

1929

CANADA
LAW REPORTS

Exchequer Court of Canada

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

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



OTTAWA
F. A. ACLAND
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1930

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, British Columbia Admiralty District—appointed
4th March, 1902.
- do CHARLES D. MACAULAY, Yukon Admiralty District—appointed 6th
January, 1916.
- do F. E. HODGINS, Toronto Admiralty District—appointed 14th
November, 1916.
- do W. S. STEWART, Prince Edward Island Admiralty District—
appointed 26th July, 1917.
- do SIR J. DOUGLAS HAZEN, New Brunswick Admiralty District—
appointed 9th November, 1917.
- do HUMPHREY MELLISH, Nova Scotia Admiralty District—appointed
25th November, 1921.
- do LOUIS PHILIP DEMERS, Quebec Admiralty District—appointed 3rd
November, 1928.

DEPUTY LOCAL JUDGES:

- do W. A. GALLIHER—British Columbia Admiralty District.
- do Vacant—Nova Scotia Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE ERNEST LAPOINTE, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE LUCIEN CANNON, K.C.

CORRIGENDUM

Footnote (p. 22) No. 3 should read "(1877) 2 C.P.D. 445."

Footnote (p. 36) No. 2 should read "(1883) 27 L.C.J. 214."

Footnote (p. 42) No. 3 should read "(1920) 50 D.L.R. 6."

Footnote (p. 166) No. 3 should read "(1921) 20 Ex. C.R. 207."

Reporter's Note, p. 69, should read "Appeal allowed."

This case is now reported in (1929) A.C. 269.

The name "A. R. McMaster" on page 137 should read "A. C. McMaster."

The name "C. F. Fraser" on page 181 should read "C. Fraser Elliott."

ERRATUM

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

TABLE OF CONTENTS

Memoranda <i>re</i> Appeals.....	VII
Table of the Names of Cases Reported in this Volume.....	IX
Table of the Names of Cases Cited in this Volume.....	XI
Reports of the Cases Adjudged.....	1
Index.....	257

MEMORANDA RE APPEALS

A—To the Judicial Committee of the Privy Council:—

1. *Canadian General Electric Co. v. Fada Radio Limited.* (1927) Ex. C.R. 134; (1928) S.C.R. 239. Appeal allowed and judgment of the Exchequer Court restored.
2. *Dominion Building Corporation Ltd. v. The King.* (1927) Ex. C.R. 101; (1928) S.C.R. 65. Appeal allowed and judgment of the Exchequer Court restored, October 15, 1929.

B—To the Supreme Court of Canada:—

1. *Clatworthy & Sons Ltd. v. Dale Display Fixtures Ltd.* (1928) Ex. C.R. 159. Appeal dismissed.
2. *Fraser Valley Milk Producers Association v. The Minister of National Revenue.* (1928) Ex. C.R. 213. Appeal dismissed.
3. *The King v. The Bank of Nova Scotia.* (1929) Ex. C.R. 155. Appeal dismissed.
4. *Minister of Railways & Canals v. Hereford Railway Company,* (1928) Ex. C.R. 223. Appeal dismissed.
5. *Proctor & Gamble Co. v. Pugsley, Dingman & Co. Ltd.* (1928) Ex. C.R. 207. Appeals allowed.
6. *Sincennes McNaughton Line Ltd. v. The Brulin.* (1928) Ex. C.R. 45. Appeal allowed.
7. *H. K. Wampole & Co. Ltd. v. Hervay Chemical Corporation of Canada Ltd.* (1929) Ex. C.R. 78. Appeal dismissed.

The following are still pending:—

1. *Canadian Radio Patents Ltd. et al v. The Hobbs Hardware Co. Limited.* (1929) Ex. C.R. 238.
2. *Christiani v. Rice.* (1929) Ex. C.R. 111.
3. *Dobbs & Company v. Robert Crean & Co.* (1929) Ex. C.R. 164.
4. *Electrolytic Zinc Process Co. v. French's Complex Ore Reduction Co.* (1927) Ex. C.R. 94.
5. *Fares v. The King.* (1929) Ex. C.R. 144.
6. *Grissinger v. Victor Talking Machine Co. of Canada Ltd.* (1929) Ex. C.R. 24.
7. *The King v. Carling Export Brewing & Malting Co. Ltd.* (1929) Ex. C.R. 130.
8. *The King v. Consolidated Distilleries Limited & Consolidated Exporters Corporation.* (1929) Ex. C.R. 101.
9. *The King v. Frowde Ltd.* (1929) Ex. C.R. 119.
10. *The King v. Miln-Bingham Printing Co.* (1929) Ex. C.R. 133.
11. *Roger Miller & Sons Ltd. v. The King.* (1929) Ex. C.R. 136.
12. *Saskatchewan Co-operative Wheat Producers Ltd. v. Minister of National Revenue.* (1929) Ex. C.R. 180.
13. *Western Electric Co. Ltd. v. Bell.* (1929) Ex. C.R. 213.

Olsen Company v. The "Princess Adelaide" and the C.P.R. v. The "Hampholm." (1929) Ex. C.R. 199. On appeal to this court the P.A. was found alone to blame.

A TABLE
OF THE
NAMES OF CASES REPORTED
IN THIS VOLUME

A	Page	E	Page
<i>Adelaide, The Princess, Fred Olsen & Company v.</i>	199	<i>Easterbrooke, The King v.</i>	28
<i>Amla, The Ship, Burce Stewart & Co. Ltd. v.</i>	192	<i>Eastern Steamship Co. Ltd. and Canada Atlantic Transit Coy.</i>	103
<i>Amla, The Ship, William P. Burke et al v.</i>	194	<i>Elite Cafe Limited, The King v.</i>	56
B		F	
<i>Bank of Nova Scotia, The, The King v.</i>	155	<i>Fares, Wm. H. et al, v. The King.</i>	144
<i>Bell, The, Western Electric Coy. Ltd. v.</i>	213	<i>Fidelity Insurance Co. of Canada, The, The King v.</i>	1
<i>Birmingham Jewellers' and Silver-smiths' Association v. W. N. Stock.</i>	175	<i>Fischer, The Mary C., The King v.</i>	207
<i>Bonham et al v. The King and Canada Steamship Lines Ltd.</i>	32	<i>Frowde Ltd., The King v.</i>	119
<i>Bruce Stewart & Co. Ltd. v. The Amla.</i>	192	G	
<i>Burke, Wm. P. et al, v. The Ship Amla.</i>	194	<i>Goodyear Tire and Rubber Company v. The Rubber Service Laboratories Co.</i>	63
<i>Burlington, The SS., James Richardson & Sons, Ltd. v.</i>	186	<i>Grissinger Elwood v. Victor Talking Machine Co. of Canada Ltd.</i>	24
C		H	
<i>Canada Atlantic Transit Coy. and Eastern Steamship Co. Ltd.</i>	103	<i>Hampholm, The, The Canadian Pacific Ry. Co. v.</i>	199
<i>Canada Steamship Lines Ltd., Bonham et al v. The King.</i>	32	<i>Hampholm, The v. The Princess Adelaide.</i>	199
<i>Canadian Pacific Ry. Co. v. The Hampholm.</i>	199	<i>Hervay Chemical Co. of Canada, Ltd., Henry K. Wampole & Co. Ltd. v.</i>	78
<i>Canadian Radio Patents Ltd. v. Higel Radio Limited.</i>	107	<i>Higel Radio Ltd., Canadian Radio Patents Ltd. et al v.</i>	107
<i>Canadian Radio Patents Ltd. et al, v. The Hobbs Hardware Coy., Limited</i>	238	<i>Hobbs Hardware Coy. Ltd., Canadian Radio Patents, Limited, et al v.</i>	238
<i>Canadian Surety Co., The, The King v.</i>	216	<i>Hodder & Coy., Walter W., Inc., v. The Strandhill.</i>	253
<i>Carling Export Brewing & Malting Co. Ltd., The King v.</i>	130	<i>Honey Dew Limited v. E. J. Rudd et al.</i>	83
<i>Christiani, F. R. et al v. John A. Rice Consolidated Distilleries Ltd., The King v. (and Consolidated Exporters Corporation Ltd.)</i>	101	<i>Hope v. Minister of National Revenue</i>	158
<i>Consolidated Exporters Corporation Ltd., The King v. Consolidated Distilleries Limited.</i>	101	I	
<i>Cooke, J. W. v. The King.</i>	20	<i>Ikala, The, Standard Oil Co. of New Jersey v. and Industry Steamship Co. v. The James McGee.</i>	230
<i>Crean & Co., Ltd., Robert; Dobbs & Coy. v.</i>	164	<i>Industry Steamship Coy. v. The James McGee & Standard Oil Co. of N.J. v. The Ikala.</i>	230
<i>Cyr, L. J. et al, The King v.</i>	225	J	
D		<i>James Richardson & Sons, Ltd. v. SS. Burlington.</i>	186
<i>Dobbs and Company v. Robert Crean & Coy. Limited.</i>	164	<i>James McGee The SS., Industry Steamship Co. v.</i>	230
<i>Doric, The SS., Lingan Steamship Co. Ltd. v.</i>	71	<i>Journal of Commerce Publishing Coy. Ltd. v. Record Publishing Coy.</i>	168
<i>Dussault v. The King.</i>	8		

K	Page	O	Page
Kennedy v. Minister of National Revenue.....	36	Oceanic Steamship Navigation Co. v. SS. <i>Lingan</i>	71
King The, v. The Bank of Nova Scotia	155	Olsen & Co., Fred v. The <i>Princess Adelaide</i>	199
—, Bonham et al, and Canada Steamship Lines.....	32	P	
— v. The Canadian Surety Co. Ltd.....	216	<i>Princess Adelaide</i> , The, Fred Olsen & Coy. v.....	199
— v. Carling Export Brewing & Malting Co. Ltd.....	130	— v. The <i>Hampholm</i>	199
— v. Consolidated Distilleries Ltd. et al and Consolidated Exporters Corp. Ltd. (3rd Pty.)....	101	R	
—, J. W. Cooke v.....	20	Record Publishing Co. Ltd., Journal of Commerce Publishing Coy. Ltd. v.....	168
— v. Cyr.....	225	Rice, J. A., Christiani et al v.....	111
—, Dussault v.....	8	Richardson & Sons, Ltd., James, v. SS. <i>Burlington</i>	186
— v. <i>Easterbrooke</i>	28	Robert Crean & Co., Ltd., Dobbs & Company v.....	164
— v. Elite Cafe Limited.....	56	Roger Miller & Sons Ltd. v. The King.....	136
—, William Henry Fares et al v.....	144	Rubber Service Laboratories Co., Goodyear Tire and Rubber Company v.....	63
— v. The Fidelity Insurance Co. of Canada.....	1	Rudd et al, Honey Dew Ltd. v.....	83
— v. The <i>Mary C. Fischer</i>	207	S	
— v. Frowde Limited.....	119	Saskatchewan Co-operative Wheat Producers Co. v. Minister of National Revenue.....	180
— v. Miln-Bingham Printing Co. Ltd.....	133	Standard Oil Coy. of New Jersey v. SS. <i>Ikala</i> , and Industry SS. Co. v. The <i>James McGee</i>	230
— v. The Miramichi Lumber Co. Limited.....	172	Stock, W. N., Birmingham Jewellers' and Silversmiths Association, v... <i>Strandhill</i> , The, Walter W. Hodder Co. Inc. v.....	175 253
—, National Dook & Dredging Corporation Ltd.....	40	T	
—, Roger Miller & Sons, Ltd. v.....	136	Tooke Bros. Ltd., Van Heusen Products Inc. et al v.....	89
— v. Vancouver Breweries Ltd. et al.....	14	V	
L		Vancouver Breweries Ltd. et al, The King v.....	14
<i>Lingan</i> , The SS., Oceanic Steamship Navigation Co. Ltd. v.....	71	Van Heusen Products Inc. et al v. Tooke Bros. Ltd.....	89
<i>Lingan</i> Steamship Company Ltd. v. The SS. <i>Doric</i>	71	Victor Talking Machine Co. of Canada, Ltd., Grissinger v.....	24
M		W	
<i>Mary C. Fischer</i> , The, The King v...	207	Walter W. Hodder Coy. Inc. v. The <i>Strandhill</i>	253
Miln-Bingham Printing Co. Ltd., The King v.....	133	Wampole & Co. Ltd. (Henry K.) v. Hervay Chemical Company of Canada Ltd.....	78
Minister of National Revenue, Hope v.....	158	Western Electric Coy. Ltd. The, v. Bell.....	213
Minister of National Revenue, Wm. Kennedy v.....	36		
Minister of National Revenue, The Saskatchewan Co-operative Wheat Producers, Limited, v.....	180		
Miramichi Lumber Coy. Ltd., The King v.....	172		
Mc.			
<i>McGee</i> , The <i>James</i> , Industry Steamship Coy. v. and Standard Oil Co. of N.J. v. The <i>Ikala</i>	230		
N			
National Dock and Dredging Corp. Ltd. v. The King.....	40		

A TABLE
OF THE
NAMES OF CASES CITED
IN THIS VOLUME

NAME OF CASE	A	WHERE REPORTED	PAGE
<i>Ailsa</i> , The.....	[1860]	2 Stuart's Adm. Rep. 38.....	233
<i>Anderson, In re</i>	[1925]	4 D.L.R. 116.....	163
<i>Antill</i> , Taxation Commissioner v.....	[1902]	A.C. 422.....	186
<i>Automatic Weighing Machine Co. v. Knight</i>	[1889]	6 R.P.C. 297.....	247
<i>Aras</i> , The.....	[1907]	P. 28.....	204
<i>Arranmore</i> , The v. Rudolph.....	[1906]	33 S.C.R. 176.....	204
<i>Attorney-General for Quebec v Attorney-General for Canada</i>	[1921]	1 A.C. 401.....	30
<i>Attorney-General v. Harris</i>	[1872]	33 U.C. Q.B.R. 94.....	30
B			
<i>Bacon v. The King</i>	[1921]	21 Ex. C.R. 25.....	22
<i>Balderson v. The Queen</i>	[1898]	23 S.C.R. 261.....	22
<i>Ball v. Crompton Corset Co</i>	[1886]	13 S.C.R. 469.....	98
<i>Batley v. Kynock</i>	[1874]	L.R. 19 Eq. 229.....	109
<i>Belanger v. The King</i>	[1920]	19 Ex. C.R. 423.....	228
<i>Belridge</i> , The, v. <i>Empress of Japan</i>	[1917]	3 W.W.R. 961.....	201
<i>Benares</i> , The.....	[1885]	5 Asp. (N.S.) 171.....	236
<i>Bernadin v. Municipality of North Dufferin</i>	[1891]	19 S.C.R. 581.....	54
<i>Billings and Spencer Coy. v. Canadian Billings & Spencer Ltd. et al</i>	[1921]	20 Ex. C.R. 405.....	165
<i>Blake v. San Francisco</i>	[1885]	113 U.S.R. 679.....	98
<i>Blakeney</i> , The.....	[1859]	5 Jur. N.S. 418.....	196
<i>Bonham v. The Honoreva</i>	[1916]	54 S.C.R. 51.....	234
<i>Bradshaw v. Minister of Customs and Excise</i>	[1927]	2 D.L.R. 490; [1927] 4 D.L.R. 278 and [1928] 2 D.L.R. 352.....	136
<i>Bristow v. Cormican</i>	[1878]	3 A.C. 641.....	152
<i>Britannia</i> , The.....	[1905]	P. 98.....	204
<i>British American Fish Corp. Ltd., The, v. The King</i>	[1918]	18 Ex.C.R. 230.....	42
<i>British Vacuum Cleaner Co. v. London, S.R. Ry. Co. (British Vacuum Case)</i>	[1911]	29 R.P.C. 309.....	96
<i>British Thompson-Houston Co. Ltd. v. Corona Lamp Works Ltd</i>	[1922]	39 R.P.C. 49.....	96
<i>British Ore Concentration Syndicate Ltd. v. Mineral Separation Co</i>	[1909]	27 R.P.C. 33.....	98
<i>Brunning v. Odhams Bros. Ltd</i>	[1896]	75 L.T.R. 602.....	177
<i>Bryde v. The S.S. Montcalm</i>	[1913]	Can. Rep.(A.C.) 472; 14 D.L.R. 46.....	235
<i>Bywell Castle</i> , The.....	[1879]	4 Asp. (N.S.) 207.....	236
C			
<i>California Fig Syrup Co's. Trade-Mark</i>	[1888]	6 R.P.C. 126.....	179
<i>Canadian Pacific Ry. Co. v. The SS. Storstad</i>	[1915]	17 Ex.C.R. 160; 40 D.L.R. 600.....	236
<i>Canadian General Electric Co. Ltd. v. Fada Company Ltd</i>	[1927]	Ex. C.R. 134.....	240
<i>Candee, Swan & Company v. Deere & Coy</i>	[1870]	54 Ill. Rep. 439.....	165

C			
NAME OF CASE		WHERE REPORTED	PAGE
Cargo, The, ex <i>Sultan</i>	[1859]	Swaby 504.....	196
<i>Carolina</i> , The.....	[1875]	34 L.T.R. 399.....	198
Carten v. Leyson.....	[1902]	19 R.P.C. 473.....	97
Carter Medicine Co's. Trade-Mark.....	[1892]	9 R.P.C. 401.....	179
Casgrain v. Prevost.....	[1890]	35 L.C.J. 29.....	36
<i>Cathay</i> , The.....	[1899]	9 Asp. 35.....	204
<i>Ceto</i> , The.....	[1889]	14 A.C. 670.....	204
Chapman v. Wintroath.....	[1920]	252 U.S.R. 126.....	68
Chicago, Burlington & Kansas City Ry. Co. v. Guffey.....	[1887]	120 U.S.R. 569.....	40
Christie, Brown & Co., <i>In re</i>	[1921]	20 Ex. C.R. 119.....	166
<i>Clackamas</i> , The v. The <i>Cap d'Or</i>	[1926]	S.C.R. 331.....	201
<i>Clara Camus</i> , The.....	[1926]	17 Asp. 171.....	204
Coltness Iron Co. v. Black.....	[1880]	1 T.C. 287.....	39
Commissioners of Niagara Falls Park v. Colt.....	[1895]	22 Ont. A. R. 1.....	31
<i>Caniston</i> , The.....	[1918]	19 Ex. C.R. 239.....	234
Consolidated Car Heating Co. v. Came.....	[1903]	A.C. 509.....	27
Cooper v. The Queen.....	[1880]	14 Ch. D. 311.....	22
Corbin Cabinet Lock Co. v. Eagle Lock Co.....	[1889]	37 Fed. Rep. 338.....	99
Corona Cord Tire Co. v. Dovon Chemical Corporation.....	[1927]	48 S.C. Reporter 380.....	69
County of Frontenac v. Breden.....	[1870]	17 Gr. Ch. Rep. 645.....	220
Cover v. American Thermo-Ware Co.....	[1911]	188 Fed. Rep. 670.....	100
D			
Darling v. Brown.....	[1877]	1 S.C.R. 360.....	36
De Dohse v. The Queen.....	[1886]	3 T.L.R. 114.....	22
De Galindez v. The King.....	[1906]	Q.O.R. 15 K.B. 320; [1907] 39 S.C.R. 682.....	38
De Nicols, <i>In re</i> (De Nicols v. Curlier).....	[1898]	1 Ch. D. 403.....	100
De Sola v. De Sola.....	[1889]	17 R.L. 315.....	36
Detroit Rubber Products Inc. v. Republic Rubber Co.....	[1928]	Ex. C.R. 29.....	99
Dominion Bedstead v. Guertler.....	[1924]	Ex. C.R. 158.....	28
<i>Dordogne</i> , The.....	[1884]	10 P. 6.....	204
Dunn v. The Queen.....	[1896]	1 Q.B.D. 116.....	22
E			
Eagle Lock Coy. v. Corbin Cabinet Lock Co.....	[1894]	64 Fed. Rep. 739.....	99
Eastern S.S. Coy. v. Canada Atlantic Transit Co.....	[1928]	Ex. C.R. 129.....	204
Edwards, <i>Ex parte</i>	[1871]	L.R. 12 Eq. 389.....	60
Elkington & Coy., <i>In re</i>	[1908]	11 Ex. C.R. 293.....	166
Esty v. Newton.....	[1899]	14 App. Cases, Dist. of Col. 50.....	68
<i>Ezardian</i> , The.....	[1911]	11 Asp. 602.....	234
F			
Fafard v. Ferland.....	[1903]	6 Q.P.R. 119.....	80
<i>Fleur de Lis</i> , The.....	[1866]	L.R. 1 A. & E. 49.....	197
Floyd Smith Aerial Equipment Co. v. Irving Air Chute Co.....	[1928]	U.S. Av. R. 275.....	94
Fraser v. Marsh.....	[1811]	13 East. 238.....	255
Frederick Wilks, application of.....	[1911]	29 R.P.C. 21.....	88
Frontenac, County of, v. Breden.....	[1870]	17 Gr. Ch. Rep. 645.....	220
G			
Gadd & Mason v. The Mayor etc. of Manchester.....	[1892]	9 R.P.C. 516.....	99
Gagné v. Minister of Finance.....	[1925]	Ex. C.R. 19.....	162
Gaisman v. Gillette.....	[1911]	36 App. Case Dist. of Col. 440.....	68
Gibson v. East India.....	[1839]	5 Bing. (N.C.) 262.....	22
<i>Glengariff</i> , The.....	[1905]	10 Asp. 103; (1905) P. 106.....	235

G		PAGE
NAME OF CASE	WHERE REPORTED	
Gold Medal Furniture Mfg. Co. v. Gold Medal Camp Furniture Mfg. Co.	[1928] Ex.C.R. 65; [1928] S.C.R. 575..	167
Gould v. Stuart.....	[1896] A.C. 575.....	22
Grant v. Secretary of State for India....	[1877] 2. C.P.D. 445.....	22
Great Eastern, The.....	[1885] 53 L.T.R. 594.....	198
Gresham Life Ass'n. Soc. v. Styles.....	[1892] 3 T.C. 185.....	39
Gresham Blank Book Co. v. The King..	[1912] 14 Ex. C.R. 236.....	54
Gulf of Suez, The.....	[1921] P. 318.....	77
H		
Hall v. The Queen.....	[1893] 3 Ex. C.R. 373.....	54
Hardin v. Jordan.....	[1891] 140 U.S.R. 371.....	152
Harper & Co. Ltd. John, v. Wright & Butler Lamp Mfg. Co. Ltd.....	[1895] 2 Ch. 593.....	167
Harvey Hubbell Inc. v. General Electric Co.....	[1920] 267 Fed. Rep. 564.....	99
Haslam & Co. v. Hall.....	[1887] 4 R.P.C. 203.....	110
Heather Belle, The.....	[1892] 3 Ex. C.R. 40.....	204
Heligoland, The.....	Swaby 496.....	196
Henderson v. The Queen.....	[1897] 6 Ex.C.R. 39; [1898] 28 S.C.R. 425.....	54
Hollinshead v. Hazleton.....	[1916] 1 A.C. 428.....	163
Horlick, <i>In re</i>	[1917] 64 S.C.R. 466.....	166
Hubbard v. Berg.....	[1913] 40 App. Cases, Dist. of Col. 577.....	68
Hurlbut Shoe Co. v. Hurlburt Shoe Coy.	[1923] Ex.C.R. 136; [1925] S.C.R. 141.....	166
I		
Incandescent Lamp Patent.....	[1895] 159 U.S. 465.....	97
Impex Electrical Ltd. v. Weinbaum....	[1927] 44 R.P.C. 405.....	166
Iron-Ox Remedy Co. v. Co-operative Wholesale Society.....	[1907] 24 R.P.C. 425.....	87
Iroquois, The.....	[1913] 18 B.C.R. 76.....	201
J		
John Harper & Co. Ltd. v. Wright & Butler Lamp Mfg. Co. Ltd.....	[1895] 2 Ch. 593.....	167
Johnston v. O'Neill.....	[1911] A.C. 552.....	152
Jones v. Commissioners of Inland Revenue.....	[1919] 7 T.C. 310.....	39
Jones, Vess v. Horton.....	[1922] 21 Ex. C.R. 330.....	165
Judges' Salaries, <i>In re</i>	[1924] Ex. C.R. 151.....	163
K		
King, The v. Bonhomme.....	[1917] 16 Ex.C.R. 437.....	30
— v. Coleman.....	[1926] Ex. C.R. 121.....	228
— v. Desrosiers.....	[1908] 41 S.C.R. 71.....	42
— v. Dixon.....	[1822] 11 Prices Rept. 204.....	7
— v. Fidelity Insurance Co. of Canada.....	[1929] Ex. C.R. 1.....	219
— v. The Globe Indemnity Co.....	[1921] 21 Ex. C.R. 34.....	102
King, The vs. Gooderham & Worts Ltd..	62 O.L.R. 218.....	126
— v. McMaster.....	[1926] Ex. C.R. 68.....	30
— v. Ontario & Minnesota Power Co. Ltd.....	[1920] 20 Ex.C.R. 279; [1925] A.C. 196	30
King, The, vs. Trudel.....	[1913] 49 S.C.R. 501.....	229
— v. Vancouver Lumber Com-pany.....	[1914] 17 Ex. C.R. 329; [1919] 50, D.L.R. 6.....	42
King, The.....	[1911] 27 T.L.R. 524.....	204
Kingston-upon-Hull, Mayor, etc., of, v. Harding.....	[1892] 2 Q.B.D. 494.....	220
Knarwater, The.....	[1894] The Rep. 784.....	204

