navigation, and they say:—

Being of such length it would be very awkward of handling and on any alteration of the tug's helm the barges would naturally follow in a snake-like fashion and not in a straight line. It would have been much easier to have kept control of a shorter tow.

There can be no doubt that the length of the tow contributed to the collision and the crowding of the steamer to the bank. The Canal Regulations are to be accepted by all parties navigating the canals as the conditions under which the canals are to be used and masters of tugs engaged in the towage business, in the crowded and narrow waters of the canals, must understand that these Regulations as well as the Rules of the Road are made to be observed and that their deliberate violation may result in serious liability.

The defendant was the owner of the tug and both barges and is responsible for their negligent and improper navigation. The *Steel Motor* coming down with the current had the right of way and it was the duty of the tug and tow, after the passing signals had been given and understood, to have gone to the north side of the canal in proper time and allowed the southern half of the canal to be free and unobstructed for the passage of the *Steel Motor*. The tug and tow broke Rules 25, 31, 37 and 38 of the Rules of the Road for the Great Lakes. There is no blame imputable to the *Steel Motor* or those in charge of her, etc.

* * * * *

Judgment accordingly.

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PAUL BERGEON PLAINTIFF;
 AND
 THE DEKERMOR ELECTRIC HEAT-
 ING CO., LTD. } DEFENDANT.

*Patents—Practice—Action to impeach—Statement of claim—Interest—
 Scire facias—Information—Rule 16.*

Held, that where it is sought to impeach, or revoke a patent of invention by statement of claim, the plaintiff must establish a personal interest in the action as distinguished from that of the public interest against a monopoly. Failing to do so, he has no *locus standi* before the court, and his action should be dismissed.

2. Where the interest of a plaintiff is no more than that which is common to the public, then his right to impeach a patent is exercisable only by *scire facias*.

ACTION to impeach certain patents of invention granted to the defendant.

Ottawa March 9, 1925, and following days.

Action now tried before the Honourable Mr. Justice Audette.

Russel S. Smart and *J. Lorn McDougall* for plaintiff.

R. V. Sinclair, K.C. for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 18th day of May, 1925, delivered judgment.

This is an action for the impeachment or revocation of the four Letters Patent of Invention mentioned in the plaintiff's Statement of Claim.

The case came on for trial in a regular way, at a date before which the hearing was actually proceeded with, when, however, the date of the actual trial was fixed. The questions of delay and date were, at the time, much debated. The defendant was asking for longer delay and the plaintiff was anxious to proceed at once. The defendant drew the attention of the court to the fact that there were seven Bergeon patents mentioned in the plaintiff's particulars of objection, that Bergeon was domiciled in France, and that a Rogatory Commission would have to be taken to examine him, etc. Thereupon counsel for the plaintiff declared he would not put any of these seven patents in evidence or offer any evidence of prior invention by Bergeon, concluding that with this undertaking the defendant should be able to proceed in a few days. Upon defend-

ant's counsel's request an order was then made giving effect to this declaration and the case was duly fixed for hearing and the trial proceeded with on such fixed date.

There were raised at the hearing an unusual number of substantial and intricate questions of law; but there is a most formidable one that lies at the very threshold of the case and which I shall have to decide before approaching any other. This question may be formulated as one based upon the well known fundamental doctrine of both civil and common law that no person can bring an action at law unless he has an interest therein.

The case was heard and closed without a tittle of evidence being adduced to establish or show that the plaintiff has any personal interest involved in this action, as distinguished from that of the public interest against a monopoly which prevents the manufacture of articles covered and protected by the patent for a limited period.

Therefore the defendant contends, and the plea is a very sound one—that the plaintiff has, by his declaration at the outset of the trial, abandoned all possible right of action, and therefore has no *locus standi* before this court. He is not an *interested* person.

Indeed to maintain an action instituted by Statement of Claim, there must be an existing and actual interest shewn and proved to permit the exercise of the right of action for the cancellation and avoidance of Letters Patent under the Great Seal. No action without interest is a maxim that sets forth a fundamental rule of law as well as of logic and has become axiomatic. The interest of the person who seeks to maintain an action must be vested in him originally or by transmission from another person. If in principle the interest asserted by a person does not belong to himself alone, but is common to the public, then the right of action is exercisable only in the name of the State.

Before considering our Canadian patent law, it will be well to ascertain what is the patent law in England upon the subject. There is no similar procedure in the United States. Walker on Patents, 3rd ed. 274.

Before 1883 the mode in England of revoking and cancelling a patent for invention was by a *Sci-fa*. in which a person complaining of the illegality of a patent was author-

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ized by the *fiat* of the Attorney General to proceed in the name of the Crown for the repeal of the patent. The Crown has at common law an undoubted right to proceed by *Sci-fa.* to repeal and cancel a patent respecting which it has been deceived or by which *its subjects are prejudiced.* The King can avoid his own grant *jure regio.*

This cumbrous procedure by *Sci-fa.* has been abolished by sec. 26 of the Patent Act of 1883, and replaced by a petition to the court on behalf of certain person under specific circumstances. Then came the Patent Act of 1907 which, by sec. 25, authorizes various persons to present such a petition to the court:

- (a) by the Attorney General or any person authorized by him; or
- (b) by any person alleging,—
 - (i) that the patent was obtained in fraud of his rights, or of the rights of any person under or through whom he claims; or
 - (ii) that he, or any person under or through whom he claims, was the true inventor of any invention included in the claim of the patentee; or
 - (iii) that he, or any person under or through whom he claims any interest in any trade, business or manufacture had publicly manufactured, used or sold, within the realm, before the date of the patent, anything claimed by the patentee as his invention.

If the petitioner is qualified under (b) he presents his petition *as of right*; any other person must obtain the fiat of the Attorney General authorizing the presentation of the petition. A *locus standi* can only be obtained under these two courses. And, as stated by Frost on Patents, 293, 4th ed., if there is any doubt as to whether a would-be petitioner is qualified *as of right*, he should take the precaution to arm himself with the fiat of the Attorney General, for the court will at the hearing refuse to go into the questions whether a patent is good or bad, if it appears that the petitioner has no *locus standi*, and that view is also borne out by the jurisprudence. See also Moulton on Patents, 211, 214.

Under sec. 32 of the Act of 1907, a defendant in an action of infringement may counter-claim for the revocation of a patent.

In the light of the English procedure let us now investigate what is the practice in force in Canada for the revocation of a patent.

The only section of the Canadian Patent Act (R.S.C. 1906, ch. 69) which deals specifically with the impeach-

ment of patents, is section 35 which provides for the revocation by way of *Sci-fa*. That is the only originating procedure provided by the Act, outside of sec. 45 which gives the Exchequer Court jurisdiction, upon the information of the Attorney General of Canada, or at the suit of any person *interested*, in respect of the seven preceding sections, dealing with importation and manufacture, a subject-matter not in question in this action. However, by sec. 34 thereof, the defendant, in an action of infringement, may also counter-claim for the revocation of the patent—as provided by the English Act.

By sec. 23 of The Exchequer Court Act, relied upon at trial, the Exchequer Court is given jurisdiction, as well between subject and subject as otherwise,

(b) in all cases in which it is sought to impeach or annul any patent of invention.

Now this section only makes cognizable in the Exchequer Court all such actions, and the Patent Act confers the substantive rights under a patent. All Canadian Patents granted, under the signature of the Commissioner, are so granted

subject to the conditions contained in the Patent Act.

Moreover, by Rule 16 of the Exchequer Court (made under the provisions of sec. 87 of the said Exchequer Court Act) and which has the force of statute, unless clashing with it, it is provided, viz:—

Impeachment of Letters Patent of Invention

Rule 16

Action to impeach or annul Patent of Invention

Any action or proceeding to impeach or annul any patent of invention may be instituted:—

- (a) By information in the name of the Attorney General of Canada; or
- (b) By a Statement of Claim filed by any person interested; or
- (c) By a Writ of *scire facias* as provided in the 35th section of the Patent Act.

The present plaintiff originated the present action by a Statement of Claim; therefore he must be a person *interested*.

When an action is instituted either by information or by *Sci-fa*. it is quite different.

In the case of *Sci-fa*. the issue is made *jure regio* for the advancement of justice and right. It is not necessary to show interest.

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Hindmarch On Patent Privileges, relied upon by the plaintiff, does not apply to the present case, because Hindmarch only deals with *Sci-fas*. At p. 234 it sets forth the three cases in which the King will direct the issue of a *Sci-fa*. At the foot of page 234, he says:

The action of *scire facias* is a remedy provided by law not only for the Crown on behalf of the public, but also for any of Her Majesty's subjects who can show that a void or illegal patent operates to his prejudice. And further on, at p. 235, he proceeds to say that a patent is always, to a certain extent, prejudicial to every one of His Majesty's subjects, in that they must abstain from the use of the art or invention comprised in it, etc.

However, one must not overlook that in a case of *Sci-fa*, the subject can only sue after having obtained a fiat, etc., and that the whole structure of this procedure and the principle upon which it is founded differ materially from the one where the originating proceeding is by a Statement of Claim by a person *interested*. As already said, the issue of a *Sci-fa*. is not made by a person interested, but is made *jure regio* for the advancement of right and justice. Tidd's Practice, 1093.

The plaintiff cites and relies on the statement made with respect to Scottish decisions at page 248 in *Fulton*, Law of Patent, reading as follows:

For instances of persons "having interest" see *Worthington Pump Co. v. Weir* (1) and *Montgomerie v. Peterson* (2). In this latter case it was held by the Court of Session that the owner of an invalid patent may yet obtain the revocation of another patent.

After reading the case last cited I find that it does not justify the broad statement made by the learned author. There is a total answer to this authority in that it cannot apply to or be used in support of this case which has been instituted by a Statement of Claim, at the instance of a person who should be a person *interested*; because the Scottish law is totally different from ours and even from the English law. In Scotland, under the provisions of sec. 94 of the English Patent Act, 1907, the corresponding proceedings for the revocation of a patent are in the form of an action of reduction at the instance of the Lord Advocate, or at the instance of a party having interest with his concurrence which concurrence may be given only on just cause shown. See sec. 94, Patent Act, 1907.

(1) [1894] 11 R.P.C. 657.

(2) [1894] 11 R.P.C. 221, 633.

In the result, under the English law, the action for the revocation of a patent which was, before the Act of 1883, by *Sci-fa.* is now by a petition of the Attorney General, or by a person interested in specified and determined instances or cases.

Under our Canadian law, the action in revocation instituted in the Exchequer Court of Canada can be either by Information, *Sci-fa.* or by a Statement of Claim filed by any *person interested.*

The plaintiff failed to disclose any interest authorizing him to institute proceedings for revocation by a Statement of Claim. So far as the record now stands there is not a tittle of evidence showing that the plaintiff has any personal inherent *interest*, as distinguished from an interest common with the public at large, which would entitle him to prosecute the present proceedings. It is quite different from an action instituted by an Information or by *Sci-fa.* in the name of the King—as already above set forth.

The plaintiff who is a foreigner, and manufacturer of his devices in France, has, in the course of the trial tendered for production as exhibit 28, his Patent No. 243,069 for an Electrical Heating Apparatus, a patent distinct from the seven patents already mentioned in the particulars of objection. The application for the grant of this patent had been made on the 5th October, 1921, and the patent was issued and bears date the 23rd September, 1924.

It was issued to the plaintiff after the institution of the present action—(the Statement of Claim having been filed on the 9th June, 1924). He had no ascertained legal right in that patent at the time the action was instituted and no evidence whatsoever was adduced in respect of this patent,—either generally or specifically showing that it could be affected by the defendant's patents, and counsel for plaintiff stated he was only filing it to show the interest his client had "through having the patent" and that he was not relying upon it as an objection to the defendant's patents.

The production of this patent at trial was objected to by the defence, and, subject to his objection, reserving all his rights, I allowed it, stating at the time I could see no objection to its being filed and standing on the record for what it was worth, and evidence could be adduced or not

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in support of it or leave it on the record in that bare way;— because I did not see that as a result of the undertaking already mentioned in regard to the seven Bergeon patents, mentioned in the Particulars, that the plaintiff could now be precluded from putting in that additional Bergeon patent for what it is worth. I can only find now that it is of no avail to the plaintiff for the purposes of establishing any interest that would justify him in instituting the present action by a Statement of Claim.

A person interested, under our Canadian Patent law, can institute, *as of right, an action* by a Statement of Claim to avoid a patent; but if there is any doubt as to whether or not he is as of right qualified as plaintiff he should have recourse to a *Sci-fa*. The proceedings on *Sci-fa*. are conducted through the agency of the Crown; but if it is initiated by a subject the *fiat* of the Attorney General must be obtained, as a condition precedent to the issue of the writ.

If a patent, or a Crown grant, stands as a prejudice to the Crown and affects its rights, an action for revocation will lie on the Information of the Attorney General of Canada.

For the reasons above mentioned I am of opinion that the plaintiff has no *locus standi* in the present case; that he has failed to show or prove any interest that would give him, as of right, any power or authority under our Canadian law, as it stands, to institute or maintain an action by Statement of Claim under Rule 16, for the revocation of a patent.

Having found as above mentioned it becomes unnecessary to consider the several other questions raised at trial.

The action is dismissed with costs.

Judgment accordingly.

STEVE SCHROBOUNST ET AL. SUPPLIANTS;
 AND
 HIS MAJESTY THE KING. RESPONDENT.

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 Dec. 22.

*Constitutional Law—Exchequer Court—Jurisdiction—“On a public work”
 —7-8 Geo. V, c. 23, section 2.*

The suppliants were in a vehicle, standing at the curb, on a public street of the city of St. Catharines, when they were run into and injured by a motor truck, the property of the Crown, alleged to be due to the negligence of the driver thereof, a servant of the Crown, employed in transporting other employees of the Crown to a public work at Thorold. The Crown pleaded that the present action did not come within the meaning of subsection (c) of section 20 of the Exchequer Court Act, as amended by 7-8 Geo. V, c. 23, and that the court was without jurisdiction.

Held, that the defence in law was unfounded, and that the court had jurisdiction, under said section 20 s.s. (c) to hear and entertain the present action.

2. That the words “employment upon any public work” in subsection (c) of section 20 are merely descriptive of the work or employment, and not intended to mean that the work or employment must be performed on any defined or specific locus whereon a public work is being maintained or constructed, or that the negligence complained of must occur thereon.

HEARING upon questions of law raised by the defense herein.

Ottawa, December 10, 1924.

Action now heard on the questions of law before the Honourable Mr. Justice Maclean.

Louis Côté for suppliants.

L. P. Varcoe for respondent.

MACLEAN J. now, this 22nd day of December, 1924, delivered judgment (1).

This is an action for damages, alleged to have been sustained by the suppliants on a public street in St. Catharines, Ont., owing to the negligence of a truck driver, a servant of the respondent, in the employ of the Department of Railways and Canals.

The present proceedings in the action is to determine the points of law raised by the Attorney General in his defence, and as provided for by Exchequer Court Rule 126.

Sec. 20 (c) of the Exchequer Court Act, Chap. 140, R.S.C. 1906, provided as follows:

(1) NOTE: This judgment was affirmed by the Supreme Court of Canada on the 12th June, 1925.

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

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

Subsection (c) of section 20, as quoted above, was amended by chap. 23, sec. 2, 1917, by striking out the said subsection (c) and substituting therefor the following:

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

The real issue before me for determination is whether under sec. 2, chap. 23, 1917, amending the Exchequer Court Act, the Crown is in law liable for damages for injury to person or property resulting from the negligence of its officer or servant, while acting within the scope of his duties or employment, on any public work, and where the negligence causing the injury arose or was committed elsewhere than upon the public work, as for example upon a public street as is alleged in this action, though the duties at the time being performed related to the public work.

In a series of cases, among them *Piggott v. The King* (1), the Supreme Court of Canada held, in actions founded upon sec. 20 (c), chap. 140, R.S.C. 1906,—the Exchequer Court Act—that no action was maintainable where the death or injury to the person or property occurred outside the bounds of a public work, notwithstanding the same was due to the negligence of a servant or employee, acting within the scope of his duties while on a public work. The statute however is now quite different, and the question now is if the amended or substituted sec. 20 (c), already referred to, so extends the jurisdiction as to bring within it a claim for damages arising in the circumstances I have already stated.

The original section apparently limited the jurisdiction, to claims where the death or injury caused by negligence occurred on any public work, and as I have said, the courts have so held. The purpose of the amended section was obviously intended to widen the jurisdiction, so as to include claims for damages where the death or injury to person or property occurred off or away from a public work.

(1) [1916] 53 Can. S.C.R. 626.

That obviously was the spirit and purpose of the amending legislation. It was suggested by counsel appearing before me that the amendment was intended to apply to cases where the servant or employee, committed or performed some act of negligence while physically upon a public work, but which negligent act resulted in injury to a person or property off the public work, and that the amended section covers only such cases. I should find it extremely difficult to conclude that Parliament intended, when enacting the amended clause, to legislate so narrowly and precisely, as to cover only the very limited class of cases where an officer or servant of the Crown could, while on a public work negligently cause injury to a person or property without the public work. Conceivably the facts disclosed in *Piggott v. The King, ubi supra*, may truly indicate the origin of the amending legislation, but to say that it was in the mind of Parliament to cover only such a condition of facts is quite another thing, and I think without warrant in view of the language of the amended section.

Apparently, under the old section a servant or employee might be outside any public work and by some means or circumstances quite imaginable, inflict an injury upon a person or property, on or within a public work, and thus render the Crown liable. It seems therefore improbable that the amended clause was intended to cut down the Crown's liability for the negligence of its servants or employees, to cases only where the officer or servant was physically on the public work, whereas up to the time of the amendment it would not seem that the statute required that the servant or employee should be physically on the public work himself, when the negligent act complained of occurred. There is nothing to indicate that this was the policy of the legislation. Still this is its effect if the respondent's contention is correct. The requirement necessary under the old section to furnish a ground of action, was that the person or property injured should be on the public work. For example, a carter, being a servant or employee, upon a public street or road unloading material upon a public work might in some way or other negligently injure a person or property on a public work. In that case

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under the original sec. 20 (c) it would seem the court had jurisdiction and an action for damages was maintainable. If the contention of the Crown made in these proceedings is sound, then in such a state of facts no action would lie under the new section 20 (c).

I think that the amended section was intended not to cut down in any sense the Crown's liability, but rather to enlarge it. Section 20 (c) 1917 was I think intended merely to remove the qualification that liability did not arise where the person or property injured was not on the public work, only that and nothing more. If it was meant to require that the offending servant or employee must also be on the public work, then the liability of the Crown in tort was cut down by the amended section, which I do not think was intended. I do not think the present section is at all open to the construction that the officer or servant must be actually on the public work. I think it only means that generally he must be employed on a public work and that his duties must generally relate to employment on a public work, and that there is jurisdiction if the injury to person or property is negligently caused by the officer or servant while acting within the scope of his duties or employment on a public work, and regardless of whether the negligence causing the injury was committed on the public work or not. The latter words of the amended section were not in my opinion intended to operate as a geographical or territorial qualification as to jurisdiction or liability, but rather as descriptive of the services, duties or employment. I cannot construe the concluding words of the section to mean that the negligence causing the injury must occur on a public work, but it is sufficient to constitute liability if the negligence occurred while the servant or employee was acting within the scope of his duties or employment in connection with a public work, wherever that might be.

It is obvious that in many cases, the greater portion of the duties of a servant of the Crown employed on a public work, would necessitate his being off the public work the major portion of his time, and conceivably his whole time. For instance, take the case of a driver, employed on a public work, say the construction of a government building, and engaged in carrying stone to this public work.

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from a quarry located on another and distant property, carried on also as a part of the same public work, and never in fact driving his team or truck upon the public work, the same being unloaded on the public works by derricks or some other means from the truck while on the public street. In such circumstances surely it could not be contended successfully that this servant was not employed upon a public work, or was not acting within the scope of his duties in such employment. I cannot conceive of any reason for not holding that in such work or employment, the servant was not acting within the scope of his duties or employment upon a public work. "Public work" under sections 3 (c) and 35 of the Public Works Act, ch. 39 R.S.C. 1906, means I think any "work or property" under the control of a Minister of the Crown or a Department of Government. I know of no other statutory definition applicable to this case, and even if this definition did not exist I could not employ better language too define a "public work." I cannot perceive of anything in this definition to support the respondent's contention. The "work" wherever performed is still "work" and under the control of a representative of the Crown.

I am of the opinion therefore that the words "employment upon any public work" is merely descriptive of the work or employment, and was not intended to mean that the work or employment must be performed on any defined or specific locus whereon a public work is being maintained, constructed, controlled or managed or that the negligence complained of must occur thereon. I cannot therefore uphold the points of law raised on behalf of the respondent.

* * * * *

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

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EAST ASIATIC COMPANY LTD.....PLAINTIFF;

AND

THE *CHILCOT*DEFENDANT.

Shipping—Collision—Liability based on tonnage—Engine-room space—Canada Shipping Act—R.S.C. 1906, c. 113 as amended by 13-14 Geo. V, c. 35, sec. 9.