NAME OF CASE	. L	WHERE REPORTED	PAGE
Laliberte v. Godoua.....	[1895]	R.J.Q., 8 S.C. 308.....	36
Leaman v. The King.....	[1920]	3 K.B.D. 663.....	21
Llanelly, The.....	[1914]	P. 40.....	76
Lord v. Commissioners for City of Sydney	[1859]	12 Moore P.C. 473.....	152
Louisa, The.....	[1863]	9 Jur. N.S. 676 (pt. 1).....	196
Lynch v. Hornby.....	[1918]	247 U.S.R. 339.....	162
M			
MacDonald v. Dillon.....	[1883]	27 L.C.J. 214.....	36
MacLaren v. Attorney-General for Quebec.....	[1914]	A.C. 258.....	150
Mary Stewart, The.....	[1844]	2 Wm. Rob. 244.....	233
Mason v. Hepburn.....	[1898]	13 App. Cases, Dist. of Col. 86.....	68
May v. The King.....	[1913]	14 Ex. C.R. 341.....	54
Mayor, etc., of Kingston-upon-Hull v. Harding.....	[1892]	2 Q.B.D. 494.....	220
Melachrino & Co. v. Melachrino Egyptian Cigarette Co., <i>In re</i> Case of.....	[1887]	4 R.P.C. 215.....	89
Melanie, The SS.....	[1919]	35 T.L.R. 507.....	232
Menard v. The King.....	[1919]	Q.O.R. 29 K.B. 420.....	237
Mills v. Gregory.....	[1754]	Sayer, 127.....	197
Missouri Steamship Co., <i>In re</i>	[1889]	L.R. 42 Ch. D. 321.....	100
Mitchell v. The Queen.....	[1896]	1 Q.B. 121 N.....	21
Mc.			
McBerty v. Cooke.....	[1900]	16 App. Cases Dist. of Col. 133.....	68
McLeod v. The Queen.....	[1889]	2 Ex.C.R. 106.....	13
N			
Needham v. Oxley.....	[1863]	1 H. & M. 248.....	109
Neilson v. Harford.....	[1841]	1 W.P.C. 295.....	26
New York Herald Coy. v. The Ottawa Citizen Co.....	12 Ex.C.R. 1; [1908]	41 S.C.R. 229..	172
Nieblo Manufacturing Co. Inc. v. Reid.....	[1928]	Ex. C.R. 13.....	99
Northern Shirt Co. v. Clark.....	[1917]	17 Ex.C.R. 273; [1918] 57 S.C.R. 607.....	94 & 98
O			
Oceanic, The.....	[1903]	88 L.T.R. 303.....	204
P			
Pacific Lime Coy., <i>In re</i>	[1920]	20 Ex.C.R. 207.....	166
Pallen v. <i>The Iroquois</i>	[1913]	18 B.C.R. 76.....	201
Partington v. the Attorney-General.....	[1869]	L.R. 4 E. & I. App. (H.L.) 100.39 & 185	
Payton & Co. Ltd. v. Snelling Lampard & Co. Ltd.....	[1899]	17 R.P.C. 48.....	80
Payton & Co. Ltd. v. Titus Ward & Co. Ltd.....	[1899]	17 R.P.C. 58.....	80
Permutit Company, The v. Borrowman.....	[1924]	Ex. C.R. 8; [1926] 4 D.L.R. 285; 43 R.P.C. 356.....	64
Peter Benoit, The.....	[1915]	13 Asp. 203.....	206
Philadelphia Novelty Mfg. Co. v. Blakesley Novelty Co.....	[1889]	40 Fed. Rep. 588.....	81
Pianotist Coy., Application of.....	[1906]	23 R.P.C. 774.....	88
Pierman v. Chisholm.....	[1916]	44 App. Cases Dist. of Col. 460.....	68
P. & M. Manufacturing Co., The, v. The Canada Machinery Corp. Ltd. et al.....	[1925]	Ex.C.R. 47; [1926] S.C.R. 105..	28
Pope Appliance Corp. v. The Spanish River Pulp & Paper Mills Ltd.....	[1927]	Ex.C.R. 28; [1928] S.C.R. 20; [1929] A.C. 269.....	69
Power et al. v. Griffin.....	[1902]	7 Ex.C.R. 411; 33 S.C.R. 39.....	98
Prince Leopold de Belgique, The.....	[1909]	P. 103.....	76

Q		PAGE
NAME OF CASE	WHERE REPORTED	
Queen, The, v. Castro.....	[1879-80] L.R. 5 Q.B.D. 490.....	100
— v. Finlayson et al.....	[1897] 5 Ex.C.R. 387.....	102
— v. Henderson.....	[1898] 28 S.C.R. 425.....	56
— v. Woodburn.....	[1898] 29 S.C.R. 112.....	54
R		
Ramsden v. Dyson.....	{ [1865] L.R. 1 E. & I. App. 129; L.R. 1 H.L.R. 129).....	31, 223
Rex vs. Gooderham & Worts Ltd.....	62, O.L.R. 218.....	126
St.		
St. Catharine's Milling and Lumber Co. v. The Queen.....	[1886] 13 S.C.R. 577; 14 A.C. 46....	30
S		
Salvas v. Vassal.....	[1896] 27 S.C.R. 68.....	36
Scholefield v. Templer.....	[1859] 4 de G. & J. 429.....	220
Scoble et al v. Secretary of State for India.....	[1903] 4 T.C. 618.....	39
Seaward, The.....	3 Ex. C.R. 268.....	196
Smith v. Lord Advocate.....	{ [1897] 25 Scotch Sess. Cases (4 Ser.) 112.....	22
Smith v. Gibson.....	[1865] 25 U.C. C.P. 248.....	31
Smith Potatoe Crisps Ltd. v. Paige Potatoe Crisps Ltd.....	[1928] 45 R.P.C. 132.....	80
Smith v. Krause.....	[1908] 160 Fed. Rept. 270.....	81
Smith v. Nichols.....	[1874] 88 U.S. (21 Wall.) 112.....	99
Smith v. Attorney General for Canada.....	[1924] Ex. C.R. 193.....	162
Smith v. St. Lawrence Tow Boat Co....	[1873] L.R. 5 P.C. 308.....	204
Stahlwerk Becker Aktiengesellschaft, <i>In re</i>	[1918] 36 R.P.C. 13.....	100
Standard Ideal Co. v. Standard Sanitary Co.....	[1911] A.C. 78.....	165
Stoffregen v. Moore.....	[1920] 264 Fed. Rep. 232.....	162
Strandhill, The, and Walter W. Hodder Co. Inc.....	[1926] S.C.R. 680.....	255
Sunlight, The.....	[1904] P. 100.....	76
Syers v. Metropolitan Board of Works..	[1877] 36 L.T.R. 227.....	62
T		
Talbot, The.....	[1890] 6 Asp. (N.S.) 602.....	234
Tartar, The v. The Charmer.....	[1907] Mayer's Ad. Prac. 536.....	207
Taxation Commissioners v. Antill.....	[1902] A.C. 422.....	186
Tennant v. Smith.....	[1892] A.C. 150.....	162
Thomas v. The King.....	[1928] Ex. C.R. 26.....	22
Treo Company Inc. v. Dominion Corset Co.....	[1918] 18 Ex. C.R. 115.....	99
Trewhella v. Rowe.....	[1809] 11 East. 434.....	255
Tufnell, <i>In re</i>	[1876] 3 Ch. D. 164.....	22
Tyler v. Boston.....	[1868] 7 Wall. 327 (74 U.S.).....	97
U		
Union, The.....	[1928] P. 175.....	204
Union SS. Coy. v. The Wakena.....	{ [1917] 16 Ex. C.R. 397; 35 D.L.R. 644; 37 D.L.R. 579.....	235
United Kingdom Tobacco Co., Applica- tion of.....	[1912] 29 R.P.C. 489.....	88
United States Shipping Board v. Laird Line Limited.....	[1924] A.C. 286.....	204
United States v. Bell Telephone Co....	[1897] 167 U.S.R. 224.....	68
— v. Zerbey et al.....	[1926] 271 U.S.R. 332.....	6

V		
NAME OF CASE	WHERE REPORTED	PAGE
<i>Valiant</i> , The.....	[1914] 19 B.C.R. 521.....	211
<i>Van Hensen Products Inc. et al. v. Earl & Wilson</i>	[1924] 300 Fed. Rep. 922.....	100
<i>Velocity</i> , The.....	{ 6 Moo. P.C. (N.S.) 263; 3 L.R. P.C. 44; [1870] 39 L.J. Adm. 20.....	76
<i>Vera Cruz</i> , The.....	9 P.D. 96; 10 A.C. 59.....	196
<i>Vess Jones v. Horton</i>	[1922] 21 Ex.C.R. 330.....	165
<i>Vivar</i> , The.....	2 P.D. 29.....	196

W

<i>Walker v. Baird</i>	[1892] A.C. 491.....	179
<i>Wells v. Osmond</i>	[1794] 6 Mod. R. 238.....	197
<i>Williamson Candy Coy. v. W. J. Crothers Company</i>	[1924] Ex.C.R. 183; [1925] S.C.R. 377.....	167
<i>Wood v. The Queen</i>	[1877] 7 S.C.R. 631.....	54
<i>Wright v. Brake Service</i>	[1926] S.C.R. 434.....	69
<i>Wylie v. City of Montreal</i>	[1885] 12 S.C.R. 384.....	40

Y

<i>Yates v. Great Western Ry. Co.</i>	[1877] 2 A.R. (Ont.) 226.....	99
<i>Yorke v. The King</i>	{ [1915] 31 T.L.R. 220; 84 L.J., K.B. 947; [1915] 1 K.B. 852.....	22
<i>Young Sid</i> , The.....	[1929] 45 T.L.R. 389; [1929] P. 190..207, 255	
<i>Ystradyfodwg & Pontyfridd Main Sewerage Board v. Bensted</i>	[1907] A.C. 264.....	185

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

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE FIDELITY INSURANCE COM- }
 PANY OF CANADA } DEFENDANT.

1928
 ~~~~~  
 Oct. 8, 9.  
 Oct. 23.  
 ———

*Revenue—Excise Act—Bond for exportation—Liability thereunder—  
 Limitation of action—Section 279, Customs Act—Substantial  
 compliance*

The B.C.D. Co. imported certain liquor into Canada, and warehoused it without paying duty. Later it made entry outwards of this liquor for exportation to G. The defendant gave a bond in double the amount of the duty, that the said liquor would be exported, and to the place mentioned in the entry, and if so exported, and proof thereof made, then the bond to be void; otherwise to remain in full force and virtue. This liquor never reached its declared destination, but was transhipped at sea; it was not re-landed in Canada.

*Held*, where the bond is one specifically required by a statute and the obligation of the bond is to secure the absolute exportation of specific goods to a fixed destination, which in this case admittedly was not done, and where the goods have not been lost or destroyed, the defendant is liable upon the bond.

2. The statutory provisions make it impossible for a Court to give effect to the defence that the goods not having been re-landed in Canada, there was an actual exportation and a substantial compliance with the statute. Relief upon this ground can come only from the Crown, and not from the courts.
3. That the limit of three years, mentioned in section 279 of the Customs Act, within which certain actions must be brought, does not apply to a speciality contract or to a suit upon a bond given under the Act. This limitation relates to penalties and forfeitures imposed by particular sections of the Act.

INFORMATION to recover upon bonds executed in favour of plaintiff under the provisions of the Excise Act.

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

*Hon. N. W. Rowell, K.C.*, and *Mr. Lindsay* for plaintiff.  
*W. L. Scott, K.C.*, and *Cuthbert Scott* for defendant.

1928

THE KING

v.  
THEFIDELITY  
INSURANCECO. OF  
CANADA.

THE PRESIDENT, now (October 23, 1928), delivered judgment.

This is an action upon a bond executed at Vancouver, B.C., by the defendant, for the payment to His Majesty of the sum of \$3,707. The cause was heard upon an agreed statement of facts.

On the 19th day of May, 1924, the British Columbia Distillery Company Limited, made entry outwards for exportation from Customs warehouse in the city of Vancouver, B.C., to one J. Hamilton, San Jose, Guatemala, of one hundred cases of Martel's Three Star Cognac. These liquors had been imported by the British Columbia Distillery Company Ltd., and warehoused by it without payment of duty. On the same day this company gave security by bond, made and executed by the defendant company in the form approved by the Minister of Customs and Excise, in the sum of \$3,707, being double the duties of importation on the goods referred to. These goods were placed on board the motorship *Principio*, and formed part of her cargo, when she reported outwards from Vancouver, for San Jose, Guatemala, on the 23rd day of May, 1924. On the 30th day of May, 1924, the British Columbia Distillery Company Ltd., the exporters, advised the Collector of Customs at Vancouver in writing, that this shipment of liquor had been diverted to the port of Ensenada, Mexico. Nothing however, turns upon this fact, as it is admitted that these goods were not in fact landed at that port.

On the 11th day of June, 1924, the exporting company delivered to the Collector of Customs and Excise at Vancouver, a written document, a landing certificate as it is usually termed, purporting to be signed on the 31st day of May, 1924, at Ensenada, Mexico, by officers of the Mexican Customs, and vided by a British Vice-Consul at that place, which certified that the goods in question had been landed at that place, and had been duly delivered over to the Customs authorities there.

Sections 101 and 102 of the Customs Act are as follows:

101. Upon the entry outwards of any goods to be exported from a Customs warehouse, either by sea or by land or by inland navigation, as the case may be, the person entering the same for such purpose shall, by and upon the making of such entry, whether so expressed in such entry or not, become bound, when the entry aforesaid is for exportation by sea, to the actual exportation of the said goods, and, when the entry aforesaid is for exportation by land or inland navigation, to the actual landing or

delivering of the goods at the place for which they are entered outwards, or, in either case, to otherwise account for the said goods to the satisfaction of the collector or other proper officer, and to produce, within a period to be named in such entry, such proof or certificate that such goods have been exported, landed or delivered or otherwise lawfully disposed of, as the case may be, as shall be required by any regulation of the Governor in Council, or by the collector or other proper officer.

Provided, however, that upon the entry outwards of wines and spirituous liquors to be exported from a Customs warehouse either by sea or by land or inland navigation, as the case may be, the person entering the same for such purpose shall give security by bond of an incorporated guarantee company authorized to do business in Canada, and whose bonds are acceptable to the Dominion Government, such bond to be in form approved by the Minister, in double the duties of importation on such goods, that the same shall, when the entry aforesaid is for exportation by sea, be actually exported to the place provided for in the said entry, and when the entry aforesaid is for exportation by land or inland navigation, shall be landed and delivered at the place for which they are entered outwards, unless in either case the said goods were after leaving Canada lost and destroyed, and that such proof or certificate that such goods have been so exported, landed or delivered, or lost and destroyed, as the case may be, as shall be required by any regulation of the Minister, shall be produced to the collector or other proper officer within a period to be appointed in such bond. This proviso, however, shall not apply to wines and spirituous liquors in a Canadian port, without entry thereat for warehouse and for no other purpose than their transportation *in transitu* on a through bill of lading from a port outside of Canada to another port of destination outside of Canada via a Canadian port or ports.

102. If, within the period appointed in the entry for such exportation or in such bond there is produced to the collector or other proper officer the written certificate of some principal officer of Customs or of colonial revenue at the place to which the goods were exported, or, if such place is in a foreign country, of any proper officer of Customs therein or of any British or foreign consul or vice-consul resident there, showing that the goods named in the said entry were actually landed and left at some place, naming it, out of Canada, as provided for in the said entry, or, if it is proved to the satisfaction of the collector or other proper officer that the said goods were, after leaving Canada, lost and destroyed, the person making such export entry shall be deemed to have satisfied the obligation thereby imposed upon him and if security by bond has been given the said bond may be cancelled.

It was under the proviso to sec. 101 of the Customs Act, that the bond sued upon in this action was entered into by the defendant company, and it is to be observed that a bond is required only in the case of the exportation of wines and spirituous liquors.

The condition of the bond is as follows:—

NOW THE CONDITIONS OF THE ABOVE WRITTEN OBLIGATION are such that, if the said goods, shall, when the entry aforesaid is for exportation by sea, be actually exported to the place provided for in said entry, and when the entry aforesaid is for exportation by land or inland navigation, shall be landed and delivered at the place for which

1928  
 THE KING  
 v.  
 THE  
 FIDELITY  
 INSURANCE  
 CO. OF  
 CANADA.  
 Maclean J.

1928  
 THE KING  
 v.  
 THE  
 FIDELITY  
 INSURANCE  
 CO. OF  
 CANADA.

Maclean J.

they are entered outwards, unless in either case the said goods are after leaving Canada lost and destroyed, and if such proof or certificate that such goods have been so exported, landed or delivered, or lost and destroyed, as the case may be, as required by Regulations of the Minister of Customs and Excise, be produced to the Collector or other proper officer of Customs and Excise at the Port of Vancouver, B.C., within thirty (30) days from the date hereof, then this obligation shall be void; but otherwise shall be and remain in full force and virtue.

The regulations respecting the entry outwards of wines and spirituous liquors to be exported from a customs warehouse, provide that:—

3. If, within the period appointed in such bond, there is produced to the Collector or other proper officer the written certificate of some principal officer of Customs or of colonial revenue at the place to which the goods were exported, or, if such place is in a foreign country, of any proper officer of Customs therein, or of any British or foreign Consul or Vice-Consul resident there, showing that the goods named in the said bond were actually landed and left at some place, naming it, out of Canada as provided for in the said bond, or, if within the said period appointed, it is proved to the satisfaction of the Collector or other proper officer that the said goods were, after leaving Canada, lost and destroyed, the said bond may be cancelled.

In the agreed statements of facts, relative to the export of the goods here in question, is the following:—

That the goods referred to in paragraph 1 hereof were not exported to the place provided for in the said entries nor to Ensenada, Mexico, nor were they landed or delivered over to Customs at either of the said places, but that they were taken out of the port of Vancouver and out of the territorial waters of the Dominion of Canada and discharged from the *Principio* at sea into a small boat or small boats off the coast of the United States of America and were not lost or destroyed or brought back to Canada.

It is clear therefore from the agreed statement of facts, that the goods in question were not exported or landed in Guatemala, or in Mexico, and they were not lost or destroyed. Consequently no proof could be furnished within the period of thirty days, that such goods had been actually landed at the place mentioned in the export entry, or that they were lost or destroyed. It is indisputably clear from the agreed statement of facts, that the landing certificate purporting to come from an officer of the Customs at San Jose, Guatemala, and vided by a British Vice-Consul there, was not bona fide. I do not apprehend that if evidence were taken upon this point, that this conclusion would at all be disturbed.

It was contended on behalf of the defendant, that, it being agreed that the goods in question had not in any

event been reloaded in Canada, that no loss of revenue to the Crown could possibly have occurred, and that the purpose of the bond and the requirements of the Customs Act had in spirit been carried out, in that there was in fact an export from Canada of goods which were not reloaded in Canada, and that the defendant should therefore be discharged from any liability under the bond.

The bond being one specifically required by statute, the obligation of the bond being to secure the absolute exportation of specific goods to a fixed destination which admittedly was not done, and it being admitted the goods were not lost or destroyed, it seems to me there is no power in a Court upon such a state of facts, but to hold the defendant liable upon the bond for the amount there mentioned and here sued upon. The duty on goods imported and entered for consumption, if dutiable, must be paid immediately. The law provides however, in order to facilitate trade, that imported goods may be placed in a bonded warehouse to be later removed for domestic consumption or for export. In the latter case, if the goods are wines or liquors, security must be given that the goods will be actually exported to the place mentioned in the export entry. The bond stipulated that this would be done, the two cases of the goods being lost or destroyed excepted, and if this were not done, the bond should remain in full force and effect.

The amount stated in the bond is fixed by statute, being double the duties of importation on the goods to be exported from a bonded warehouse, and might be regarded as liquidated damages for the non-performance of a statutory provision which requires that when wines or spirituous liquors are to be exported from a customs warehouse, the exporter making the entry shall give security by bond of an incorporated guarantee company authorized to do business in Canada, that the specific goods shall be actually exported to the place provided for in the entry outwards, exemption of liability being provided for where it is established that the goods had been lost or destroyed. To escape liability upon the bond, the exporter must produce a certificate within a stated period that the goods were actually landed at the place mentioned in the entry. That was not done, and the condition upon which the export was

1928  
 THE KING  
 v.  
 THE  
 FIDELITY  
 INSURANCE  
 Co. OF  
 CANADA.  
 Maclean J.

1928  
 THE KING  
 v.  
 THE  
 FIDELITY  
 INSURANCE  
 CO. OF  
 CANADA.  
 Maclean J.

permitted from a customs warehouse was broken. The language of the bond here in question means, I think, that if the goods fail to reach Guatemala, and excepting a proven loss or destruction of the goods, the defendant shall pay and forfeit the sum therein mentioned. The goods in fact have not been shown to have been landed in any country. The rigidity of the statutory provisions make impossible a consideration of the defence urged upon me, that the goods not having been relanded in Canada there was an actual export and a substantial compliance with the statute. Relief upon this ground can come only from the Crown, and not from the courts.

The case of the *United States v. Zerbey et al* (1), was cited as an authority in support of the defendant's contention. That case is clearly distinguishable from the one under consideration. There a permit was issued to sell wines and distilled spirits for other than beverage purposes, and the bond was given to secure compliance with the requirements of the laws of the United States. The security in question was a collateral bond, and United States Government Bonds were pledged as security, this being permissible under the statute, for any liabilities arising under the bond. The bond contained the provision that

the said principle expressly agrees that the said bonds so deposited may be sold . . . and the proceeds applied to the payment of any internal revenue taxes, interest, and penalties which may be due and in satisfaction of any liabilities incurred hereunder, and the expenses of such sale, if any; and the residue, if any, paid to the said principal.

It was held by the Supreme Court of the United States that the bond was not a bond for a penalty forfeitable in its entire amount upon a breach of condition, but was a bond for indemnity securing the payment of the internal revenue taxes, interest penalties and liabilities accruing to the United States by reason of the breach. That case is entirely different from the one presently under consideration, in fact it has no resemblance to it whatever. Here the bond executed to the plaintiff was in the specified sum prescribed by statute, and is forfeitable in its full amount, for a breach of its condition.

(1) (1926) 271 U.S.R. 332.

There is a distinction, as one text writer puts it, between a bond intended as an indemnity between private persons, and those transactions in which a bond is given in pursuance of a statute, as indemnity against a violation of a statute or some policy of the law. In the latter case, the condition of the bond is for a due compliance with the statute. The damages for the breach not being ascertainable, and if there is to be any recovery upon the bond, it must be upon the theory that the sum named in the bond is presumed to be in the nature of liquidated damages.

It may appear strange, where as in this case, the goods were not relanded in Canada, to hold that by virtue of a literal breach of the bond, the defendant must be condemned in the amount of the bond. That however is what, in my opinion, the statute says. As was stated by one of the learned judges in *The King v. Dixon* (1), a great body of Excise and Customs laws are not confined to the inflicting of penalties on persons for actual breaches of the law, but a great many are enacted to prevent people putting themselves into a situation making it possible for them to infringe important provisions of the laws, and when these irregularities take place, as here, the law is put in motion, in order that others in the same situation, who may not be innocent of an intention or will to violate the revenue laws of the country, may be restrained from doing so.

It is also claimed by the defendant that this action is barred by sec. 279 of the Customs Act, which enacts that all seizures, prosecutions or suits for the recovery or enforcement of any of the penalties or forfeiture imposed by the Act, may be commenced at any time within three years after the offence was committed, or the cause of prosecution or suit arose, but not afterwards. I do not think this section was intended to apply to a specialty contract or to a suit upon a bond given under the Act; it relates I think to penalties and forfeitures imposed by particular sections of the Act.

Altogether, I am of the opinion that the plaintiff should have judgment for the amount sued upon together with his costs of action.

*Judgment accordingly.*

(1) (1822) 11 Prices Rep. 204.

1928  
 THE KING  
 v.  
 THE  
 FIDELITY  
 INSURANCE  
 Co. OF  
 CANADA.  
 Maclean J.

1928 SIMON DUSSAULT ..... SUPPLIANT;

Oct. 22 & 23.  
Nov. 3.

AND

HIS MAJESTY THE KING ..... RESPONDENT.

*Expropriation—Compensation—“Value in use”—Market value*

*Held*, that the productive value of land, or the value of the land to its owner based on the income he is able to derive from its use, is not the measure of compensation, for land expropriated, and is not material, except in so far as it throws light upon the market value. “Value in use” is to be repudiated as a test.

PETITION OF RIGHT by suppliant to have the compensation of his property taken by expropriation, fixed.

The action was tried before the Hon. Mr. Justice Audette at Quebec.

*R. Langlais, K.C.*, and *Mr. Flynn* for suppliant.

*Gerard Lacroix* for respondent.

AUDETTE J., now (3rd November, 1928), delivered judgment.

This is a Petition of Right whereby it is sought to recover compensation for certain farming land taken and expropriated from the suppliant, by the respondent, for the purposes of a public work, viz: the Canadian National Railways, by depositing, in the Registry Office, on the first October and the 20th November, 1923, a plan and description of the same.

The area expropriated is (0.49) forty-nine hundredths of an acre, or practically half of an acre, from a farm at Les Ecureuils.

The suppliant, by his Petition of Right, claims the sum of \$14,303.25.

The Crown, by its Statement in Defence, offers the sum of \$725.

This half acre is taken out of a farm of about 60 or 61 acres, which the C.N.R. crosses diagonally, practically from east to west, leaving between 4 and 5 acres to the south and 56 acres to the north.

What seems to have unduly complicated this matter and to have entirely carried away those who approached its consideration is that the officers of the Provincial Experimental Farm started on this farm what is called a *champ d'expérimentation* which usually lasts three or four years, as said by witness Lavoie, that is an experiment with the culture of strawberries or small fruits, on that part of the



farm which was expropriated. As stated by witness Lavoie, the chief of the Agricultural Service, Experimental Farm, the suppliant's land is not specially favourable (pas très favorable) for the cultivation of small fruits, but the farm was selected because it was close to Donnacona where a small market for these products is available.

1928  
 DUSSAULT  
 v.  
 THE KING.  
 Audette J.

The suppliant has produced as exhibit No. 4 (upon which unnecessary importance has been placed) the theoretical result prepared by the Experimental Farm, upon information supplied by the suppliant with respect to the cost of operation. These manipulated figures show fairly large revenues from the cultivation of these small fruits; but the accuracy of the expenditure for labour and expenses of this nature is absolutely wanting. The Experimental Farm worked this statement from information supplied by the suppliant who kept no books and said he made this report to the department, to the best of his knowledge, and that he might have made mistakes, and that his return may be varied. All of this is said not because it affects the result of the case; but because the evidence has been tendered with the absolute consideration of the same and that, and that alone, can explain how everything has been so much magnified and exaggerated.

Within the same purview and with the same result in its consideration, is also the other question which seems to have been mentioned by most of the witnesses, and that is that the parcel of land taken was absolutely the only piece of the whole 60 acres which could be used for that kind of culture. The evidence leaves it a controverted question; while some say it is the only place on the farm where such cultivation could be made, others say that part of the farm on the south could be so used and witness Robert, a hard headed farmer of long experience, says he has more practice than the experts, that if he has not the theory he has the practice, and he swears that 50 per cent of the land to the south of the railway is quite suited for that special cultivation of vegetables and strawberries, notwithstanding what is said to the contrary. Witness Constantin, who has experience in the cultivation of strawberries, testified that 2½ acres to the south of the railway would lend itself to the cultivation of strawberries.

On behalf of the suppliant, the following witnesses testified as to the value of the land taken and the damages re-

1928  
 DUSSAULT  
 v.  
 THE KING.  
 Audette J.

sulting from the expropriation, and valued the same as follows, viz:—witness Baillaut at between \$6,000 and \$6,500; witness Savard at a minimum of \$6,000; witness Auger at between \$6,000 and \$7,000; witness Doré at \$6,000, and witness Giguère at between \$6,000 and \$7,000.

On behalf of the Crown, the following witnesses valued the same as follows, viz:—witness Constantin at between \$1,500 and \$2,000; witness Marcoux at \$681.50; witness Parent at \$720 to \$725; witness Giroux at \$525, and witness Robert at \$800.

Another very important and controlling fact proved by the suppliant's witness Doré is that farms at Les Ecureuils are worth \$80 to \$100 an acre when under cultivation, including dependencies.

The suppliant's farm seems to be a very ordinary one, nothing very special about it; and under the market price prevailing in the parish the farm, as a whole, would be worth (on this basis of \$80 to \$100 an acre) between \$4,880 and \$6,100; and yet for not quite half of an acre taken by the railway, the suppliant by his Petition of Right, unreasonably claims the sum of \$14,303.25, and his witnesses carried away and proceeding upon a wrong basis, have even testified to a value between \$6,000 and \$7,000, and their unanimity in the same amount—they being domiciled quite close to the suppliant's farm—is also significant of much; while the evidence of the respondent's witnesses, it must be conceded, is absolutely disinterested.

Now what we are seeking in this case is the fair market value of the land taken and the amount of the damage resulting from the expropriation, taking into consideration any and all uses to which the land is reasonably adaptable. By fair market value is meant the amount of money which a purchaser, willing but not obliged to buy the property, would pay to an owner, willing but not obliged to sell, taking into consideration all uses to which the land was adapted and might in reason be applied. And in this respect, agriculture stands no higher in the eye of the law than manufacture and trade.

The land is looked upon as so much land, entirely apart from the personality of its owner and care must be taken to distinguish between income from the property and income from the business conducted upon the property. It might be that two rival farmers held adjacent farms, of

the same nature of soil and buildings, similar in all respects, upon which they cultivated. One of them, by reason of his shrewdness, foresight and good fortune might be deriving a large return and would doubtless be unwilling to sell for a sum considerably in excess of its market value—while the owner of the adjacent farm may find himself losing money and hardly making a living on it, and he would be pleased to dispose of it at a sacrifice. Yet if the two farms were taken by eminent domain or expropriation, the measure of damages would be the same in each case. Nicol, *On Eminent Domain*, p. 662.

Where one of these farms, say of 100 acres each, of a value of \$10,000 was entirely exploited as a potato field, yielding 300 bushels an acre, selling at \$2 a bushel, returning \$600 to the acre, the whole farm giving a gross return at that rate of \$60,000,—while upon the other equally valuable farm, in so far as the soil is concerned and otherwise, the usual mixed farming were conducted with the result of a bare living for the farmer and his family, the market value of these two farms would be the same. The industry, ability and enterprise of the respective farmers will explain the difference.

The land is looked upon as so much land of a certain quality, entirely apart from the personality of the owner and the manner in which he exploits it.

The productive value of the land, or the value of the land to its owner based on the income he is able to derive from his use of it, is not the measure of compensation, and is not material except so far as it throws light upon the market value. In other words what is sometimes called “value in use” is everywhere repudiated as the test. *Idem* 663.

If the owner of a property uses it himself for commercial purposes, the amount of his profits from the business conducted upon the property depends so much upon the capital employed and the fortune, skill and good management with which the business is conducted, that it furnishes no test of the value of the property. It is accordingly well settled that evidence of the profits of a business conducted upon land taken for public use is not admissible in proceedings for determination of the compensation; but evidence of the character and amount of the business conducted upon the land may, however, be admitted as tending to show one of

1928  
 DUSSAULT  
 v.  
 THE KING.  
 Audette J.

1928  
 DUSSAULT  
 v.  
 THE KING.  
 ———  
 Audette J.

the uses for which the land is available. And when, as in the present case, the land is used for a specific and temporary agricultural purpose and experiment these considerations obtain to a lesser degree.

The amount claimed for this half acre of a most ordinary farm is so grossly exaggerated and magnified that it becomes a direct challenge to reason and common sense; the suppliant in so claiming obviously places himself in the rank of (*les plaideurs téméraires*) those who are adamant to the just criticism that is evoked by reckless statements as to values of property in which they are interested, but who must bear the consequence. Such an intransigent claimant places the expropriating party in the impossibility of ever transacting with him and coming to terms as to the compensation. This manner of magnifying everything must be avoided and discouraged. The number of plants claimed could not reasonably be placed upon the land taken. Although claim is made for gooseberries, the suppliant in the witness box says there were none on the land taken. The claim is beyond reason.

Assuming that the land in question, as in the rest of the Parish, be worth \$80 to \$100 an acre, it must, however, be conceded that, when a small portion of land is carved out of a farm for expropriation, the land in such cases is worth much more. To meet that view to its full limit I will for the purpose of fixing the compensation, put a value upon the same at \$500, and therefore allow for the 0·49 (forty-nine hundredths) of an acre the round figures of \$250. Then there remains the question of the severance and the damage resulting therefrom, i.e., the gates, the crossing of a double track to establish and maintain communication between his 56 acres on the north and the 4 or 5 acres to the south;—and to meet a full compensation for the same I will allow the value of these 4 or 5 acres to the south, i.e., 4½ acres at \$90 an acre, equal to \$405. With this allowance the suppliant will recover the value of that land and yet hold it for all purposes, remaining thus fully compensated with a sum of \$655. The damages resulting from a severance must obviously vary with each farm, depending upon the areas formed by the severance.

The suppliant, after the Crown had taken this 0·49 of an acre remains with two strips of that land under the cultivation of strawberries, one to the north and one to the

south of the railway. Each strip being of  $\frac{1}{8}$  of an acre, making in all  $\frac{1}{4}$  of an acre. I can see no reason why he should not, as contended at trial, if he sees fit, continue this cultivation with the quarter of an acre, much more so when it is abundantly proved that some part of the south would lend itself to a similar kind of culture.

1928  
 DUSSAULT  
 v.  
 THE KING.  
 Audette J.

The suppliant has set up a most exaggerated and magnified claim, a claim beyond common sense. He has been supported to an amount of about half by unfortunate witnesses who obviously, misled by this small plot of berries, proceeded upon a wrong basis to ascertain the value of the land and the damages. The Court cannot give support to any such contention and claim.

This evidence adduced by the suppliant upon a wrong basis disappears and he remains without evidence in support of his claim, and the only apposite evidence extant on the record is that offered by the respondent.

Were I to allow in this case even somewhat over and above this amount of \$655 or the amount of \$725 offered by the statement in defence or somewhat more, I would feel compelled to follow the decision in the case of *McLeod v. The Queen* (1), where it was held that where the tender is not unreasonable and the claim very extravagant, the claimant will not be given costs although the amount of the award exceeded somewhat the amount tendered. While no cost will be allowed the suppliant, there will be no cost in favour of the Crown, taking into consideration that this is a case of expropriation where the land was forcibly taken from the suppliant.

Therefore there will be judgment as follows, namely:—

1. The land expropriated herein is declared vested in the Crown as of the 1st October, 1923.

2. The compensation for the land taken and for all damages whatsoever resulting from the expropriation is hereby fixed at the sum of \$725, the amount offered by the statement in defence.

3. The suppliant, upon giving to the Crown a good and satisfactory title, free from all hypothecs, charges and incumbrances whatsoever, is entitled to recover against the Crown the said sum of \$725 and without interest. (See sec. 31 of The Expropriation Act.)

4. There will be no costs to either party.

*Judgment accordingly.*

1928  
Oct. 8, 9.  
Oct. 23.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE VANCOUVER BREWERIES, }  
LIMITED ET AL ..... } DEFENDANTS.

*Revenue—Excise Act—Bond for exportation—Liability thereunder—  
Power of to extend conditions*

Defendants furnished bonds under the Excise Act, the conditions of which read as follows: "Now the condition of the above written obligation is such that if the said goods and every part thereof shall be duly shipped, and shall be exported and entered for consumption or for warehouse at San Jose, Guatemala, aforesaid, and if proof of such exportation and entry shall, in accordance with the requirements of the Warehousing Regulations in that behalf, be adduced within ninety days from the date hereof, to the satisfaction of the said Collector of Inland Revenue for the division of Vancouver, B.C., or if the above bounden Vancouver Breweries shall account for the said Goods to the satisfaction of the said Collector of Inland Revenue for the said Inland Revenue Division of Vancouver, this division, then this obligation to be void, otherwise to be and remain in full force and virtue." On an agreement of facts filed it was admitted that the goods in question were not re-landed in Canada.