Held, that the words “engine-room space” in R.S.C. 1906, c. 113, as amended by 13-14 Geo. V, c. 35, sec. 9, are wide enough to cover the boilers appurtenant to the engines whether they are actually in the same compartment or not, which arrangement is primarily one of convenience and would vary according to the size and construction of the vessel.

ACTION to recover damages by reason of a collision in Burrard Inlet, between the plaintiff’s motorship *Peru* and the defendant steamship. The liability for damages was admitted by the defendant but the question arose respecting the extend of defendant’s liability based on her tonnage.

Vancouver, March 21, 1925.

Action now heard before the Honourable Mr. Justice Martin.

Martin Griffin and *Sydney Smith* for the plaintiff.

E. C. Mayers and *J. L. Abbott* for defendant.

The facts are stated in the reasons for judgment.

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

This action arises out of a collision in Burrard Inlet between the plaintiff’s motor ship *Peru* and the defendant steamship. The liability for the damage is admitted by the defendant but a question has arisen respecting the extent of the defendant’s liability based on her tonnage, under sections 921-2 of the Canada Shipping Act [R.S.C. (1906) c. 113], as amended in 1923 by 13-14 Geo. V, c. 35, sec. 9, as follows:—

922. Tonnage of a steamship shall be her registered tonnage with the addition of any engine-room space deducted for the purpose of ascertaining that tonnage; and the tonnage of a sailing ship shall be her registered tonnage: Provided * * * *

The plaintiff submits that the expression *engine-room space* which first appeared in Canada in this section, should include the space for the boilers whether situate within

the walls of the main engine room or not, as being inseparable parts of the engines as the propelling power, and if this view is correct about 138 tons should be added to the computation of the tonnage as otherwise conceded by the defendant. For the defendant it is submitted in brief, that *engine-room space* is a new expression, first used in the Merchant Shipping Act of 1906, sec. 69 (in force 1st June, 1907) and is in contra-distinction to the former wide expression of *space occupied by the propelling power* in sec. 78 of the Merchant Shipping Act, 1894, and that as a fact, in the *Chilcot* the engine room and the boiler room are in separate compartments.

Several cases were cited by the plaintiff's counsel but they are not really applicable, all being based on actions begun before the act of 1906 came into force. This case therefore is one of first impression and so I have carefully considered all the statutes and relevant rules and regulations that have been cited with the result that I think the expression *engine-room space* is wide enough to cover, and should in reason and practice be held to cover, the boilers appurtenant to the engines whether they are actually in the same compartment or not, which arrangement is primarily one of convenience and would vary according to the size and construction of the vessel. As to whether *engine-room space* is in general equivalent to *space occupied by the propelling power*, I express no opinion, but confine myself to the distinct point in issue which alone it is necessary to decide. There will be judgment for the plaintiff in accordance with this view, the costs to follow the event.

Judgment accordingly.

BETWEEN:—
 THE CANADIAN NATIONAL RAIL- } PETITIONER;
 WAY COMPANY }
 AND
 ELLEN BOLAND RESPONDENT.

Expropriation—Canadian National Railway—Warrant of Possession—Jurisdiction—Exchequer Court—9-10 Geo. V, c. 13.

Held, that section 13 of the Canadian National Railway Act (9-10 Geo. V, c. 13) declaring that the provisions of the Expropriation Act, except

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- when inconsistent with the said Act, applied *mutatis mutandis*, to the company, did not confer jurisdiction upon the Exchequer Court to hear and determine an application by the Company for the issue of a warrant of possession of property expropriated.
2. That such an application is a "proceeding" within the meaning of sec. 15 of the said Act which provides that such matters shall be heard by the courts having jurisdiction in similar matters arising between "private parties," such matters not falling within the jurisdiction of the Exchequer Court.
 3. The Canadian National Railway Company under the provisions of the last mentioned section has no *locus standi* before the Exchequer Court of Canada in a proceeding for the determination of any controversy as between itself and "private parties."

PETITION for the issue of a warrant of possession under the provisions of the Expropriation Act.

Ottawa, April 15th, 1925.

Petition now heard before the Honourable Mr. Justice Audette.

Eugène Lafleur, K.C. for petitioner.

W. J. Boland for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 16th day of April, 1925, delivered judgment.

This is a proceeding in the nature of an application by the Canadian National Railway Company (as distinguished from the Crown) for the issue of a warrant of possession under the provisions of sec. 21 of the Expropriation Act, as distinguished from the provisions of secs. 238 *et seq.* of the Railway Act. The same remedy is provided by both statutes.

Notice of this application was given the respondent and the hearing of the same, which was made returnable in open court, was duly argued by counsel for both parties respectively.

The Canadian National Railway Company has no *locus standi* before this court for the determination of any controversy as between itself and a subject. This court has no jurisdiction to hear any such matters at the request or instance of the Canadian National Ry. Co.; it has no jurisdiction between subject and subject. The Exchequer Court has no jurisdiction between subject and subject beyond explicit statutory enactment which is not to be presumed, and it has been expressly laid down that statutes are not

presumed to alter any statutory jurisdiction beyond what the enactment explicitly declares, either in express term or by unmistakable implication. In all general matters beyond, the law remains undisturbed. It is not to be assumed that the legislature would alter fundamental jurisdiction without expressing itself with irresistible clearness. Jurisdiction is not lightly assumed and one must not seek to be astute to assume the same. It must exist in clear and distinct term.

Now, by sec. 13 of 9-10 Geo. V, ch. 13, an Act to incorporate The Canadian National Railway Company and respecting the Canadian National Railways (which for the purpose hereof will hereinafter be called the Canadian National Railway Act), it is provided as follows:

13. (1) All the provisions of the Railway Act (excepting those provisions which are inconsistent with this Act; and excepting also the provisions of the Railway Act relating to the location of lines of railway, the making and filing of plans and profiles—other than highway and railway crossing plans—and the taking or using of lands) shall apply to the company and its undertaking, it being declared that all the provisions of the Expropriation Act, except where inconsistent with this Act, apply *mutatis mutandis* to the company and its undertaking, in lieu of the provisions of the Railway Act so excepted.

Subsection 2 of this section provides for the deposit of plans and declares that by such deposit the lands taken or expropriated become vested in the *company* and the last subsection thereof provides that the ascertaining of the amount of compensation for such vested land shall be made under the Railway Act: “beginning with the notice of expropriation to the opposite party.”

This section 13 primarily declares:—

1st. That all the provisions of the Railway Act shall apply,—subject to the following exceptions:

2nd. Exceptions,—

- (a) Except when the provisions of the Railway Act are inconsistent with the Canadian National Railway Company Act (Ch. 13).
- (b) Excepting also the provisions of the Railway Act relating to the location of lines of railway, the making and filing of plans and profiles—other than highway and railway crossing plans—and *the taking or using of lands.*

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3rd. Then it further declares that all the provisions of the Expropriation Act, except when inconsistent with the Canadian National Railway Act, apply *mutatis mutandis* to the Canadian National Railways and its undertaking—in lieu of the provisions of the Railway Act *so excepted*.

Therefore the Railway Act applies to the Canadian National Railways, subject to the above exceptions.

Dealing with (a), it is inconsistent for the Canadian National Railway Act to institute proceedings before the Exchequer Court, which has no jurisdiction to hear the same, because section 15 of the Canadian National Railway Act, the company's special Act of incorporation, distinctly enacts that "actions, suits or other proceedings by or against the company" are to be heard before the court of *competent jurisdiction*, which is defined by subsection 2 of said section 15, and which is the court to hear such actions, suits or other proceedings when arising between *private parties*, thereby excluding the Exchequer Court.

Dealing with exception (b) it is clear that the provisions of the Expropriation Act which apply to the Canadian National Railway relate to the expropriating or taking of the land and is clearly defined in subsection 2 of section 13, whereby alike under the Expropriation Act, the *taking of the land is effected by the deposit of plans*, thereby vesting the land in the company. A mode of expropriation much less complicated (dispensing with deposit of money, etc.), than under the Railway Act.

Dealing now with the third exception (c), the statute proceeds further to declare that the Expropriation Act, except when inconsistent with the Canadian National Railway Act, applies *mutatis mutandis* to the company in *lieu of the provisions of the Railway Act so excepted*. Then the question arises, what are the provisions of the Railway Act so excepted? The answer is they are defined within the first bracket of section 13, and they are the provisions of the Expropriation Act dealing with the manner of expropriating or taking, which is by way of a deposit of plan, which vests the lands in the company without the company having to make any tender, deposits, etc., as provided by the Railway Act. Were the Crown the party expropriating, it might well be contended that the Exchequer Court

had jurisdiction; but all these proceedings are at the instance of the railway company.

Moreover, the provisions of the Expropriation Act might—in any railway company special Act—be declared applicable to that company,—as is done with the Canadian National Railway—without giving the Exchequer Court the jurisdiction to hear the controversies of the companies with the owners of land expropriated. The Expropriation Act only applies *mutatis mutandis*; that is it provides a certain manner for the Canadian National Railway to expropriate; but it does not give the Exchequer Court jurisdiction to hear any action taken by it. The Expropriation Act would become inconsistent with the Canadian National Railways Act, if action were taken under the Expropriation Act when section 15 of (Ch. 13) of the Company's Act, as already said, provides that these actions are to be taken before the provincial courts,—which are defined by subsection 2 of that section to be the courts of competent jurisdiction.

Moreover, the same relief which is sought by the present proceedings can be obtained under sections 238 *et seq.* of the Railway Act as under section 21 of the Expropriation Act and in the latter case even before a judge of a provincial court,—with however this important qualification that under the Railway Act, the warrant may be obtained when resistance or opposition is made to the *company*, while under the Expropriation Act it is obtained when the resistance or opposition is made to the *Minister*. Then the present proceedings are obviously at the instance of the company and not the Crown. The Exchequer Court has jurisdiction when resistance is made to the Minister, in a case wherein the Crown is the expropriating party, and I may here again repeat that by the fact that the Expropriation Act is made applicable *mutatis mutandis*,—that is so far as applicable,—to the Canadian National Railway Company,—it does not mean it gives the Exchequer Court jurisdiction when the Crown is not a party to such proceedings. It only means that the manner, the method of expropriating is made applicable.

Then subsection (c) of subsection 2 of section 13 of the Canadian National Railway Company Act provides that

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the compensation shall be ascertained under the provisions of the Railway Act, and further that such jurisdiction "begins with the notice of expropriation to the opposite party," a procedure not provided by the Expropriation Act and a procedure which must precede the proceedings on an application for a warrant and which therefore is separate and distinct from the expropriation itself, which is entirely consummated by that time under the Expropriation Act, and which then ceased to apply.

In other words when the expropriation has been consummated under the Expropriation Act by the deposit of plans, the lands have become vested in the company and at that stage, at the very next step, the Railway Act applies by giving notice of expropriation which is not necessary under the Expropriation Act. The proceedings for a warrant of possession must therefore necessarily be after such notice has been given to the owners. Therefore the proceedings at that stage must be taken under the Railway Act.

The present proceedings are at the instance of the company and not of the Crown. The Crown and the company are both a separate and distinct entity, as already held in *re Semple v. Canadian National Railway Co.* (1). The *aula designata* is clearly defined by section 15 of the Canadian National Railway Company Act, whereby the jurisdiction of the Exchequer Court is clearly ousted.

If the Canadian National Railway Company has to go to court, it has to go to court under the provisions of section 15 of its Act of incorporation, its special Act, as therein enacted. See *Michaud v. Canadian National Railway* (2); *Croteau v. Cliche and Canadian National Railway* (3); *Semple v. Canadian National Railway* (4).

Having said so much I have come to the conclusion that the Canadian National Railway has no *locus standi* on its present application and that the Exchequer Court has no jurisdiction to entertain its application for the issue of a warrant of possession under the present circumstances.

It would seem that sections 238 *et seq.* of the Railway Act, subject to the manner of taking or expropriating lands

(1) [1923] 25 Ont. W.N. 461, at p. 463.
 (2) [1924] 3 D.L.R. 1.

(3) [1924] Q.R. 62 S.C. 371.
 (4) [1923] 25 Ont. W.N. 461 and [1924] 25 Ont. W.N. 556.

which is under the provisions of the Expropriation Act, would provide for proceedings of the present kind and nature.

The application is dismissed with costs for want of jurisdiction.

Judgment accordingly.

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TORONTO ADMIRALTY DISTRICT

INTERLAKE NAVIGATION COM- } PLAINTIFF;
 PANY, LIMITED }

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AGAINST

THE STEAMSHIP *GLENFARN* DEFENDANT.

Shipping—Accident—Damage—Negligence—Onus of Proof.

Held, that the owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired, and that the increased value of a ship by reason of such repairs is not ground for deduction in the amount of damages recoverable.

2. That even if the ship were in a weak condition, and the damage is greater than would ordinarily be the case, the ship in fault for the collision is none the less liable for the entire loss, even where the repairs include the substitution of new work and material for what was previously injured, as well as new for old material. Repairs clearly not consequent upon a collision cannot be recovered.
3. That where a ship has been driven on shore as the result of a collision or other accident, and damages are claimed, as arising therefrom, it is incumbent on her to prove that such damage was occasioned by the stranding as a consequence of the collision or other accident; and that the stranding, collision or other accident was the result of the negligence of the other ship.

ACTION by the plaintiff against the SS. *Glenfarn* for damages caused to one of its vessels resulting from the breaking of the gates of a lock on the Welland Canal by the ship *Glenfarn*.

March 17th, 18th and 19th, 1925.

Action now tried before the Honourable Mr. Justice Hodgins at Toronto.

Francis King, K.C. for plaintiff;

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

The facts are stated in the reasons for judgment.

HODGINS L.J.A., now this 15th April, 1925, delivered judgment.

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This action is brought for damages caused to the plaintiff's SS. *Saskatoon* through the breaking of the gates of lock 11 on the Welland Canal at about 2 a.m. on the 20th May, 1924, by the defendant's SS. *Glenfarn*. The *Saskatoon* is a steel vessel 256 feet long, 42 feet eight inches beam and drawing 14 feet.

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It was, early in the course of the trial, admitted that this action of the *Glenfarn* caused a great rush of water into the stretch between Locks 10 and 11, which carried the *Saskatoon* forward through the Railway Bridge crossing the canal and resulted in injury to her.

The actions of the *Saskatoon* due to this rush of water and also the extent of the injury caused thereby were, however, subjects of dispute.

[His Lordship here discusses the evidence on this point and proceeds.]

While the *Glenfarn* must be held responsible for the damage, which immediately followed from her action in breaking through the gates, it is incumbent on the plaintiff to prove what that damage consisted of, either by direct evidence, or by evidence from which its character and extent could naturally be inferred. This I think they have done. The defendant insists however that the whole of the repairs were not due to this particular accident, and refers to entries in the log indicating that there were various incidents in 1923 and 1924 which might or could produce injury to some of the plates such as is now complained of. The defendant further contends that the damage suffered could not be caused by striking and rubbing along the banks, which are described by his witnesses as consisting of mud.

I am satisfied that the banks of this canal were reinforced by piles placed at short intervals, between which was sheeting extending down some distance but not to the bottom of the piles; that the stones or rip rap were placed on the sloping mud bank as a facing and when disturbed by the continual passing of vessels could and did slip down inside, and found its way outside the foot of the piles and sheeting. That being so, the damage alleged to have been suffered, could have been caused by these stones or by some similar obstruction such as old anchors or chains. The

force of the blow under the influence of the flood water would, in my judgment, in view of the evidence presented, fully account for the extent and nature of the injury suffered.

The fact that, in the seasons I have mentioned, the *Saskatoon* met with some mishaps, most of them usual in canal traffic, is urged as indicating that the plaintiff has, in the repairs effected, been able to make good the damage, whatever it was, which was caused by these incidents related in the log. But I think I am relieved from the necessity of going into the details of these suggested injuries or of estimating their value. The evidence regarding them is not sufficient in itself to enable me, or, as I venture to think, anyone, to draw the line with anything like precision, if it was my duty to analyse it fully.

The general rule is stated in *Marsden* (1), as follows:—

The owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired; and if the necessary consequence of this is, that the value of the ship is increased, so that the owner receives more than an indemnity for his loss, he is entitled to that benefit. No deduction is made from the damages recoverable on account of the increased value of the ship, or the substitution of the new for old materials. If the damage received in a collision is greater than would ordinarily be the case, because the injured ship was in a weak condition, the other is not the less liable for the entire loss, if she is in fault for the collision. The principle is, that if a part of the damage was clearly attributable to the wrongdoer so that it is impossible to draw the line with precision, and to say how much, the wrongdoer must make good the whole loss.

The principle covers, I think, the substitution of new work and material for what was previously injured, as well as new for old materials. *The Gazelle* (2), *The Alfred* (3), *The Pactolus* (4), *The Bernina* (5), *Re Halley* (6).

It is quite true that if repairs clearly not consequent upon the collision are done, the amount of these cannot be recovered. *The Princess* (7), *J. T. Easton* (8).

If positive evidence had been called, if such was possible, of earlier damage, this would have afforded no defense, unless it was shewn to be so unconnected with the damage resulting from or consequent on the accident and so completely different in position and character as to indicate that its origin lay outside the cause implicating

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(1) 8th Ed. pp. 115 & 123.

(2) [1844] 2 Wm. Rob. 279.

(3) [1850] 3 Wm. Rob. 232.

(4) [1856] Swabey 173.

(5) [1886] 6 Asp. 65.

(6) [1867] L.R. 2 A. & E. 3.

(7) [1885] 5 Asp. 451.

(8) [1885] 24 Fed. Rep. 95.

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the plaintiff's ship, and which received no further injury therefrom. In that case the rule which I have mentioned with regard to wrongdoers would not apply. But if what was established merely indicated the likelihood of similar damage and not its actual happening, or that what was repaired might have been earlier damaged as is the case suggested here, the rule would govern.

I have carefully read the entries in the log relating to the course of the *Saskatoon* during the years 1923-24, and considered the evidence given with relation to damage which it is argued might have been incurred during those years.

Having regard to what is laid down in the cases I have mentioned both as to the right of recovery for all the damage shown on a proper survey, the importance of the evidence of competent surveyors, and the onus as to displacing it, I hold that the evidence given in this case on behalf of the plaintiff fully meets the requirements which those decisions involve. Two independent and capable surveyors were called who testified that in their opinion all the repairs done were needed to make good recent injury of a character referable to the alleged accident. Opposed to them was an employee of the defendant, with much less experience in this particular department of knowledge. His testimony, while rather positive, failed to convince me that the others were mistaken in their conclusions, nor did those witnesses who professed to know of the absence of stones or similar obstructions in the canal, successfully maintain their positions under cross examination.

The cases which show that it is incumbent on the plaintiff to prove that the damages he claims directly have actually resulted from the collision with the defendant's ship, are applicable where the damages follow from the ship being driven on shore as a consequence of the collision or other accident. I refer to *The Pensher* (1); *The Govino* (2); *The Waalstroom* (3), and to a recent case, *The Paludina* (4). While the judgment in that case somewhat narrows the rule laid down by Dr. Lushington in the first mentioned report, it is upheld where the damage is due to stranding

(1) [1857] Swabey 211.

(2) [1880] 6 Que. L.R. 57.

(3) [1923] 17 Ll. L. Rep. 53.

(4) [1925] P. 40.

immediately following the accident. Bankes L.J., after stating,

that the plaintiff must always show, in a case in which he complains of damage resulting from negligence, that the negligence was the direct cause of the damage. In some cases a considerable interval may elapse between the time when the negligence is said to have occurred and the time when the damage is said to have resulted. In those cases I think the onus lies upon the plaintiff to show that the chain of causation connecting the damage with the negligence is complete. He may give evidence which, if not challenged and in reference to which no suggestion is made that it is not complete, will discharge the burden, or which is such that in the absence of any such challenge there is only one inference which could be drawn. refers with approval to the language of Hill J. in the *Waalstroom*, which is as follows:

In my view, in the circumstances of this case, the burden of proving that the consequential damage was a consequence of the negligence is upon the plaintiffs. In my view it is always upon the plaintiffs; but the facts may speak for themselves, and in themselves shift the burden upon the defendants, as, for instance, in a case where stranding immediately follows the collision, and so follows that it speaks for itself and is *prima facie* a consequence of the collision.

* * * * *

Judgment for plaintiff.

TORONTO ADMIRALTY DISTRICT

MERLO, MERLO & RAY, LIMITED PLAINTIFF;

AND

THE SHIP *HARRY R. JONES* DEFENDANT.

Shipping—Collision—Strict observance of Rules of Navigation required—Warning—Division of Damages—Narrow Channels—Overtaking Vessel—4-5 Geo. V, c. 13.

Held: When a ship ahead after receiving a passing signal from an overtaking ship in a narrow channel deviates and continues to go to starboard, she contravenes Rule VIII which states that the boat ahead shall in no case crowd upon the course of the passing vessel.