*Held*, that such admission cannot be construed as of greater consequence than if that fact had been established by oral evidence at trial, and that it cannot be inferred from such admission that the conditions of the bond had been complied with.

- 2. That the period of 90 days mentioned in the bond, is not only the time within which the exporter must furnish proof of exportation and entry of the goods for consumption at the nominated destination, but applies equally to the accounting for the said goods to the satisfaction of the said Collector of Inland Revenue, which accounting must also be within the said 90 days.
- 3. The bonds themselves fixing the time within which their conditions must be performed, the court has no power to extend said period, and whether or not there was a belated compliance with the spirit of the statute, the regulations, and the bond, is not material to this action.

ACTION to recover upon bonds executed in favour of plaintiff under the provisions of the Excise Act.

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

*Hon. N. W. Rowell, K.C., and Mr. Lindsay* for plaintiff.  
*W. L. Scott, K.C., and Cuthbert Scott,* for defendant.

THE PRESIDENT (this 23rd of October, 1928), delivered judgment.

This is an action upon three separate bonds executed by the defendants for payment to His Majesty the King, under the provisions of The Excise Act, Chap. 51, R.S.C., 1906, for the sums stated respectively therein. The cause was heard upon an agreed statement of facts.

1928  
 THE KING  
 v.  
 THE  
 VANCOUVER  
 BREWERIES,  
 LTD.  
 Maclean J.

On the 14th day of May, 1924, the defendant company, The Vancouver Breweries Limited, made an entry for exportation from an excise bonding warehouse in the city of Vancouver, B.C., of 7,500 sacks of bottled beer, and on the 15th day of May, 1924, it made a similar entry for 325 sacks of bottled beer, in each case the goods were to be exported to J. Hamilton, San Jose, Guatemala, the beer being goods subject to duties of excise, and having been deposited in an excise bonding warehouse by the defendant company without payment of the excise duties imposed thereon by the Excise Act.

On the 14th day of May, 1924, the defendants executed and delivered to the Collector of Customs and Excise at Vancouver, their bond, in the prescribed form, for \$4,050, being double the excise duty on the goods referred to in the first mentioned export entry, and similarly their bond for \$175.50 in connection with the second mentioned export entry. Later, there was a third export entry made by the defendant company for which a similar bond was executed and delivered by the defendants to the same customs official, in the amount of \$1,512. I shall not further refer to this exportation as it is in the same position as the others. The goods referred to in the first two export entries were laden on board the motor ship *Principio*, and formed part of her cargo when she reported outwards from Vancouver for San Jose, Guatemala, on the 23rd day of May, 1924, while the goods mentioned in the third export entry left the Port of Vancouver at a later date on the same ship.

In each case the bond states the name of the person making the entry, the place of destination, the name of the vessel and master, the quantity of the shipment of beer, and to whom to be shipped. The condition of the bond is as follows:—

Now the condition of the above written obligation is such that if the said Goods and every part thereof, shall be duly shipped, and shall be exported and entered for consumption or for Warehouse at San Jose, Guatemala, aforesaid and if proof of such exportation and entry shall, in accord-

1928  
 THE KING  
 v.  
 THE  
 VANCOUVER  
 BREWERIES,  
 LTD.  
 Maclean J.

ance with the requirements of the Warehousing Regulations in that behalf, be adduced within ninety days from the date hereof, to the satisfaction of the said Collector of Inland Revenue for the division of Vancouver, B.C., or if the above bounden Vancouver Breweries shall account for the said Goods to the satisfaction of the said Collector of Inland Revenue for the said Inland Revenue Division of Vancouver, this division, then this obligation to be void, otherwise to be and remain in full force and virtue.

On May 30, 1924, the defendant company by letter advised the Collector of Customs and Excise at Vancouver, that the cargo was being diverted to and landed at Ensenada, Mexico. The goods were not however diverted to this place, as will later transpire.

On July 11, 1924, the defendant company delivered to the Collector of Customs and Excise at Vancouver, two written certificates each purporting to be signed on May 31, 1924, at Ensenada, Mexico, by a person purporting to be of Mexican Customs, and each purporting to be vised by a British Vice-Consul at the same place, the certificates being to the effect that the goods mentioned in the first two export entries had been there landed and delivered over to the Customs authorities. The *Principio* reported inwards at Vancouver on August 21, 1924, "in ships stores and ballast," and presented to the proper officer of that port, a bill of health and foreign clearance purporting to have been issued at Ensenada, Mexico.

It is now agreed that none of the goods in question were exported to the places mentioned in the several export entries, nor were they delivered over to Customs at any of the said places, but they were taken out of the port of Vancouver, and out of territorial waters of the Dominion of Canada, and discharged from the *Principio* at sea, into a small boat or small boats off the coast of the United States of America, and were not lost or destroyed or brought back to Canada.

Goods warehoused under the Excise Act may be exported without payment of duty, under such restrictions and regulations as the Governor in Council deems necessary. The regulations provide that goods subject to duties of excise, shall only be exported in bond from a port where there is an officer of Customs, and only to British or foreign ports of entry where there are Collectors or other officers of the Government having similar functions. The regulations comprise the following in respect of export bonds:—



16. Export bonds shall be conditioned for the due delivery of the goods bonded at the place designated in the entry within a specified time, which time in any case shall not exceed the time usually necessary for the performance of the voyage or journey by the conveyance adopted (allowing a reasonable time for detention within the discretion of the collector) and for returning the vouchers by the next mail; and in no case shall the period allowed for the cancellation of the export bond exceed six months unless special authority has been granted by the Department.

1928  
 THE KING  
 v.  
 THE  
 VANCOUVER  
 BREWERIES,  
 LTD.  
 Maclean J

Regulation 17 states the conditions under which export bonds, such as those in question here, may be cancelled. It states:—

In all cases where the exportation out of Canada is by a bonded railway, or by a vessel clearing for Port outside of Canada and plying on a published route and schedule, with first Port of call a Port outside of Canada, such evidence of exportation of the goods as is above herein provided for, shall operate as a cancellation of the bond, notwithstanding the actual terms of the obligation of the bond.

In all other cases the bond shall not be cancelled, unless:—

(1) Within the period named in said bond, there be produced to the proper Collector or officer of Customs and Excise, the duly authenticated certificate of some principal officer of Customs at the place to which the goods were exported, stating that the goods were actually landed and left at some place (naming it) out of Canada, as provided by the said bond; or

(2) Within the period of three months from the date of the exportation of the goods, evidence satisfactory to the Commissioner of Customs and Excise shall be furnished to him that the goods so undertaken to be exported shall not have been re-landed in Canada, or if re-landed in Canada, that the proper entry has been made at Customs and the proper duties paid thereon.

Thus we have this somewhat confusing situation: (1) The bond which is conditioned for the due delivery of the goods at the place designated in the entry within a specified time, provides that if within the period of ninety days, proof is furnished that the goods were actually exported to the port named in the entry, the bond may be cancelled; (2) failing this, the bond states that if an accounting for the goods is made to the satisfaction of the Collector of Inland Revenue at Vancouver within ninety days, the bond may be cancelled; the regulation states that the bond may be cancelled if the Commissioner of Customs and Excise is furnished with satisfactory evidence within three months that the goods were not re-landed in Canada; and (3) there is the agreed statement of fact that the goods were not re-landed in Canada, but this agreed statement of facts was reached after the period of ninety days mentioned in

1928  
 THE KING  
 v.  
 THE  
 VANCOUVER  
 BREWERIES,  
 LTD.  
 Maclean J.

the bond, and there is no stipulation that this admission was to be regarded as an accounting for the goods, made to Excise within ninety days from the date of the bond.

The defendants now say, it being agreed between the parties that the goods were not re-landed in Canada, that there has been a compliance with the spirit of the statute and the regulations, and an accounting for the goods under the terms of the bond, all of which should void the bond. Had it been a matter of agreement reached by the parties herein within ninety days of the date of the bond, that the goods had not been re-landed in Canada, the bonds in question might have been cancelled by the Collector of Inland Revenue at Vancouver or by the Commissioner of Customs and Excise, upon the ground that there had been a compliance with the regulations and the conditions of the several bonds. But that did not happen, and it is pleaded by the plaintiff that cancellation of the bonds in question was refused, upon the ground, that the condition of the several bonds had not been performed. The proof of exportation of the goods, the accounting made otherwise for the goods, the evidence that the goods were not re-landed in Canada, was not it is said deemed satisfactory by the officers of the Excise Department nor was the same furnished within ninety days. It is I think indisputable, that no *bona fide* evidence was furnished of actual exportation of the goods to the place mentioned in the outward entry, nor was any *bona fide* accounting of any nature made by the defendant company within ninety days from the date of the bond. Had the particular agreement of fact to which I have referred been entered into within the period of ninety days, it is possible I would be dealing with an entirely different case.

The admission that the goods were not re-landed in Canada cannot I think be construed as of greater consequence than if that fact had been established by oral evidence at the trial. At that, the question would remain for decision, whether the defendants were still liable upon their bonds, for failure of full performance of the express conditions of the bonds, and within the stipulated period. The Crown asserts that it accepted the admission by the defendants that the goods were not re-landed in Canada, as one fact only, but not to mean that it was an admission or agree-

ment that the conditions of the bonds had been complied with. I think this is the proper view of the matter.

There is another point in connection with the bond itself that perhaps should be briefly referred to, although I do not recall that it was mentioned at the trial. Evidence of the exportation to and entry for consumption at San Jose, Guatemala, was required to be furnished within ninety days, but failing evidence of that fact, the exporter, under the terms of the bond might otherwise account for the goods, but the time within which such accounting was required to be made under the terms of the bond might be said to be in doubt. I think, however, that the period of ninety days mentioned in the bond, has reference to both matters, that is to say, proof of the exportation and entry of the goods for consumption at the nominated destination, must be made within ninety days; failing that, a satisfactory accounting for the goods to Canadian Excise, must be made within ninety days. I think that is the proper construction of the condition of the bond. Besides, the regulation prescribes that in such a case, evidence must be furnished within three months that the goods were not re-landed in Canada, and that I assume is essentially of the same effect as the accounting required by the bond, that is to say, an accounting why the goods were not landed at the place designated in the entry; and an accounting showing that they were not re-landed in Canada, but elsewhere, but if in Canada, that they were properly entered at Customs and the proper duties paid thereon.

The bond is a promise, to pay a debt or penalty, or to perform the obligation of the bond. It seems to me that there was not here a performance of the obligations of the bonds and within the period there mentioned. At the end of that period there had not been furnished to Excise satisfactory proof of the exportation of the goods to the place mentioned in the outward entry and the bond or elsewhere, and there was not within that period any other satisfactory accounting made for the goods. The conditions upon which the obligations of the bonds were to become void were not performed. Whether or not there has been a belated compliance with the spirit of the statute, the regulations, and the bond is not I think of importance in this action. The bonds themselves fix the time within which their conditions

1928  
 THE KING  
 v.  
 THE  
 VANCOUVER  
 BREWERIES,  
 LTD.  
 Maclean J.

1928  
 THE KING  
 v.  
 THE  
 VANCOUVER  
 BREWERIES,  
 LTD.  
 —  
 Maclean J.  
 —

must be performed, and the Court has no power to extend this period. There was not a performance of the conditions of the bonds within the period stipulated, that being so, the bonds are in my opinion still in full force and effect and the plaintiff must have judgment for the amounts sued upon, and for his costs of action.

*Judgment accordingly.*

1928  
 Sept. 17.  
 Nov. 3.  
 —

JOHN WILLIAM COOKE ..... SUPPLIANT;  
 AND  
 HIS MAJESTY THE KING.....RESPONDENT.

*Crown—Militia Act—Enlistment—Military Pay—Right of Action—Jurisdiction*

*Held*, that enlistment by a subject under the Militia Act, is in the nature of a formal transmutation of a citizen into a soldier for the time being, and as required by the defence of the realm, and does not constitute a contract between the subject and the Crown creating mutual rights and obligations.

(2) That Military officers and soldiers, while in the service of the Crown hold their positions at and during the pleasure of the Crown and no action at law lies for their pay.

PETITION OF RIGHT by the suppliant to recover his pay as a soldier in the Overseas Expeditionary Force.

The action was tried before the Honourable Mr. Justice Audette at Vancouver, B.C.

*J. A. McInnis* and *C. S. Arnold* for the suppliant.

*A. B. McDonald, K.C.*, for the respondent.

The facts are set forth in the reasons for judgment.

AUDETTE J., now (November 3, 1928), delivered judgment.

The suppliant, by his petition of right, sets forth, *inter alia*, that on the 8th of April, 1915, he joined the Canadian overseas expeditionary force, and went to France on active service; that his pay was discontinued in April, 1918, because, as alleged by the Crown, he was a deserter; but the suppliant denying the same asserts that he disappeared because he was taken prisoner by the Germans. Hence the present controversy.

However, the only question of law now to be determined, before going to trial upon the facts, and which comes under Rules 126 and 161 of the Rules and Orders of this Court, is whether or not the suppliant has any right of action, which can be enforced before a Court of Law, for his pay as soldier and separate allowance and war service gratuity, assuming the facts as alleged to be true.

1928  
 COOKE  
 v.  
 THE KING.  
 Audette J.

The parties, at the opening of the hearing, filed the following admission:

It is admitted by counsel for the suppliant and the respondent solely for the purpose of argument upon the points of law prior to setting down for trial:—

1. That the suppliant enlisted April 8, 1915, for service in the Great War, and joined the 47th Battalion, a portion of His Majesty's Canadian Expeditionary Force, at New Westminster, British Columbia.

2. That the attestation paper of suppliant completed on that occasion is in Canadian Expeditionary Force attestation paper without change of any kind in the printed portion thereof.

The suppliant was duly enlisted and engaged as a private soldier under the usual attestation paper, filed as exhibit No. 1, whereby he declared his willingness to be so attested, and that he was further willing to fulfill the engagement thus made by him to serve, the nature of which engagement he further declared as being understood by him; taking further the oath of allegiance.

It is contended by counsel for the suppliant that whereas, under the Militia Act (sec. 23 and 54) both the engagement and the remuneration are provided for, there results an engagement with mutual contractual obligation.

With that contention I am unable to agree, as, by a long catena of cases, it has already been decided that an action in law will not lie by a private soldier against the Crown for his pay, and there is in that respect no difference between a private soldier and an officer. *Leaman v. The King* (1). Then per Fry L.J., in *Mitchell v. The Queen* (2):

I am clearly of opinion that no engagement between the Crown and any of its military or naval officers in respect of services either past, present and future can be enforced in any Court of Law.

The question of the enforcement of such claims involves a radical departure from the ordinary rules of law.

Military officers and soldiers, while in the service of the Crown, hold their positions at and during the pleasure of

(1) (1920) 3 K.B.D. 663.

(2) (1896) 1 Q.B. 121n.

1928  
 COOKE  
 v.  
 THE KING.  
 ———  
 Audette J.  
 ———

the Crown, and consequently the civil courts have no power to intervene in any dispute relating to military pay or pensions. 25 Hals. 48. Officers and soldiers are dismissible at will and no petition of right can be brought by them to recover pay and pension. 10 Hals. 29.

In the case of *De Dohse v. The Queen* (1), Lord Halsbury L.C., was of opinion, enunciating the very principle of all these engagements, that had there even been a contract it must have been subject to a reserve of the right of the Crown's prerogative to dismiss an officer (and *a fortiori* a private soldier) at pleasure and that a contract which purported to override that prerogative would be unconstitutional and contrary to public policy.

I have already had occasion to consider that question in the case of *Bacon v. The King* (2), where I have gathered and reviewed the authorities upon this point of law and would refer to the same.

The question of right of a soldier or officer to recover money from the Crown in respect of his pay has been fully discussed in the cases of *Grant v. Secretary of State for India* (3); *In re Tufnell* (4); *De Dohse v. The Queen* (ubi supra); *Mitchell v. The Queen* (ubi supra); *Smith v. Lord Advocate* (5); *Cooper v. The Queen* (6); and finally *Leaman v. The King* (ubi supra). See also *Gibson v. East India* (7); Robertson, Civil Proceedings, pp. 611, 359, 35, 643; *Dunn v. The Queen* (8); *Balderson v. The Queen* (9); *Gould v. Stuart* (10); *Yorke v. The King* (11); *Thomas v. The King* (12).

Coming now to a consideration of our Statute law as related to the suppliant's claim, there would seem to be no material difference between it and the English Statute law under which the *Leaman* case (*supra*) was decided.

Under the provisions of the Canadian Militia Act (R.S.C. 1906, ch. 41, sec. 10) all male inhabitants of Canada at the age of 18 years, and upwards, and under sixty, being British subjects, are liable to active service, that is (sec. 2, sub-

- |                                                      |                                                                    |
|------------------------------------------------------|--------------------------------------------------------------------|
| (1) (1886) 3 T.L.R. 114.                             | (7) (1839) 5 Bing. N.S. 262.                                       |
| (2) (1921) 21 Ex. C.R. 25.                           | (8) (1896) 1 Q.B.D. 116.                                           |
| (3) (1877) 2 C.P.B. 445 at pp. 455<br><i>et seq.</i> | (9) (1898) 28 S.C.R. 261.                                          |
| (4) (1876) 3 Ch. D. 164.                             | (10) (1896) A.C. 575.                                              |
| (5) (1897) 25 R. Scotch Sess.<br>Cases (4 Ser.) 112. | (11) (1915) 31 T.L.R. 220; 84 L.J.<br>K.B. 947; (1915) 1 K.B. 852. |
| (6) (1880) 14 Ch. D. 311 at 315.                     | (12) (1928) Ex. C.R. 26.                                           |

sec. 9) to be enrolled, enlisted, drafted or warned for service. That is the supremacy of the law of the land under which every male Canadian must enlist when circumstances demand his services.

1928  
 COOKE  
 v.  
 THE KING.  
 Audette J.

The compliance with this law, whereby the subject is so enlisted, cannot be called a contract creating mutual rights and obligations between the parties, as contended by suppliant at trial. The enlistment is more in the nature of a formal transmutation of a citizen into a soldier for the time being and as required by the defense of the realm. This expression of contract used by laymen in the English Manual has been qualified as a loose expression which is not to be construed too literally,—much more so now since it has been held in the *Leaman* case (*ubi supra*) that it could not give a legal right of action. The enlistment of the soldier in its true substance and merit is absolutely unilateral. Complying with the requirements of the statute, he submits himself to it and consents to abide by it. While, however, he undertakes to serve his sovereign, as required by law, yet there does not, from this enlistment paper or otherwise, flow a bilateral contract whereby the sovereign is deprived of his prerogative to act as he wills it. The soldier is bound to observe and obey all orders of His Majesty and of the generals and officers set over him; he is enlisted or engaged at pleasure and may be displaced by the Crown at any moment while he has no right to resign or vacate his enlistment; nor can he recover his pay, if withheld, by legal proceedings against the Crown. Clode, Military and Martial Law, 73.

The enlistment is more in the nature of a species of compact (which is intelligible and requires only the statement of it to recommend it to the consideration of any one of common sense) whereby the soldier is placed at the pleasure of the State, as referred to by Mr. Justice Willes. See Clode, On Military and Martial Law, 81.

The authority and power given the State under the Act is quite extensive. The King has the right to require the personal service of every man able to bear arms and the allegiance due from the subject renders it incumbent upon him to assist his Sovereign. The prerogative of the Crown is founded on immemorial usage, recognized, admitted and sanctioned by Parliament. Chitty's Prerogative, 46, 47.

1928  
COOKE  
v.  
THE KING.  
Audette J.

The facts set forth in the Petition of Right, even accepted as true, as said in the *East India* case (*ubi supra*) do not disclose the *vinculum juris*, which is of paramount necessity in a court of justice; they may however disclose an obligation *in foro conscientiae*, but that cannot be enforced in a court of law. The suppliant is left entirely at the mercy of the Crown.

Apart from the question of law, unfortunately the circumstances of the case involve a very serious complexion, in that a soldier's reputation who duly enlisted, exposed his life for the protection of his country, rests now under a cloud, upon the accusation of being a deserter, while he denies the same and asserts he was taken prisoner by the Germans. That question should be immediately and thoroughly investigated by the officers of the Crown who have in hand all the necessary machinery and material to do so. Having done so, with the result that the suppliant has established his contention, while in law he cannot recover, he would be in equity and justice morally entitled to the exercise of the mercy and bounty of the Crown in his favour. It may indeed appear to be a severe measure of justice that will deprive the suppliant of the recovery of his pay. That is the law and the duty of the Court is to decide accordingly. In the result it is a matter to be dealt with by the officers of the respondent who will have to decide whether or not the case commends itself to the bounty and benevolence of the Crown; but it is not enforceable in a court of law.

Therefore there will be judgment adjudging and declaring that the suppliant is not entitled to the relief sought by his Petition of Right, but without cost to either party.

*Judgment accordingly.*

1928  
Oct. 15.  
et seq.  
Nov. 13.

ELWOOD GRISSINGER ..... PLAINTIFF;  
AND  
VICTOR TALKING MACHINE COMPANY OF CANADA, LTD. .... } DEFENDANT.

*Patents—Infringement—Principle—Different Means of Operating*

*Held*, that a principle cannot be the subject of a patent, and a claim to every mode or means of carrying a principle into effect amounts to a claim for the principle itself.



*Held* further, that a patent may be granted for a principle coupled with a mode of carrying the principle into effect, but such principle may be carried into effect under several patents operating in different ways and by different means.

1928  
 GRISSINGER  
 v.  
 VICTOR  
 TALKING  
 MACHINE  
 CO. OF  
 CANADA,  
 LTD.

ACTION by the plaintiff against the defendant for alleged infringement by it of a patent granted to the plaintiff.

The action was tried before the Honourable Mr. Justice Audette, at Ottawa, on October 15 to 31, and November 2 to 13, 1928.

*G. Wilkie, K.C., and T. D. Delamere* for the plaintiff.

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

AUDETTE J., now (November 13, 1928), delivered judgment.

I have listened with great interest and attention to this long and protracted trial and to the searching evidence placed before me on this question of sound both fundamental and harmonic controlling all these patents, and which, in their very nature, are so complex that some witnesses heard on behalf of the plaintiff have declared a multitude of questions raised by the patent, in respect of the same, as beyond their comprehension.

It was not even without most elaborate mental exertions that the plaintiff, the patentee himself, in the course of his testimony, after considerable time, ventured to point out and mark with letters the several expansions, the different parts of the internal mechanism of the defendant's devices charged with infringement. Yet, we find him coming on the following day declaring he made mistakes in respect of the same, and correcting himself, marking such places differently. All of this goes to show that the charges of infringement, even at the hand of the plaintiff, are not very clearly conceived. However, counsel has since made that clear.

The laws of nature with respect to sound have been much discussed in the course of the trial and both the plaintiff's and the defendant's devices are built according to such laws or principles. However, it must be borne in mind that a principle cannot be the subject of a patent, and a claim to every mode or means of carrying this principle into

1928  
 GRISSINGER  
 v.  
 VICTOR  
 TALKING  
 MACHINE  
 CO. OF  
 CANADA,  
 LTD.  
 Audette J.

effect would amount to a claim to a principle, for it was said in *Neilson v. Harford* (1), that there is no difference between a principle to be carried into effect in any way you will and claiming the principle itself. A patent may be granted for a principle coupled with a mode of carrying out this principle into effect and it may be carried into effect under several patents operating in different ways and by different means and that is what we have in this case. The question of infringement is an issue of fact and this question disentangled and freed from the manifold questions discussed in the course of the trial is the simple issue before the Court in these proceedings. The evidence discloses the prior art at the date of the charged infringements and having regard to it the monopoly claimed by the plaintiff's devices must be limited to the same.

Were I to take the case under consideration for further advisement, I would perhaps be in a position to review the evidence at length; but I could not come to any other conclusion than the one I have now formed, after hearing the case during these several days.

The plaintiff's patent is not dealing with a new field in that art. His patent is necessarily a narrow patent and must receive a narrow construction. The prior art discloses innumerable patents in connection with this subject-matter, and there are over 100 such patents mentioned in the defendant's particulars. The difference among some of these patents is very, very small. Yet patents were granted. A number of patented devices were exhibited and tested before me during the trial and comparing such devices with each other, I find there is less mechanical difference between them than there is between the plaintiff's and the defendant's devices, and yet they were all patented. The principle underlying all these inventions is the same. And without entering upon the question of the validity of the patent, it must be found that all the patentee is entitled to claim is a special means by which the known principles are carried into effect, and his patent, in view of the prior art, can merely lie in the use of old features all well known before.

The defendant's devices produce the known results, but omit, add and distribute a number of mechanical features

belonging to the prior art, and not at all infringing any mechanical devices in the plaintiff's patent. In the result the defendant shows devices having a different means of achieving the ends contemplated and involved in the general principle controlling all these patents. *Consolidated Car Heating Co. v. Came* (1). The mechanical details and means of obtaining the common result under the general principle are different in the defendant's devices from that of the plaintiff's devices. The curve at the slot in the plaintiff's patent is angular and in the defendant's devices it maintains a steady and gradual curve.

1928  
 GRISSINGER  
 v.  
 VICTOR  
 TALKING  
 MACHINE  
 CO. OF  
 CANADA,  
 LTD.  
 Audette J.

The defendant's structures are obviously different from those of the plaintiff. The mechanical construction of all these devices is mechanically different from that of the plaintiff, besides in most cases obtaining a longer horn, fitted in a reasonable sized cabinet, with good results. The controlling of the curved wave sounds is different in the respective devices; the division of the channels is obviously different from a single channel, and then the abrupt angular curvature found in the Grissinger device is avoided in the respondent's devices, with perhaps better effects according to the evidence. However, I am not called upon in this case to pass upon the respective efficiency of these devices of different construction. The infringement is the only question before the Court.

Moreover, the mere ocular observation of the plaintiff's and the defendant's structures and devices will readily convey the firm notion that they are materially different and that notion will become more confirmed as one pursues the examination in detail and especially comparing the easy curves of the defendant's machine with the abrupt course in the plaintiff's device. This manner of proportioning, of modulating the air planes in the defendant's devices is very different from the abrupt manner shewn in the plaintiff's construction. All of this is significant of much especially when going back many years in that art.

When two separate devices work under the same principle, both arriving at the same result, but by different means and new ways of achieving the end contemplated,

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

1928  
 GRISSINGER  
 v.  
 VICTOR  
 TALKING  
 MACHINE  
 CO. OF  
 CANADA,  
 LTD.  
 Audette J.

there is no infringement. *The P. & M. Company et al v. The Canada Machinery Corporation Ltd. et al* (1).

I am clearly satisfied that the defendant's devices do not infringe the plaintiff's devices. Having so found on the question of infringement, it becomes unnecessary, under the practice of this Court, *Dominion Bedstead v. Guertler* (2), to pass upon the question of the validity of the plaintiff's patent.

The action is dismissed with costs.

*Judgment accordingly.*

1928  
 May 15 & 16.  
 May 28.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

FRANCIS N. EASTERBROOK .....DEFENDANT.

*Crown—Intrusion—Indian Title—Right to Compensation for Improvements made by Tenant*

*Held*, that at common law a tenant is not entitled on quitting to any compensation for permanent improvements made by him during his tenancy on the premises leased.

2. That under the statute law of Ontario, in order that the occupant of any land may be entitled to compensation for "lasting" improvements on the land he must show that the improvements were made "under the belief that the land was his own," and a tenant recognizing another as the owner by the payment of rent to him is not entitled upon the lease being terminated to any compensation for any improvements made by him.
3. The question of Indian title discussed.

INFORMATION of intrusion exhibited by the Attorney-General to recover possession of certain parcels of land in possession of the defendant.

The action was tried before the Hon. Mr. Justice Audette at Ottawa.

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

*George I. Gogo, K.C.*, for the defendant.

AUDETTE J., now (May 28, 1928), delivered judgment.

This is an information of intrusion exhibited by the Attorney-General of Canada, whereby the plaintiff claims

(1) (1925) Ex. C.R. 47; (1926) (2) (1924) Ex. C.R. 158. S.C.R. 105.

possession of a certain parcel of land situated on Cornwall Island, in the province of Ontario, forming part of certain tracks of land ever set apart, prior to the 10th March, 1821, for the use and benefit of the band of Iroquois Indians, known as the St. Regis tribe, and which have never been surrendered by the said Indians to the Crown. The Crown is making no claim to the fee in these lands, but claims on behalf of the indians, the wards of the nation, the use and benefit of these lands for the indians themselves.

1928  
 THE KING  
 v.  
 EASTERBROOK  
 —  
 Audette J.  
 —

The plaintiff further claims from the defendant a reasonable sum for use and occupation of the said lands and premises and of rents and profits thereof, from the 10th of March, 1920, until possession of the said land and premises be delivered.

The defendant claims title, under an indenture or lease, bearing date the 10th March, 1821, between the British indian chiefs of the St. Regis and one Solomon Youmans Chesley, his predecessor in title, of the 196 acres in question herein paying therefor to the said chiefs the sum of \$100 before the signing and sealing of the said indenture, together with a yearly "rent" of ten dollars. The lease is for a period of 99 years or

for and during the full term of 99 years fully ended and completed, and at the expiration of that period for another and further like period of 99 years and so on until the full end and term of 999 shall be fully ended and completed.

It is admitted the rent was duly paid during the full term of 99 years. It was tendered at the expiration of that period but refused by the Crown. It appears that the rent was at the beginning paid direct to the Indians and at a later period paid to the Crown for the use and benefit of the Indians.

Looking to the "root of title," we find that these lands upon which the indians title might have been a burden, but which never amounted to a fee, form part of the unalienated Crown lands, upon which the Crown had all along a substantial and paramount estate. The Proclamation of 1763 prohibited the purchase of lands from indians, their tenure being only a personal and usufructuary right dependant upon the good-will of the Sovereign. Therefore this lease of 1821 is null and void *ab initio*, for want of power and authority on behalf of the indians to enter into such agreement.

1928  
 THE KING  
 v.  
 EASTERBROOK  
 Audette J.

This question of the Indian title has become a trite question which it is unnecessary for me to discuss. Suffice to say that this question has been settled beyond cavil, *inter alia*, by the well known cases of *St. Catherine's Milling and Lumber Co. v. The Queen* (1); *Attorney-General for Quebec v. Attorney-General for Canada* (2); *Attorney-General v. Harris* (3); *The King v. Bonhomme* (4), confirmed by the Supreme Court of Canada; *The King v. The Ontario & Minnesota Power Co. Ltd.* (5); *The King v. McMaster* (6).

This case of *McMaster* (*ubi supra*) decided quite recently involves questions of law and facts absolutely identical with the present case, and concurring entirely as I do in the *ratio decidendi* therein it becomes unnecessary to repeat here what has been said in that case which clearly and absolutely decided the questions involved in the present controversy.

Upon the evidence adduced I find that the Crown is entitled to the sum of \$400 a year for the occupation of these lands from the 10th March, 1920, until possession thereof.

There remains the question of the improvements claimed by the defendant. He had possession of this land under the lease in question and was regularly paying a yearly rent for the same. He could not under such circumstances have a reasonable belief he was the owner of the land and he cannot either set up prescription by possession as he cannot prescribe against his own title, nor could the doctrine of acquiescence be invoked by him from the correspondence or behaviour of the officers of the Crown, as the doctrine of estoppel does not apply to or operate against the Crown. 13 Hals. 167-168.

At common law the tenant is not entitled on quitting to any compensation for permanent improvements which he has made during his tenancy, but he may be entitled to recover under statutory right. 18 Hals. 567.

Turning to the statute law in Ontario, we find that, by sec. 37, R.S.O., ch. 109, it is provided that where a person makes lasting improvements on land under the belief that the land is his own . . . he is entitled to such improvements.

(1) (1886) 13 S.C.R. 577; 14 A.C. 46.

(2) (1921) 1 A.C. 401.

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

(4) (1917) 16 Ex. C.R. 437.

(5) (1920) 20 Ex. C.R. 279; (1925) A.C. 196.

(6) (1926) Ex. C.R. 68.

That enactment dates very far back. It is clear and self evident that the present defendant does not come within the ambit of such enactment. He was in occupation of the land under lease for which he was regularly paying rent. Under such circumstances he could not have any reasonable belief or doubt that he was not the owner of the land. He is therefore not entitled to recover the value of his improvements. *Ramsden v. Dyson* (1); *Commissioners Niagara Falls Park v. Colt* (2); *Smith v. Gibson* (3).

1928  
THE KING  
v.  
EASTERBROOK  
—  
Audette J.  
—

In a court of law when the plaintiff is found entitled to judgment, the law must take its course, even when the defendant *ex equo et bono* might show equity in his favour.

In view of all the circumstances of the case I was asked to make a declaration that if the defendant could not in strict law recover the value of his improvements, that he was in equity and justice morally entitled to the exercise of the mercy and bounty of the Crown in his favour. It may indeed appear to be a severe measure of justice that deprives the defendant from recovering the value of his improvements which go to enhance the value of these lands, therefore enabling the Crown to enrich itself at his expense. However that may be, it is a matter to be dealt with by the officers of the Crown who will have to decide whether or not the case commends itself to the benevolence of the Crown, but it is not enforceable in a court of law. In such event the rent for the use and occupation at \$400 a year since the 10th March, 1920, might be allowed *pro tanto* as against the value of the improvements.

Therefore there will be judgment adjudging and declaring the lease in question null and void *ab initio* and that the Crown do recover the possession of these 196 acres of land mentioned in the lease. Moreover that the plaintiff do recover the sum of \$400 for the use and occupation of these lands from the 10th March, 1920, until delivery of the same.

On the question of costs, I will follow the finding in the McMaster case (*ubi supra*) but not without hesitation, as the defendant was already aware of that decision before coming to trial. Each party will pay his own costs.

*Judgment accordingly.*

(1) (1865) L.R. 1 E. & I. Ap. (2) (1895) 22 Ont. A.R. 1.  
129 at 141.

(3) (1865) 25 U.C. Com. P. 248.

1928  
 }  
 Oct. 5.  
 Nov. 19.

PERCY CHARLES BONHAM AND } CLAIMANTS;  
 FREDERICK R. JOHNSON..... }

AND

HIS MAJESTY THE KING.....RESPONDENT.

AND

THE CANADA STEAMSHIP LINES LIMITED,  
 CREDITOR MIS-EN-CAUSE

*Prescription—Commercial Transaction—Article 2260 Civil Code—Law of  
 of the Province of Quebec*

The *Sarnor*, owned by claimants and another, was requisitioned by the Crown during the war, and handed over to the C.S.S. Lines to be operated. The C.S.S. Lines advanced various sums to B. & J. amounting to \$25,000 in connection with the *Sarnor*, and the said B. & J. transferred their interest of 60 per cent in the *Sarnor* to the C.S.S. Lines as collateral security for the repayment of the said sum. On the 29th September, 1924, the *Sarnor* became a hulk and was destroyed. By judgments on the Petitions of Right by the co-owners of the *Sarnor*, B. & J. became entitled to recover 60 per cent of \$11,000, fixed as the compensation for the *Sarnor*, and the C.S.S. Lines applied to have this amount paid to them as assignee of B. & J. B. & J. denied any liability and contended that the transaction was of a commercial nature and was prescribed by five years.

*Held*, that it was not in the company's ordinary course of business to advance money for the repair of vessels belonging to others, and that the transaction in question was not one of a commercial nature within the meaning of sub-par. 4 of Article 2260 of the Civil Code, of the Province of Quebec, but was in the nature of a loan only prescribed by thirty years.

MOTION by the Creditor *Mis-en-cause* to be paid out of the fund in Court as assignee of the Claimants.

The motion was heard before the Honourable Mr. Justice Audette, at Ottawa.

*J. A. H. Cameron, K.C.*, for the Claimants.

*O. M. Biggar, K.C.*, for the Crown.

*W. F. Chipman, K.C.*, for the Creditor *Mis-en-cause*.

AUDETTE J., now (November 19, 1928), delivered judgment.

This is a matter coming up with respect to the distribution of moneys realized as compensation for the requisition of a ship during the Great War, wherein, on the 15th May,



1928, by judgments of this Court, the amount of compensation was duly fixed in respect of the same, at the total sum of \$11,000; the claimants in this case and the claimants in the case of McKay (No. 7372) making claim thereto. By such judgments it was *inter alia* provided that:

the compensation moneys would only be paid after hearing all parties claiming to be entitled to the same, or any part thereof, and the matter of the distribution of these \$11,000 could be brought on before this Court by any of the parties interested making a claim thereto, upon giving notice to all interested parties.

When the matter came up before this Court upon this reserve, the interest of the claimant McKay was duly disposed of and upon application, the Canada Steamship Lines Ltd. were *mis-en-cause* as party creditors, asking to be collocated upon these \$11,000 in lieu and place of the claimants in this case, under an agreement or covenant (Exhibit B.) passed between themselves and the claimants. This agreement reads as follows, viz:—

THIS INDENTURE MADE IN TRIPLICATE,  
THE 22<sup>ND</sup> DAY OF FEBRUARY, 1919.

BETWEEN:—

FREDERICK R. JOHNSON, of the Town of Port Colborne. Province of Ontario, Master Mariner, and PERCY CHARLES BONHAM, of the City of Montreal, Province of Quebec, Marine Engineer and Surveyor, hereinafter called THE ASSIGNORS;

Of the First Part;

AND

CANADA STEAMSHIP LINES LIMITED, a body politic and corporate, having its principal office in the City of Montreal, hereinafter called THE ASSIGNEE;

Of the Second Part;

WHEREAS the assignors are owners of a sixty per cent (60%) equitable interest in the Steamship *Sarnor*, subject to the provisions of the Judgment of the Appellate Division of the Supreme Court of Ontario, dated January sixteenth, 1918, in an action in which A. B. MacKay, of the City of Hamilton, is plaintiff, and the assignors are defendants, and also subject to the provisions of the judgment of the Honourable Mr. Justice Latchford, in the Supreme Court of Ontario, dated June twelfth, 1918, in an action for an accounting in which the assignors are plaintiffs and A. N. MacKay is defendant;

WHEREAS said Frederick R. Johnson is registered as owner of the said steamship *Sarnor* in the Registry Office at the Port of Montreal, Province of Quebec;

WHEREAS the assignors have agreed with the assignee to assign their said interest in the steamship *Sarnor* as collateral security to secure the assignee against any loss on account of having up to date disbursed money in connection with the said *Sarnor* to the sum of twenty-five thousand dollars (\$25,000), as also against all and any loss that may be suffered by

1928  
BONHAM  
AND  
JOHNSON  
v.  
THE KING.  
AND  
THE  
CANADA  
STEAMSHIP  
LINES LTD.  
Audette J.

1928  
 ———  
 BONHAM  
 AND  
 JOHNSON  
 v.  
 THE KING,  
 AND  
 THE  
 CANADA  
 STEAMSHIP  
 LINES LTD.  
 ———  
 Audette J.  
 ———

said assignee from and in connection with any moneys the assignee may hereafter advance in connection with the said vessel either for the maintenance or the operation thereof;

NOW THIS INDENTURE WITNESSETH:—

1. In consideration of the premises, the assignors hereby assign to the assignee, their said interest in the steamship *Sarnor* as collateral security to secure the repayment to the assignee of the sum of twenty-five thousand dollars (\$25,000), as also any other sum or sums which the assignee may, as hereinabove mentioned, be called upon to pay in connection with the said steamship *Sarnor* and litigation now pending in connection with the ownership of same;

2. The assignors hereby give the assignee the right or option to purchase the assignors' said interest in said steamship *Sarnor* for the sum of five thousand dollars (\$5,000), of which two thousand five hundred dollars (\$2,500) would be payable to the said assignors and two thousand five hundred dollars (\$2,500) to one J. H. Cameron, Barrister, on account and in deduction of his bill for services in connection with the said steamship *Sarnor* provided the said Cameron will have a valid claim against the said assignors and the said vessel for said services to the extent of the said sum of two thousand five hundred dollars (\$2,500);

3. The present option, which is given in consideration of the payment by the assignee to the assignors of the sum of One Dollar (\$1), is to be valid and hold good up to and including the twenty-first day of February next, 1920;

4. It is hereby declared and agreed that these presents and everything herein contained shall respectively be binding upon and enure to the benefit of the executors, administrators, successors and assigns of the parties hereto respectively."

The option to purchase therein referred to was never acted upon and lapsed.

The parties then filed the following admission:—

Under reserve of allegations in pleadings herein, particularly allegations in amended defence, and for the purpose of this action only, the object being to save time and costs, I admit, on behalf of claimants:

(a) That not less than \$25,000 was paid out by the Canada Steamship Lines, Limited, on behalf of steamship *Sarnor* up to the date of the assignment, namely, February 22, 1919;

(b) That subsequent to February 22, 1919, further sums were paid as aforesaid, the last payment being a payment of \$500, having been made August 12, 1922.

Made in Court, October 5, 1928, by consent.

J. A. H. CAMERON,  
 Attorney for claimants Percy Charles Bonham and Frederick R. Johnson.

BROWN MONTGOMERY AND McMICHAEL,  
 Attorneys for intervenant.

The claimants deny any liability to the Canada Steamship Lines Limited (hereinafter called the Company), asserting that the transaction between them is of a commer-

cial nature and is prescribed by 5 years under subsec. 4 of Art. 2260 C.C.P.Q., which reads as follows:

4. Upon inland or foreign bills of exchange, promissory notes, or notes for the delivery of grain or other things, whether negotiable or not or upon any claim of a commercial nature reckoning from maturity; this prescription does not apply to bank notes.

The question as to whether or not a transaction is of a commercial nature is rather impossible of precise definition, and the will alone of the parties will not make it so. Would it not seem that these words used in Art. 2260 should be approached and considered as *ejusdem generis* with matters therein mentioned, thus eliminating a transaction in the nature of the one subject to the present controversy.

Moreover if the delay for prescription is to be reckoned, as mentioned in the article, *from maturity*, it would seem that as long as the vessel remained in possession of the company, or was in existence, that prescription could not run and that it only began to run on the 29th September, 1924, when the vessel became a hulk and was destroyed for all practical purposes, a date determining that statement alleged in the claimants' written argument. Should not therefore the prescription, if any, run from that date? If so, the delay of five years is wanting. See Planiol, Droit Civil, vol. 2, p. 759, no. 2462.

The claimants are mariners and the company runs different lines of vessels. It is not in the nature of the claimants' occupation to purchase vessels or portions thereof, and it is not in the ordinary course of business of the company to advance moneys for the purposes of repairing vessels belonging to others. All of this occurred as a result of the Great War and was but a casual transaction, a civil loan, outside of their respective usual occupation.

The vessel, after being requisitioned, has been the subject of long, protracted and numerous litigations, before the matter of compensation came before this Court.

In the result it appears that the \$25,000 and more advanced by the company was nothing but a loan to the claimants for the purposes of repairing the vessel, to put her in operation during the war. The company at no time became owner of the same. The vessel has disappeared, and there is no privilege attaching to the same for the loan so made for her repair, but the civil obligation between the

1928  
 BONHAM  
 AND  
 JOHNSON  
 v.  
 THE KING.  
 AND  
 THE  
 CANADA  
 STEAMSHIP  
 LINES LTD.  
 ———  
 Audette J.  
 ———

1928  
 BONHAM  
 AND  
 JOHNSON  
 v.  
 THE KING.  
 AND  
 THE  
 CANADA  
 STEAMSHIP  
 LINES LTD.  
 Audette J.

parties to the agreement is still extant and I fail to see any justification by the claimants to repudiate to-day the obligation assumed under this indenture. This agreement (exhibit B) shows that the parties were acting in good faith and they intended the contract to be as set forth. The company did actually advance the money and the claimants received the benefit of the same. *Salvas v. Vassal* (1).

The claim may rest on the loan appearing in the indenture as a civil debt or obligation, outside of any privilege. *Macdonald v. Dillon* (2); *DeSola v. DeSola* (3); *Casgrain v. Prevost* (4); *Laliberté v. Godoua* (5).

The moneys advanced were in the nature of a loan which can only be prescribed by thirty years and the claim is not affected by the five years prescription under art. 2260. *Darling v. Brown* (6).

Therefore, the sum of \$6,600 found coming to the claimants as owners of 60 per cent of the vessel, will be paid to their assignee, the Canada Steamship Lines Company, Limited, with costs of this issue in favour of the latter.

*Judgment accordingly.*

1928  
 Dec. 7.  
 Dec. 27.

WILLIAM KENNEDY ..... APPELLANT;  
 AND  
 THE MINISTER OF NATIONAL }  
 REVENUE ..... } RESPONDENT.

*Revenue—Government Annuities—Income—7-8 Ed. VII, c. 5—Income War Tax Act, 1917—Exemptions—Burden of proof—“ Issued exempt.”*

*Held*, that the annuity paid to a person by virtue of a Dominion Government annuity contract, issued under the provisions of 7-8 Ed. VII, c. 5, is “ income ” within the meaning of the Income War Tax Act, 1917, and is not issued free of taxation.

2. That any representation made to the contrary by any officer of the Crown, cannot alter the law nor bind the Crown in any way.
3. That the onus of proving that an income is exempt from taxation under the Taxing Act, is upon the one claiming such exemption.

- |                          |                                |
|--------------------------|--------------------------------|
| (1) (1896) 27 S.C.R. 68. | (4) (1890) 35 L.C.J. 29.       |
| (2) (1883) L.C.J. 214.   | (5) (1895) R.J.Q. 8, C.S. 308. |
| (3) (1889) 17 R.L. 315.  | (6) (1877) 1 S.C.R. 360.       |

4. That the annuity in question not having been "issued exempt" from taxation, and, in any event, not being in the nature of a "bond" or "security" mentioned in sec. 5, subsec. i of the Taxing Act (now sec. 4, subsec. j, R.S.C., 1927, ch. 97) is not exempt from taxation, and was properly taxed.

1928  
 KENNEDY  
 v.  
 THE  
 MINISTER  
 OF NATIONAL  
 REVENUE.

APPEAL by the appellant herein from the decision of the Minister refusing to grant him the full exemption of \$3,000.

Audette J.

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

*Romeo LeBlanc* for the appellant.

*C. F. Elliott* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 27th December, 1928, delivered judgment.

This is an appeal, under the provisions of sec. 15 *et seq.* (now 58 *et seq.*, c. 97, R.S.C., 1927), of The Income War Tax Act, 1917, and amendments thereto, from the assessment of the appellant's income for the year ending 31st December, 1926.

Briefly stated the appeal arises from the decision of the Minister granting the appellant only \$1,500 exemption as a married man. He claims he should receive \$3,000 exemption, because \$1,500 of his wife's income amounting to \$1,720 is derived from a Dominion Government Annuity which he claims to be tax free. Hence the present controversy.

The following admission of fact agreed upon by the parties was duly filed to be used on this appeal, viz:—

1. The appellant, William Kennedy, Jr., was a resident of Canada during the year 1926.
2. He was in receipt of a net income during 1926 of \$24,914.50.
3. He filed a return of his income on the 29th April, 1927.
4. There was assessed and levied a tax thereon in the sum of \$2,544.30.
5. In determining the tax payable there was allowed a statutory exemption of \$1,500 and not an exemption of \$3,000.
6. The wife of William Kennedy, Jr., was and is Elizabeth Ann Kennedy, who resided with him in Canada in 1926.
7. The income of the wife of William Kennedy, Jr., for the year 1926, was \$1,720 made up as follows:

|                                  |         |
|----------------------------------|---------|
| Dominion Government Annuity..... | \$1,500 |
| Industrial bond interest.....    | 220     |

1928  
 KENNEDY  
 v.  
 THE  
 MINISTER  
 OF NATIONAL  
 REVENUE.  
 Audette J.

8. A copy of the annuity contract between the said Elizabeth Ann Kennedy and the Dominion Government, certified by the Superintendent of Annuities, is attached hereto.

Approved and agreed to.

The contention that the wife's annuity contract issued under the provisions of 7-8 Edward VII, ch. 5, was issued from from taxation, may be first considered.

There is no provision in that Act which makes such annuity free from taxation, and moreover the annuity was not "*issued free*" of taxation. Any representation made to the contrary by any officer of the respondent or on behalf of the Crown is without any force or effect as no one had the power to change the law as enacted.

The Crown is not bound by the laches of its officers and an erroneous construction of a statute by the officers of the Crown affords no ground to recover from such construction. *DeGalindez v. The King* (1), confirmed on appeal to the Supreme Court of Canada (2).

Section 3 of the Taxing Act defining the meaning of income, includes in its first paragraph (the Act then in force) the payments made under an annuity contract. It therefore becomes, in its very nature, liable to taxation, as forming part of the wife's income.

This is a case arising in the province of Quebec and which is accordingly to be governed as to property and civil rights by the laws of that province. However, it will not be necessary for this Court, in the consideration of the case, to pass upon the validity of this annuity contract as coming within the ambit of Art. 1265 C.C.P.Q. which prohibits consorts to in any manner confer benefits *inter vivos* upon each other.

The proceeds of this annuity contract paid to the appellant's wife is the income from the capital invested by the husband's capital which he has wholly expended to procure the annuity. For commentaries, observation and definition of *annuity contract* and the reasons for the taxation of the same, reference may be had to the following decisions:

(1) (1906) Q.O.R. 15 K.B. 320.

(2) (1907) 39 S.C.R. 682.

*Scoble et al v. Secretary of State for India* (1); *Coltness Iron Co. v. Black* (2); *Jones v. Commissioners of Inland Revenue* (3); Internal Revenue Bulletin—July-Dec., 1924, p. 60; Report of Royal Commission (England) on Income Tax, par. 184, 185; *Gresham Life Ass'n. Soc. v. Styles* (4).

1928  
KENNEDY  
v.  
THE  
MINISTER  
OF NATIONAL  
REVENUE.

Audette J.

Now, having found that revenue derived from the annuity contract forms part of the income of the beneficiary thereof, there remains to be found as to whether such income is exempted from taxation under the language of the Taxing Act. The *onus* is upon the appellant to prove such exemption if any and I find he has failed to do so. He relies upon sec. 5 of the Taxing Act, subsec. i (now sec. 4, subsec. j, R.S.C., 1927), which reads as follows:

(j) The income derived from any bond or other securities of the Dominion of Canada *issued exempt* from any income tax imposed in pursuance of any legislation enacted by the Parliament of Canada.

First, this annuity contract was not *issued exempt from taxation*, and secondly it is not in the nature of a bond or the security mentioned in that section. It is not a bond and the word security following the word bond must be read as meaning bonds, debentures, *ejusdem generis*, and not such annuity contract now under consideration.

Taxing is the rule and the relief from taxation is the exception. As said by Lord Cairn in re *Partington v. Attorney-General* (5):

If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such construction is not admissible in a taxing statute, when you can simply adhere to the words of the statute.

For consideration of public policy, the court cannot, unless for very clear reason, frustrate the object of the Tax-

(1) (1903) 4 T.C. 618, at pp. 621, 622.

(2) (1880) 1 T.C. 287 at pp. 307, 308, 321.

(3) (1919) 7 T.C. 310 at p. 314.

(4) (1892) 3 T.C. 185, 196.

(5) (1869) L.R. 4 E. and I. App. (H.L.) 100 at p. 122.

1928  
 KENNEDY  
 v.  
 THE  
 MINISTER  
 OF NATIONAL  
 REVENUE.  
 Audette J.

ing Act. *Wylie v. City of Montreal* (1). There is no such thing as presumption of exemption, if anything, the presumption would be in favour of the taxing power. 37 Encly. Law and Prac. 891. Immunity from taxation by statute will not be recognized unless granted in terms too plain to be mistaken. *Chicago, Burlington and Kansas City R.R. v. Guffey* (2).

Having found that the annuity is part of income and that it is not exempted from taxation, I must also find that, under sec. 4, subsec. (a) of 1a and 1b of 16-17 Geo. V, ch. 10 the Act in force at the time, the husband and wife in the present case have "a separate income in excess of fifteen hundred dollars" and that each must receive an exemption of \$1,500 in lieu of \$3,000.

Therefore there will be judgment dismissing the appeal with costs.

*Judgment accordingly.*

1928  
 Nov 26-30.  
 1929  
 Jan. 8.

NATIONAL DOCK AND DREDGING } SUPPLIANT;  
 CORPORATION LIMITED ..... }  
 AND  
 HIS MAJESTY THE KING .....RESPONDENT.

*Crown—Contract—Interpretation of Contract—Order in Council—Power of Minister*

*Held*, that an Order in Council authorizing the Minister to enter into a contract for the removal of clay, sand and gravel, tendered for at a given price, does not carry with it any authority to add anything to or to vary the scope of the contract beyond the ambit of the Order in Council. The introduction of a clause purporting to be part of the authorized contract, throwing upon the contractor the obligation to remove, at the same price, material of another class than that mentioned in the Order in Council, is beyond the authority conferred by said Order in Council.

2. However general the terms of a contract may be expressed, they extend only to the things concerning which it appears that the parties intended to contract, which, in the present case, was clay, sand and gravel.
3. Where under an executory contract, the Crown accepted the works done by the contractor, beyond its executed contract in writing, it must be taken to have ratified it, and such work and labour having accrued to its benefit, it becomes liable therefor, on a *quantum meruit* basis, as upon an implied contract.

(1) (1885) 12 S.C.R. 384, at pp. 388, 389. (2) (1887) 120 U.S.R. 569.



PETITION OF RIGHT of the Suppliants to recover from the Crown the sum of \$98,478.35, under a contract.

1929

The action was tried before the Honourable Mr. Justice Audette, at Quebec.

NATIONAL  
DOCK AND  
DREDGING  
CORPORATION  
LIMITED  
v.  
THE KING.

*George Parent K.C.* and *Robert Taschereau* for suppliant.

*Hon. J. N. Francoeur K.C.* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now (January 8, 1929), delivered judgment.

The suppliant, by its Petition of Right, seeks, *inter alia*, to recover the sum of \$98,478.35, as resulting from work done under a contract entered into between the parties herein for certain improvements by the Government in the harbour at Matane, P.Q., by way of dredging, in the channel and basin at Matane, P.Q., clay, sand and gravel, as more specifically described in the call for tenders and the submission of the same.

A call for such tenders was duly published in the usual manner (exhibit No. 39) with, among other things, the clause stating that

Tenders will not be considered unless made on the forms supplied by the department and according to conditions set forth therein.

The tenderer, the suppliant, or rather its predecessor in the contract, applied for such form and specification and the same was duly supplied to them as shewn by exhibit No. 1.

It will be observed that the department itself filled in the form of such tender which sets forth that the material to be dredged is *clay, sand and gravel*, and for that alone.

The price for the dredging of such material is shown on exhibit No. 1, under the general heading of "Price per cubic yard" and is extended mostly under the first of the two subdividing columns of Class "A" and Class "B," while, however, in the tender attached to the contract, it is all extended under Class "B."

Much argument was offered in this respect to show that the tender was for Class "B"; but under the circumstances the Court finds that the 37 cents per cubic yard must be read with the tender which is for removal of clay,

1929  
 NATIONAL  
 DOCK AND  
 DREDGING  
 CORPORATION  
 LIMITED  
 v.  
 THE KING.  
 Audette J.

sand and gravel (art. 1015 C.C.P.Q.). Indeed, if it had been for any other class than material described, the price would obviously be higher and this view is also confirmed by the several Orders in Council and the actions of all those dealing with the subject matter of this controversy to which reference will be hereinafter made.

The contract in writing, exhibit No. 2, is for work to be performed in the province of Quebec, and it was duly signed and entered into at Quebec; therefore the obligations resulting thereunder, as held in *The King v. Desrosiers* (1), must be determined by the laws of the province where the cause of action arose.

The acceptance of the suppliant's tender for the removal by way of dredging at Matane, of clay, sand and gravel was duly authorized by the Order in Council (exhibit No. 32) of the 14th March, 1923.

The Crown, as represented by the Executive Government, can only speak by Order in Council, and this Order in Council, circumscribes the authority to enter into a defined contract, and that is in respect of clay, sand and gravel, the very wording of the tender, and no more.

An Order in Council authorizing the Minister to enter into a contract for the removal of clay, sand and gravel, tendered for at a given price, does not carry with it any authority to add anything to or to vary the scope of the contract beyond the ambit of the Order in Council. The introduction of a clause purporting to be part of the authorized contract, throwing upon the contractor the obligation to remove at the same price material covered by another class (Class "B") is absolutely beyond the authority conferred by the Order in Council and is also beyond any offer expressed or implied in the tender of the suppliant. The authority for such view is to be found in the case of *The King v. The Vancouver Lumber Company* (2) and confirmed on appeal by the Supreme Court of Canada and by the Judicial Committee of the Privy Council (3); *The British American Fish Corporation Ltd. v. The King* (4).