2. That if the ship ahead anticipates damages from the approach of an overtaking ship it is the duty of the former to give warning. On the other hand the ship overtaking must observe the utmost care and watchfulness of the movements of the ship ahead, and if the movements or changes in the course of the ship ahead are not understood the overtaking ship is bound to slacken speed and if necessary to stop or to keep out of the way of the overtaken ship.
3. When both ships in a collision are held to be contributory to an accident, the damage can only be apportioned one half to each, as 4-5 George V, c. 13 (Dom.) does not apply to the Great Lakes.

This was an action brought by the plaintiff against the ship *Harry R. Jones* for damages by reason of collision between the plaintiff's ship *Sawyer* with the steamship *Minch*

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for which collision it was alleged the ship *Harry R. Jones* was responsible.

April the 28th, 29th and 30th, and December 16th and 17th, 1924.

Action now tried before the Honourable Mr. Justice Hodgins L.J.A., at Toronto.

J. H. Rodd, K.C., for plaintiff.

Francis King, K.C., for defendant.

The facts are set out in the Reasons for Judgment.

HODGINS L.J.A., now (31st January, 1925) delivered judgment.

Action for damages arising out of a collision, heard before this court on the 28th, 29th and 30th April, 1924, and on the 16th and 17th days of December, 1924.

Broadly speaking the accident happened in this way. The SS. *Sawyer*, a steam vessel of 484 gross and 259 net tons, 152 feet long and 32 feet beam laden to 13 feet, owned by the plaintiffs, having crossed Lake St. Clair was proceeding in a southerly direction through the channel which leads from Lake St. Clair to Detroit, U.S.A.

While in this channel, she was overtaken by the SS. *Jones*, a steam vessel of 5,315 gross and 4,160 net tons, 468 feet long, 52 feet beam and with a draught of 19.5 and fully laden, and a collision, without appreciable injury, occurred when the two vessels were passing, resulting, as the plaintiffs allege, in causing the *Sawyer* to get under the stern of the *Jones* and to shoot across the ship channel, during which movement she came in contact with SS. *Minch*, a vessel proceeding up channel. Owing to the injury which resulted from this last contact, the *Sawyer* was beached in shallow water, and its owners sue the *Jones* for the damage suffered.

The channel in which the occurrence took place is known as the Grosse Point channel in the lower end of Lake St. Clair. At its northern end is a lightship and there are on each side gas buoys, at three different points, those mentioned in the evidence being gas buoys 19 and 20, which are south of the lightship, and 9 and 10 which are still further south. These are spar buoys on each side between these gas buoys. The channel itself is 800 feet wide, and

its east side is nearest Canadian territory and is to the left or port of vessels descending, that is, moving southward through the channel; the westerly side is nearest to American territory and is on the right or starboard side of vessels so proceeding. The channel lies wholly in American waters, and both sides agree that the rules applicable to the case are those known as the Pilot Rules for the Great Lakes and for Connecting and Contributory Waters, Edition May 1, 1912, together with the laws relating to the navigation of vessels on the Great Lakes and connecting and tributary waters, being an Act of Congress approved 9th June, 1910, all being found in Exhibit 4.

[His Lordship here gives the contentions of the parties as found in their respective Preliminary Acts, and then proceeds.]

The sheering of the *Sawyer* towards the *Jones* is alleged by the plaintiffs to be due to suction from that vessel. On the other hand the defendants say that the *Sawyer*, through some error or mismanagement, came too far towards the *Jones* and that if then affected by suction, which they deny, it was due to her own fault. It was not contested that the subsequent striking of the *Minch* was due to what happened between the *Sawyer* and the *Jones*.

The movements of the *Sawyer* and a vessel, the *Cadillac* during and before their passing one another are to my mind important features in this case. The *Cadillac* whose gross tonnage is 3,582, and the length 400 feet and beam 50 feet, with a speed of about 10 miles per hour, was coming down the lake ahead of the *Jones* and behind the *Sawyer* and ultimately passed the latter in the channel a little more than half way between the light ship at the northern entrance to the ship channel and gas buoys 19 and 20. The *Cadillac* was easterly of and behind the *Sawyer*, the *Jones* to the west and still further behind. When the *Cadillac* was overtaking the *Sawyer* she signalled her desire to pass down on the port side of the *Sawyer* and this was accepted. But she found she could not safely do this having regard to the position and course of the *Sawyer* which was to the east of the centre line of the channel, just how much is not certain, but is given as from 30 to 40 feet. If this distance is accurate it would give the *Cadillac* 360 feet of clear

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channel, less her beam, and whatever distance she was from the eastern side of the channel (together 100 to 125 feet). Being fearful that she would get into shoal water if she continued on her course on the port side of the *Sawyer* the *Cadillac* desisted when about abreast, dropped back, and changed her course to the westward, signalling the *Sawyer* that she intended to pass her on the *Sawyer's* starboard side. This she did, and her master, Walter M. Amsbary, called for the plaintiffs, gives rather important evidence as to what had occurred. It is as follows:

[His Lordship here cites from the evidence and then proceeds.]

The conclusion I draw from this and other evidence to which I shall refer, is that when the *Cadillac* discovered that she could not safely pass the *Sawyer* on the latter's port side, and went westward to pass her to starboard, the *Sawyer* moved towards the east, crossing her bow and then straightened up on a course somewhat to the east of that which she had previously been following. That then when the *Cadillac* passed, at 100 feet distance, the *Sawyer*, after signalling the *Minch*, altered her course to starboard and went further to the westward to avoid any danger from the *Minch*. Now if the courses, of the two vessels, the *Sawyer* and the *Jones* became sixty to seventy feet apart, due to that change of course, they were then too near for passing in safety, and the manoeuvre of the *Sawyer* was calculated to bring her into collision with the *Jones*, even disregarding the view that suction or interaction at 100 feet or less would draw the vessels together.

There are other items of evidence which have a bearing upon my conclusion. When Hill on the *Sawyer* took over the wheel from the wheelsman, Avelin, as the *Jones* was passing, the latter says it was amidships. If so the *Sawyer* must have straightened up after getting back on her course, because Avelin says that when the *Cadillac* passed, the *Sawyer* was 100 feet east of the centre line and only 25 feet east when the *Jones* passed. The *Sawyer* had hauled to the east according to Amsbary, the Master of the *Cadillac*. To get back to 25 feet east of the centre line, the *Sawyer* must have gone to starboard. Amsbary further

says that it was only two or three minutes after the *Sawyer* signalled the *Minch* that the former took her sheer across to the *Minch* and that he thought that after the *Cadillac* passed the *Minch*, the *Sawyer* was west of the centre line. Hill says that the wheel was slightly apart to get away from the *Minch* when he took it, and that he put it hard apart to carry the bow to starboard as the suction of the *Jones* was drawing in her stern. If the wheelsman is right as to the position of the wheel this action of Hill would necessarily result in a collision with the *Jones* as the vessels were then only 30-40 feet apart. But I believe it had been and was apart when Hill took it, whether from the carelessness of the wheelsman or in forgetfulness of the position of the *Jones*. It was suggested by one witness that the *Sawyer* should have taken the eastern side and let the *Minch* come between her and the *Jones*. It may be that that was the *Sawyer's* first intention but her signal indicated that she had decided to resume her original course.

There is very clear evidence of inattention on the part of the *Sawyer*, to the position and movements of the *Jones*. Hill says that after observing the *Jones* five or six hundred feet astern, he did not notice her again until she was abreast of the *Sawyer's* wheelhouse. His evidence is as follows:

[His Lordship here cites from the evidence and proceeds.]

If the course of the *Jones* was, as Hill and the other of the *Sawyer's* witnesses assert, only 60-70 feet distant laterally from that of the *Sawyer*, when 500-600 feet away (which is only about the length of the *Jones* or somewhat over that), it would be the duty of the *Sawyer* to have sounded a danger signal when she realized that fact and she did not do so. This is the more extraordinary, as it was just then that she signalled the *Minch* that she was going to starboard to pass her safely. Hill says that having blown a signal to the *Minch*, he had to keep clear. Kelly, Master of the *Minch*, places the *Minch's* position as 75 feet from the buoys showing the eastern limits of the channel when he noticed the *Sawyer* and *Jones* abreast. Hill puts the *Minch* at 150 to 200 feet east of the centre line of the channel. If the *Sawyer's* position is correctly given by her witnesses as being 25 feet to the east of the centre line,

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then there was 300 feet according to Kelly, or 125 or 150 feet according to Hill, between them when the *Minch* whistled, and there was no necessity for giving her any room. Kelly says he had practically all his half of the channel when signals were exchanged and the *Cadillac* had passed about 100 feet away. Ericson corroborates the position of the *Minch* as being well over to the east and close to the buoys.

The wheelsman of the *Sawyer* impressed me as being rather stupid, and his evidence indicated a measure of inexperience and unfamiliarity with the Rules of Navigation applicable to narrow channels. He had charge while the *Cadillac* passed them to starboard and before and after the change of direction. The *Jones*, he says, was then one-half mile astern when seen by him and others of the crew. In cross-examination he says 1 mile, and that the *Minch* was a mile away when the *Cadillac* went by. These figures are not to be depended on. There were thus, to his knowledge, three vessels in proximity. After signalling to the *Minch* he says that he again noticed the *Jones* one-quarter mile away but paid no further attention to her till she was broadside going by. In another part of his evidence he says he saw her 500 feet astern and coming on at 11 miles an hour as compared to their seven miles, and coming closer to the *Sawyer*. Indeed notwithstanding her gain of one-quarter mile he says he had no idea she was going to pass. This he confirms on cross-examination. His account as to the wheel of which he was in charge differs from that of Hill. He says it was amidships when Hill the mate took it and that the *Jones* was then only ten feet away. He contends that it so remained till the stern and bow of the *Sawyer* had struck the *Jones*, when the wheel was put to port by Hill. He is very confused when describing how the wheel acted and what orders would be given, and cannot be relied on.

The Master of the *Sawyer* was very late in appearing on the scene, and came into the wheelhouse just when the *Sawyer's* bow after she touched the *Jones*, swung out towards the *Minch* and had got about 100 feet from the *Jones*. Avelin took the wheel again from Hill before the Master turned up, and the latter then took it. The Master

confirms Hill's testimony as to the wheel and says it was hard aport when he took it and that it so remained till the *Sawyer* hit the *Minch* and that there was no time to change it before they did so. He then put it hard astarboard to make for the shore.

It is practically agreed that the *Cadillac* had passed the *Sawyer* at a distance of 100 feet. She is about as large and long as the *Jones*, and no suction was felt.

In considering all the distances given, it must be remembered that they are estimates, only trustworthy when the observer has a trained eye and time to use it. But taken as they are given, the distance between the *Jones* and the *Sawyer*, even if 200 feet, is only a little more than the length of the latter vessel, so that any movement by her towards the course of the *Jones* would in a very short space of time fill up the intervening distance. The beginning of a swerve would create a very real peril of collision, seeing that the *Jones* was only twice her length behind and was going three miles an hour or $1\frac{1}{4}$ miles (whichever version is taken) faster than the *Sawyer* whose movement forward on a slant would be slightly slower than if she had held her course.

* * * * *

The duty of the *Sawyer* was to have kept its course and speed, and she deviated. This is indirectly contrary to Rule VIII "The boat ahead shall in no case * * * * crowd upon the course of the passing steamer." The position of the wheel when Hill took it over was "aport," so that Rule 20 (Laws) was broken by going and continuing to go to starboard, after the *Jones* had signalled and (Rule VIII) in not sounding a danger signal before so doing. Those on the *Jones* say the *Sawyer's* signal (said to be intended for the *Minch*) was taken by them as answering their passing signal. The giving by the *Jones* of the latter signal is denied by some of the witnesses on the *Sawyer*, but I find that it was given and that in all probability concentration on the *Minch* accounts for the *Jones'* signal being unnoticed. Indeed the position of the latter vessel, only about three lengths of the *Sawyer* away was such that its catching up and passing must have been and indeed was clearly anticipated. If danger was anticipated from the

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rapid approach of the *Jones* it was, as I have said, the *Sawyer's* duty to warn her. This was not done nor any indication of any kind given as to what the *Sawyer* was going to do. Hill says he knew that the *Jones* was going by almost twice as fast as the *Sawyer* was running. The *Minch* was quite near enough, about three ship-lengths away, to require prompt attention. The *Sawyer* was bound to have due regard to each of these vessels, and to have dealt with each. Her changing her course to avoid the *Minch*, with the *Jones* on her starboard side or quarter, was inexplicable.

In answer to all this it is alleged that the *Jones* was entirely to blame for the disaster because she came too near and caused the *Sawyer* to swerve from her course by force of the suction exerted by the *Jones*.

With regard to suction, or interaction, between these vessels, it is to be noted that, according to Hill, who was in charge, it was felt when the wheel houses of each boat were in line and resulted in pushing the bow of the *Sawyer* away from the *Jones* and bringing the stern in towards her. This would be the natural consequence of a bow wave. Or if the *Sawyer* was edging in towards the course of the *Jones* interaction might catch her bow as the *Jones* proceeded and so throw it to port. The wheelhouse of the *Sawyer* is about 15 feet aft of her bow and that of the *Jones* is 30 feet from her stern. This being so, the stern of the *Jones* would extend very much beyond the stern of the *Sawyer*, in fact about 300 feet. The vessels are respectively 468 and 152 feet long. Suction caused by the stern of the *Jones* which was chiefly emphasized in the evidence given, would not be felt in that position.

Vaughan Williams L.J., in the *Olympic* and *H.M.S. Hawke* (1), speaks of the question of suction or interaction as

too uncertain to enable any one to speak positively as to the distance within which such a possible cause will be dangerous

He adds:

knowledge of the subject is still in its infancy, and as applied to the witnesses in this case, I think the description is unusually accurate. The Masters of the

Minch and the *Cadillac* say that a wrong wheel or mismanagement, equally with suction, would account for what happened. In the case of *Caldwell v. SS. Bielman* (1), the effect of suction or interaction is considered and a quotation from Spencer on Collisions is given.

It must be presumed that the master of a large steamer must know the effect of frontal and side waves made by such steamer when going at her ordinary rate of speed in narrow channels, and he should therefore regulate or moderate the rate of speed and keep sufficiently out of the way of an overtaken vessel.

It appears from the case of the *Cederic* (2), that in a narrow channel, where the speeds and some of the conditions were very similar to those in this case, passing at a distance of 100 feet is considered as dangerous, a view taken in the United States in the *City of Brockton* (3). I find also that MacLennan J. in *Geo. Hall Coal Co. v. SS. Lord Strathcona* (4), says:

Suction is a force that has been recognized as a danger in close navigation especially in shallow waters, and always results from a too close approach.

The explanation of the case of the *Olympic* and *Hawke* (ante) as given in Marsden on Collisions, illustrates the *onus* which must be met in this case.

In the House of Lords the Judgment in the *Olympic* (5) case was affirmed, both the Lord Chancellor and Lord Atkinson admitting the probability of suction being effective in shallow water.

If the *Jones* was in reality only 60-70 feet away laterally from the course of the *Sawyer* it would seem that the *Jones* would be wrong in attempting to pass at her greater speed. The position and movements of the *Jones* must therefore be considered.

Those responsible for the navigation of the *Jones* saw the passing of the *Sawyer* by the *Cadillac* and the whole of their manoeuvres towards the east and west, prior thereto. The *Jones* was then about half a mile astern, or according to Neely, her lookout, only a quarter of a mile. When signalling the *Sawyer* and getting what the Master of the *Jones* took as a complying answer, he says that he ordered the wheelsman to slightly port so as to throw her bow to

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(1) [1906] 10 Ex. C.R. 155.

(3) [1889] 37 Fed. Rep. 897.

(2) [1924] P. 215.

(4) [1924] Ex. C.R. 32.

(5) [1914] 12 Asp. Mar. Cases 580.

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starboard and to keep gas buoy No. 9 somewhat on the starboard bow, and that she afterwards passed that buoy at a distance of fifty feet. Clifford (the wheelsman) was not called and it was stated by counsel that Clifford could not be found since last June. At No. 19 gas buoy the Master says that the *Jones* was 175-200 feet east of it, or just about in the middle of the west half of the channel. This is somewhat corroborated by Gillis, lookout on the *Moll* who says the *Jones* was 150 feet from the west limit when she entered the channel, and was gradually working to westward and that the *Moll* steered on her. The *Sawyer*, he says, was then just east of the centre line. The *Sawyer's* swerve of 50 feet, spoken of by the Master of the *Jones*, if he is accurate, would just bring her on the range. But at this time the bow of the *Jones* had lapped up on the starboard quarter of the *Sawyer*. This would leave, according to the *Jones* 175-200 feet between the vessels. The *Sawyer's* version makes the distance 60-70 feet, though Hill also says that the *Jones* had 150 feet of water clear to the West; this agrees with the latter's statement of her position, but if true displaces the distance between the vessels alleged by the *Sawyer* and makes it agree with that given by the *Jones*. The *Sawyer* took two minutes to strike the *Jones*, according to the Master and Second Mate of the latter. But Taylor the Engineer of the *Sawyer* and her Master make it half or less than half that time. The *Jones* admits she did not check or stop until the *Sawyer* had drawn within 30 or 40 feet of her, because it was presumed that she would straighten up. If the vessels were as close as 60-70 feet this would seem peculiar as the Master of the *Jones* admits that suction would affect the vessels within 100 feet.

The account given by the Master of the *Jones*, Macdonald, is that the *Sawyer* was east of the centre line and kept her course till the bow of the *Jones* had "lapped up" on the starboard quarter of the *Sawyer*, when the latter sheered to starboard 50 feet and then straightened up, leaving some 200-250 feet between them clear; that when the pilot houses were abreast, the *Sawyer* came towards them, apparently under a port wheel, and struck the *Jones* in two minutes. The *Jones* gave a danger signal when the

other vessel was within 30 to 40 feet, checked and stopped and not till then. If the position of the *Jones* at gas buoy 19 is correctly given, and the *Sawyer* was 25 feet east of the centre line, it increases the lateral distance between the vessels by nearly 180 feet. The question is which of these accounts is correct, because if the *Jones* was 250 feet away, the first change of the *Sawyer's* course would leave 200 feet clear, and it would not be till later that danger would become imminent. The second mate of the *Jones*, Costa, does not pretend that the "wobbling" of the *Sawyer* which he speaks of had a swing of more than 50 feet so that that cannot account for her movement in crossing 200 feet of water. When the blow was delivered, the *Jones* was put full speed astern but when the *Sawyer* swung under her stern they were stopped. The Master of the *Jones* denies that suction caused the collision. He admits that he did not see or notice the *Minch* coming up, though she might have been visible when he signalled the *Sawyer* to pass her, and so he did not attribute her signal as to any other ship than his own. Nor did he see the *Minch* till the *Jones* was "lapped up" on the *Sawyer*, although he admits that when she must have been about $\frac{3}{4}$ miles away he could see $2\frac{1}{4}$ miles that evening. He says he looked down channel but fails to give any intelligible reason for not seeing the *Minch*. Costa, second mate of the *Jones*, says he saw a vessel, probably the *Minch*, but that she was not within signalling distance (what that is he does not say) but he says he did signal her just when coming up with the *Sawyer*. The lookout says that he hadn't picked up the *Minch* until the bow of the *Jones* was abreast of the *Sawyer's* stern, though he could see two miles clearly. The Master of the *Cadillac* puts the *Jones* as 200 feet from the western limit of the channel and says that she was further to the west than the *Cadillac* was when she passed the *Sawyer*. Kelly, Master of the *Minch*, says that the *Jones* was about 400 feet west of her when the collision occurred and she herself was 40-50 feet from the eastern side of the channel.

But the important question after all, is whether the *Jones*, having regard to the previous actions of the *Sawyer* should have stopped or hauled further to the westward in

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order to give her a wide berth and pass in safety, or to have signalled for leave to pass when it was seen that the *Sawyer* had changed her course. Two of the witnesses on behalf of the *Jones* speak of the course of the *Sawyer* as being wobbly and that this was noticed before they got into the channel. I think that the *Sawyer* moved westward more than she admits. While several of the witnesses on behalf of the *Jones* say they observed the spar buoys or stakes on the western side of the channel and the course is given as tending westward from the lightship down to the buoys known as numbers 9 and 10 and while I have mentioned other evidence tending to place the *Jones* well to the westward, yet the result which happened could not, in my judgment, have occurred if the *Jones* had kept as near to the western buoys as she alleges. I should place her nearer the centre of the western half of the channel. But adopting the *Jones* evidence, the *Sawyer's* first swing and straightening up being observed and apparently not understood it then became the duty of the *Jones* under Rule II to signal "danger," and to slow up and stop, or else to go to starboard so as to avoid trouble. It may be that those on the *Jones* had not observed the *Minch*, but they should have done so. A sight of that vessel earlier might have explained to the *Jones* why the movement was effected, and so brought about some action on her part.