(1) (1908) 41 S.C.R. 71, at p. 78.

(2) (1914) 17 Ex. C.R. 329.

(3) (1919) D.L.R. 6.

(4) (1918) 18 Ex. C.R. 230.

Moreover, under Arts. 1019 and 1020 C.C.P.Q., if any doubt could arise in so clear a tender drawn by the opposite party, such doubt must be interpreted against him who has stipulated and in favour of him who has contracted the obligation. And however general the terms of a contract may be expressed, they extend only to things concerning which it appears that the parties intended to contract,—in the present case, exclusively to clay, sand and gravel.

Now the controversy in the present case, it is well to bear in mind, arises from the fact, duly confirmed by the suppliant and from most of the Crown's officials who saw the material dredged, that such material, for a quantity of 10,340 c.y., was not sand, clay or gravel, as mentioned in the tender, and in the Order in Council, but was of hard material which commanded a larger price than the material actually contracted for.

The bucket dredge used by the suppliant was duly approved both by the chief engineer and the Order in Council above cited and the contract was to be given subject to their getting that dredge which, at the origin, had cost \$165,000. This bucket dredge is the proper kind to dredge the material contemplated by both parties, and if the parties had not been induced into error as to the nature of the material, and had they known the actual kind, a shovel or dipper dredge would have been required and used.

The suppliant started work at Matane, on the 28th July, 1923, and contended that if the material had been as mentioned in the tender and contract for the same, they would have terminated the work before the time assigned, and the resident engineer confirms that view. They moreover seem to have substantiated that contention from the fact that, even with the Government dredge working, the new contractors who undertook to finish the works, have been working at it for several seasons. They further contend that the plan, exhibit A, supplied to them did not even show any borings or boulders in the cuts of the channel, and that is easily ascertained by referring to the plan. The party in charge of such borings, as shown on plan, deceived and misled both parties by its want of accuracy from the fact that the borings were made outside of the channel and very few in the basin.

1929

NATIONAL  
DOCK AND  
DREDGING  
CORPORATION  
LIMITED

v.

THE KING.

Audette J.

1929  
NATIONAL  
DOCK AND  
DREDGING  
CORPORATION  
LIMITED  
v.  
THE KING.  
Audette J.

The entrance of the river Matane is at right angle with the St. Lawrence, facing the north, and is very much exposed to winds, storms and heavy seas which churn and disturb the very formation of the material of the beach and which may, as is well known, be very different at a few feet distant.

Very soon after the beginning of the works the suppliant complained to the resident and to the district engineers, who in turn advised the chief engineer, that the material encountered was quite different from that contemplated, that they were tearing their buckets on the hard material, that the material was hard, with many boulders, and as said by resident engineer, it was a very hard clay, coming out in large cakes or slabs which, with boulders, were blocking the buckets in the dredge and had the effect to break and wreck it by the end of September. The district engineer in the course of his testimony said "c'était des roches, boulders cimentés ensemble."

On the 14th August, 1923, the district engineer informs the chief engineer (exhibit No. 16) of the difficulty arising from the hardness of the material and says "This material is hard pan with cemented boulders." That is followed, on the 16th August, 1923, by a letter of the suppliant to the Deputy Minister complaining that the material he is dredging is not clay, sand and gravel, and asking for an estimate for this new encountered material. On the 15th September, 1923, Mr. Amiot writes to Mr. Décarie (exhibit No. 22) that

At the beginning, the material removed was consisting of clay and 45 per cent of boulders; this percentage was kept until the bar at the entrance of the harbour was passed, then, boulders are encountered less frequently.

Boulders small enough to go through the chutes of the dredge are allowed to be dumped from the buckets the ordinary way into the scows, but up to date 125 boulders ranging from one to three cubic yards were first picked up into bucket, then dredge stopped, the boulders were chained and removed by derrick into scow, sometimes requiring as long as an hour to do so.

Boulders too large to be removed by the dredge were blasted and removed. Up to date, five of them were blasted. A record as to the position and size of these boulders has been kept.

In conclusion, I should think that from the amount of material removed up to date, 25 per cent could be classed as Class "A" material and the balance as Class "B." It is my opinion that all what is shown on the boring plan as sand and gravel is of the Class "A."

Then the resident engineer advises the district engineer of the difficulty in the operation and the district engineer, in turn, writes to Mr. Décarie (exhibit No. 5), the superintendent engineer for the province, stating among other things, as follows:—

From the time of arrival of the dredge *New Welland* at Matane, I have always had an assistant engineer of my staff on the site of works in order to be kept regularly "au courant" of the prosecution of the dredging works; and from information supplied by Mr. Assistant Engineer L. de B. Roy, I have to state that although in the contract and specification the material to be excavated was set forth as being clay, sand and gravel, it was found in the course of the work to be much harder than ordinary clay.

The dredge started work on July ult. the 28th, beginning at the eight-foot contour line, some 1,200 feet from the northeast corner of the western breakwater, the width of the cut being the western half of the proposed channel; from this starting point to the 5-foot contour line, the material dug out was nothing else but boulders more or less large and stones.

From the 5-foot contour line to the south side of the bar at the harbour entrance or 100 feet inside the north face of western breakwater, depth of face increased varying from five to ten feet and the material excavated in that area consisted again in large boulders and stones with boulders cemented into the clay underlying the top layer which varied between 12 and 24 inches.

The amount of material taken out in the areas above described is 25,590 c.y. (place measurement); it is estimated that 25 per cent of this amount or 6,390 c.y. should be classified as Class "A" material, being boulders and that the balance or 19,200 c.y. is ordinary as Class "B" material. Such classification has been arrived at after a thorough and careful investigation of the material taken out and of the conditions into which the dredge has had to do this work.

As above mentioned, it is stated that the top layer of the area where dredging work has been done to date consisted in boulders and stones upon a depth varying between 12 and 24 inches; outside of this, many other boulders had to be derricked into the dumping scows which boulders were too large to go through the chutes; others had to be blasted and removed.

Moreover, in fairness to the contractors, allow me to state that the clay which was found underneath the top layer was indurated clay or hard pan of the hardest kind with cemented boulders; this material was so hard that the dredge could never move more than 1 foot at the time, the slices of material coming up into the buckets were blocking the chutes so that a six-inch jet of water could not dislodge any of it. Boulders coming up that were too large to go through the chutes were derricked into the scows. This, sometimes, took around one hour during which the dredge did not do any work.

Boulders over seven feet in any dimension could not be handled and eight or nine of these were blasted as per your instruction. Two of these large boulders were the cause of much delay to the contractors; they had to abandon their first cut and start on ahead of them.

On the 8th June, 1926 (exhibit No. 33), the superintendent under instruction from the chief engineer writes

1929  
 NATIONAL  
 DOCK AND  
 DREDGING  
 CORPORATION  
 LIMITED  
 v.  
 THE KING.  
 Audette J.  
 ———

1929  
 NATIONAL  
 DOCK AND  
 DREDGING  
 CORPORATION  
 LIMITED  
 v.  
 THE KING.  
 Audette J.

to him that "he concurs in Mr. Amiot's report, exhibit No. 5, above recited, excepting as to price, yet in exhibit No. 14, on the 3rd October, 1923, he recommends \$4.50 could be allowed for the 25 per cent of the material removed by the suppliant which is claimed to be of Class "A." See also, in this respect, another letter of the district engineer of the 15th September, 1923, to the superintendent (exhibit No. 22) dealing with the same matter. The resident engineer testified at trial that he confirms the opinion expressed in exhibit No. 5; that it expressed both his opinion and that of the inspector.

The resident engineer, on the 13th September, 1923 (exhibit No. 25), reports as follows:—

With reference to the material first removed, at least 45 per cent were boulders but as a deeper face was met, until the bar at the entrance of the harbour was passed this percentage was kept but has been reduced to 25 per cent, and boulders are encountered less frequently.

Boulders small enough to go through the chutes of the dredge were allowed to be dumped from the buckets the ordinary way into the scows, but a large number (125) up to date ranging from one cubic yard to three cubic yards, and depending upon their shape, these were first picked into a bucket, sometimes requiring as long as an hour to do so, then the dredge stopped, these boulders chained and removed by derrick onto a scow. It is worth noting that while trying to raise these large boulders into a bucket no other material was being removed, therefore causing much loss and delay.

Boulders too large to be removed by the dredge were ordered to be blasted and removed, as per your verbal instructions, and I beg to report that three boulders were blasted some three hundred feet back of the dredge and that this procedure has been used on two boulders ahead of the dredge, on the 12th instant.

In concluding my report, I would say that up to date 25 per cent of the material removed could be classed as Class "A" material and the balance of this present total above mentioned to be classed as Class "B."

This same officer, on the 26th September, 1923 (exhibit No. 24), writes to the district engineer as follows:—

From the 5 feet contour to the south side of the bar at the harbour entrance or 100 feet inside the north face of the West Breakwater, the face to cut through increased, varying from five to ten feet, and the material excavated in this area was still large boulders and the stones with boulders cemented into the clay underlying the top layer.

The amount of material excavated to this bar above referred to, shows that 25,590 cubic yards were removed and of this amount 25 per cent should be classed as Class "A" or 6,390 cubic yards, and the balance as Class "B."

Re the handling of the material excavated I may say that the clay removed was so tough that the dredge was never moved more than a foot at a time as the slices of material that came up would then block

the chutes even with a 6-inch jet of water pushing this material down the chutes. All boulders that could go through the chutes were allowed to dump the ordinary way, an occasional one blocking in the chutes, causing hours of delay. Boulders that came up and were found too large to be dumped through the chutes were brought up the level of the deck of the dredge, then the dredge stopped. This boulder had to be chained from the bucket and deposited on the deck or on a nearby scow, and the dredge again started. It is worth noting that while the dredge tried to raise a boulder no material came into the bucket as there was no lateral movement being done until this boulder was raised, or pushed along into a corner of the cut, sometimes requiring as long as an hour to do so.

Boulders over seven feet in any dimension could not be handled and eight or nine of these were blasted as per your instructions. Two of these large boulders occasioned the contractors much delay, in this way that they had to abandon their first cut, and start ahead of these boulders. These boulders have since been blasted but not removed from the cut.

It is shown by the Inspector's daily records that over forty hours were lost only in chaining and removing boulders from buckets, leaving alone the time lost in getting them into the buckets.

I may say also a few words with regard to the material removed, say 200 feet from the north end of the west breakwater, and which has proved to be very different from the material found on the north side of the bar, first being a softer clay with more gravel and sand, yet with boulders large enough that they were blasted to allow the dredge to proceed.

This is followed by the letter (exhibit No. 14) of the superintendent to the chief engineer, wherein Mr. Décarie says:—

From the 5-foot contour line to the south side of the bar at the harbour entrance, or 100 feet inside the north face of the western breakwater, the depth of face increased varying from 5 to 10 feet and the material excavated in that area consisted again in large boulders and stones cemented into the clay, forming what is generally called natural concrete or conglomerate. In other words, the bottom of the river was paved with stones and boulders cemented in a mixture of very hard clay, gravel and sand.

The buckets of the dredge would slip on these boulders and, sometimes, the dredge had to work an hour and more before being able to dislocate the stones and boulders in order to take them in the buckets. A quantity of the boulders were too large to go through the chutes. Some boulders were immensely large and could not be taken into the buckets. Mr. Assistant Engineer Roy, and the inspectors, affirmed that they had seen boulders 20 feet long. The boulders that could not go through the chutes of the dredge had to be removed with the help of a derrick, that is to say, the dredge had to be stopped, the boulders in the bucket had to be chained, removed from the bucket with the derrick, and placed on the scow.

Mr. Roy also informs that the clay found underneath the top layer was indurated clay of the hardest kind, absolutely dry, with a number of boulders of all kinds cemented into it. This underneath material was so hard that the elevator dredge could never move on its anchor more

1929  
 NATIONAL  
 DOCK AND  
 DREDGING  
 CORPORATION  
 LIMITED  
 v.  
 THE KING.  
 —  
 Audette J.

1929

NATIONAL  
DOCK AND  
DREDGING  
CORPORATION  
LIMITED  
v.

THE KING.

Audette J.

than one foot at a time and the material was coming into the buckets in large slices which were blocking the chutes so that a 6-inch jet of water could not dislodge any of it.

The removal of large boulders with the help of a derrick from the buckets of the dredge was a long operation taking about an hour of time during which the dredge was stopped.

\* \* \* \* \*

From the above it is evident that there is some of the material removed which must be classed in Class "A." Mr. Assistant Engineer Roy informs that about 25 per cent of the material excavated to date is of the Class "A."

\* \* \* \* \*

The department might consider that the lowest quotation received for Class "A" could be allowed to the contractors in this connection, and I would recommend the price of \$4.50 per cubic yard for Class "A" as being a fair and reasonable price.

The district engineer in his letter to the chief engineer, on the 13th December, 1923 (exhibit No. 15), says:—

"All what was possible, humanly, to go ahead with the work was done, I am a witness to that. \* \* \* All troubles \* \* \* due to the kind of material encountered.

And by exhibit No. 23, we had a complete analysis of the situation by the district engineer, which reads as follows:—

In compliance with your instructions regarding the above subject, and with reference to the different interviews and discussions we did have together in connection with the claim of the National Dock and Dredging Corporation Limited, I beg to submit the following report embodying the conclusions arrived at during our discussions:—

During the summer season of the year 1922, when the survey and examination were made in order to prepare the contract plans and specifications for the dredging required at Matane, it was found that soft material composed of clay, sand and gravel only was to be removed by dredging. Consequently, the contract plans and specifications were prepared accordingly and we eliminated from the contract any other class of material.

Tenders were called on that assumption; a contract was entered into with the National Dock and Dredging Corporation Limited for the dredging of clay, sand and gravel amounting to 290,000 cubic yards. No mention was made of any other kind of material because, from the result of the survey and inspection, we were under the impression that soft material only was to be removed and that it could even be done with a suction dredge.

The contract was signed on the 15th April, 1923. The dredge *New Welland* arrived at Matane on the 26th July, 1923.

Immediately at the start, the hard material referred to in the claim of the National Dock and Dredging Corporation Limited was encountered. It was noticed by our inspector and by the assistant engineer who was in charge of the work, but no complaint was made because it was thought that the material would improve.



On the 9th August, 1923, the assistant engineer in charge of the work at Matane did inform me that the dredge *New Welland* was encountering hard material and a quantity of stones and boulders of all sizes, that from his observations, from the beginning of the work to date, the quantity of stones and boulders removed was a great percentage of the material being dredged.

I went to Matane to investigate by myself and I did find that a large percentage of the material removed was nothing else than concreted clay, sand, gravel, stones and boulders.

On the 14th August, 1923, I (did report) to the chief engineer on this question stating that a large percentage of the material dredged by the dredge *New Welland* was composed of a conglomerate or concreted clay, sand, gravel, stones and boulders of all sizes, etc.

On the 16th August, 1923, the National Dock and Dredging Corporation Limited (did send) a protest to the department claiming that the material encountered was not as specified in their contract.

On the 29th August, 1923, we went to Matane together where we (did have) opportunity to verify the accuracy of the facts referred to above, and from the information we have been able to gather on that date, it was shown to us by our inspector and assistant engineer in charge that at the beginning of the dredging operations, the material removed was consisting of indurated clay containing about 45 per cent of stones and boulders of all sizes, that this percentage was the same until the bar at the entrance of the river Matane was passed.

From there onwards, the percentage (did) decrease to quite an extent, but did not come under 25 per cent of the material removed.

I informed you that, on a previous visit of mine at Matane, I had personally seen a loaded scow containing not less than 90 per cent of stones and boulders of all sizes.

During the navigation season of 1924, the department, in order to verify the situation, did send two expert engineers, not connected with this department, in order to make a minute investigation on the situation at Matane and to report.

These two experts, Mr. A. E. Doucet, consulting engineer, and Mr. Victor Formeret, superintending engineer of the River St. Lawrence Ship Channel for the Department of Marine, went to Matane where they have made a very careful examination and investigation. All facilities and help were given to them and they have made their report to the department which confirms what had already been reported.

It is therefore evident that material other than what had been specified in the contract plans and specifications was encountered. The material in question cannot be classed in Class "B," and it is in my opinion a material that should be classed as Class "A."

With regard to the quantities of such material, from the result of the observations of the inspector and assistant engineer in charge at Matane, it was found that this hard material composed as described above was encountered on a length of 1,200 feet, starting from station 29 to station 17 on an average width of 116.4 feet as shown on the accompanying plan of cross section, by a thickness varying between 18 inches and 36 inches but having an average thickness of 24 inches, making an amount of 10,340 cubic yards place measurement, of material which, in my opinion, is of the Class "A."

As far as the price is concerned, I may say that, although the department when calling for tenders did eliminate Class "A," two of

1929  
 NATIONAL  
 DOCK AND  
 DREDGING  
 CORPORATION  
 LIMITED  
 v.  
 THE KING.  
 Audette J.

1929  
 NATIONAL  
 DOCK AND  
 DREDGING  
 CORPORATION  
 LIMITED  
 v.  
 THE KING.  
 Audette J.

the tenderers did put in a price for Class "A," one at \$8 per cubic yard and the other one \$4.50 per cubic yard.

In my opinion, the lowest tender for Class "A," \$4.50 per cubic yard, is fair and reasonable and, from the result of my investigation and findings, this price of \$4.50 per cubic yard would be a fair and reasonable price to pay to the contractors for the material referred to above.

I have the honour to be, sir,

Your obedient servant,

P. E. AMIOT,

*District Engineer.*

On 25th June, 1924, the Minister of Public Works (exhibit No. 8) writes to the contractor

that two engineers who have no connection with the Department of Public Works. \* \* \* Messrs. Forneret, superintendent engineer, River St. Lawrence Ship Channel, and Major Doucet, consulting engineer, Quebec, will be secured to make an inspection, during 15 working days, of the material, etc.

Thereupon the chief engineer instructed these two independent engineers as follows:—

It is desired that a report be furnished to the department as to whether or not there exists material to be dredged at Matane which was unexpected and could not be fairly within the description contained in the specification and plans of soundings and borings.

These two engineers, on the 16th October, 1924 (exhibit No. 12) report to the chief engineer, *inter alia*, as follows:—

\* \* \* we met here a lot of boulders, cemented into a hard crust some two feet in thickness. \* \* \*

\* \* \* Here we dug into the same hard cemented material as that found on Saturday. \* \* \* We are therefore of the opinion that the borings shown to the contractors do not altogether fairly represent the nature of a part of the material to be dredged since in no one instance do they mention the existence of the hard cemented crust filled with boulders overlaying the hard clay bed and again in no one instance is it stated that boulders of over stone size occur. Material to be dredged does exist at Matane which was unexpected and could not fairly be brought within the description contained in the specification and borings. The claim of the contractors that they encountered material different from that which they were led to expect by the information furnished them, is doubtless due to the facts mentioned above as well as to the material to be dredged being described in the form of sand or as clay, sand and gravel, and to the statement that should an hydraulic pipe line dredge be used, the dumping ground should be 3,000 feet away.

Had solid rock or boulders of solid rock size been expected, the clause relating to Class "A" material would not have been struck out in the Indenture and a pipe line could not have been considered when dealing with a hard crust of material filled with large and small boulders and a layer of tough clay in which large boulders were deeply imbedded. In our opinion, the borings in such a formation as that of Matane

should have been made with a core boring machine. An elevator dredge working in a shallow cut of such material as that described above could not be sufficient or economical work and the resulting loss was bound to give occasion to claims.

We are not able to state the quantities of the hard material met with, but the engineers in charge of the work when it was performed should be in a position to supply the necessary information.

The suppliant was offered to continue his works in 1924 at other figures which he declined.

In October, 1923, the dredge being broken and partly wrecked, the suppliant was allowed to leave the works at Matane for good and, as testified by witness Dussault, he said he understood that this step did put an end to the contract. The chief engineer heard as a witness confirms that statement. See also in that respect exhibits M., N., and O.

This was followed by the Order in Council of the 19th July, 1924 (exhibit No. 11), which declared the contract closed, stating further that steps were under way in the department to effect a settlement. This same Order in Council also states that the reported material, under the contract, consisted of clay, sand and gravel.

The closing of the contract by this Order in Council is also recognized by the chief engineer in his memorandum to the Deputy Minister, exhibit M.

After both Messrs. Forneret and Doucet had reported, an attempt of settlement was made by the Crown at the figure of \$2.21 for the material in question; but it was refused by the suppliant. This report was criticized by exhibit E, but it amounts to nothing but a *pro domo* plea after the event, to which I attach no importance.

These figures of \$2.21 were arrived at upon getting at the normal earning of the dredge in question at some other works, and, as put by the chief engineer, it was thought reasonable to pay that amount to the contractor, as checked by independent methods. However, the fallacy of this estimate falls to the ground since that was calculated when the dredge was working only in daytime, while at Matane it was working night and day with two shifts of men. Calculated on proper basis this \$2.21 should, under the circumstances of the case, be \$4.42, as the dredge was working night and day at Matane.

1929  
 NATIONAL  
 DOCK AND  
 DREDGING  
 CORPORATION  
 LIMITED  
 v.  
 THE KING.  
 Audette J.

1929

NATIONAL DOCK AND DREDGING CORPORATION LIMITED v. THE KING.

Audette J.

On the 9th June, 1926, the chief engineer writes to the Deputy Minister (exhibit N.) among other things, viz:—

\* \* \* The National Dock and Dredging Corporation Limited, who had a contract with the department for dredging at Matane, entered a claim against the department for extra compensation due to the nature of material encountered when dredging at that place under this contract.

The District Engineer, Mr. Amiot, reported that the overlying layer of material difficult to dredge was removed to the extent of 10,340 cubic yards, place measurement, by the contractors, and Mr. Décarry recommended that the company be allowed a rate of \$2.21 per cubic yard, place measurement, for this quantity of material.

10,340 cubic yards, P.M., at \$2.21 cubic yard..... \$22,851 40
Of this amount the company has already received payment at the rate of 37 cents per cubic yard, place measurement ..... 3,825 80

Which will leave a net payment of..... \$19,025 60 to the company in full and final settlement of their claim.

The company, in tendering on the work, proposed to use the bucket ladder dredge New Welland and borings taken by departmental officers had disclosed underlying clay with a surface layer of gravel and sand. The work consisted of dredging a basin on the inside to a depth of 15 feet at low tide, and an entrance channel 9 feet deep. It was considered that the material was not compacted in any way, but would allow of ready dredging either by a bucket type dredge or possibly by a hydraulic pipeline dredge.

The material was found when the dredge arrived to carry out the work to be unexpectedly difficult to dredge and the contractors' claim is based on misleading information supplied by the department.

It was believed that the borings and the description of material conveyed a reasonably true picture of the material to be encountered. Actually, the gravel contained a large proportion of large stones and a quantity of Class "A" boulders, which were the cause of a very material delay to the operations of the dredge.

The department had the claim of the contractors investigated by two engineers—Messrs. V. W. Forneret, superintendent engineer, St. Lawrence Ship Channel, and Col. A. E. Doucet, consulting engineer, Quebec, whose report substantiates the claim that the description and information furnished by the department did not give bidders a true picture of the material to be encountered.

The contractors excavated the first cut through the outer bar and, the season then being late, discontinued operations. They decided not to continue and their contract was closed out. The part of the work which they undertook to do first, the cut through the outer bar, was the most difficult of the whole work, and the work done was of value to operations subsequently carried on towards completion of this dredging.

After careful consideration of the circumstances I beg to concur in the recommendation of the superintending engineer that the contractors be allowed \$2.21 per cubic yard, place measurement, for the quantity of 10,340 cubic yards, place measurement, of harder material encountered.

All attempts at a settlement having failed, the present action was instituted.

We are therefore met with the consideration of both an executed and an executory contract.

The work done under the executed contract for the removal of clay, sand and gravel was duly paid for.

We have then to deal with the other works done "hors du contrat" not contemplated by the executed contract.

The suppliant has overwhelmingly proved his case in this respect, not only by its own witnesses, that is by persons who were actually on the dredge and engaged in the operations, but from the mouth of the Crown's employees and officers.

There is also spread upon the records much evidence by witnesses who did not see the material which was actually removed and whose evidence is based upon surmise and conjecture derived from other material seen afterwards at Matane. This class of testimony in face of the best evidence carries neither weight nor conviction. One among this latter class of witnesses has even ventured statements as to the size of the knives of the bucket—a matter evidently unknown to that deponent as he was entirely astray. This, however, was rectified by those who knew. That, however, would warrant the inference that it was done with a view to discredit the claim and to cover these laches of the officers who were in charge in making the borings and soundings that deceived both parties. (See art. 992 C.C.P.Q.)

The Order in Council of the 3rd March, 1927 (exhibit O), recites further, among other things, that, viz:—

That the contractors have entered a claim for extra compensation due to the nature of material encountered in the performance of the contract.

That the chief engineer of the Department of Public Works has stated that the contractors' claim that the description and information furnished by the department did not present a true picture of the material to be encountered is substantiated by reports submitted by Messrs. V. W. Formeret, superintending engineer of the St. Lawrence Ship Channel, and by Col. A. E. Doucet, consulting engineer of Quebec.

That the superintending engineer of the Department of Public Works states that, in his opinion, a price of \$2.21 per cubic yard would be a fair remuneration for the 10,340 cubic yards of concreted clay, sand and boulders removed by the contractors. That officer recommends that the contractors be paid at the rate of \$2.21 per cubic yard for this quantity of material as follows:—

1929  
 NATIONAL  
 DOCK AND  
 DREDGING  
 CORPORATION  
 LIMITED  
 v.  
 THE KING.  
 Audette J.

1929  
 NATIONAL  
 DOCK AND  
 DREDGING  
 CORPORATION  
 LIMITED  
 v.  
 THE KING.  
 Audette J.

|                                                                                         |             |
|-----------------------------------------------------------------------------------------|-------------|
| 10,340 cubic yards, P.M., at \$2.21.....                                                | \$22,851 40 |
| Of this amount the company has already received<br>payment at the rate of 37 cents..... | 3,825 80    |
| Which will leave a net payment of.....                                                  | \$19,025 60 |