It may be said that on the second erratic movement of the *Sawyer*, she apparently became a crossing vessel, having taken a course involving risk of collision and therefore having the *Jones* on her starboard bow was bound to avoid her. But I think the true view is that the actions of the *Sawyer* threw upon the *Jones* the duty, or afforded her the opportunity of escaping her. While "the court ought to be careful not to cast blame too readily upon a vessel which is placed in difficulty by another vessel," per Evans P. in *The Tempus* (1), there was enough time for some deliberation on the part of the *Jones*. She had proceeded on her course and maintained her speed till the ships had come within 30 or 40 feet of each other. On her own showing 100 feet is a safe distance and less than that is not. In addition there were three ships involved. Taking the most

(1) [1913] P. 166-171.

favourable view of the *Jones* and the *Minch* 50-75 feet from the east and west limits of the channel, and deducting their beam, say 100 feet, that leaves only 150 to 200 feet between the *Sawyer* and the *Jones*. This is about the length of the *Sawyer*, and half the length of the *Jones* and the *Minch*. Any deviation from parallel lines would therefore involve considerable risk. This deviation is proved against the *Sawyer* and it is also asserted by the *Jones* that her navigation was for a considerable time faulty, i.e., "wobbly." In addition, the *Cadillac* had, in full view of the *Jones* crossed over from east to west to pass the *Sawyer* which had then come back towards her former course. The *Jones'* speed $9\frac{3}{4}$ miles was not checked nor was any signal made to ascertain if after the *Sawyer's* change of course, she still had permission to pass. See Rules 2, 8, and 22 and 26.

I think under all these circumstances the *Jones* was to blame and contributed to what happened. As 4-5 Geo. V, c. 13 (Dom.) does not apply to the Great Lakes I can only apportion the damage one-half to each.

What happened subsequently to the collision between the *Jones* and *Sawyer* does not come in question here. The consequences of the situation brought about by the *Jones* and *Sawyer* are described by the Master of the *Jones* as "natural." The actions of the *Sawyer* just before and after the collision were not characterized by any great degree of seamanship or intelligence, and there is something to be said in favour of the view that the position of the wheel and the starting of the *Sawyer's* engines also contributed to make the collision with the *Minch* inevitable. But the *Sawyer* had been in a position of peril by her own fault and by that of the *Jones* and it is unnecessary to determine as to exact cumulative effect of her actions after she had cleared the *Jones*. The comment of the Master of the *Jones* is justified and the injury suffered by her hitting the *Minch* is attributable to and is the effect of the situation created by the negligence of both vessels originally involved. My conclusion may be summed up thus. I find the *Sawyer* to blame for having altered her course after passing the *Cadillac* and for continuing on the altered course too long, for neglecting to pay proper attention to

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the approach of the *Jones* and approaching her too closely and executing a dangerous manoeuvre in face of the vessels approaching from front and rear, and failing to return the *Jones* signal for leave to pass and for failing to signal her on making her change of course and for violation of the Rules mentioned. I find the *Jones* to blame for neglecting to sight the *Minch* and to apprehend her relation to the *Sawyer*, for taking for granted that the *Sawyer's* signal was an answer to the *Jones*, for neglecting the warnings indicated by the various changes in the course of the *Sawyer* and in failing to check and stop her engines in time or to go to starboard, and for approaching too closely to the *Sawyer*, and passing too near to that vessel and for violation of the Rules mentioned.

Judgment will therefore be entered for the plaintiff for one-half the damages sustained by the *Sawyer*. Each party must pay his own costs of the action. Reference to the Registrar in Toronto to assess the damages.

Judgment accordingly.

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May 16.

IN THE MATTER OF WAR MEASURES ACT 1914

THE SYNTHETIC DRUG COMPANY }
LIMITED } PETITIONER;

AND

IN THE MATTER of the Custodian under the Treaty of Peace
(Germany), Order 1920.

Constitutional law—Treaty of Peace—Custodian—Commissioner of Patents—Patents granted to enemy—Suspension of rights—Royalties.

In November, 1914, the Commissioner of Patents ordered that certain patents, then the property of the German Nationals, be suspended as regards and in favour of M. & C., under the War Measures Act, 1914, and the Orders and Regulations respecting Patents of Invention, the latter to accept a license, which license was later assigned to the Synthetic Drug Co., Ltd. The licensee was to pay a certain royalty and any moneys paid as such were to be a "debt due from the licensee to His Majesty." Payments were at first made to the Commissioner of Patents, but the moneys paid were subsequently transferred to the Custodian, by whom they are now held. The petitioner asking to have same refunded, the Custodian requested the petitioner to take proceedings under section 41 of the Treaty of Peace (Germany) Order 1920, to ascertain his powers and duties in respect

Held, that royalties paid by the licensee from the date of his license up to the expiration of six months from the ending of the war, i.e., to January 10, 1920, were not sums belonging to an enemy, and were not properly in the hands of the Custodian, but should be under the control and direction of the Receiver General or the Commissioner of Patents; and that neither Germany nor German Nationals had any claim upon the royalties paid during such period.

2. That the predetermined policy of the Commissioner of Patents that such license was to continue after the war and the provisions in the same providing therefor was "legislation of an allied power in force at the moment of the signature" of the Peace Treaty as contemplated by paragraph 3 of article 306, but the royalties paid or to be paid after the 10th July, 1920, were properly paid or payable in the hands of the Custodian as a debt due to an enemy, the amount thereof to be agreed upon, and in default of agreement, to be fixed by the Commissioner of Patents.

PETITION for a declaration as to the power and authority of the Custodian under the Treaty of Peace (Germany), Order 1920.

Ottawa, 21st day of April, 1925.

Petitioner now heard before the Honourable the President.

James F. Edgar for petitioner.

G. Wilkie, K.C. for custodian.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 16th day of May, 1925, delivered judgment.

By an Order of the Commissioner of Patents, dated the 28th day of November, 1914, and made under the Orders and Regulations respecting Patents of Inventions, enacted under the War Measures Act, 1914, it was ordered that four Canadian Letters Patent numbered 133,636, 144,874 and 152,320 respectively, then the property of German nationals, be suspended so far as regards, and in favour of, Messrs. Macallum and Candee, jointly, of Toronto, upon the terms that the Commissioner of Patents should grant and the licensee should accept, a license, in the form set out in the schedule to that Order. Subsequently a license was issued to Messrs. Macallum and Candee, trading under the name of The Synthetic Drug Company, in conformity with the form prescribed by the said Order. This license was later assigned to The Synthetic Drug Company Limited, the petitioner, with the consent of the Com-

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missioner of Patents. Paragraphs 2 and 8 of the license agreement, between the Commissioner of Patents and the licensee are as follows:—

(2) The licensee shall during the continuance of the license hereby granted (hereinafter referred to as this license) pay to the Commissioner half-yearly on every first day of June and first day of December, a royalty at the rate of five per cent (5%) on the gross proceeds of the sale of the products made under said Letters Patent of any of them as may be sold during the present war and six months afterwards; and that on such sales as may be made after the expiration of such six months, royalties of such amounts as in default of agreement may be hereinafter determined by the Commissioner to be paid to the patentees.

(8) Any moneys which may at any time be payable by the licensee under the provisions of this license shall be a debt due from the licensee to His Majesty.

The license prescribed also the price to be charged by the licensee, for the product or preparation made and sold under the Letters Patent, and which product or preparation the licensee was obliged to manufacture and sell in Canada.

The payments of royalty made by the Synthetic Drug Company Limited, the Petitioner, and its predecessors, under the license, were made to the Commissioner of Patents, but were subsequently transferred to the Custodian, by whom the royalties so paid are now held, less an amount refunded to the licensee on account of sales of product manufactured in Canada, but sold in the United States.

For reasons which are clearly set forth in the petition, and which I need not here repeat, the petitioner has requested the Custodian to refund to it the royalties paid, or a portion of the same.

Before dealing with the petitioner's request for a refund of the royalties paid, the Custodian requested the petitioner to institute proceedings in this court, as authorized by sec. 41 of the Treaty of Peace (Germany), Order 1920, to ascertain his powers and duties in respect of such royalties, his accountability therefor, and for a declaration as to the ownership thereof.

The submission of the petitioner is, that the royalties paid under the license are not and never were sums due to a German national, and asks for a declaration that the moneys now in the Custodian's hands are not moneys belonging to an enemy, or alternatively, for a declaration that

the ownership of such money is subject to the right of the Crown, or the Commissioner of Patents, or the Custodian, to rebate, remit or refund the same to the petitioner, in whole or in part, as may appear just and expedient, and that the Custodian is accountable for such part only as shall not have been rebated, remitted or refunded. Such is the question for determination in this proceeding.

Subject to any legislation to the contrary, and subject to any of the provisions of the Treaty of Peace, and the Treaty of Peace (Germany), Order 1920 (Canada), it may be said that the law of this country does not confiscate the property of an enemy. He cannot claim to receive it during the war, his right to the property is not extinguished but is merely suspended. That is the general principle. It remains therefore for consideration, to what extent this general principle is modified by the Treaty of Peace, the Treaty of Peace (Germany), Order (Canada), or by virtue of any special war measures enacted by Canada.

Article 306 of the Treaty of Peace deals with rights in industrial, literary and artistic property, as such property is defined by the International Conventions therein mentioned, and which it is conceded, covers the property in the patents in question. The first paragraph of this article is the following:—

“Subject to the stipulations of the present Treaty, rights of industrial, literary and artistic property, as such property is defined by the International Conventions of Paris and of Berne, mentioned in Article 286, shall be re-established or restored, as from the coming into force of the present Treaty, in the territories of the High Contracting Parties, in favour of the persons entitled to the benefit of them at the moment when the state of war commenced or their legal representatives. Equally, rights which, except for the war, would have been acquired during the war in consequence of an application made for the protection of industrial property, or the publication of a literary or artistic work, shall be recognized and established in favour of those persons who would have been entitled thereto from the coming into force of the present Treaty.”

(2) “Nevertheless all acts done by virtue of the special measures taken during the war under legislative executive or administrative authority of any Allied or Associated Power in regard to the rights of German nationals in industrial, literary or artistic property shall remain in force and shall continue to maintain their full effect.”

From this provision of Article 306 of the Peace Treaty, it would appear that the beneficial ownership in the patents, is restored to the patentees subject however, to the rights of the petitioner under its license, which is still in

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force and continues to maintain its full effect, by virtue of par. 1, s.s. 2, quoted above. This is not I think subject to doubt.

Paragraph 2 of Article 306 is as follows:—

“No claim shall be made or action brought by Germany or German nationals in respect of the use during the war by the Government of any Allied or Associated Power or by any persons acting on behalf or with the assent of such government of any rights in industrial, literary or artistic property, nor in respect of the sale, offering for sale, or use of any products, articles or apparatus whatsoever to which such rights applied.”

This paragraph clearly and precisely bars any claim by Germany, or any German national, for any use of industrial property during the war by the Government of any Allied or Associated Power, or by any person so doing, with the assent of such government. This I think was intended to cover such a case as the one now under consideration, and it was I think a natural provision to make in respect of the class of property dealt with by this article of the Treaty. There can therefore in my opinion be no basis of claim by Germany or a German national to any portion of the royalties paid during the war by the petitioner or its predecessors.

The issuance of the license was an act done in virtue of the special measures taken during the war, and therefore the license continues to maintain its full effect, as provided by the Treaty. The license provided that the royalty stipulated therein, was to be paid to His Majesty, and was to be paid during the war and for a period of six months thereafter. Paragraph 3 of Article 306 to which I shall later refer, makes it clear that unless legislation of the Allied Powers “otherwise directs” payments made in virtue of acts resulting from the special measures referred to in paragraph 1 of Article 306 shall be dealt with, as other sums due German nationals, are directed to be dealt with. The license being legislation of an Allied Power, and the payments of royalty therein stipulated for, being “otherwise directed,” that is, to His Majesty, such payments are not sums to be dealt with as are “other sums” due German nationals, under the Treaty provisions.

I am of the opinion therefore, that any sums paid under the license in question, up to the time of the expiration of six months from the ending of the war, which has been

fixed as of January 10, 1920, is not properly in the hands of the Custodian, but should be in the possession of or under the control and direction of the Receiver General of Canada, or the Commissioner of Patents. These sums do not constitute property belonging to an enemy. I do not think the royalty payable by the licensee up to this date, was ever intended to accrue to any one else but the Crown, in the right of the Dominion of Canada. The license itself clearly states that any moneys payable thereunder shall be a debt, due from the licensee to His Majesty, and in my opinion it never was intended that the same should ever be payable to any other person.

As to the royalties paid since the expiration of six months from January 10, 1920, namely July 10, 1920, their proper destination perhaps presents greater difficulties. Paragraph three of Article 306 is as follows:—

“Unless the legislation of any one of the Allied or Associated Powers in force at the moment of the signature of the present Treaty have otherwise directed, sums due or paid in virtue of any act or operation resulting from the execution of the special measures mentioned in paragraph 1 of this Article shall be dealt with in the same way as other sums due to German nationals are directed to be dealt with by the present Treaty; and sums produced by any special measures taken by the German Government in respect of rights in industrial, literary or artistic property belonging to the nationals of the Allied or Associated Powers shall be considered and treated in the same way as other debts due from German nationals.”

Is this paragraph of Article 306 applicable to the condition of facts disclosed in this proceeding? In the first place, let me here repeat the latter portion of clause 2 of the license, dealing with the royalties. It says, respecting the payment of royalty after the period following the expiration of six months from the conclusion of war:—

“and that on such sales as may be made after the expiration of such six months, royalties of such amounts as in default of agreement may be hereinafter determined by the Commissioner to be paid to the patentee.”

It would seem from this, as if it had been the predetermined policy of the Commissioner of Patents in respect of the letters patent and the license here in question, that the license was to continue in effect after the war, but that the payments of royalty to be made by the licensee after the expiration of the six months period following the conclusion of the war, were to go to the patentees. It would also appear that the amount of royalty then to be paid,

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was to be the subject of agreement between the licensee and patentee, and in failure of such an agreement, the same was to be fixed by the Commissioner. The word "agreement" here must I think have contemplated an agreement between the licensee and the patentees. This was the policy adopted by Canada in dealing with enemy rights in the industrial property here in question, subsequent to the war.

This provision of the license was "legislation of an Allied Power in force at the moment of the signature" of the Peace Treaty as contemplated by para. 3 of Article 306, and had the licensee and patentee subsequent to the war agreed upon the royalty, or failing that had the Commissioner of Patents fixed the same, such sum fixed would be payable to the Custodian in conformity with the letter and spirit of Article 306 of the Peace Treaty, and in conformity with the license itself, and would be a sum due or paid in virtue of an act or operation resulting from the execution of a special measure as mentioned in the subsection of the first paragraph of Article 306 and section 78 of the Treaty of Peace (Germany), Order 1920.

The royalty to be paid by the licensee to the patentee for the period under discussion, has not been agreed upon between themselves, nor has the same been fixed by the Commissioner. I assume this to be a correct statement of the facts, because the contrary was not suggested at the hearing. The amount of royalty payable not having been fixed it is impossible to determine what portion of the amount paid within this period, is a sum due to an enemy. In essence, what the petitioner desires, is in part a fixing of the royalties for the period following July 10, 1920. In point of fact the amount of royalty payable since that date, should be determined. It is quite clear that the Commissioner of Patents on the application of the licensee, is empowered to fix the royalty payable since July 10, 1920, on failure of the parties themselves to agree. The Custodian is not authorized to do so, and it would be inappropriate that he should. When this is determined, then the Custodian is entitled to the payment of royalty so fixed, and the amount accruing due at such rate, since July 10, 1920. Any amount in excess of this sum in the Custodian's possession, in virtue of payments made by the licensee to the

Commissioner of Patents during this period, is not a sum due an enemy under the Treaty Provisions. I do not think it is necessary for me to decide what is the proper destination of this amount.

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I do not think the petitioner is to be prejudiced or bound by reason of the payments made by it over the period I am now dealing with. In order to protect its license, I assume it was obliged to do so, or that it thought it prudent to do so. Apparently the payments were made under protest.

Maclean J.

Accordingly the petitioner is entitled to a declaration that the royalties paid by the licensee from the date of issuance of the license, up to the expiration of six months from January 10, 1920, is not a sum of money belonging to an enemy. As to the amounts paid since July 10, 1920, by the petitioner, directly or indirectly to the Custodian, I cannot say they are improperly in the hands of the Custodian. These amounts are as appropriately and rightfully in the Custodian's possession as they would be elsewhere, so far as I can see, and perhaps more so. They are sums of money in which an enemy is interested. Such amounts, however, are there subject to the condition that the exact royalty payable since July 10, 1920, is yet to be fixed by the Commissioner of Patents. The petitioner is entitled to a declaration that if when such royalty is determined, any reduction should be made or ordered in the amount of the royalty at present stipulated in the license, the Custodian is empowered and may rebate and refund accordingly to the petitioner any sum paid by the petitioner during such period in excess of the royalty so fixed by the Commissioner of Patents, and that any such excess is not a sum of money due an enemy.

There shall be no order as to costs.

TORONTO ADMIRALTY DISTRICT
 THE PINE BAY STEAMSHIP COMPANY. PLAINTIFF;
 AGAINST
 THE SHIP *CHARLES DICK*

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Collision—Moored ship—Standing by—Vigilance.

Held, that in a case of collision with a moored ship the onus of proving that she was properly and securely fastened to the dock, in view of

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perils which she should have anticipated, is upon the moored ship, and a duty lies on her to do all that is possible in the circumstances to render a collision or accident less probable. The degree of vigilance to be exercised must depend on the possible danger to be anticipated and guarded against (1).

2. In a narrow channel where vessels are passing or are expected to pass, standing by is necessary on the part of the moored ship, unless she intends to rely entirely on the sufficiency of her fixed moorings or on a warning to approaching vessels.
3. The use of a canal is undertaken upon the conditions imposed by the rules governing that use, and that a vessel which, in deliberate breach of such a canal regulation, keeps her engines moving while passing a moored ship, is responsible for the consequent damage. She is not excused because she could not pass without keeping her engines going, unless her safety requires her to pass the moored ship when she does, or unless she takes adequate precautions to avoid injury.

ACTION for damages by collision between the steamer *Pine Bay* and the steamer *Charles Dick* in the Welland Canal.

Toronto, April 14th, 1925, and following days.

Action now tried before the Honourable Mr. Justice Hodgins.

Mr. W. Law for plaintiff.

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

The facts are stated in the reasons for judgment.

HODGINS L.J.A., now April 28th, 1925, delivered judgment (2).

This is an action for damages alleged to have been suffered from a collision between the steamers *Pine Bay* and *Charles Dick* in the Welland Canal, or consequent upon the passing in the canal by the *Charles Dick* of the *Pine Bay*, then moored to Beattie's dock, whereby the latter was torn from her moorings and injured by contact with the bank. What happened took place at about 1.40 a.m. of the 24th October, 1923. The *Pine Bay* is a steel vessel of 1,222 gross tons, 218 feet long, 34 feet beam and 15 feet depth, and was loaded with 54,000 bushels of wheat and drew 14 feet. The water in the canal being low she tied up at Beattie's Dock waiting for it to rise. While there the *Charles Dick* went by with her engines going at 3 miles an hour (dead slow) a slight adverse current estimated at 1 mile causing her to pass over the ground at 2 miles. The

(1) Note: See *Pine Bay SS. Co. v. The Steel Motor*, (1925) Ex. C.R. 147.

(2) An appeal has been taken to the Exchequer Court.

Charles Dick is a steel vessel 244 feet in length, 43 feet beam, 14 feet depth and of 2,015 registered and 650 registered tonnage.

During the passage of this vessel she created the usual movement of the water in the canal, and its interaction caused the *Pine Bay's* after moorings to part. She swung across the channel and it took about $\frac{3}{4}$ of an hour to get a line out and to work her back and remoor her. When this was done an additional steel cable was put out aft.

I find on the evidence that the *Charles Dick* moving under the power of her engines past the *Pine Bay* caused the breaking of the lines, and the consequent swing but I am not able to find that any actual collision between the two ships took place.

[His Lordship here discusses the evidence.]

I have come to the conclusion and so hold, that the *Pine Bay* was insufficiently moored in view of the conditions existing at the time when she ought and should have apprehended what happened. The onus to show that she was properly and securely fastened to the dock in view of perils which she should have anticipated, is upon her. *The Harley v. Wm. Tell* (1). Beattie's wharf as described in the evidence is a staging, and was neither intended for nor was in fact a mooring wharf. There was a notice on it against trespassing. No proper provision existed upon it for the reception of the lines or cables, so that what could be done depended on where posts were found to which to tie. The photographs put in indicate this, and the evidence of Gothard makes this fact quite clear. The canal is narrow there, so that it was to be expected that the action of the water would be strongly felt. It is clearly shown that many vessels did in fact pass during the day and the canal was known to be a busy thoroughfare. A duty lay on the moored ship to do all that was possible in the circumstances to render a collision or accident less probable. *The Pladda* (2); *St. Aubin* (3). The cases which deal with an anchored vessel are equally applicable to one that is moored. I also refer to the statement of MacLennan L.J.A. in the *Geo. Hall Coal Co. v. C.P. Ry.* (4),

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(1) [1865] 13 L.T. 413.
 (3) [1907] P. 60.

(2) [1876] 2 P.D. 34.
 (4) [1925] Ex. C.R. 70, at p. 78.

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the degree of vigilance to be exercised * * * must depend on the danger to be anticipated and guarded against.

There was, somewhat astern of the *Pine Bay*, a good and sufficient concrete Government dock with ample facilities for safely tying up. I was pressed with a decision of my brother Maclellan in this court given in Montreal, in a case involving this same vessel at the same place, several hours later during the night following this accident. I do not know on what facts the view was arrived at by the learned judge and his assessors, that the mooring there was sufficient, and that Beattie's Wharf was *a safe place*. It is not of course binding upon me as it must depend on facts and conditions which may be, and indeed, in one respect, are, different from those developed before me. That particular respect is that there had been an additional wire cable put out after the accident here in question. But it is nevertheless with some considerable hesitation that I venture to differ from it. My own experience would lead me to appreciate highly the value of spring lines running from amidships, fore and aft, and I may perhaps refer to a decision of the Judicial Committee in a case of *Playfair v. Meaford Elevator Company* (1), as indicating that in that court the general concensus of nautical opinion was shown to regard the use of these lines as usual in proper mooring. What happened here would not in my opinion have occurred had they been in use on the night in question. They lead fore and aft and are properly springs, while the breast lines referred to in the *Steel Motor* case lead from the vessel at a right angle and do not give any power to aid bow or stern when either the fore or aft moorings part. Some of the fastenings of the cables in board were such as to render the taking up of any slack really impossible. The Montreal decision is, I think, distinguishable on two other points. It appears from that judgment that when *Steel Motor* was approaching, the *Pine Bay* sounded a signal for reduced speed and that *Steel Motor* disregarded the warning and passed at too great a speed. This produced an unusual effect, i.e., damaging the winch, something which was not to be expected if the speed had been reduced. It is also said that

the *Pine Bay* could not be expected to have had men standing by to ease her lines as other vessels passed by.

(1) [1912] 24 O.W.R. 946.

This conclusion may be supported by the fact that a warning signal having been given, it would not be expected that it would be disregarded and that in consequence the men would not stand by on the assumption that it would not be obeyed. Upon the evidence before me I must hold that no such signal was given, although sworn to by the wheelsman and watchman of the *Pine Bay*, and corroborated by the mate (Piement) who, however, was down below in bed and was not clear as to some matters which, if he had been alert, he would not have had any doubt about. Upon the evidence here, I arrive at the conclusion and so hold, that standing by is necessary where vessels are passing or expected to pass, unless the moored ship intends to rely entirely on the sufficiency of her fixed moorings or on a warning to approaching vessels. The mate of the *Pine Bay* said that if on duty he would have had a man on the winch all the time and that in the daytime when vessels were passing the watchman and wheelsman handled the winches and gave play to the lines when needed. See the *Excelsior* (1); *The Hornet* (2); *Ogilvy v. Richelieu & Ontario Nav. Co.* (3). The taking up and letting out of slack is essential where a vessel is lifted up in the water and drawn forward and aft or sideways. The crew of the *Pine Bay* admit this was their duty as they understood it, and one of them says that if slack had been taken up there would have been no collision. Notwithstanding this the winches were not used.

Generally speaking the evidence given by several of the plaintiffs' witnesses and some on the other side did not impress me by its clearness or candour, and I have had in some measure to arrive at conclusions directly contrary to statements made before me. The Master of each vessel was rather garrulous and frequently obscured the situation instead of clearing it up.

I have further arrived at the conclusion, after some doubt, that the defendant ship is also to blame. She was proceeding at night—a rainy one according to her witnesses, past a ship tied up at a point in the canal and to a so-called dock which was known to the officers of the pass-

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(1) [1868] 2 A. & E. 268.

(2) [1892] P. 361, at p. 365.

(3) [1908] 11 Ex. C.R. 231.

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ing ship according to their evidence not to be safe or suitable for tying up. She did not warn the *Pine Bay* in any way that she was intending to steam past. It is not denied, and indeed it was asserted by the defendant, that to carry the *Dick* past the *Pine Bay*, her engines needed to be kept moving. She did so and so broke Canal Rule 19, and was a vessel deliberately using the canal under forbidden conditions. It was urged that (1) the rule could not be obeyed, (2) that the provision in the rule rendering the violator of it liable for damages was ultra vires, as being an invasion of civil rights which the Dominion Parliament could not authorize, (3) that Rule 37 (under the Canadian Shipping Act) applied and governed.

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.

It is not necessary to consider whether the latter part of Rule 19 is ultra vires or can be supported ancillary to the right to legislate as to canals. If the condition imposed by that Rule is one on which the use of the canal is undertaken then I think that if its breach caused damage, Admiralty law would warrant the court in imposing liability therefor quite apart from the rule itself. Rule 37 does not, under the situation proved, apply here.

I think the Canal Regulations are binding on those using the canal. See *Canadian Sand and Gravel Co. v. The Key West* (1). My reference to Canal Rule 22 in the *Lakes & St. Lawrence Transit Co. v. Niagara St. Catharines & Toronto Ry. Co.* (2), was merely directed to the fact that the Railway Board had no authority to direct how navigation in the canal should be regulated. That belonged to another

(1) [1917] 16 Ex. C.R. 294.

(2) [1923] Ex. C.R. 202.

authority. This case differs from one relied on by the defence, the *George Hall Coal Co. v. SS. Parks Foster* (1), in that here the breach of the regulation directly caused the accident, although it was impossible to pass without the risk of an accident, unless the rule was disregarded.

I therefore find both vessels to blame and the result is that judgment must go for the plaintiff for half the damages, the amount of which will be referred to the Registrar at Toronto to fix. There will in consequence be no costs to either party.

Judgment accordingly.

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ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT

BETWEEN:—

WENTWORTH N. MACDONALD (PLAIN- } APPELLANT;
TIFF)

AND

THE ATLANTIC SALVAGE CO. LTD. } RESPONDENTS.
ET AL (DEFENDANTS)

*Shipping and Seamen—Collision—Passing vessel—Rule 24—Damages—
Negligence*

The *L.E.* had been aground on the northern entrance of the Strait of Canso and the *C.* having been successful in pulling her off shore was engaged in towing her at a distance of some three miles from shore, when the plaintiff's tug, the *A.* came to assist in the operations. The *A.* passed the *C.* and her tow port to port some distance away; she then pursued a circuitous course and coming about on a parallel course with the tug and tow, placed herself in a direct line between them and stopped, when she was struck on the stern by the tow and damaged so that she subsequently sank. Both the tug and tow were displaying all proper lights indicating they were under way.

Held (affirming the judgment of the Local Judge in Admiralty for the Nova Scotia Admiralty District) that the *A.* was an overtaking vessel and was bound, under the Rules, to keep clear of the overtaken vessel, and that the collision was entirely due to her blundering and unseamanlike conduct in misconceiving instead of properly appreciating the dangerous position into which she had wrongly placed herself.

(1) [1923] Ex. C.R. 56.

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APPEAL from the judgment of the Local Judge in Admiralty for the Nova Scotia Admiralty District (1).

Halifax, 17th September, 1925.

Appeal now heard before the Honourable Mr. Justice Audette.

C. J. Burchell K.C. for the appellant.

W. C. Macdonald K.C. for the respondents.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 14th September, 1924, delivered judgment.

I have read with great satisfaction the succinct but convincing reasons for judgment of the learned trial judge and

(1) The following are the reasons for judgment of Mellish L.J.A.:

(December 30, 1924.) This is an action for damages from collision. The SS. *Lake Elmsdale* had been ashore at the northern entrance to the Strait of Canso, near Cape Jack on the western side. The SS. *Canadienne* had been successful in pulling her off shore and was engaged in towing her off, when the plaintiff's tug boat, the *Alert* came presumably to assist the operation. The *Alert* came north out of the Strait and passed *La Canadienne* and her tow port to port some distance away. The *Alert* then came about on a parallel course with the tug and her tow and placing herself in a direct line between them stopped, when she was struck on the stern by the tow and damaged so that she subsequently sank. The tow was then proceeding very slowly and the *Alert* if alive, as she should have been, to the situation would have had no difficulty in keeping clear of the tow. The *Alert*, however, had not paid proper attention to the lights of the other tug and her tow but wrongly concluded that the *Lake Elmsdale* was still fast on the ground.

It is contended on behalf of the *Alert* that notwithstanding these facts and even admitting them

(they were not admitted) that the tow must be held in some measure at least responsible for the accident. I cannot come to that conclusion. Neither of the other ships had I think any reason to suspect that the *Alert* would do what she did, viz: stop in front of the tow, and I cannot find either of defendants guilty of negligence under the circumstances. The accident occurred near midnight. And even if the *Alert* had been watched by the other ships in the closest and minutest way I am not at all satisfied that anything would have been discovered which would have made it the reasonable duty of either of the other vessels to have avoided or minimized the accident, or that they would then on such discovery have had the power to do so. And it is to be remembered that "it is not in the" mouth of those who have created the danger of the situation to be "minutely critical of the conduct of those whom they have, by their own fault involved in the danger." *U.S. Shipping Board v. Laird Line Ltd.* (93 L.J. P.C. 123.)

In my opinion therefore the plaintiff's action must be dismissed with costs.

I have much pleasure in concurring in every word he says in his determination of the case.

The facts of the case are indeed so clear that it appears to me quite obvious that there is no excuse or justification on behalf of the plaintiff's ship (*The Alert*) for placing herself in the position of peril which she did. Indeed, she left port under instruction to assist the tug in floating the *Elmsdale* which was aground on the shore; but when she arrived or met at about 10.30 hrs. p.m., the *Elmsdale*, which had been pulled off the shore at about 4.45 hrs., was being towed and the tug and the tow were three miles away from the shore with all nautical display from their lights indicating they were under way. After the *Alert* passed them port to port she circuited around, steamed in the same direction in a parallel course at a speed of about 2½ miles through the water, when she suddenly starboarded her helm, proceeded ahead and placed herself between the tug and the tow which were travelling at about 1½ miles through the water. The *Alert* then stopped her engines and thereby inevitably collided with the bow of the tow. She was also, under Rule 24, an overtaking vessel manoeuvring ahead on a parallel course, and she should therefore have kept clear of the overtaken vessel. The *Elmsdale* was not under power, she had stripped off all the blades of her propeller on a big bolder when she had grounded.

Counsel at bar on behalf of the appellant contended that the tow should have noticed when the *Alert* had stopped her engine and she should have steered clear of her. A doubtful manoeuvre, indeed, under the circumstances. *Inman v. Reck* (1). Moreover, the bow of the tow was about 30 feet above the water line and obstructed the view below. Why did not the *Alert* herself notice that the engine of the tug was all the time going? Why did she not govern herself accordingly?

The *Alert* had no excuse to place herself in such an unusually dangerous position and, as was held in *The Cape Breton* (2) if a steamer is following a course which may possibly appear unusual to other steamers, even when jus-

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(1) [1868] L.R. 2 P.C. 25, at p. 34.

(2) [1904] 9 Ex. C.R. 67 at 116; 36 S.C.R. 564 at 579; [1907] A.C. 112.

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tified by special reasons (and there were none here) she does so at her own risk and peril and ought to signal her intention, for the others have the right to assume that she will conform her course to the ordinary rules. See also *The Lancashire* (1). Having manoeuvred in such reckless position she had at her own risk and with proper signals to right herself back into the fairway. *The Glengariff* (2).

It is quite obvious that the collision was caused by the blundering navigation and unseamanlike conduct of the *Alert*, the appellant vessel, in misconceiving, instead of promptly appreciating, the dangerous position into which she had placed herself,—notwithstanding the proper lights which were displayed by both the tug and the tow indicating clearly they were under way,—and in not taking the proper steps to avoid the collision, such as sheering off sufficiently or otherwise as circumstances required, instead of persisting in her unseamanlike conduct which eventually brought her in collision with the respondent's vessel.

The appeal is accordingly dismissed with costs.

Judgment accordingly.

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Oct. 12.

ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT
THE STEAMSHIP *VENOSTA* (DEFEND- } APPELLANT;
ANT)

AND

IVAN COLLIERS AND OTHERS (PLAIN- } RESPONDENTS.
TIFFS)

Shipping and seamen—Wages of seamen—Dismissal—Forfeiture—Deserters

The *V.* was a fishing trawler, and it appeared by the evidence that when trawlers such as the *V.* arrive in port on Sunday they usually only leave on the following day, and the crew are not asked and do not work at the landing of fish and are allowed to go ashore. In this case the crew did go ashore, without notice from the proper officer when to return, and did not return until Monday at six or seven a.m. when they were dismissed. The master refused to pay the crew the wages earned up to that day, on the ground that they were deserters, and that their wages were thereby forfeited.

Held, by the trial judge, that the plaintiffs were not hired for any definite time and, even if rightly dismissed from their employment, the em-

(1) [1874] 2 Asp. M.C. (N.S.) 202. (2) [1905] 10 Asp. M.C. N.S. 103; [1905] P. 106.

ployers were not entitled to retain their wages for the period which they had served on the ship. The right of peremptory dismissal does not carry with it a forfeiture of the wages applicable to such period unless there is an indivisible term of service fixed by the contract of hiring.

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Held, on appeal (affirming the judgment of the Local Judge in Admiralty for the Nova Scotia Admiralty District) that although the crew may have unduly extended their absence, it could not be said that they had remained away so long as to warrant the master in regarding their absence as an abandonment of the work, that they were not deserters, and that forfeiture of their wages could not be enforced.

APPEAL from the judgment of the Local Judge in Admiralty for the Nova Scotia Admiralty District maintaining plaintiffs' action with costs (1).

Halifax, 16th day of September, 1925.

Appeal now heard before the Honourable Mr. Justice Audette.

W. H. Holmes for appellant.

J. E. Griffiths for respondents.

The facts are given in the reasons for judgment.

AUDETTE J., now this 12th October, 1925, delivered judgment.

(1) The following are the reasons for judgment of Mellish L.J.A.:

This is an action for wages against the defendant ship,—a trawler, and compensation up to the time of plaintiff's dismissal as members of the crew.

The plaintiffs were not under Articles, but paid at a monthly rate, with a share in the proceeds of the catch made from time to time.

Plaintiffs were absent without leave from the ship when in port on Sunday. They left the ship Sunday morning. It was intended by the master to go to sea again at 10 p.m. on Sunday evening and as the men had not returned by 9 p.m. they were considered dismissed and were not allowed to ship again on the following morning. The plaintiffs did not desert, and I do not decide whether the master had a right to dismiss them. Nor do I decide whether

the work which they were required to do on Sunday, viz: go to sea on a fishing trip would if performed be a violation of law. The plaintiffs were not hired for a definite time, and even if they were rightly dismissed from their employment, their employers were not in my opinion entitled to retain their wages or compensation for any of the period which they had served on the ship. A right of peremptory dismissal does not I think carry with it a forfeiture of wages applicable to such period unless there is an indivisible term of service fixed by the contract of hiring. I do not think that the hiring was a monthly hiring or a hiring from month to month. It was a general hiring and the practice was to pay at or near after the beginning of each month.

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The present controversy arose under the following circumstances. The captain of the defendant (appellant) ship before arriving at Halifax, being delayed by fog, sent a wireless to get coal, if possible, on a certain Sunday, and told his mate that if they could get coal on Sunday they would leave for the next trip Sunday afternoon at 6 o'clock. The vessel docked somewhere around one o'clock on Sunday morning.

It is clearly established by the evidence that, when arriving on Sunday, the crew of such trawlers as the *Venosta* are not asked to and do not work at the landing of the fish and are allowed to go ashore.

The plaintiffs, who are all seamen, have earned the wages claimed as deck-hands on board a fishing trawler, and were not articulated, but were engaged for no definite time or period. Some were told to go on board and work, and that they would be paid so much per month and a certain percentage on the catch and no more. Others were told of the amount of their pay, without either any mention if the engagement was for a week, a month or a year, or how it would run. As I apprehend the evidence the hiring was not by the month, but the amount of the wages was to be ascertained on a basis of so much a month, and I entirely concur on these two points respecting the contract of engagement with the decision of the learned trial judge. Possibly it is a fair inference from the evidence that the engagement ended with each fishing trip. In the view I take of the case it is, however, unnecessary to pass upon that point.

There is a deal of contradictory evidence as to whether or not the plaintiffs were notified by the proper officer and in the proper manner that they should return at 6 o'clock on Sunday afternoon. The plaintiffs affirm they were not so notified and they were under the impression, as was mostly the practice, that as they had arrived on a Sunday they would only leave next day, and they behaved accordingly—only returning to work between 6 and 7 o'clock Monday morning, when they were discharged.

The evidence of the plaintiffs on this question of notification and as to whether the vessel would sail on the same day, is all one way. Most of the evidence on behalf of the defendant controverts this, but it is given by some wit-

nesses who seem to disclose an interest which might lead to bias. Moreover, the captain's evidence is controverted on several points, even by counsel for the plaintiffs who took the stand to do so. However, the mate, who was the proper officer to notify the deck-hands, testified that before docking the captain told him that if he could get coal on Sunday they would sail at 6 o'clock the same day, and this he said he repeated on the galley when the ship made fast, just after they had arrived.

He afterwards became aware they were actually going that day as soon as the skipper had gone ashore and received orders from the office, and that was when he (the mate) was on the wharf where he was later kept busy taking the weight of the fish, and he worked up to 25 minutes to 5 o'clock. At that time he thought everybody was asleep. He then went to bed and got up at 7 hrs., and at breakfast time he told three or four men aboard then,—the others were ashore by that time—that they were sailing at 6 o'clock. Then being asked about the plaintiffs:

Q. They had gone without knowing?

A. Yes, I did not know when they went.

Witness Anstey, one of the plaintiffs, confirms that. He met the mate on the Sunday evening, at about 10 p.m. who informed him he had been replaced; Anstey then told him he had never received any orders from him, and thereupon the mate answered no.

Considering the conflict of evidence between the plaintiffs and the defendant, and especially the unsatisfactory character of the defendant's evidence, when placed in juxtaposition to the clear evidence of the mate who was the proper officer to advise and notify the plaintiffs, who were all deck-hands under his special direction, I am disposed to find that the plaintiffs left the ship, as they said, that morning under the impression that they were not to sail until next day, as had been done on several other occasions, and further that they left when they had not been notified to the contrary by the proper officer.

These seamen (plaintiffs) were not deserters. They could go ashore on Sunday morning without leave, that is conceded by all parties; the most that can be said is that they may have unduly prolonged their absence—although that

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may possibly be excused by the fact that on most occasions when they arrived on Sunday they only left on the following day. Under the circumstances would that vest the captain with the power to discharge them peremptorily, and deprive them of their earned wages up to that time? I must find in the negative.

Even if, under the circumstances of the case, there was a stipulation for forfeiture it could not be enforced.

Labatt's Master and Servant (2nd ed.) vol. 2 at pp. 1469, 1470 and 1471 bears out this view when he says:— [Sec. 507 is here cited at length.]

The only challenge under the present circumstances is that the plaintiffs

merely absented themselves temporarily from their duties by extending their leave—and whether or not such extended absence did or did not import fault on their behalf; but the forfeiture is only enforceable when they remain away so long as to warrant the master in regarding the absence as an abandonment of their work.

And that was not the case here; they all reported next morning early. Therefore, apart from what has been said above as to whether or not the plaintiffs were properly notified on Sunday morning to return for 6 o'clock I find that there cannot be any forfeiture of the wages so earned on board by the plaintiffs.

I am strengthened in this view by the fact that the Admiralty Court has always shewn a favourable inclination towards the interest of mariners, consistent, however, with justice to all concerned.

In the *Minerva* (1) Lord Stowell at p. 358 said:

Seamen are the favourites of the law . . . and placed particularly under its protection.

And McLennan L.J. in the *Ship Marshall* (2)—

It has been an immemorial and benevolent practice of the court, if there is any doubt about a contract, to give the seamen the benefit of it.

Citing in support of that view: *The Nonpareil* (3) and Roscoe's Admiralty Practice, 4th ed. 251.

The plaintiffs have satisfied the burden of proof on the issue of the liability for wages earned—their evidence is accepted both by the learned trial judge and by myself and their claim ought to be maintained.

(1) [1825] 1 Hagg. 347.

(2) [1921] 20 Ex. C.R. 299 at 304.

(3) [1864] Br. & L. 355.

The defendant seeks to escape liability by urging forfeiture by absence from work without leave. On this point the evidence is contradictory and for the reasons above mentioned I find the burden of proof cast upon him has not been satisfied.

The appeal is dismissed with costs.

Judgment accordingly.

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ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT
 THE *GLENCLOVA* (DEFENDANT) APPELLANT;
 AND
 JOHN F. SOWARDS (PLAINTIFF) RESPONDENT.