| to the company in full and final settlement of<br>their claim.                          |             |

That the chief engineer and the Deputy Minister of Public Works concur in the above recommendation.

That provision for the settlement of this claim has been made in the Supplementary Estimates voted by Parliament for the fiscal year 1926-27 (vote 434) "Matane in full and final settlement of the claim of H. Dussault and Company in connection with their contract for dredging in 1923-24—\$19,025.60."

The Minister, therefore, recommends that authority be granted to pay to H. Dussault and Company the above-mentioned sum of \$19,025.60 in full and final settlement of their claim in connection with their contract for dredging at Matane, P.Q., during the year 1923-24.

This offer of \$19,025.60 is renewed in the respondent's statement in defence and is refused by the reply. Counsel for the Crown, in the course of the trial, stated that considering that the 10,340 cubic yards in question do not come under Class "A" or "B," an offer was made by the respondent to pay at the rate of \$2.21 per c.y. representing this sum of \$19,025.60.

Therefore, in the result, the claim means that under the executed contract, in writing, as above set forth, the suppliant was only bound to remove clay, sand and gravel, and any part of the contract beyond this scope and the ambit of the Order in Council authorizing the same was of no value and effect and comes within the ambit of its work done under an executory contract.

Then, under this executory contract, not in writing, the Crown, having accepted the works done by the suppliant beyond its executed contract, must be taken to have ratified it and such work and labour having accrued to its benefit, it becomes liable, on a *quantum meruit* basis as upon an implied contract. *Henderson v. The Queen* (1); affirmed on appeal to the Supreme Court (2); *Hall v. The Queen* (3); *The Gresham Blank Book Co. v. The King* (4); *Wood v. The Queen* (5); *The Queen v. Woodburn* (6); *May v. The King* (7); *Bernardin v. The Municipality of North Dufferin* (8).

|                             |                                     |
|-----------------------------|-------------------------------------|
| (1) (1897) 6 Ex. C.R. 39.   | (5) (1877) 7 S.C.R. 631, at p. 645. |
| (2) (1898) 28 S.C.R. 425.   | (6) (1898) 29 S.C.R. 112.           |
| (3) (1893) 3 Ex. C.R. 373.  | (7) (1913) 14 Ex. C.R. 341.         |
| (4) (1912) 14 Ex. C.R. 236. | (8) (1891) 19 S.C.R. 581.           |

1929

NATIONAL  
DOCK AND  
DREDGING  
CORPORATION  
LIMITED  
v.  
THE KING.  
Audette J.

From the perusal of exhibits 23, 33 and N, it must be found that the chief engineer, after accepting the finding of the superintendent who had concurred with the report of the district engineer Amiot, does find that, for a quantity of 10,340 cubic yards, the material encountered was harder than what was either mentioned or contemplated by the executed contract and that it should be paid at a higher price.

In other words, this harder material is found to be outside of the executed contract and that it must be paid as upon a *quantum meruit* on an executory contract of which the Crown received the benefit. The price of \$2.21 mentioned by the engineer is not accepted as a sound *quantum meruit* for the reason above mentioned. Moreover, the chief engineer (exhibit N) finds that

the part of the work which they (suppliant) undertook to do first, the cut through the outer bar, was the most difficult of the whole work, and the work was of value to operations subsequently carried on towards completion of this dredging.

The evidence as to the ratio of remuneration per yard has been most satisfactorily established by those better able to speak upon the subject, such as the engineer in charge, confirmed as it is by several witnesses, and that ratio will be placed at \$4.50 per cubic yard. Answering a question put by the Court, the district engineer said:—

I was there, saw the material and say it is worth \$4.50—all of which is based upon my personal knowledge and that of the resident engineer and the inspector.

This witness impressed me as an honest man and as a person who would not give expression of opinion upon any matter without primarily considering it with great care from every angle.

The number of these cubic yards (outside of clay, sand and gravel) has, all through the trial, been accepted at 10,340.

These 10,340 at \$4.50 represent..... \$46,530 00

From which should be deducted 37 cents a  
cubic yard already paid upon the same  
quantity, i.e. ....

3,825 80

---

\$42,704 20

1929  
 NATIONAL  
 DOCK AND  
 DREDGING  
 CORPORATION  
 LIMITED  
 v.  
 THE KING.  
 Audette J.

Following the decision of the Supreme Court of Canada in the case of *The Queen v. Henderson* (1) the cause of action having also arisen in the province of Quebec, the amount recovered will carry interest from the date the Petition of Right was left with the Secretary of State (sec. 4 Petition of Right Act). This date may be established by affidavit. Failing which the interest will run from the date the petition was filed in this court.

There are a few other items of claim mentioned in paragraph 18 of the Petition of Right which however were not pressed at trial. Suffice it to say in this respect that no ground of action has been shewn and that the suppliant cannot succeed in the recovery of the same.

Therefore there will be judgment declaring and adjudging that the suppliant is entitled to be paid by and recover from the respondent the said sum of \$42,704.20 with interest thereon at the rate of five per centum per annum from the date above mentioned to the date hereof. The whole with costs in favour of the suppliant.

*Judgment accordingly.*

1928  
 Sept. 22.  
 Dec. 27.

HIS MAJESTY THE KING.....PLAINTIFF;  
 vs.  
 ELITE CAFE LIMITED.....DEFENDANT.

*Expropriation—Leasehold—Civil rights—Elements of damage to lessee—  
 Market value as test—Compensation*

*Held*, that the rights conferred by a lease being a matter of property and civil rights, within the exclusive powers of the Provincial Legislature, the Court in ascertaining the estate or interest of persons claiming compensation thereunder in an expropriation by the Dominion Crown, will have regard to the laws affecting such estate or interest in the province where the property is situated, notwithstanding sections 25 and 26 of the Expropriation Act.

- Where a leasehold has been expropriated, the compensation to be made to the lessee for the unexpired term of his lease should cover all reasonable cost of moving, refitting and settling the new premises; loss of time in seeking new location; depreciation of valuable business fixtures and fittings and damage thereto due to moving, etc., and a certain amount for dislocation or disturbance of business, which however cannot be fixed with mathematical certainty.

(1) (1898) 28 S.C.R. 425 at p. 434.



3. That the customary test of market value is no test of value in arriving at the compensation to be allowed for a leasehold interest expropriated. That leaseholds rarely have any market value.

1928  
 THE KING  
 v.  
 ELITE CAFE  
 LIMITED.

INFORMATION exhibited by the Attorney-General of Canada to have the compensation for the leasehold interest expropriated valued and fixed by the Court.

The action was heard before the Honourable Mr. Justice Audette at Regina.

*D. R. Curtin, K.C.*, and *D. A. Grant* for the plaintiff.

*D. J. Thom, K.C.*, and *J. L. McDougall* for the defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now (27th December, 1928), delivered judgment.

This is an Information exhibited by the Attorney-General of Canada, whereby it appears, among other things, that a certain leasehold interest in the expropriated building erected on lots four (4) and five (5) in block 306, in the city of Regina, in the province of Saskatchewan, was taken from the defendant, at the time the Crown expropriated the property for the purposes of a public work, by depositing, on the 10th day of October, 1927, a plan and description of such land in the Land Titles Office for the Regina Land Registration District at Regina.

The plaintiff offers, by the Information, the sum of \$25,000 as full compensation for the defendant's leasehold interest, and the defendant avers, by the statement in defence, that this sum is not sufficient and just compensation and claims the sum of \$80,000.

I have had the advantage, accompanied by counsel for both parties, of viewing the premises in question.

As there seemed at the trial to exist some doubt in the mind of those representing the company as to what the expropriation did cover—and it could not cover movables—counsel for the plaintiff, after the matter or doubt had been spread upon the record, with the view of dispelling any misapprehension in that respect, declared that by the present proceedings, the Crown is only expropriating the leasehold interest, and that the defendant may remove and retain, as its own property, all the fixtures, fittings and equipment of the defendant in the said premises, including all contents of the restaurant.

1928  
 THE KING  
 v.  
 ELITE CAFE  
 LIMITED.  
 Audette J.

Approaching the consideration of the controversy as to fixing the compensation and the rights of the defendant thereto we are, *in limine*, met with the objection, raised at trial, that the lease under which the defendant claims was executed and signed only by the landlords, and that it is therefore null and void; a momentous question, indeed, which goes to the very root of the claim and the right of the defendant to recover.

It is quite true that the lease is not signed by the defendant company, and this error may have arisen from the facts that the landlords are also the Elite Cafe Ltd., being the only shareholders in that latter company. However, the lease is purported to be signed by both lessors and lessee—but it is only signed by the five owners of the building and not by the corporate name of the lessee.

Counsel at trial admitted the lease had been registered.

The plaintiff in attacking the lease for want of the defendant's signature relies on sec. 92 of The Land Titles, R.S.S., ch. 67. That section throws upon the owner, *the party to be charged*, the onus of executing a lease, but under Form M., therein referred to, it is both provided for the acceptance of the lease by the lessee and for his signature.

Be all this as it may, it has been held in many cases, a number of which are gathered at p. 120 of Woodfall's Law of Landlord and Tenant, 21st ed., that while a lease must be signed by the party to be charged, it need not be signed by both parties. Therefore the obligation in the present case would not be only unilateral, but would indeed be with mutuality, even if the lease is unsigned by the occupants the defendants. See also upon this question Encyclopedia of the Laws of England, verbo Fraud, Statute of, vol. VI, pp. 268-9; Fry's Special Performance of Contract, 4th ed., pp. 230-1; Leake's Law of Contract, 4th ed., p. 184.

Undoubtedly this question of lease being a matter of property and civil rights, within the exclusive powers of the Provincial Legislature, the Court in ascertaining the estate or interest of persons claiming compensation thereunder in expropriating by the Dominion Crown, will have regard to the laws affecting such estate and interest in the province where the property is situated, notwithstanding secs. 25 and 26 of The Expropriation Act.

However, the lessee has an undoubted right, as against the landlord, to the performance of the lease, and that is the right which is now expropriated. His acceptance of the lease need not be in writing and he has signified his acceptance of the lease by the overt act of occupying the premises and paying the rent. The whole dealings between the parties establish a legal right enforceable against the Crown in expropriation proceedings wherein indeed the subject has to surrender his rights by compulsion and not at his invitation. And while there is no waiver by the Crown yet, by the pleadings, it recognizes the rights of the lessee to be compensated, and the amount tendered could only have been in consideration of a five year lease—otherwise the amount would have been much less. The lessee should be compensated for such damages as it has actually sustained in respect of his leasehold interest.

1928  
 THE KING  
 v.  
 ELITE CAFE  
 LIMITED.  
 Audette J.

The defendant carries on a restaurant business, upon the premises in question, under the name of the Elite Cafe. It is, according to the evidence, the best cafe in the city of Regina. However, notwithstanding its equipment, the good name attached to it, the financial results of the company is far from satisfactory and that will have to be measured and weighed when considering the question of goodwill. Is it due to the fact that the rent payable under their lease is too high notwithstanding that the salaries were too low? That has certainly contributed to it. Will not the company benefit by finding and moving into a new location which they could occupy under better conditions and terms?

In 1926, the company joined in giving an option with the owners for \$150,000, covering the land, the building, the cancellation of the lease and walk out. It was then quite ready to get other premises to carry on their business. The manager, witness Girgulis, in his examination on Discovery, testified that their intention was to try and obtain new suitable premises. At trial he declared he did not expect to retire and intended to continue if he could get a location, and added that one block or one block and a half away would do for his business.

I am quite satisfied that the defendants can and will, if they look around and inquire, find in a city like Regina, new premises to continue their operation, if they see fit and

1928  
 THE KING  
 v.  
 ELITE CAFE  
 LIMITED.  
 Audette J.

could do so with better financial result under reduced rent. As it is the company could not carry on much longer losing money, notwithstanding the low salaries paid to the managing officers; they had gone behind in their payments of rent, salaries, etc., at the time of renewing the rent. At the end of the year 1926 the arrears of rent appeared to have been about \$16,000.

Then is not the goodwill of a business financially so unsatisfactory almost left with the mere hope and probability that old customers will resort to the old Elite Cafe? And in such a case it would mean the name of the cafe and the popularity and the good name attaching to the personality of the persons operating the restaurant, all of which will pass over to the new premises the company will occupy within a reasonable compass and zone of the present premises. The expropriation does not take away from the lessee its commercial qualities, its initiative, nor the goodwill of his clients.

Now the negotiations for the purchase of this property and the leasehold interest were started in April, 1927, and yet the lease in question was signed on the 11th May, 1927, when the defendant was quite aware, as admitted by their manager, that the Crown was expropriating for the purpose of enlarging the Post Office building at Regina. See *Ex parte Edwards* (1).

As I had occasion to say in previous cases and as stated by Nichol, on Eminent Domain, p. 714, it is no simple matter to fix the market value of an unexpired term of a lease; it is almost impossible to apply the customary test of market value to a leasehold interest. It is no test at all, because a lease rarely has any market value and that especially applies to the present lease under the financial circumstances mentioned above. It would seem that a lease in this country,—contrary to the custom of trade in France—might be held to fall within the class of property not commonly bought and sold and that therefore the intrinsic value or the value to the owners might be taken as the best and only available test of market value. The value to the owner of a lease, when he is paying the full rental value of the premises as rent, is the right to remain in un-

disturbed possession to the end of the term. But in this case it is to the advantage of the defendant to put an end to their business under such onerous tenancy and to improve its position by going somewhere else, *the abatement of rent necessarily* following since the building has also been expropriated and that the landlord cannot exact his rent.

1928  
 THE KING  
 v.  
 ELITE CAFE  
 LIMITED.  
 Audette J.

The amount of compensation to be awarded cannot be fixed with mathematical certainty, but must largely be a matter of conjecture, after taking all the circumstances into consideration.

Bearing in mind the declaration made at the opening of the trial by counsel for the plaintiff, as above recited, that the expropriation is of the leasehold and that the defendant may remove and retain as its own property all the fixtures, fittings and equipment in the premises, including all the contents of the restaurant,—which is only repeating the legal effect of the expropriation under the present circumstances,—I will now proceed to fix the compensation.

The compensation must be such as to cover all reasonable cost of moving, refitting and settling the new premises, the loss of time in seeking new location, and more especially the depreciation of these valuable business fixtures and fittings, including plumbing which is its full value, additional depreciation of fixtures and equipment from moving, etc., all what was mentioned at trial in such classes; furthermore a certain allowance should be made for the dislocation or disturbance of business occasioned by the removal and all incidental legal elements of compensation for all damages done to his tenancy arising out of the expropriation—all of these allowances being very difficult of estimating in detail. The defendant is entitled to recover all such damages and losses as are the natural result of the expropriation and he should not be any poorer or richer than before the expropriation.

Adverting duly to what must enter into the compensation I am of opinion, having regard to the several considerations above mentioned that the total sum of \$35,877.05, including 10 per cent for compulsory taking, will be an ample, fair and just compensation to the defendant under the circumstances.

1928  
 THE KING  
 v.  
 ELITE CAFE  
 LIMITED.  
 Audette J.

Now the compensation allowed is greater than the amount tendered and offered by the Crown and it therefore primarily carries interest from the date of the expropriation to the date hereof. However, the defendant company was still in occupation of the premises and operating their business at the date of the trial, and at the date the Court was viewing the premises, and the defendant cannot recover both the interest and occupy the premises. I will therefore hereby reserve leave to either party to apply to the Court for further direction in respect of the question of interest and occupation under the circumstances. Indeed, if the defendant were to stay in occupation during the whole life of the lease, it would have no claim to compensation. *Syers v. Metropolitan Board of Works* (1). Will the defendant be allowed to remain in possession of the premises for the whole life of the lease, paying rent to the plaintiff? The defendant has paid rent up to January, 1928.

Therefore there will be judgment as follows, to wit:

1. That the leasehold interest of the defendant in the premises in question is vested in the Crown as of the 10th October, 1927.

2. That the compensation for the said leasehold interest is hereby fixed at the sum of \$35,877.05, in full satisfaction for any loss or damages whatsoever arising out of the expropriation and the termination of the defendant's tenancy of the said premises in advance of the expiry of its term of occupation under its lease, the whole with interest thereon from the 10th October, 1927, to the date hereof.

3. That the defendant is entitled to be paid the said sum of \$35,877.05, the question of interest being held in abeyance until the parties, or either of them, move for further direction, upon material showing if the defendant is still in occupation and will further occupy, and any fact relating thereto, in respect of the question of interest and occupation.

4. The defendant will further be entitled to the costs of the action.

*Judgment accordingly.*

THE GOODYEAR TIRE & RUBBER }  
COMPANY .....

PLAINTIFF;

1928  
Dec. 3, 4 & 5.

VS.

THE RUBBER SERVICE LABORA- }  
TORIES COMPANY .....

DEFENDANT.

1929  
Jan. 23.

*Patents—Conflict—Rule 343—Undesirability of moving to amend sealed statement—International convention—Abandonment and estoppel—Invention.*

*Held*, That rule 343 of the General Rules and Orders of this Court requiring the parties, in a conflict action, within ten days after issues joined, to file, in a sealed envelope, a statement giving the date on which they claim to have invented the matter described in their application, was made to avoid placing a person between his duty and his interest, and whilst an application at trial to amend such statement, by giving a later date, was granted, the Court observed that such an application created an undesirable atmosphere.

- 2. That in a case of conflicting applications the Court has to decide who is the first inventor and not who first filed an application for a patent, and where the first inventor filed his application after a later inventor, a plea of abandonment or estoppel cannot be set up upon the ground of delay in making his application.
- 3. The words "not known or used by others before his invention" must be read alone, as they are without any qualification attached to them (*Wright v. Brake Service*, (1926) S.C.R. 434, referred to).
- 4. Under the International Convention, where inventors have filed applications for patents for invention in the United States and subsequently apply for patents in Canada for the same thing, they are entitled to have the priority of invention determined by the date of the filing of their applications in the United States.
- 5. That the true inventor is not he who first may say to himself that such and such a thing might be done, but he who works out the idea to completion and success and shows how it is done.

ACTION brought before this Court, under Section 22 of The Patent Act, for a declaration as to who, as between plaintiff and defendant, was the first inventor of the subject matter of their applications for patent, in respect to which the Commissioner of Patents had declared a conflict.

The action was tried before the Honourable Mr. Justice Audette, at Ottawa.

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

*R. S. Cassels, K.C.*, and *H. Cassels* for defendant.

The facts are stated in the reasons for judgment.

1929

AUDETTE J., now (January 23, 1929), delivered judgment.

GOODYEAR  
TIRE &  
RUBBER CO.  
v.  
RUBBER  
SERVICE  
LABORATORIES  
Co.

This is a case of conflicting applications for a patent relating to certain new and useful improvements in *Accelerators of Vulcanization* or otherwise called *Rubber Vulcanization Accelerators*.

An accelerator, as defined at trial, is a chemical compound which, when mixed with rubber, sulphur and zinc oxide causes the manufacture of rubber to take place in a shorter time than it would otherwise require and gives improved results as well. It increases the life of rubber compound in a great many cases, shortens the time of vulcanizing and gives improved results in the rubber.

Now the matter comes before this Court as a matter within its ordinary curial functions, and as set forth in sec. 22 of The Patent Act "for the determination of the conflict." The controversy is narrowed down or limited to the question of priority of inventorship between the parties. Who is the first inventor? And, under the numerous decisions of this Court, the Supreme Court and the Judicial Committee of the Privy Council (*The Permutit Company v. G. L. Borrowman*) (1), the consideration of the question of priority must be approached on the assumption that the Commissioner of Patents has found that the patent applied for is a meritorious one and involves invention.

At the beginning of the trial, both counsel stated that the inventors, Messrs. Sebrell and Scott, would be heard as witnesses before the Court, and they in agreement asked leave to read and use at trial the evidence of several witnesses, on corroboration of the inventors, heard before the American Commissioner of Patents.

The application was refused; but, with much hesitancy and doubt, not to be used as a precedent, I allowed the parties to file an admission, to which such evidence was attached, stating that both parties agreed that Thomas W. Bartram, George L. Magoun, Herman K. Eckert, Paul T. Bricker, Charles R. Dawson, E. R. Waite and C. O. North, if called as witnesses in this case, would give the questions and answers set forth in the annexed printed record, and that the said record may be used with the same force and

(1) (1924) Ex. C.R. 8; (1926) 4 D.L.R. 285; 43 R.P.C. 353.



effect as if the witnesses had been called and had given the said evidence. The whole filed as exhibit B. (See also Exhibit 13.)

1929  
 GOODYEAR  
 TIRE &  
 RUBBER Co.  
 v.  
 RUBBER  
 SERVICE  
 LABORATORIES  
 Co.  
 Audette J.

Speaking generally, the subject of the inventions may be termed a reactive product or compound, formed from the chemical reaction between what is termed a mercaptan compound and a saturated organic base. This reaction product is described in Dr. Sebrell's laboratory note-book as of mercapto benzothiazole with ammonia, with ethylamine, with dimethylamine and amylamine, or with substances as theophenol, to cause it to react with a number of mercaptans, such as theophenol or mercaptobenzothiazole.

Both inventors being chemists engaged in the laboratories of the respective parties, seem to have proceeded in a similar manner to arrive at their discovery, which is the result of experiments in the laboratory, to be followed by the patent department of their company applying for a patent. That department in the plaintiff company—perhaps because of being a larger company having more business to discharge, was not as diligent as the department of the defendant company, in making the application for a patent. That, however, will be again hereinafter mentioned.

The status—if I may use this expression of the respective inventors, Sebrell and Scott—may be summarized as follows, viz:—

*Sebrell*

- Conception . . . . . 30th Noverber, 1923.
- Reduction to practice . . . . . 4th March, 1924 (February and March, 1924).
- Commercial use . . . . . June and December, 1925,  
 on balloons and solid  
 tire—involving sales.
- U.S. application . . . . . 8th October, 1926.
- Canadian application . . . . . 1st September, 1927.

1929

Scott

GOODYEAR  
TIRE &  
RUBBER Co.

v.  
RUBBER  
SERVICE  
LABORATORIES  
Co.

Audette J.

Conception (by amendment). 25th September, 1924.  
Reduction to practice in U.S.. 10th February, 1925—with  
some work done in Aug.,  
1925.

Commercial use . . . . . December, 1925.

Application for patent in U.S. 9th October, 1925.

Application for patent in  
Canada . . . . . 6th October, 1926.

It will be realized that this is not one of the critical cases where the Court is called to decide between conception and reduction to practice, because the plaintiff is prior in conception, reduction to practice and commercial use.

Dr. Sebrell has obviously made a *primâ facie* case of priority.

There is more. Before entering into the consideration of the facts with the statute, it is well to say that Dr. Sebrell had, at previous times, been a co-inventor of this material of mercaptobenzothiazole for use as an accelerator of rubber vulcanization with Mr. C. W. Bedford. He had invented that material in 1920, so that in 1924, he had had several years of experience in working with mercaptobenzothiazole in different forms and under different conditions. (P. 35 of evidence.)

This matter is brought up in the course of the evidence when questions are put to him to explain letter exhibit A. In effect it amounts to this, that after having obtained a sample of Z<sup>88</sup>, his preliminary analysis of the same revealed the presence of mercaptobenzothiazole. The rest of the compound of its exact composition was still then unknown to him for a much longer period of time; but, having as the result of this preliminary analysis, found this mercaptobenzothiazole, and thinking therefore it had been made according to his earlier United States patents, he assumed his previous patents infringed and that is the reason why these patents were mentioned in Exhibit A.

The final analysis of Z<sup>88</sup> was not completed by Sebrell until (much) long after the time the plaintiff's application was filed.

On the other hand, dealing with the defendant's case also, on preliminary facts, I must say that in compliance with rule 343, of the Rules and Orders of this Court, reading as follows:

1929  
 GOODYEAR  
 TIRE &  
 RUBBER Co.  
 v.  
 RUBBER  
 SERVICE  
 LABORATORIES  
 Co.  
 Audette J.

343. In all cases of conflicting applications for a patent, each applicant shall, within ten days after the issues are joined upon the pleadings, file with the Registrar of the Court in a sealed envelope a statement in writing duly signed by him setting forth the date on which he claims to have invented the matter or thing alleged to have been invented by him in his application for a patent, and each party making disclosure as aforesaid shall be bound by the date of his alleged invention so established. that each party complied with the provisions of the same.

In this statement, the defendant sets forth that he has conceived and disclosed his invention in the United States on the 1st February, 1924.

However, when we come to trial, an application is made to amend the same and to declare the conception and disclosure of the invention in the United States is the 25th September, 1924. At the date of the compliance with rule 343 there was no interest to adhere to one date or the other because then he did not know the plaintiff's date, but at the time of the amendment he did. This places us in an undesirable atmosphere.

Indeed the rule was made with the very object of preventing the parties disclosing the date of their invention when they knew of the date of the invention in the conflicting application. All of this was to avoid placing a person between his duty and his interest.

I allowed the amendment because it moved the date back, but I dislike the atmosphere of this change of that date and would rather it had not occurred, especially in view of the fact that the evidence now before the Court does not justify the shadow of a reason for him to have named the 1st February, 1924, in his first disclosure.

Coming now to the consideration of the controversy under its legal aspect, it must be found that the true issue rests on the determination as to who is the first inventor of this reaction product of those mercaptan compounds with saturated organic basis, for the purpose of an accelerator in the manufacture of rubber.

There is no controversy as to what the parties actually did and we are met with the same class of evidence to prove the contention of the respective parties.

1929  
 GOODYEAR  
 TIRE &  
 RUBBER Co.  
 v.  
 RUBBER  
 SERVICE  
 LABORATORIES  
 Co.  
 Audette J.

The question, as defined by the statute, is who invented first, and not who first applied for the patent. And when the applications have been filed within the delay mentioned in the statute, it would seem subversive to the substance of the law, to contend that he who applied first should succeed. The question of abandonment or estoppel by laches of delay cannot arise in a case like the present one. The application was made within the statutory delay. When both applications are before the Patent Office without any determination upon either of them,—an abandonment or estoppel cannot be pleaded on the ground that one application came long after the other.

See upon this question *Mason v. Hepburn* (1), where the inventor did not disclose his invention for seven years and yet was found the first inventor.

See also *Esty v. Newton* (2); *McBerty v. Cook* (3); *Gaisman v. Gillette* (4); *Pierman v. Chisholm* (5); *Hubbard v. Berg* (6); *United States v. Bell Telephone Company* (7); *Chapman v. Wintroath* (8).

Furthermore one must distinguish this case from cases where a second applicant comes after the statutory delays or when a patent has already been granted and issued. This is not the case under consideration.

Section 7 of the Patent Act is as follows:

7. (1) Any person who has invented any new and useful art, process, machine, manufacture or composition of matter or any new and useful improvements thereof, not known or used by others before his invention thereof and not patented or described in any printed publication in this or any foreign country more than two years prior to his application and not in public use or on sale in this country for more than two years prior to his application may, on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property in such invention.