1925
 July 8.

*Shipping—Collision—Precaution—Signal—Turning ship in harbour—
 Practice of seaman—Risk of collision.*

Held, (varying the judgment of the Local Judge in Admiralty for the Toronto Admiralty District), that although a ship has received signals authorizing her to continue her course and speed, where she is aware of the other's intended manoeuvre and the time and space required therefor, and is not embarrassed by any doubtful movements on her part; if there is at any time reason to apprehend that to continue her course might lead to a collision, she is no longer justified in doing so, but, by the practice of seamen and prudent navigation is required to take such manoeuvres as will prevent collision, even where no danger signal is given by the other.

APPEAL from the judgment of the Local Judge for the Toronto Admiralty District dated the 7th April, 1925 (1).
 Ottawa, June 17, 1925.

Appeal now heard before the Honourable the President assisted by Captains Demers and Dickson as nautical assessors.

R. I. Towers, K.C. for appellant.

Francis King, K.C. for respondent.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 8th July, 1925, delivered judgment.

The facts are as stated in the judgment of the learned trial judge and need not I think be repeated. There is considerable conflict in the evidence, and portions of it are per-

(1) The reasons for judgment of the learned trial judge will be found at the end of this report, page 221.

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haps quite unsatisfactory as the learned trial judge himself remarked, but it is to be observed that a considerable time elapsed between the date of the collision and the trial, and such matters as the distances traversed in certain movements, the alterations of helm, course, and the different movements of the engine of the defendant ship, were not registered in a scrap log book, and I, together with my assessors, feel that much of the evidence, particularly as to distances and intervals of time, should not be interpreted too strictly and should in many instances at least be regarded merely as general recollections or impressions of such events. We think also that the distance the *Glenclova* manoeuvred from the shore is not after all of great importance, for whether it was one distance or another, neither necessarily affords a defence for either ship for other acts which were against the prescribed rules and prudent seamanship, and which might primarily be the cause of a collision. On the whole we think also that the statements and findings of fact made by the learned trial judge afford a reasonably accurate reconstruction of the events leading to the collision.

The learned trial judge held that under Rule 30 the *Jeska* was entitled to hold her course and speed; that the master of the *Glenclova* must have assumed that he could complete his turning movement in time to pass port to port, but finding that he was unable to do this without risk of collision owing to his ship's forward movement, he should have sounded his danger signal and reversed and gone astern. Disregarding for the moment the question as to whether Rules 30 and 32 applied and that the *Glenclova* was a crossing ship, I am quite of the opinion that the *Glenclova* was at least to blame. When a collision appeared imminent, or a risk of a collision was involved, it was clearly the duty of the defendant ship to sound an alarm signal with an immediate order of full speed astern, the effect of which, my assessors advise me, would have thrown her stern rapidly to port, hastening the turning movement towards the south and southwest, and permitting her to pass the *Jeska* port to port. As a ship departing from a dock, I think the *Glenclova* did not exercise a proper degree of caution. I therefore agree with the finding of the learned trial judge, as do my assessors, that the *Glenclova* was

blameworthy, and it is not therefore necessary to say more in respect of this ship.

The next question is, whether the *Jeska* was to blame or not. The defendant ship contends substantially that the *Jeska* knew that the *Glenclova* was turning, and that the *Jeska* had ample sea room and time to go to starboard, and thus avoid the collision. The learned trial judge found that the *Jeska* had plenty of room to sheer off and clear the *Glenclova*, had the latter given a danger signal.

The conduct of the *Jeska* was, I think blameless, and my assessors concur in this, up to the time that a risk of collision became imminent. It is admitted that the *Jeska* had ample time and sea room to starboard, and her master admits he could have done so, had the *Glenclova* intimated that she could not in time complete her turning movement and that there was a danger of collision. I do not think it is necessary to decide whether the *Glenclova* was a crossing ship under Rule 30. That is a most difficult rule to interpret in circumstances such as prevailed in this case. I think the liability of the *Jeska* can be determined without a decision upon this point. There was a moment of time when the *Jeska* must have known that the maintenance of her course and speed, involved a risk of collision, and there was a moment of time when the *Glenclova* was dangerously close to her intended course. It was then, I think, the imperative duty of the *Jeska* to port her helm as she had any amount of sea room on her starboard. However, she never changed her course or speed after first sighting the *Glenclova* up to the time of the collision. Supposing it were correct that the *Glenclova* under the prescribed rules or in the exercise of prudent seamanship should have turned nearer the shore or well within the line of the inside of the marked channel, or that she should have earlier ported or gone full speed astern, should that exculpate the *Jeska* after seeing, as she must have seen, that there was a risk of collision if she did not go to starboard? A very slight porting of helm of the *Jeska* would have clearly obviated the collision. Did the *Jeska* hold her speed and course longer than she ought to have done? I do not think a ship is justified in standing even upon her strictly technical rights, if a departure therefrom will avoid danger or the risk of a collision. And that observation is made upon the assumption

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that in this particular case, the *Glenclova* was a crossing ship, which as I say is not at all clear in my opinion, and that rules 30 and 32 applied. The precaution of the *Jeska* porting her helm, or stopping, or going astern, was in the circumstances required by the practice of seaman and prudent navigation, and rule 38 in my opinion applied. The *Jeska* assuredly knew that the *Glenclova* was turning, and that such a movement, considering the size of that ship, was attended with some risk and involved a risk of collision, when the *Jeska* was within close distance of the *Glenclova* and if the former persisted in her course and speed. Even if the *Jeska* thought that ordinarily under rules 30 and 32, she should keep her course and speed, and that the *Glenclova* should keep out of her way, still under rule 37 a departure from that course of action was quite proper and necessary to avoid immediate danger. It was a case where the rules of good seamanship applied: *The Llanelly* (1); *The Ornen* (2); *The Ranza* (3). The case of *The Hazelmere* (4) is not without interest in the same connection. The spirit of the note to rule 21 of the international regulations for preventing collisions, though not stated in express terms in the rules applicable to the Great Lakes, is to be found, I think, in rules 37 and 38. I would refer to pages 65 to 67 of Moore, fourth edition, on the Rules of the Road at Sea, and the authorities there referred to. Here the *Jeska*, if considered a crossing ship, was not embarrassed by any unascertained and doubtful movements of the *Glenclova*, that is to say, the former ship all along knew what the latter ship was trying to do, her exact location she being always visible, the probable time and space required, and the *Jeska* was not at any time in doubt as to all this, owing to any circumstances whatever. It is difficult to understand why the *Jeska* challenged a risk of collision or did not avoid a danger from which she could so easily have escaped. The critical moment was easily within her determination. A little assistance from the *Jeska* would have avoided the collision, notwithstanding the signals exchanged. As the learned trial judge himself states, a vessel whose master has received a signal which justifies her

(1) [1914] P. 40.

(2) [1910] 79 L.J. Prob. 23n.

(3) [1910] 79 L.J. Prob. 21n.

(4) [1911] P. 69.

continuing her course and speed is entitled to hold on, until she realizes there was danger. I am of the opinion that the *Jeska* is also to blame and with this conclusion my assessors agree.

Therefore I very respectfully am of the opinion that both ships were to blame.

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* * * * *

Judgment accordingly.

REASON FOR JUDGMENT OF HODGINS L.J.A.

The *Glenclova* is a steel vessel of 1,902 registered tons, and is 250 feet long. She came up the St. Lawrence, light, and went to the pilot pier where she dropped her river pilot. She lay broad-side to the end of the pier, with her bow pointing northwest. The weather is stated in both preliminary acts to be clear and the time was 7 p.m. Standard time.

This pier is on one side of a channel, 600 feet wide, at the easterly edge of which is a shoal (Caruthers) marked on the inner side by a line of red stakes. The *Glenclova* then began to turn, holding on by her bow line, and throwing her stern out. When it was about 100 feet from the dock she began to move backward, her stern following an arc of a circle or as it was described a semi-circular movement toward the southwest till she reached a point off the southwest angle of the Collingwood Dry Dock Co's. pier. Between this pier and the pilot pier is what is called in the evidence the Centre pier. Her bow, as part of the manoeuvre, kept swinging to starboard, so that she could proceed westward into Lake Ontario when the turn was completed.

During this time the SS. *Jeska* was coming up the harbour from 4 mile point, so as to pass into and through the channel I have mentioned. According to the testimony on her behalf which I accept, she was holding a course

slightly outside or to the eastward of the line of stakes, and in fact pointing across the shoal; the water over which was deep enough to allow her to navigate it safely. She is of wood, 104 feet long, of 300 tons burden, and with a speed of 6½ miles an hour. She was coal laden on this trip and draws 5 to 8 feet aft. Her engines are at the stern.

The plaintiff alleges that the *Glenclova* kept moving on while swinging and had got athwart the course of the *Jeska*, and struck her a severe and nearly direct blow with her stem, while the defence allege that the blow was only a glancing one, which was due to the *Jeska* failing to give her sufficient room while turning and thus herself colliding with the *Glenclova* while she was motionless, except for her swing, in the water.

The evidence given on behalf of the defendants was that at the close of the semi-circular movement under a reversed engine, the *Glenclova's* stern was from 210 to 250 feet off the end or southwestern point of the Collingwood Drydock pier and she was heading S.S.E. or in a line similar to that of the streets which on the chart (Ex. 1) run down toward the piers, the sides of which are on the same line. The stern of the ship, when the cast off from the Pilot dock was made, had been worked out 100 feet from it, so that she must, if that evidence is accepted, have

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moved her stern in her semi-circular movement, still further out by 100 to 150 feet.

In their pleadings the defendants assert that the ship completed this movement "coming to a stop as intended with her stern 50 or 75 feet from the dock." If so, that disposes of the argument that the ship could not safely approach the dock nearer than 250 feet.

The distance thus given agrees with the observation of the Master of the *Jeska* when he blew his passing signal. Geoghan who was on the centre pier says he saw the *Glenclova's* stern 50 feet from the Collingwood Dry Dock pier. The argument I have mentioned was founded on the evidence of the master of the *Glenclova* and of several witnesses, though Clark, a witness for the defence denies that at the time of the collision the *Glenclova's* stern was only 75 feet from the dry dock which is the situation set up in par. 4 of the defence. But the pleading must be regarded as an admission that during the turning movement the stern of the vessel was at one time within that distance of the dock.

There is also evidence which satisfies me that the *Glenclova* could have passed the end of the Collingwood Dry Dock pier and backed in west of it, as the sunken crib spoken of did not come within about 150 feet of the end of the pier. The second mate of the *Glenclova*, Greer, was not at the stern, which was his proper place during the turning movement, nor was any other officer or sailor there to give the master information as to her nearness to the dock. This, I take to be a fact of importance, as the master was on the bridge forward, and he could not judge with intelligence, as he in effect admits, how far he was off and how near he could still approach without danger.

If the *Glenclova* got into a position 250 feet from the end of the dry dock it would indicate that

she had, in her manoeuvre to get clear of the dock, or in turning to starboard to proceed on her course, moved forward, while swinging, more than she need, or should, have done. As her length is 250 feet, she would occupy 500 feet of the 600-foot channel, or was at least that far out from the dock, while swinging. I must find the fact, which is established by the witnesses for the defence, that she did move forward as well as sideways.

The witnesses who say so are these following: Clark says the *Glenclova* when stopped was 250 feet out at the time of the collision, but doesn't know how she got there, and that if starting at 100 feet her stern could not be 250 feet out in completing her turn. Foote, her master, says he signalled full speed ahead when off the Collingwood Dry Dock pier to get way on the ship but says he got no headway on her, though he admits he had got 210/5 feet out from dock and the collision 250 feet. He admits he would have cleared *Jeska* if he had been 100 feet back. McLeod, 1st mate, says the *Glenclova* could have gone further astern but can't say how far, and that she might have moved a little ahead. Greer, 2nd mate, was not at the stern but says that had he been there he would not have called to the master until 100 feet off the dock. Daoust, a pilot, who was on the pilot dock, says the *Glenclova* was reversing till her stern got 250 feet from pier, and then got a "kick ahead" for two or three minutes and she went ahead 20 feet, and then reversed again. Also that 100 feet from the dock would not be dangerous. Malette, another pilot, on cross-examination admits that the *Glenclova* should have worked astern and let the *Jeska* go past, and that she must have had headway to get where she was when the collision took place.

This evidence agrees with that offered by the plaintiff as to the distance from the dock and of a forward movement before the collision.

The evidence of the engineer of the *Glenclova* was extremely unsatisfactory. He gave, in chief, a statement of the successive motions of the engines, but on cross-examination gave quite a different one. My impression was that he had no solid ground for his statements, no part of which was indicated in his log and that he really remembered nothing of the sequence of orders or motions nor of the space of time separating them. I entirely discard his evidence.

I find upon the conflicting stories and the events which happened that the *Glenclova* was further forward than she admits at the time of the collision and was forging ahead while swinging instead of going astern. Her speed forward, whatever it was, carried her far enough to cross the course of the *Jeska*. If she occupied 500 feet of the channel there was more than 100 feet left before she would intersect the course of the *Jeska* which was to the east of the line of stakes on the east side of the channel.

The results of the impact indicate to my mind very clearly a distinct forward thrust against the *Jeska*.

There remains the question whether the vessels under these conditions took what the President of this Court has called reasonable precautions. In *C.P.R. v. SS. Camosum* (1), he says:—

“Precautions required by law, to be taken when there is risk of collision, must be taken in time to be effective against such risk. In any event, in view of their respective courses, which is not

questioned, the ships should have made known to each other by the whistle and otherwise, in ample time, their intention to observe this regulation then applicable to each. The obligation to observe this rule was all the greater as McKay Reach, in my opinion is a narrow channel.”

His remarks in *SS. Fryer* and *SS. Westmount* (2) are somewhat apposite:

* * * “it appears to me that the *Westmount* is wholly to blame. Her failure to give the signal that she was to depart from her dock, the speed with which she swung across the channel, and generally her method of manoeuvring to get out of the slip, to the apparent exclusion or danger of other ships seeking entry to the slip, were each acts of negligence, the proximate causes of the collision.”

and in reference to a ship engaged in a turning movement he says in the *SS. Hamonic* and *SS. Fryer* (3):

“The presence of the *Fryer* was known to the *Hamonic*, and the latter must have been cognizant of the fact that she was occupying a considerable space of the river channel. A ship proceeding down a narrow channel obliquely to or athwart the stream, as in this case, must produce a situation of embarrassment for an approaching ship awaiting the turning event, and as well a situation involving a possible risk of collision.”

“Regulations are not merely made for the purpose of preventing a collision, but also to prevent the risk of a collision. They apply at a time when there is a probability of collision or when risk of collision can be avoided. The use of the danger signal long before it was used by the *Hamonic* was I think imperative.”

During the turning movement of the *Glenclova* the *Jeska* gave her

(1) [1925] Ex. C.R. 39.

(2) [1924] Ex. C.R. 109.

(3) [1924] Ex. C.R. 102.

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a passing signal, one blast, which she answered by a similar blast. Those on the *Glenclova* admit these signals to be passing signals and the pleadings so treat them.

Under Rule 30 the *Jeska* was then entitled to keep her course and speed. It is obvious, I think, that the master of the *Glenclova* in giving that answer, assumed that he could complete his turning movement in time to pass port to port with the *Jeska* and that he expected her to keep carrying on as she was. If he found himself unable to complete in time, or in turning thrown out further than he intended, he had ample time and opportunity to give a danger signal. Had he done so the *Jeska* had plenty of room to sheer off and clear him. But the master did not do this, and whether from inattention or overconfidence, I think he neglected an obvious and prudent precaution in disregard of his duty as a navigator. If the master of the *Glenclova* was sure he could complete his movement in time and was in the act of swinging around to starboard, the *Jeska* should not be blamed for not anticipating his failure to do so. It was the coming forward at the same time that created the danger and the fact that it was the stem

of the *Glenclova* that struck at the oblique angle described by the plaintiff's witnesses shows that a very few moments would have sufficed to avoid the blow. A vessel whose master has received a signal which justifies her continuing her course and speed is entitled to hold on until she realizes that there is danger. Those on the *Jeska* were watching the *Glenclova* and expecting her to reverse at any moment and her failure to do so forced the change in the *Jeska's* course when too late. I cannot find the *Jeska* to blame. The President of this Court in the *Hamonic* case expresses a view which I adopt.

"I do not think that one ship should be expected to know the navigating disabilities of another ship and thereon base her own conduct and, even if she did, the ultimate welfare of each will best be conserved by the observance of the regulations and practices which experience and good seamanship have established for the guidance of each."

A consideration of Rules 25, 26, 27, 30, 32, 34, 37 and 38 as applied to this case indicate sufficient to warrant me in holding that in the circumstances of this case the *Glenclova* must be held alone to blame.

THE THERMOGENE COMPANY LIM- }
ITED OF HAYWARD'S HEATH. . . . } PETITIONER;

1925
Sept. 29.

AND

LA COMPAGNIE CHIMIQUE DES }
PRODUITS DE FRANCE LTEE. . . . } RESPONDENT.

*Practice—Trade-mark—Petition to expunge—Motion to amend by joining
action for infringement.*

Held: That where a petitioner has filed a petition in this court asking that
a trade-mark be expunged, he should not be permitted to amend his
petition by joining thereto a claim for infringement.

APPLICATION by the petitioner to amend his petition.

Ottawa, September 18, 1925.

Application now heard before the Registrar in Chambers.
R. S. Smart for petitioner.

Auguste Lemieux, K.C., for respondent.

The Registrar, now this 24th day of September, 1925,
delivered judgment.

This was a summons issued on the 15th day of September,
1925, and returnable on the 18th day of said month for an
order to show cause why the petitioner should not have
leave to amend his petition as filed, by adding a new para-
graph numbered 14 to the petition, and amending the
prayer of the petition as set forth in the copy of the
amended petition attached to the summons now on file.

Shortly stated, the object of the application is to obtain
an order authorizing the amendment of the petition; first,
to include a claim for the infringement of petitioner's trade-
mark, with the usual remedy sought in infringement cases;
and secondly, that the petition may be amended by adding
the following paragraph thereto namely,

That the said entry made at folio 34814 of Trade-Mark registered No.
155, should be varied by expunging the word "Thermogene" therefrom.

* * * * *

The authorities cited and relied upon by counsel for peti-
tioner did not appear to me to support the application on
its merits. Even if it were open to the petitioner under the
practice of the court to add a claim for infringement to a
petition seeking to expunge a trade-mark, I do not feel that
where the issues have been joined between the parties upon
the proceedings to expunge, for a lengthy period, in this

1925.
 THE
 THERMO-
 GENE
 LTD. OF
 HAYWARD'S
 HEATH
 v.
 LA COM-
 PAGNE
 CHIMIQUE
 DES
 PRODUITS
 DE FRANCE
 LIMITÉE

case over five months, it would be fair to the respondent to require him now to meet a new and entirely distinct cause of action. The tardiness of the application does not strengthen its equity. My view in this behalf seems to be supported by such cases as *Saccharin Corp. v. Wild* (1). But my disinclination to grant the application does not rest wholly or indeed chiefly upon the above considerations. Rule 38 of the Practice provides for a joinder, in infringement actions instituted by statement of claim, of an application to have any entry in any registry of trade-marks, etc., expunged, varied, or rectified. But the converse is not the case; there is no express provision in the rules authorizing the joinder of an action or claim for infringement of a trade-mark in a proceeding by petition to expunge the same. In my view the maxim *expressum facit cessare tacitum* applies in the circumstances, constraining me to hold that where the court has not seen fit to provide expressly for the converse right or privilege to that authorized by the terms of rule 38, no such application as that before me should be entertained. I therefore order that the summons in so far as it prays for an order to permit the petitioner to join a claim for infringement to the petition to expunge, must be dismissed.

Dealing with the summons in so far as it seeks to obtain an order authorizing the petitioner to amend his petition by adding a paragraph to the prayer of the petition to the effect that the entry of the trade-mark should be varied by expunging the word "Thermogene" therefrom, I think that the application *quoad hoc* should be allowed, and I so order. The respondent will be at liberty, if so advised, to amend its statement of objections to meet the prayer of the petition so amended; and I so order. * * * * *

An appeal was taken from this decision of the Registrar to a Judge in Chambers, and on the 29th day of September, 1925, the same was heard before the Honourable Mr. Justice Audette, and the decision of the Registrar was affirmed and the appeal dismissed, the learned judge observing that it would not be proper, under the circumstances, to permit the amendment asked.

Judgment accordingly.

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CONTRACT—*Crown — Contract—Lease*

—Grazing lands—Breach of contract—

Constructive eviction—Interpretation of contract.] M. Bros. were in possession of

certain grazing lands in Alberta under the usual grazing lease obtained from the

Crown.—*Held*, that the act of the Crown in dispossessing and evicting the lessees

from the leased premises, contrary to law and to the terms of the contract of lease,

is such a breach of contract for which a petition of right will lie to recover the

damages resulting therefrom. 2. That, where upon receiving notice from the

Crown that their leases had been cancelled or were to be cancelled, but which

notices were admittedly void because of informalities, the lessees vacate the

premises, it cannot be said that they have voluntarily abandoned the same, especially,

as in this case, where said cancellation was ultimately approved of by

Order in Council and acted upon by the Crown. 3. That whether there has been

constructive eviction is always a question to be decided upon the facts in each case,

and if the acts of the lessor indicate a clear intention on his part to dispossess

the tenant and terminate the lease, such acts constitute constructive eviction.

4. That the following clause in the lease "that no implied covenant or liability of

any kind on His Majesty's part is created by the use of the words "demise and

lease' herein, or by the use of any other word or words herein" refers only to

title, and was not intended to exclude, and does not exclude, liability for wrongful

entry or eviction by the lessor, nor does it destroy an implied covenant against

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INTERNATIONAL LAW — *Order in*

Council, Retroactive effect—Treaty of Versailles—Vesting order.] *Held*, that the

Order in Council dated 14th April, 1920, and passed for the purpose of carrying

out and giving effect to the Treaty of Versailles was not retroactive, and did

not, in any way, affect rights acquired under a vesting order, made under the

provisions of the Consolidated Orders respecting Trading with the Enemy, 1916,

and obtained from a court of competent jurisdiction on the 21st May, 1919. 2.

Held further, that both by the Treaty of Versailles and the Order in Council above

mentioned rights acquired under such vesting orders and directions made

thereunder are confirmed and remain in full force and effect. THE SECRETARY OF

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2—*Treaty of Peace — Custodian — Commissioner of Patents — Patents granted to enemy — Suspension of rights — Royalties.*] In November, 1914, the

Commissioner of Patents ordered that certain patents, then the property of the

German Nationals, be suspended as regards and in favour of M. & C.,

under the War Measures Act, 1914, and the Orders and Regulations respecting

Patents of Invention, the latter to accept

INTERNATIONAL LAW—Concluded

a license, which license was later assigned to the Synthetic Drug Co., Ltd. The licensee was to pay a certain royalty and any moneys paid as such were to be a "debt due from the licensee to His Majesty." Payments were at first made to the Commissioner of Patents, but the moneys paid were subsequently transferred to the Custodian, by whom they are now held. The petitioner asking to have same refunded, the Custodian requested the petitioner to take proceedings under section 4 of the Treaty of Peace (Germany) Order 1920, to ascertain his powers and duties in respect thereto.—

Held, that royalties paid by the licensee from the date of his license up to the expiration of six months from the ending of the war, i.e., to January 10, 1920, were not sums belonging to an enemy, and were not properly in the hands of the Custodian, but should be under the control and direction of the Receiver General or the Commissioner of Patents; and that neither Germany nor German Nationals had any claim upon the royalties paid during such period. 2. That the predetermined policy of the Commissioner of Patents that such license was to continue after the war and the provisions in the same providing therefor was "legislation of an allied power in force at the moment of the signature" of the Peace Treaty as contemplated by paragraph 3 of article 306, but the royalties paid or to be paid after the 10th July, 1920, were properly paid or payable in the hands of the Custodian as a debt due to an enemy, the amount thereof to be agreed upon, and in default of agreement, to be fixed by the Commissioner of Patents. **SYNTHETIC DRUG CO. v. CUSTODIAN UNDER TREATY OF PEACE**..... 196

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1 — *Constitutional Law — Exchequer Court—Jurisdiction—“On a public work”*—7-8 Geo. V, c. 23, section 2.] The suppliants were in a vehicle, standing at the curb, on a public street of the city of St. Catharines, when they were run into and injured by a motor truck, the property of the Crown, alleged to be due to the negligence of the driver thereof, a servant of the Crown, employed in transporting other employees of the Crown to a public work at Thorold. The Crown pleaded that the present action did not come within the meaning of subsection (c) of section 20 of the Exchequer Court Act, as amended by 7-8 Geo. V, c. 23, and that the court was without jurisdiction.—

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Held, that the defence in law was unfounded, and that the court had jurisdiction, under said section 20 s.s. (c) to hear and entertain the present action. 2. That the words "employment upon any public work" in subsection (c) of section 20 are merely descriptive of the work or employment, and not intended to mean that the work or employment must be performed on any defined or specific locus whereon a public work is being maintained or constructed, or that the negligence complained of must occur thereon. **SCHROBOUNST v. THE KING** 167

2—*Expropriation—Canadian National Railway—Warrant of Possession—Jurisdiction—Exchequer Court*—9-10 Geo. V, c. 13.]—*Held*, that section 13 of the Canadian National Railway Act (9-10 Geo. V, c. 13) declaring that the provisions of the Expropriation Act, except when inconsistent with the said Act, applied *mutatis mutandis*, to the company, did not confer jurisdiction upon the Exchequer Court to hear and determine an application by the Company for the issue of a warrant of possession of property expropriated. 2. That such an application is a "proceeding" within the meaning of sec. 15 of the said Act which provides that such matters shall be heard by the courts having jurisdiction in similar matters arising between "private parties," such matters not falling within the jurisdiction of the Exchequer Court. 3. The Canadian National Railway Company under the provisions of the last mentioned section has no *locus standi* before the Exchequer Court of Canada in a proceeding for the determination of any controversy as between itself and "private parties." **CANADIAN NATIONAL RY. v. BOLAND**..... 173

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PATENTS FOR INVENTION—*Foreign patent—Delay to apply in Canada—Subsection 1 of section 8, 13-14 Geo. v, c. 23.*] *R.* applied for a patent in the United States of America in May, 1922, and more than one year later applied for the same patent for Canada. His application was refused here on the ground that more than one year had elapsed since his application for the same in the United States, under the provisions of subsection 1 of section 8 of the Patent Act, 13-14 Geo. V, c. 23.]—*Held*, that the said subsection has no applicability to the present case, inasmuch as such subsection deals only with a case where a foreign patent has actually been taken out. 2. *Held* also that the following words in such subsection "elects to obtain" imply the actual issue of the patent and should be taken to be equivalent to the words "chooses to obtain."—*Reporter's Note*; The effect of article 4 of the International Convention for the Protection of Industrial Property upon the construction of subsection 2 of section 8 of the Patent Act, 1923, considered. **RUSSELL, EDWARD A., v. COMMISSIONER OF PATENTS**..... 15

2.—*Infringement—Mechanical equivalents.*] *Held*; That a principal *per se* cannot be the subject of a patent, but that a patent may be taken for a principle coupled with a mode of carrying the principle into effect. 2. Where two devices work under the same principle, both arriving at the same result, but by different and new ways of achieving the end contemplated, there is no infringement. 3. That a device constructed and operated on mechanical principles and laws of operation distinct, separate and unlike the mechanical principles and laws of operation embodied in another's device does not infringe the same.—*Judicial observation on expert evidence.*—*In comparing defendants' device with the plaintiffs', the court should guard against being carried away by the testimony of witnesses of theory, who scrutinize with specious ingenuity, sharpened by inordinate desire to discover in it some elements existing in plaintiffs' device, and overlook the positive and striking facts of the case.* **P. & M. COMPANY v. THE CANADA MACHINERY CORP. LTD.**..... 47

3 — *Infringement—Equivalency—Patentability—Process and product patents—Knitting machines.*] Both the plaintiffs' and defendants' patents consisted of improvements, in a circular knitting machine, for the knitting into a stocking of what is known as the tapered high spliced or reinforced heel. In the plaintiff's improvement this is achieved by a mechanically controlled yarn or finger guide, which at a pre-determined point brings the splicing or auxiliary yarn to certain needles in the cylinder, the

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particular means being the yarn guide which feeds the thread to the needles. In the defendant's improvement, certain needles are automatically and progressively raised by means of the inter-engagement of jacks with lateral nibs, above the level of the other needles in the cylinder, to engage the splicing thread and bring it to the knitting. The essence of the mechanism in the defendant's improvement, being the inter-engagement of jacks by means of lateral nibs.—*Held*; That the latter was not the mechanical equivalent of the former and was not an infringement thereof. 2. That when the diversity of two mechanisms performing the same function and producing the same effect, express different ideas of means, the diversity is one of substance, and each of the inventions is distinct from and independent of the other. 3. That the tests of equivalency are identity of function, and substantial identity of ways of performing that function. Where it is obvious that a person has taken an idea or principle described in a patent, and has simply altered the details to escape suggestion that he has taken the same thing, the inventor is entitled to protection. 4. That a fair test of whether a machine is an infringement of a patent is whether a skilled mechanic, without inventive faculty, could have worked out the former from a knowledge of the patent in question. 5. That a person claiming that his patent is being infringed, will be held strictly to the particular mechanical means claimed in his patent, and those having *bona fide* employed a different system are not guilty of infringing. 6. Whether or not a machine is the reduction to practice of a new process, or whether it is a new instrument for the performance of an old process, is to be determined by the state of the art at the date of the invention, and if it is the former a process may be patentable, though the machine may be new, if the latter, only the machine can be patented. **HOSIERS LTD. v. PENMAN'S LTD.**..... 93

4 — *Invention—Combination—Equivalency—Patentability.*]—*Held*; That in regard to combination patents, if a new combination or arrangement of known elements produces a new combination, or if it forms a new machine of distinct character or formation due to the co-operative action of all the elements, or if the several elements produce a new and useful result, or an old result in a cheaper or entirely advantageous way, such combination shows invention and may be the subject of a patent.—2. That invention is not capable of exact definition and is always a question of fact. That, *inter alia*, the fact that

PATENTS—*Concluded*

skilled workmen have failed to produce it or that it satisfied a long-felt want, are important facts in the determination of whether or not there was invention. 3. That a device constructed on the same principle, having the same mode of operation and accomplishing the same results as another, by the same means or by equivalent means, is the same device; and one cannot escape infringement by adding to or subtracting from a patented device or machine by changing its form or making it more or less efficient, while retaining its principle mode of operation. *WRIGHT & CORSON v. BRAKE SERVICE LTD.* 127

5—*Practice—Action to impeach—Statement of claim—Interest—Scire facias—Information—Rule 16.*—*Held*, that where it is sought to impeach or revoke a patent of invention by statement of claim, the plaintiff must establish a personal interest in the action as distinguished from that of the public interest against a monopoly. Failing to do so, he has no *locus standi* before the court, and his action should be dismissed. 2. Where the interest of a plaintiff is no more than that which is common to the public, then his right to impeach a patent is exercisable only by *scire facias*. *BERGEON v. DEKERMOR ELECTRIC HEATING CO. LTD.* 160

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PETITION OF RIGHT

See PRACTICE.

PRACTICE — *Petition of Right—General allegations—Particulars.*] Suppliants filed their petition to recover damages alleged to be due to a fire caused by the negligence of the servants of the Crown on the right-of-way of the Canadian National Railways, and respondent in its defense alleged that if "the fire occurred as alleged it was due to the fact that the suppliants failed and neglected to comply with the provisions of the law."—*Held*, that the words *failed and neglected* clearly connote acts and deeds on their part amounting to both failure of duty and negligence. The general allegation of irregularities as a means of justification on behalf of the respondent is not sufficient, the facts giving rise to such contention should be disclosed, and suppliants are entitled to obtain particulars thereof. *O'BRIEN & DOBENY v. THE KING* 1

2 — *Patents — Infringement—"First, true and sole inventor"*—*Particulars.*] Plaintiffs by their action claim that the defendant is infringing *W's* patent of invention granted to him by the Dominion Government, and *inter alia* allege that the plaintiff *W.* is the first, true and sole inventor. The defendant, before filing

PATENTS—*Concluded*

its defence, moved for particulars as to the time when and the place where the invention was made by the plaintiff *W.* alleging that it intends to contest the patent on the ground of prior knowledge thereof by others.—*Held*, that, inasmuch as the allegation of the plaintiffs as to *W.*, being the first inventor was not necessary and was mere surplusage, and further that as the *onus* is upon the defendant, attacking the validity of the patent, to prove his allegation that others than the plaintiffs were the first inventors, he is not entitled to the particulars asked, and the present application was refused. 2. Moreover, that, as in the pleadings one is only required to generally disclose the outline of his contentions, and not to disclose his evidence, such particulars should not be ordered, being in the nature of evidence. *WARREN v. WATEROUS ENGINE WORKS LTD.* 92

3—*Security for costs—Patents—Conflicting applications.*] Plaintiffs and defendant each applied for a patent of invention in the Patent Office, and the Commissioner having declared there was conflict, plaintiffs brought action before this court to have the matter of this conflict decided and to have it declared who was the first inventor.—*Held*, that, as in such an action each party is seeking affirmative relief and as such each party is as much plaintiff as the other, therefore, the defendant becoming *quasi* plaintiff, if he resides out of the jurisdiction may be ordered to give security for the plaintiff's costs. *ROWE et al v. THOMAS* 117

4—*Trade-mark—Petition to expunge—Motion to amend by joining action for infringement.*] *Held*, That where a petitioner has filed a petition in this court asking that a trade-mark be expunged, he should not be permitted to amend his petition by joining thereto a claim for infringement. *THERMOGENE COY. LTD. v. CIE CHIMIQUE DES PRODUITS DE FRANCE LTEE* 225

See also PATENTS FOR INVENTION. No. 5.
JURISDICTION. NOS. 1 AND 2.

REVENUE — *Income Tax — Dividend — 10-11 Geo. V, ch. 49, sec. 5—Accumulated profits.*] A certain company was incorporated in 1911 with a capital stock of \$43,500, in shares of \$100 each and *G.* was its manager and also the owner of 11 shares of the capital stock from 1912 until 1920. In 1920 he bought the remaining shares, at prices ranging from \$90 to \$200 a share. From 1911 to 1920 the profits of the company were allowed to accumulate, and *G.*, upon becoming the owner of all the shares, declared a dividend of 92 per cent, amounting to \$40,020, paid out of such accumulated profits. It was contended that this was

REVENUE—Continued

not income but a return of capital, etc., and not subject to taxation.—*Held*, that the dividend so declared in 1920 was "income" within the meaning of section 3 of subsection 5 of the Income War Tax Act, 1917, as re-enacted by section 3 of 10-11 Geo. V, c. 49, and was liable to surtax as provided in said Act; but inasmuch as the Crown only claimed taxes on that part of the profits earned during the taxation period, namely from 1916 to 1920, judgment was rendered accordingly. *GAGNÉ v. MINISTER OF FINANCE* . . . 19

2.—*Revenue—Income Tax—Agreement by a third party to pay same.*] By agreement between defendant and the Great North Western Telegraph Company, the latter undertook, *inter alia*, for 97 years, to work, manage and operate the defendant's telegraph system, with right to use and occupy all offices, stations, buildings and property of the defendant, except certain rooms, and obliged "themselves to pay all costs and expenses of operation of every description, including municipal taxes and assessments on the property owned by the company * * *" and bound themselves to pay \$165,000 a year out of the proceeds of the operations, the company to receive this during the term whether the earnings amount to that, or less. The defendant claimed that the Great North Western Telegraph Company should pay the income tax upon the same.—*Held*, that, as between the plaintiff and the defendant, there is nothing in the deed in question which could affect the position of the Revenue, and, even if the third parties had thereby undertaken to pay defendant's income tax, such undertaking could not be pleaded by the defendant in answer to the Crown's claim for income tax under The Income War Tax Act, 1917; furthermore, that the defendant is liable to be assessed upon the sum of \$165,000 aforesaid, less exemptions permitted under the Act. 2. That the covenant by the third parties to pay all "expenses of operation of every description, including municipal taxes on the property owned by the company," contained in said agreement, did not bind it to pay the income tax levied on the defendant upon the rental or revenue received from the leasing of its telegraph systems, inasmuch as income tax is imposed on the person and not on the property. (*N.B. and Canada Railway Company v. N.B.R. Co.* (1924) 4 D.L.R. 962, referred to.)—*Semle*; Any amount which might be paid by the third parties as income tax upon the rental of \$165,000 would form part of defendant's income for income tax purposes. *THE KING v. MONTREAL TELEGRAPH CO. & G.N.W. & Co. et al* (3RD PTYS.) 79

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3 — *Contingent interests—10-11 Geo. V, c. 49, sec. 4—Tax free bonds—Carrying on business.*] C. died in 1912, and by his will left all his property to trustees to sell and convert the same into money. He directed that after payment of debts, etc., the residue and income therefrom, be accumulated for 21 years following his death, in the interval certain annuities to be paid to his children, one son and two daughters, out of this income. At the expiration of this term the accumulated trust fund was to be equally divided among the said children, and in the event of any of them having previously died, his share was to be distributed among the grandchildren, if any, as the trustees thought best. The son died in 1920 without issue, and one sister, unmarried, resided in the United States. The other sister had three children under 21, who would be entitled to the one-third share of the estate which fell into the trust on the death of the testator's son, and, in the event of no other grandchildren being born would receive the whole of this one-third share, etc.—*Held*, That the income of this accumulating fund was "income accumulating for the benefit . . . of persons with contingent interests" within the meaning of The Income War Tax Act, 1917, as amended by 10-11 Geo. V, c. 49, sec. 4 and was taxable under the said Act. 2. That there is no principle of law defining what is the carrying on of a trade or business, this being always a question to be decided on the facts in each case. That the sale by trustees of lands in an estate, under the provisions of a will, was a mere accrual of capital and possessed none of the elements of a business, and no part of the proceeds can be called "annual net profit or gain." 3. Dividends from tax-free bonds must be fully deducted and as a class of income cannot be charged with any fractional proportion of other authorized deductions. *McLEOD, J. B., v. MINISTER OF CUSTOMS AND EXCISE* 105

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1 — *Domicile — Jurisdiction — Action in rem—Owner of cargo—Breach of charter-party—Undue delay to repair—Abandonment of voyage—General average—Elements of damage.*]—*Held*, that the domicile of a corporation is its principal place of business, i.e., the place where the administrative business of the corporation is carried on; and, where it is shown that a company has no seal or original records in Canada and no share certificates appear to be held there, it cannot be said that such a company is domiciled in Canada, although such company, owners of the ship, has its registered office in Nova Scotia, where it may be sued. 2. The *A.* was chartered to carry a cargo of coal from Halifax to Bermuda and the freight was paid in advance. She sailed on the 14th January, but on account of weather and the bad condition of her pumps, boilers and machinery, she returned to port on the 15th. Nothing substantial was done to get the ship ready for sea again until January 26. The cargo owners were not notified or consulted as to what was being done with the cargo or the probable repairs necessary, but were informed from time to time that the ship would sail in a few days.—*Held*, that, upon the facts, the cargo owners were justified in bringing the action when they did against the ship for breach of charter-party. 3. That in the event of such delay being due to the underwriters on the hull, as between the charterers and the owners, the latter were liable therefor. 4. The *A.* by counterclaim asked that the cargo contribute certain alleged average charges and that

SHIPPING AND SEAMEN—Continued

the same be set off against the plaintiff's claim.—*Held*, that inward pilotage, tugs, wharfage, cost of unloading cargo, protest fees, were proper general average charges, but that the cargo should not contribute to expenditure for wages and provisions. 5. That the forwarding of the cargo was abandoned by the ship and that she was liable therefor and for damages, and that the cargo owners were entitled to recover the costs thereof, freight paid and insurance, etc. *DARBELL, JOHN S., & Co., v. SHIP American*..... 2

2 — *Harbour — Collision — Improper display of lights—Negligence—Lookout.*] The *E.*, a small motor ship, was lying at a temporary landing stage, in a crowded harbour of Vancouver, having only moored to take on provisions. She had been displaying navigating lights, which by Art. 2 must be carried "when under way," and neglected to extinguish them when moored, and there was no lookout on her. The *D.*, while proceeding with all due caution and at lowest speed consistent with safety to her allotted berth collided with the *E.* Proper berthing signals were given by the *D.* *Held*, that by her conduct in wrongly displaying navigating lights the *E.* was liable to mislead and entrap other vessels, who might properly assume that she was in a position of instant control and able to immediately extricate herself from danger due to an approaching vessel, and that she was victim of her own negligence. 2. That the degree of watchfulness must correspond to the necessity of each case. *HARBOUR NAVIGATION CO. v. THE Dinteldyk*..... 10

3 — *Narrow channel — Right-of-way — Currents — Speed — Rules 29 and 38 of the Rules of the Road for the Great Lakes.*] The *R.* was coming down with the current, in a narrow channel of the St. Lawrence river, at the entrance to the Galop Canal, and the *B.* was coming up. The *R.* duly gave the required signals and, having the right-of-way under the rules, elected to pass to port next to the north shore. Her signals were answered by the *B.* At a point where there is a bend, just outside of the canal, the *B.*, coming on without reducing speed, failed to give the *R.* sufficient room, and the *R.*, in endeavouring to avoid collision with the *B.*, grounded.—*Held*. That the *B.* in failing to reduce speed, and in not waiting in the inside of the canal until the *R.* had passed and neglecting to respect the right-of-way of the *R.* "neglected" some "precaution" which was required "by the special circumstances of the case" and is wholly to blame for the grounding of the *R.* and consequent damage sustained. 2. Where if two steamers keep their speed they would meet at a bend in a narrow

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channel, three hundred feet wide, it would be bad seamanship for the one navigating against the stream not to wait until the other had passed clear. *GEORGE HALL COAL & SHIPPING CORP. v. SS. Beachboy*..... 23

4 — *Repairs — “Necessaries” — Jurisdiction — Interest — Admiralty Court Acts, 1840 and 1861—3-4 Vict., c. 65 and 24 Vict., c. 10 (Imp.)—Held;* (Affirming the judgment of the British Columbia Admiralty District (1) that the purpose of the Admiralty Court Act, 1861, was *inter alia* to extend the jurisdiction of the Court, not to restrict it. 2. That the Exchequer Court in Admiralty for the British Columbia Admiralty District has jurisdiction in actions to recover the price of repairs done to a foreign vessel in a foreign port, even though the ship or her proceeds are not at the time of the institution of such actions under arrest of the Court. 3. That it was not intended by section 4 of the Admiralty Court Act, 1861, to exclude repairs from the definition of “necessaries” as provided in section 5 of the said Act, but that the intention was to give an additional remedy in claims for building, equipping and repairing where the owner was domiciled in Canada, but only when the ship was under arrest. 4. That where the owner contracts to have certain repairs done to a vessel and agrees to pay for the same thirty days from the completion thereof, the court in giving judgment for the price thereof, will, in the exercise of its equitable jurisdiction, allow interest on such amount from the date when the payment thereof should have been made as agreed. *THE SHIP Pacifico v. WINSLOW MARINE AND SHIPBUILDING CO.*..... 32

5 — *Kollision — Narrow channel — Doubt — “End on or nearly end on” — “Right ahead” — Regulations 18 and 25.—Held;* That the width alone of a channel or the fact that it has lateral extensions in the nature of bays, are not conclusive and need not necessarily be regarded as of importance in the determination of what is a “narrow channel” within the meaning of regulation 25. 2. That, moreover, as the statute did not attempt to define “narrow channel,” whether any particular channel was or was not such, must be determined in a practical way, having in mind every relevant element obtaining in the particular case. 3. That an important point to consider is whether the configuration of the shore lines and the existence of headlands and other considerations so control and predetermine the movements of ships thereon as to make it a narrow channel. In case of any doubt it should, in the interests of navigation, be resolved in favour of the

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“narrow channel” construction. 4. The respective ships in this case were proceeding the one West by South $\frac{1}{4}$ South and the other North 70° East.—*Held;* That the words “end on or nearly end on” should have a signification as wide as “right ahead” in article 2; and that the ships herein, in any event, were “end on” within the spirit of the rule, when the above mentioned courses were adopted, or shortly afterwards. *THE CANADIAN PACIFIC RY. v. THE Camosun*..... 39

6 — *Scow and barge—Damages—Seaworthiness—Watchman.*] Plaintiff had a contract with defendant for coaling of certain of its ships including the steamship *M.* Shortly after the docking of the *M.*, plaintiff’s scow *W.* with a coal barge was placed alongside the *M.* When operations were discontinued on Saturday night, with the assent of the defendant the scow and coal barge were allowed to remain alongside the *M.* until operations were to be resumed on Monday. At 3.10 a.m. Monday a large volume of water was flowing on the deck of the scow from the sanitary discharge pipe in the side of the *M.* and the scow was in a sinking condition and shortly after sank and became a total loss. The scow was of sufficient seaworthiness for all purposes for which she was required. Defendant contended the scow was unseaworthy, having openings in the deck, without coverings or coamings, and holes in the stern too near the water line, and that the watchman was incompetent and negligent.—*Held:* On the facts, that as the plaintiff had its scow alongside the *M.* in the capacity of a person on lawful business in the course of fulfilling a contract in which both the plaintiff and defendant had an interest, it was incumbent upon the *M.* to use reasonable care for the safety of the scow, and that the *W.* was entitled to expect that the defendant and its employees in charge of the *M.* would use reasonable care to prevent damage from an unusual danger which such agents and employees knew or ought to have known, and that the defendant was liable for the loss of the scow. 2. That the discharge of water as aforesaid was not a circumstance which the plaintiff should have foreseen and guarded against, but that on the contrary it was upon the *M.* to protect the *W.* from the effects of such discharge or to have given plaintiff reasonable notice that it must itself take care and avoid the danger. 3. That the seaworthiness of the scow must be considered in regard to the service in which it was engaged, and if a scow is reasonably fit for the work in which it is used, the suggestion of unseaworthiness must fail. 4. That the necessity for having a watchman on a scow or barge and the degree of vigilance to be exercised by him must depend on the

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danger to be anticipated and guarded against. *GEORGE HALL COAL AND SHIPPING CORP. v. THE C.P.R.*..... 70

7— *Navigable river — Bridge — Authority to erect—Navigable Waters Protection Act—Interference with navigation—Damage to bridge by vessels—Burden of proof.*—*Held:* That the right of navigation can only be extinguished by an Act of the Parliament of Canada, and without such authority no one can lawfully put into tidal waters or maintain there anything which is an obstruction or nuisance to the right of navigation. 2. That a bridge erected over a navigable river (the Miramichi), in violation of the provisions of the Navigable Waters Protection Act, and without legal authority, constitutes an interference with navigation and thereby becomes a public nuisance, and further that the owner of such bridge cannot recover the damages caused thereto by a person legally passing through the same in accordance with his rights as one entitled to the use of the river for navigation purposes. 3. That in any event, such owner could not recover unless a case of negligence and want of due seamanship was made out against the defendant. 4. That in view of the old and well established rule that the King neither gives nor takes costs, no costs ordered. [*The Minnie Gordon*, [1885] Stockton (N.B. Adm. R.) 95 followed.] ATTORNEY GENERAL OF N.B. *v. THE WOLDINGHAM*..... 85

8 — *Collision — Narrow channel — Apprehension of danger.*] The *D.* and the *H.* were both going out to sea, down the north channel of the Chehalis river, the *D.* preceding. When the *D.* was between 600-700 yards ahead, the *H.* going at 8 knots over ground, slightly faster than the *D.*, signalled her intention to pass to port, which was answered by the *D.* The *H.* had not "passed" the *D.* at any time before collision, though 45 minutes elapsed between her signal and the collision, and though she could have done so if she chose. Both were on the wrong side of the channel, viz., the south side. (Art. 25). At buoy 6, they were practically abreast, running parallel courses with no danger of "crowding," the channel being here 2,200 feet wide, but quickly narrowing, being only 1,200 feet, $\frac{1}{2}$ of a mile away. The weather had become "misty," and from here both made for the same point to clear No. 4 on the north, and they came into collision almost immediately before said buoy. Each blames the other for bearing down upon her.—*Held:* On the facts, that the collision herein was due to the unseamanlike conduct of both vessels in misconceiving, instead of promptly appreciating the dangerous position that had come

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upon them when abreast and about to enter a quickly narrowing channel, but primarily to both being on the wrong side of the channel, and that both vessels were equally to blame. *THE WM. DONOVAN SS. CO. v. THE SHIP Helen*..... 114

9 — *Canal — Narrow channel — Moored ship—Burden of proof—Suction — Canal Rule 19.*] The *P.* down bound, was moored on the east side of the Welland Canal, at Welland. Observing the *S.* coming up, the *P.* gave three short blasts, as a notice to the *S.* to check her speed. The *P.* was properly and well moored and at a safe place, and as the *S.* passed she was drawn by suction from her mooring damaging her "winch." The *S.*'s engines were not stopped.—*Held:* On the facts, that the *S.* by her breach of Canal Rule 19, without valid excuse, and the failure to stop her engines while passing the *P.*, which increased the suction and the force operating on the *P.*, was the sole cause of the accident, and the *S.* was wholly liable for the damages caused. 2. That the burden rests upon the vessel under way, to exonerate herself from liability for an injury to one which was stationary, to show that it was not in her power to prevent the injury by adopting any practicable precautions, and in shallow waters she is bound to know and guard against the effect of the swell and suction caused by her movement. (*The Rotherfield*, 123, Fed. Rep. 460 referred to.)—*Judicial Observation:* "Suction is a force which has been recognized time and again in close navigation in shallow waters, and speed and too close approach are factors which contribute to it." *THE PINEBAY STEAMSHIP CO. v. THE Steel Motor*..... 147

10— *Navigation in harbour—Responsibility of wharf owner.*] The *L.*, under charter to the defendant, arrived at Montreal with a cargo of coal, and on defendant's instructions docked at its dock and commenced discharging the cargo. Upon the defendant's instructions the steamer was moved astern about a ship's length to make way for another ship, and later, again on defendant's instructions, returned to the dock to discharge the balance of the cargo. When returning, a wire cable attached to the boom of one of the defendant's coal towers fouled the ship's fore top mast causing damage. The *L.* had neglected to keep one of her lines attached to a back snubbing post.—*Held:* That the conditions of the berth being fully known to the officers of the ship they needed no warning of the danger, if any existed, and, moreover, had they used ordinary care and maintained adequate lookout in returning to their berth, which she should have done, the accident would not have

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happened, and she was victim of her own negligence. [The case of *The Grit* (1924) P. 246; 94 L.J. Adm. 6, where a dock owner was required to use reasonable care to see that the berth was safe for use by vessels he invited to enter it, compared and distinguished]. 2. That even if the wire in question was a source of danger, its presence being known to the officers of the ship, and as by the exercise of ordinary care the accident could have been avoided, no action lies against the defendant for the damage suffered. *THE STEAMER LIVINGSTONIA CO. LTD. v. THE DOMINION COAL COY.* 151

11 — *Collision — Canal navigation — Preliminary act—Rule 13—Canal Regulations—Duty of tug master.*] The *S.M.* was proceeding down the Soulanges Canal when she sighted a tug with tow coming up. When over half a mile apart the *S.M.* sounded one blast of the whistle which was answered by the tug. The *S.M.* started to port her helm when about a ship's length from the tug proceeding slowly to the south side of the centre. The tug continued her course in the centre of the canal until after the *S.M.* had sounded the danger signal, and when about 125 feet from the steamer started to port her helm, with increased speed, to go across to the north side. The effect of this sudden movement by the tug swung the barges to port into the water of the *S.M.*, and both barges came into contact with the *S.M.*, crowding her until she struck the south bank damaging her starboard bilge.—*Held:* That the *S.M.* in no way contributed to the collision and that the collision was solely due to the unseamanlike manoeuvre of the tug (1) in waiting too long to turn out; (2) By her master failing to instruct the captains of the barges of the manoeuvres to be adopted; (3) By his breach of Rule 13 as to the length of tow. 2. That the *S.M.* had the right of way and it was the duty of the tug and tow, after passing signals had been given and understood, to have gone to her own side of the canal in proper time and allowed the other half to be free and unobstructed for the passage of the *S.M.* 3. That a statement in a Preliminary Act is evidence against the party making it. (*The Seacombe*, 81 L.J. Adm. 36 referred to. *UNITED STATES STEEL PRODUCTS CO. v. SINCENNES McNAUGHTON LINES LTD.* 154

12—*Collision—Liability based on tonnage—Engine-room space—Canada Shipping Act—R.S.C. 1906, c. 113 as amended by 13-14 Geo. V, c. 35, sec. 9.*]—*Held,* that the words "engine-room space" in R.S.C. 1906, c. 113, as amended by 13-14 Geo. V, c. 35, sec. 9, are wide enough to cover the boilers appurtenant to the engines whether they are actually in the same

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compartment or not, which arrangement is primarily one of convenience and would vary according to the size and construction of the vessel. *EAST ASIATIC COY. LTD. v. THE Chilcot*..... 172

13 — *Accident — Damage — Negligence — Onus of Proof.*]—*Held,* that the owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired, and that the increased value of a ship by reason of such repairs is not ground for deduction in the amount of damages recoverable. 2. That even if the ship were in a weak condition, and the damage is greater than would ordinarily be the case, the ship in fault for the collision is none the less liable for the entire loss, even where the repairs include the substitution of new work and material for what was previously injured, as well as new for old material. Repairs clearly not consequent upon a collision cannot be recovered.—3. That where a ship has been driven on shore as the result of a collision or other accident, and damages are claimed, as arising therefrom, it is incumbent on her to prove that such damage was occasioned by the stranding as a consequence of the collision or other accident; and that the stranding, collision or other accident was the result of the negligence of the other ship. *INTERLAKE NAVIGATION CO. v. THE Glenfarn* 179

14—*Collision—Strict observance of Rules of Navigation required—Warning—Division of Damages—Narrow Channels—Overtaking Vessel—4-5 Geo. V, c. 13.*]—*Held:* When a ship ahead after receiving a passing signal from an overtaking ship in a narrow channel deviates and continues to go to starboard, she contravenes Rule VIII which states that the boat ahead shall in no case crowd upon the course of the passing vessel. 2. That if the ship ahead anticipates damages from the approach of an overtaking ship it is the duty of the former to give warning. On the other hand the ship overtaking must observe the utmost care and watchfulness of the movements of the ship ahead, and if the movements or changes in the course of the ship ahead are not understood the overtaking ship is bound to slacken speed and if necessary to stop or to keep out of the way of the overtaken ship. 3. When both ships in a collision are held to be contributory to an accident, the damage can only be apportioned one half to each, as 4-5 George V, c. 13 (Dom.) does not apply to the Great Lakes. *MERLO, MERLO & RAY LTD. v. THE Harry R. Jones*..... 183

15 — *Collision — Moored ship — Standing by—Vigilance.*]—*Held,* that in a case of collision with a moored ship the *onus* of proving that she was properly and securely

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fastened to the dock, in view of perils which she should have anticipated, is upon the moored ship, and a duty lies on her to do all that is possible in the circumstances to render a collision or accident less probable. The degree of vigilance to be exercised must depend on the possible danger to be anticipated and guarded against. 2. In a narrow channel where vessels are passing or are expected to pass, standing by is necessary on the part of the moored ship, unless she intends to rely entirely on the sufficiency of her fixed moorings or on a warning to approaching vessels. 3. The use of a canal is undertaken upon the conditions imposed by the rules governing that use, and that a vessel which, in deliberate breach of such a canal regulation, keeps her engines moving while passing a moored ship, is responsible for the consequent damage. She is not excused because she could not pass without keeping her engines going, unless her safety requires her to pass the moored ship when she does, or unless she takes adequate precautions to avoid injury. [Pine Bay SS. Co. v. *The Steel Motor*, (1925) Ex. C.R. 147, referred to.] PINE BAY SS. Co. v. *The Charles Dick* 203

16 — *Collision — Passing vessel — Rule 24—Damages—Negligence.*] The *L.E.* had been aground on the northern entrance of the Strait of Canso and the *C.* having been successful in pulling her off shore was engaged in towing her at a distance of some three miles from shore, when the plaintiff's tug, the *A.* came to assist in the operations. The *A.* passed the *C.* and her tow port to port some distance away; she then pursued a circuitous course and coming about on a parallel course with the tug and tow, placed herself in a direct line between them and stopped, when she was struck on the stern by the tow and damaged so that she subsequently sank. Both the tug and tow were displaying all proper lights indicating they were under way.—*Held*, (affirming the judgment of the Local Judge in Admiralty for the Nova Scotia Admiralty District) that the *A.* was an overtaking vessel and was bound, under the Rules, to keep clear of the overtaken vessel, and that the collision was entirely due to her blundering and unseamanlike conduct in misconceiving instead of properly appreciating the dangerous position into which she had wrongly placed herself. *MACDONALD v. THE ATLANTIC SALVAGE CO. LTD.* 209

17—*Wages of seamen—Dismissal—Forfeiture—Deserters.*] The *V.* was a fishing trawler and it appeared by the evidence that when trawlers such as the *V.* arrive in port on Sunday they usually only leave on the following day, and the crew

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are not asked and do not work at the landing of fish and are allowed to go ashore. In this case the crew did go ashore, without notice from the proper officer when to return, and did not return until Monday at six or seven a.m. when they were dismissed. The master refused to pay the crew the wages earned up to that day, on the ground that they were deserters, and that their wages were thereby forfeited.—*Held*, [by the trial judge,] that the plaintiffs were not hired for any definite time and, even if rightly dismissed from their employment, the employers were not entitled to retain their wages for the period which they had served on the ship. The right of peremptory dismissal does not carry with it a forfeiture of the wages applicable to such period unless there is an indivisible term of service fixed by the contract of hiring.—*Held*, on appeal (affirming the judgment of the Local Judge in Admiralty for the Nova Scotia Admiralty District) that although the crew may have unduly extended their absence, it could not be said that they had remained away so long as to warrant the master in regarding their absence as an abandonment of the work, that they were not deserters, and that forfeiture of their wages could not be enforced. *THE VENOSTA vs COLLERS et al* 212

18 — *Collision — Precaution — Signal — Turning ship in harbour — Practice of seaman — Risk of collision.*]—*Held*, (varying the judgment of the Local Judge in Admiralty for the Toronto Admiralty District), that although a ship has received signals authorizing her to continue her course and speed, where she is aware of the other's intended manoeuvre and the time and space required therefor, and is not embarrassed by any doubtful movements on her part; if there is at any time reason to apprehend that to continue her course might lead to a collision, she is no longer justified in doing so, but, by the practice of seamen and prudent navigation is required to take such manoeuvres as will prevent collision, even where no danger signal is given by the other. *THE GLENCOVA v. SOWARDS* . . . 217

STATUTES

Admiralty Courts Act, 3-4 *Vict.*, c. 65; 24 *Vict.*, c. 10. 32
See SHIPPING AND SEAMEN. No. 4.

Canada Shipping Act, R.S.C. (1906) c. 113; 13-14 *Geo. V.*, c. 35, s. 9. 172
See SHIPPING AND SEAMEN. No. 12.

Canadian National Railway Act, 9-10 *Geo. V.*, c. 13. 173
See JURISDICTION. No. 2.

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Exchequer Court Act, 7-8 *Geo. V*, c. 23, s. 2
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See JURISDICTION. No. 1.

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See REVENUE. NOS 1 AND 3.

Navigable Waters Protection Act, R.S.C. (1906) c. 115..... 85

See SHIPPING AND SEAMEN. No. 7.

Patent Act, 13-14 *Geo. V*, c. 23..... 15

See PATENTS FOR INVENTION. No. 1.

TRADE MARKS — Personal name—

Company — Prohibited user.] — Held: That the name "Wampole's" having acquired a secondary meaning, was properly registered as a trade-mark and could not be used as such by any other person or company, without the latter clearly distinguishing their goods from those of the owner of the trade-mark. 2. That the distinction between permissible and prohibited user is to be decided upon the special circumstances and facts of each case. 3. That although any person may use his own name for purposes of his trade, and that no one bearing a similar name can arrogate to himself the exclusive use thereof, still he cannot so use it to deceive the public to induce purchasers to buy his wares for those of another. 4. That a company with a name of which a personal name forms a part has not the same natural right as the individual born with such name to trade under it, particularly when there is a possibility of confusion between it and the name of an old established company. 5. That moreover a company cannot, under cover of its name, use the same to justify or excuse an overt act or course of conduct plainly indicative of an unfair and disloyal effort to pass off its goods for those of another. 6. That the court, in deciding whether there is infringement or not, will consider the impression produced by the mark as whole, and it is not necessary to constitute infringement that the mark used corresponds in all respects to that of another person, and which such person has the exclusive right to use. *WAMPOLLES, H. K., & Co., v. HENRY S. WAMPOLLE & Co. et al.*..... 61

TRADE MARKS—Concluded

2 — *Infringement — General appearance — Deception—Fraud—Intention to deceive.*]

The defendant adopted for the sale of her tea a wrapper of the same material and size as that of the plaintiff, with a label identical in design and colour thereto and with practically the same literature, save *inter alia* that the word "Imperial" was substituted for the word "Salada."—*Held*, that where the general appearance of defendant's trade-mark and label taken as a whole may lead the unwary and uncautious purchaser to take the defendant's goods thinking they were the plaintiff's, notwithstanding the substitution of the word "Imperial" for that of "Salada," the defendant's trade-mark and label will be adjudged to be an infringement of the plaintiff's.

2. That in a case of infringement it is not necessary that improper motives or fraudulent intention be made out; the only question is whether or not the alleged infringing mark is likely to mislead and deceive the public. *Quære*: Is not the fact that a person in adopting a trade-mark deliberately copies another's, as in this case, in itself evidence of an intention to obtain unfair trade advantage and to profit by the other's reputation. *SALADA TEA COY. OF CANADA LTD. v. KEARNEY*..... 119

See also PRACTICE. No. 4.

**TREATY OF VERSAILLES or
TREATY OF PEACE (1920)**

See INTERNATIONAL LAW.

VESTING ORDER

See INTERNATIONAL LAW.

WARRANT OF POSSESSION

See JURISDICTION. No. 2.

WORDS AND PHRASES

"*End on or nearly end on.*"—

C.P.R. v. Camosum..... 39

"*Right ahead*"—

C.P.R. v. Camosum..... 39

"*On a public work*"—

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"*Engine room space*"—

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