Now the evidence establishes that Sebrell conceived or invented his reaction product, reduced it to practice and even to commercial use, in applying it upon balloon and

- |                                                             |                                                |
|-------------------------------------------------------------|------------------------------------------------|
| (1) (1898) 13 App. C., Dist. of Col. 86, at pp. 93, 94, 96. | (5) (1916) 44 App. C., Dist. of Col. 460.      |
| (2) (1899) 14 App. C., Dist. of Col., 50                    | (6) (1913) 40 App. C., Dist. of Col. 577, 585. |
| (3) (1900) 16 App. C., Dist. of Col. 133, 134.              | (7) (1897) 167 U.S. 224 at 247.                |
| (4) (1911) 36 App. C., Dist. of Col. 440.                   | (8) (1920) 252 U.S. 126 at 137.                |

solid tires, before Scott (defendant) conceived the idea of his invention.

The words of sec. 7 "not known or used by others before his invention" obviously apply to Sebrell, while it cannot apply to Scott who is alleged to have invented not only after the plaintiff did invent, but even after his product had been reduced to practice and used commercially. The invented product claimed by Scott was known and used by Sebrell before he invented and the public will only know of the ingredients of the product from the specification when the patent is granted and becomes known.

These words "not known or used by others before his invention" commented in the case of *Wright v. Brake Service* (1) must be read alone as they are without any qualification attached to them. The *Laforce* case was also discussed in the latter case. And as said in the Judicial Committee of the Privy Council in the case of *The Pope Appliance Corporation v. The Spanish River Pulp and Paper Mills, Limited*, (1) (unreported),

After all what is invention? It is finding out something which has not been found by other people.

The Patent Office has decided what and where is the conflict and it is now for the Court to determine who is the first inventor of the subject matter in conflict,—since the Patent Office has no power or authority to decide the same.

The case of *Corona Cord Tire Co. v. Dovan Chemical Corporation* (2) dealing, as in the present case with rubber accelerators. is quite illustrative and apposite. At p. 387 (8), after stating that the accelerators had been reduced to practice in the production of cured or vulcanized rubber, as in the present case,—the Court says:—

This constitutes priority in this case. It was not followed by commercial use thereafter, because of the then cost of D.P.G. But this patent is for the mere discovery and application in the making of rubber of a particular accelerator. It was the fact that it would work with great activity as an accelerator that was the discovery, and that was all, and the necessary reduction to use is shown by instances making clear that it did so work, and was a completed discovery.

(1) (1926) S.C.R. 434.

(2) (1927) 48 S.C. Reporter 380.

*Reporter's Note:* (1) Judgment allowed on the 23rd November, 1928.

1929  
 GOODYEAR  
 TIRE &  
 RUBBER Co.  
 v.  
 RUBBER  
 SERVICE  
 LABORATORIES  
 Co.  
 Audette J.

1929  
 GOODYEAR  
 TIRE &  
 RUBBER Co.  
 v.  
 RUBBER  
 SERVICE  
 LABORATORIES  
 Co.  
 Audette J.

Reduction to use, as in the present case, makes the discovery complete.

(9) It is said that these tests of ——— were mere abandoned laboratory experiments. There was no abandonment in the sense that ——— had given up what he was seeking for in demonstrating a new and effective accelerator in D.P.G. If he had been applying for a patent for the discovery he clearly could have maintained proof of a reduction to practice. A process is reduced to practice when it is successfully performed. A machine is reduced to practice when it is assembled, adjusted and used. A manufacture is reduced to practice when it is completely manufactured. A composition of matter is reduced to practice when it is completely composed.

\* \* \* \* \*

It is a mistake to assume that reduction to use must necessarily be a commercial use. If ——— discovered, and completed, as we are convinced that he did, the first use of D.P.G. as an accelerator in making vulcanized rubber, he does not lose his right to use this discovery when he chooses to do so for scientific purposes or purposes of publication or because he does not subsequently sell the rubber thus vulcanized or use his discovery in trade or does not apply for a patent for it. It is not an abandoned experiment because he confines his use of the rubber thus produced to his laboratory or to his lecture room.

Although the Canadian applications are filed at the dates given, the applicant is entitled to have the priority determined under the United States date by reason of it having been filed under the International Convention. Therefore, it would seem that the date to be considered, is the date of the filing in the United States, and that applies to both parties. See Exhibit No. 1.

The facts establish, beyond controversy, that the idea of the compound for the purpose of accelerator in rubber, had flashed upon the mind of Sebrell, and that he reduced his discovery both to practice and commercial use, long before it appears to have been thought of by Scott. However, it may be added, an inventor is not the person who first may say to himself that there may be some way of using some given chemical compound to be used as rubber accelerator; but the true inventor is he who works out the idea to completion and success and shows how it is done. Sebrell in that true and genuine sense is the first inventor. His discovery is described with minute and convincing fidelity and is corroborated by a number of witnesses.

Therefore, I have come to the conclusion to adjudge and declare Sebrell, the plaintiff's assignor, and not Scott, the defendant's assignor, the first inventor of the subject-matters of his application for a patent, as above referred to. The whole with costs in favour of the plaintiff.

*Judgment accordingly.*

OCEANIC STEAMSHIP NAVIGATION }  
 CO., LTD. .... } PLAINTIFF;

1927  
 Dec. 30.

v.

THE SS. *LINGAN* ..... DEFENDANT.

AND

THE LINGAN STEAMSHIP CO., LTD. .... PLAINTIFF;

v.

THE SS. *DORIC* ..... DEFENDANT.

*Shipping—Collision—Good seamanship—Harbour*

On June 19, 1927, at 9.43 p.m., the night being fine and clear, the *D.*, a passenger boat, was moored in Quebec Harbour heading down stream and had all required lights, and was otherwise lighted up as a passenger boat. There was a flood tide of three miles an hour and the *D.* being bound for Montreal had to turn to go up the river. The river at this point is about 3,000 feet in width. The *D.* when leaving dock gave three blasts to warn ships in dock. There was then no other ship in sight except one coming up from the Island of Orleans. After working the engines for 7 minutes to clear the shore, the *D.* went ahead and started to turn, the flood tide helping her. The collision took place 6½ minutes later about 600 feet from the south shore, the starboard bow of the *L.* striking the portquarter of the *D.* Before porting her helm, the *D.* gave one blast indicating she was directing her course to starboard. The *L.*, a freighter, was then below Buoy 140 B., and showed her red light, but suddenly, as the *D.* was pointing to the south shore, the *L.*, which was over half a mile away, starboarded her helm, changed her course and began to show her two lights, then a green light only. As the *L.* changed her course, the *D.* gave a second short blast, to which the *L.* replied with two short blasts, indicating she was altering her course to port, which course she continued to follow until the collision. When 750 feet from the *D.*, the *L.* reversed her engines, but too late. It was impossible for the *D.* to go full speed for fear of grounding, but to ease the blow she starboarded her helm, put her port engine astern and the starboard engine ahead.

*Held*, on the facts, that by attempting to pass starboard to starboard instead of going between the north shore and the stern of the *D.*, and by starboarding her helm when she did the *L.* violated the rules of good seamanship and was wholly to blame for the collision.

2. That although a vessel emerging from a dock must be navigated with utmost care, yet other vessels should be manoeuvred with consideration to the difficulties of the vessel that is emerging. The manoeuvres and caution to be taken in such cases all depend on the distance at which the ships sight each other.

These two actions, consolidated for purposes of the trial, were the result of a collision between the SS. *Doric* and the SS. *Lingan*.

1927  
 OCEANIC  
 STEAMSHIP  
 NAVIGATION  
 Co., LTD.  
 v.  
 SS. *Lingan*  
 AND  
 LINGAN  
 STEAMSHIP  
 Co., LTD.  
 v.  
 SS. *Doric*.

The actions were tried before the Honourable Mr. Justice Archer, at Montreal, assisted by two assessors.

*Arthur Holden, K.C.*, for the SS. *Doric* and the Oceanic SS. Navigation Co., Ltd.

*L. Beauguard* for the SS. *Lingan* and the *Lingan* SS. Co., Ltd.

The facts are stated in the reasons for judgment.

ARCHER J., now (December 30, 1927), delivered judgment (1).

These two actions *in rem* were joined for the purposes of the trial and judgment.

At about 9.43 p.m. on June 19, 1927, the SS. *Doric* and the SS. *Lingan* came into collision in the River St. Lawrence opposite the city of Quebec, at about a distance of 600 feet from the south shore (Levis).

The SS. *Doric*, commanded by Captain Samuel Boulton, is a passenger ship of 9,870 tons net, 16,084 tons gross. She is a twin screw ship, measuring 601 feet in length and 61 feet 5 inches beam, and at the time of the collision was drawing 25 feet forward and 26 feet 8 inches aft. Her speed is 16 knots in smooth water.

The SS. *Lingan* is a freight boat, carrying coal from Sydney to Montreal. She was under the command of Captain Lewis. Her length is 375 feet and her beam is 52 feet. She was drawing 29 feet forward, and 25 feet aft. Her tonnage is 4,676 gross, 2,603 net. Her speed is about 9 knots. At the time of the collision Captain Lewis was on the bridge with the mate and third mate.

On the evening in question there was no wind to speak of. The weather was fine and clear, and there was a flood tide running about 3 knots.

The River St. Lawrence is approximately 3,000 feet wide at the place of the collision.

The plaintiff's case is as follows:—(His Lordship here cites from pleadings.)

---

(1) The judgment herein was appealed to this Court, and on the 19th November, 1928, was affirmed by the Honourable Mr. Justice Maclean, the Court observing that the trial of actions upon evidence taken before another tribunal was an undesirable practice, and should not be encouraged.



The case of the *Lingan* is as follows:—(His Lordship here cites from pleadings.)

It is claimed by the *Lingan* that amongst the faults attributable to the *Doric* is that the *Doric* began to turn in a frequented channel at a moment when a vessel was seen down the river impelled by flood tide, and that the *Doric* should have waited the passing of the *Lingan*.

By consent of the parties this case was submitted on the evidence taken before the Wreck Commissioner, subject to the right of the parties to recall the same witnesses. Two witnesses were recalled, Captain Boulton and Pilot Angers of the *Doric*, both of whom have had considerable experience in navigating the St. Lawrence.

Some of the evidence is most unsatisfactory, especially as the witnesses give illustrations with models as to the positions of the ships and this court has not had the benefit of seeing all such illustrations.

At 9.30 p.m. on June 19, 1927, all hands were at stations on the *Doric*. The Chief Officer and the Second Officer were on the forecastle-head, and the fourth and fifth officers were on the bridge with the Captain and the Pilot. The first and third officers were aft. The *Doric* was then moored at Berth 26 (See Exhibit L-1) heading downstream, and being bound for Montreal had to turn to proceed up the river. In starting from the wharf after the lines had been cast off the ship went astern, and three blasts of the whistle were given in case some ship might be coming out of the docks which are indicated in Exhibit L-1. At that time there was no other ship in sight except a ship coming up from the Island of Orleans. After working the engines for seven minutes to clear the shore the *Doric* went ahead and started to turn opposite the breakwater, which is indicated by the letter "A" on the chart Exhibit L-1, the flood tide at that point would help her to turn more rapidly. The collision took place six and a half minutes later. Before porting her helm Pilot Angers of the *Doric* gave a signal of one blast of the whistle, indicating that he was directing his course to starboard.

The Master of the *Lingan* claims he only got a one-blast whistle from the *Doric* in answer to his two-blast signal, and he then thought the *Doric* was to proceed down the river. I do not believe this statement. The first signal

1927  
 OCEANIC  
 STEAMSHIP  
 NAVIGATION  
 Co., LTD.  
 v.  
 SS. *Lingan*  
 AND  
 LINGAN  
 STEAMSHIP  
 Co., LTD.  
 v.  
 SS. *Doric*.  
 Archer  
 L.J.A.

OCEANIC  
STEAMSHIP  
NAVIGATION  
Co., LTD.  
v.  
SS. *Lingan*  
AND  
LINGAN  
STEAMSHIP  
Co., LTD.  
v.  
SS. *Doric*.  
Archer  
L.J.A.

was certainly given by the *Doric*, and the Master of the *Lingan* had no right to believe the *Doric* would proceed down the river. It is rather difficult to determine exactly at what distance the *Lingan* was at that time, but there is no doubt she was at some distance below buoy 140-B. She then showed her red light to the *Doric*, and I believe the officers on watch on the *Doric* when they say that owing to the distance between the ships there could not be any anticipation whatsoever of trouble. Suddenly the helm of the *Lingan* was put astarboard and she commenced to show her two lights, and then her green light only. The *Doric* gave a second short blast of her whistle, and in answer the *Lingan* gave two short blasts indicating she was altering her course to port, and continued to follow this course up to the time of the collision.

It is claimed by the Captain of the *Doric* that when he gave the second signal of one blast the *Lingan* was one mile away. The Captain of the *Lingan* claims he was 2,000 feet away at that time, and that he stopped his engines. Why not reverse? It is certainly difficult for the witnesses to give the exact distance between the two ships, and there is a certain amount of guessing. On the whole, however, when we consider the time that elapsed after the *Doric* started to turn, the speed of the ships, the time of the collision, the place of the collision, and all the evidence, it seems clear that the *Lingan* was much farther down than is claimed by the defendant. I would say the *Lingan* was somewhat over half a mile away at that time.

The *Doric* was then pointing towards the south shore, and gave another blast of her whistle, which was again answered by a two-blast signal. When at a distance of about 750 feet from the *Doric* the *Lingan* reversed her engines, but too late to prevent the collision. As the *Doric* was approaching the south shore it was impossible for her to go full speed on account of the danger of running aground on the south shore, and her helm was put astarboard, and her port engine astern and her starboard engine ahead, to ease the blow. The starboard bow of the *Lingan* struck the port quarter of the *Doric*.

Much of the evidence given on behalf of the *Lingan* is incredible. If the court accepted the evidence of Captain Lewis and the evidence of the other officers on watch on

board the *Lingan* it would be impossible to explain how the collision could have happened. The *Lingan's* witnesses claim the ship was abreast of buoy 140-B when the *Doric* was still parallel to the wharf, and the Captain of the *Lingan* goes so far as to say that when at that distance the *Doric* was still tied up at the wharf. A ship abreast of buoy 140-B coming up on the Quebec ranges would be approximately 900 to 1,000 feet from the end of the wharf where the *Doric* was docked (that is at the point marked "A" on Exhibit L-1) and between 1,800 and 1,900 feet from the starboard side of the *Doric* in a direct line. Even if the *Doric* had not been tied to the wharf but was still parallel with the wharf, or near the wharf, if the *Lingan* had kept the course it is claimed she was then following she would have easily passed starboard to starboard before the *Doric* attempted to turn and take her course towards Montreal.

I may say that although there may be discrepancies in the evidence produced on behalf of the *Doric* as to the time which elapsed between the different manoeuvres, and as to the distances, on the whole I accept this evidence in preference to the evidence produced by the *Lingan*. There is no doubt in my mind the signals were given as sworn to by the witnesses on behalf of the *Doric*, and that the *Lingan* coming up with a flood tide was going faster than is admitted by her Master and other witnesses.

I do not think the *Doric* started to turn when the *Lingan* was two miles away, but, as I said before, I am of opinion the *Lingan* was over half a mile away when she suddenly changed her course by starboarding her helm, and showed her green light, instead of porting her helm if necessary.

After considering the positions of the two ships when the *Doric* started to turn and when the *Doric* gave the second one-blast signal, and the place of the collision 600 feet from the south shore, my assessors and I agree that if the *Lingan* had been handled according to the rules of good seamanship there would have been no collision, as the *Lingan* could easily have passed between the north shore and the stern of the *Doric*.

It is claimed by the *Lingan* that amongst the faults attributable to the *Doric* is the fact that the *Doric* began to

1927  
 OCEANIC  
 STEAMSHIP  
 NAVIGATION  
 Co., LTD.  
 v.  
 SS. *Lingan*  
 AND  
 LINGAN  
 STEAMSHIP  
 Co., LTD.  
 v.  
 SS. *Doric*.  
 Archer  
 L.J.A.

1927  
 OCEANIC  
 STEAMSHIP  
 NAVIGATION  
 Co., LTD.  
 v.  
 SS. *Lingan*  
 AND  
 LINGAN  
 STEAMSHIP  
 Co., LTD.  
 v.  
 SS. *Doric*  
 Archer  
 L.J.A.

turn in a frequented channel at a moment when a vessel was seen down the river impelled by flood tide, and that the *Doric* should have awaited the passing of the *Lingan*. In support of the above defendant's counsel cites Marsden, 8th Edition, page 380:

As between vessels leaving docks, or coming out between breakwaters, and other vessels passing outside, the crossing rule may not apply. That, it has been said, must always depend upon the distance at which vessels sight one another. The vessel emerging must be navigated with the utmost caution, but the other vessel should be manoeuvred with consideration for the difficulties of the emerging vessel arising from obstructions, which prevent her from moving freely in all directions. A vessel, by getting under way when another is approaching, cannot put the other into the position of the give-way ship under this rule.

He also refers to the following cases: *The Llanelly* (1); *The Sunlight* (2); *The Velocity* (3); *Prince Leopold de Belgique* (4).

These cases refer to ships entering a river from the docks. In this case the officers on watch on the *Lingan* had seen the *Doric* alongside Berth 26 for some time. They saw her masthead lights and her green light, and she was all lighted up as passenger ships generally are. If they had a proper lookout they could not have helped knowing that she was moving for some time before she started to turn and take her course up the river.

The distance between the vessel emerging from the dock and the vessel coming up or down the river as mentioned in the above cases is entirely different from the present case. In this case the distance was far greater than in the cases mentioned. It is not contested that a vessel emerging from a dock must be navigated with the utmost care, but, on the other hand, as stated by Marsden, the other vessel should be manoeuvred with consideration for the difficulties of the vessel that is emerging. I am of opinion that all depends on the distance at which ships sight each other. In this case it is proven that the *Doric*, which should have been moving for some time, started to turn when the *Lingan* was quite a distance below buoy 140-B. Moreover, when the *Doric* gave a second one-blast signal, as the *Lingan* started to starboard her helm, there was then a distance of over half a mile between the vessels.

(1) (1914) P. 40.  
 (2) (1904) P. 100.

(3) (1870) 39 L.J. Adm. 20.  
 (4) (1909) P. 103.

My assessors advise me, and I agree with them, that under the circumstances proven the *Doric* was quite justified in leaving her dock as she did and that she was handled with proper care and skill.

1927  
 OCEANIC  
 STEAMSHIP  
 NAVIGATION  
 Co., LTD.  
 v.  
 SS. *Lingan*  
 AND  
 LINGAN  
 STEAMSHIP  
 Co., LTD.  
 v.  
 SS. *Doric*.  
 ———  
 Archer  
 L.J.A.  
 ———

It was held in the case of the *Gulf of Suez* (1), that the question whether the crossing rule, Article 19, applies in a case of a vessel coming out of dock and a vessel coming up or down the river depends on the distance at which they sight each other and the vessels were just sufficiently far apart for the crossing rule to apply, and the *Gulf of Suez* was blamed for not stopping or reversing her engines.

Rule 19 reads as follows:—

When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other.

For the purposes of this case I do not think it is necessary for me to determine if Rule 19 does apply as fault would attach to the *Lingan* whether the two ships were under the governance of the crossing rules or whether their conduct was to be judged by good seamanship independently of the rules.

I find the *Lingan* solely to blame.

There will, therefore, be judgment against the SS. *Lingan* and her bail for the damages proceeded for, and for costs; with the ordinary reference to the Deputy Registrar to assess the amount of damages.

The action of the *Lingan Steamship Company, Ltd.*, is dismissed with costs.

*Judgment accordingly.*

*Atwater, Beauregard & Phillimore* for plaintiff.

*Meredith, Holden, Heward & Holden* for defendant.

1929  
 Jan. 10.  
 Feb. 4.

HENRY K. WAMPOLE & CO., LIMITED.. PLAINTIFF;

AND

HERVAY CHEMICAL CO. OF CAN- }  
 ADA LIMITED ..... } DEFENDANT.

*Trade-Marks—Infringement—Packings common to the trade—Form, size or colour—“Get-up”*

For some years previous to the date of plaintiff's registration of its trade-marks in question herein, it had been common to the trade, including the defendant, to market cod liver oil in pink or red packings, similar to the plaintiffs. The defendant's package complained of however bore his name prominently at the top. This was so also of the label on the bottle itself inside. Plaintiff's outside package also bore the name "Wampole" in large letters at top. This being the essential characteristic of the two trade-marks.

*Held:* That when the goods of one manufacture are so packed or arranged externally as to resemble those of others engaged in the same trade (as in the case of starch and tea), the similarity common to all does not of itself expose the manufacturer to an action for infringement, but makes it incumbent upon him to take care that his distinguishing mark is really distinguishing. The imitation or similarity must be in respect to matters which are not common to the trade, but special to one trader. And in this case the manufacturer's name, printed in large letters at the top being really distinguishing, the public could not be deceived, and the action was dismissed.

2. A trade-mark does not lie in each particular part of the label, but in the combination of them all. It is the impression produced by the mark as a whole, *dans son ensemble*, in its "get-up" and which strikes the eye, that must be considered.
3. The user of a trade-mark does not result in what the person using it may have in mind; but what the public would obviously understand upon looking at the package.
4. There can be no trade-mark right in the mere form, size or colour of a package containing an article used commercially.
5. Where two traders are selling the same medicine, and the one prints on his bottle directions for its use, assuming such directions to be correct, it is no infringement of such label to copy or repeat such directions; otherwise his liberty as a manufacturer would be unduly interfered with.

ACTION by the plaintiff to restrain the defendant from infringing its trade-marks.

The action was tried before the Honourable Mr. Justice Audette, at the city of Quebec.

*O. M. Biggar, K.C., and H. A. O'Donnell* for plaintiff.

*The Honourable J. L. Perron and E. J. Flynn* for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now (February 4, 1929), delivered judgment.

This is an action whereby it is sought to restrain the defendant from infringing the plaintiff's specific trade-mark and from selling any cod liver extract in packages and in bottles which the plaintiff alleges have labels colourably resembling the plaintiff's two trade-marks:—one upon the outside wrapper and one upon the bottle inside of the wrapper.

For the proper understanding of this case it is thought advisable to here recite these two trade-marks and to show how often the plaintiff's name appears upon his goods.

The mark applicable to the outside package consists of a

Specific trade-mark to be applied to the sale of a preparation of Cod Liver Extract, and which consists of a four-part label, of a *peculiar salmon pink colour*, the front panel bearing the word "Wampole's" "Tasteless preparation of an Extract of Cod Liver," and descriptive matter, across which appears the signature "Henry K. Wampole & Co.," underneath is the name "Henry K. Wampole & Co. Limited"; one of the side panels, printed longitudinally, bears the words "Henry K. Wampole & Co. Limited" and descriptive matter; the corresponding side and back panels bear a translation in French.

The plaintiff's mark for the bottle, placed inside this wrapper, consists of a

Specific Trade-Mark to be applied to the sale of a preparation of Cod Liver Extract, and which consists of a label for a bottle, comprising three white panels bordered with a peculiar salmon pink, the center panel bearing the word "Wampole's", "Tasteless preparation of an Extract of Cod Liver", and descriptive matter, across which is the signature "Henry K. Wampole & Co." diagonally, in red; underneath is the name "Henry K. Wampole & Co. Limited;" one of the side panels contains the words: "Wampole's has stood the test for nearly half a century" and descriptive matter, with a translation in French underneath; the remaining panel is a translation in French of the center panel.

Both trade-marks bear date the 19th July, 1924.

It is well to bear in mind that, unlike a patent or copyright which relates to the substance of an article, a trade-mark differs from them and does not protect the substance of the article to which it is attached from being imitated; but it identifies an article and indicates the source to which that article is to be attributed. The function of a trade-mark is to identify goods of an individual.

The evidence discloses that cod liver oil has been on the market in similar pink or red packings for a number of years. This similarity, common to so many in that trade,

1929

HENRY K.  
WAMPOLE  
& Co., LTD.

v.  
HERVAY  
CHEMICAL  
Co. OF  
CANADA,  
LTD.

1929

HENRY K.  
WAMPOLE  
& Co., LTD.

v.

HERVAY  
CHEMICAL  
Co. OF  
CANADA,  
LTD.

Audette J.

has in the present case been made distinguishable, among other manners, by the name of each party in very large type placed at the most conspicuous part of the packing, at the very top of the wrapper to avoid any confusion and possibility of deception. Here, there is the signature across Wampole's wrapper in very striking type, which is not correspondingly to be found on Hervey's wrapper.

The defendant was using similar packing, with almost the same colour, upon the same article, some twenty-five years ago and more, as shewn by exhibit No. 3. A number of other such packings, practically of the same colour, were also used for a number of years back by a number of cod liver oil manufacturers; all before the date of the registration of the plaintiff's trade-mark. *Fafard v. Ferland* (1). The registration, by the plaintiff, of these trade-marks did not *per se* give him any new rights in respect thereto.

When goods of one manufacturer are so packed or arranged externally as to resemble those of others engaged in the same trade (as when starch was put up commonly in the trade in packets of a certain colour and appearance, tea in well known kind of boxes, flour in barrels) the similarity common to all does not of itself expose the manufacturer to an action; but it makes it incumbent upon him to take care that his distinguishing mark is really distinguishing, as in the present case. *Sebastian*, 14 ed. 154. *Payton & Co. Ltd. v. Snelling, Lampard & Co. Ltd.* (2); *Payton v. Titus Ward & Co. Ltd.* (3); *Smith Potato Crisps Ltd. v. Paige's Potato Crisps Ltd.* (4). The trend of the law is strongly towards the proposition that in ordinary circumstances the adoption of packages of peculiar form or colour alone, unaccompanied by any distinguishing symbol, letter, sign or seal, is not sufficient to constitute a trade-mark. If the article produced by one person is the same as that produced by another, and the latter is quite at liberty to produce the same article, and if the directions used by the latter are the correct directions for use of the former's article, he can only repeat them. In fact, if he could not give the appropriate directions for using the

(1) (1903) 6 Q.P.R. 119.

(2) (1899) 17 R.P.C. 48, at p. 50.

(3) (1899) 17 R.P.C. 58.

(4) (1928) 45 R.P.C. 132 at 136.



article which he is entitled to make, his liberty to manufacture would be unduly interfered with.

In other words the imitation or similarity must be in respect to matters which are not common to the trade but special to the plaintiff.

Can a wrapping be made the subject of a trade-mark by only being coloured, without any other distinguishing features? *Smith v. Krause* (1); *Philadelphia Novelty Mfg. Co. v. Blakesley Novelty Co.* (2).

The difference between the plaintiff's and the defendant's wrappers is honestly accentuated by the name of each trader, in very large type. No one could be deceived, because the name of each trader is what necessarily strikes the eye upon looking at the package.

*Distinctiveness* is of the very essence of the mark and that principle applies to the component parts visible upon the exterior of the package. Distinctiveness means adoption to distinguish. Sebastian 55.

The trade-mark does not lie in each particular part of the label, but in the combination of them all. It is the impression produced by the mark as a whole, *dans son ensemble*, in its "get-up" that must be considered. It is the appeal to the eye that must control and decide. The essential characteristic of the two trade-marks in question is the name of each trader at the very top of the package, which is the main feature of the whole "get-up."

The user of a trade-mark does not result in what the person who makes use of it may have in his mind; but what the public would obviously understand when the name or trade-mark is impressed upon the wrapper or the bottle. And the weight of the evidence, with which I concur, establishes that in view of the name so largely printed and disposed in such conspicuous place and manner, the public, even the unwary and incautious purchaser, could not be made or led to purchase the goods of one party for that of the other.

Coming to the joint consideration of the outside wrapper with the bottle inside the same, upon which much stress was put at trial, it would seem that if one would stop and think, that the answer to the matter is indeed

(1) (1908) 160 Fed. Rep. 270 at 271.      (2) (1889) 40 Fed. Rep. 588.

1929

HENRY K.  
WAMPOLE  
& CO., LTD.  
v.  
HERVAY  
CHEMICAL  
CO. OF  
CANADA,  
LTD.  
Audette J.

that if a purchaser cannot be deceived by the outside cover—the wrapper in which the bottle is sold without being exhibited at the time of sale—how can it be logically contended that he could or might be deceived by the label on bottle inside the wrapper. The evidence even discloses that a commercial traveller selling the plaintiff's goods for a number of years had never looked at the bottle inside and could not speak in respect of the same.

Each bottle,—of either party—bears the name of each trader as upon the wrapper, and the description or direction as to use; but the same language cannot be invoked as infringement for the reasons above set forth.

If a purchaser bought a Hervay bottle from the outside wrapper, he expects a bottle of Hervay inside. When the wrapper is broken and he extracts the bottle from the inside he obviously sees in large type the name of Hervay, which confirms him that he has what he bought and he could not, under such circumstances, in any way conceive that he has a Wampole bottle.

This cod liver oil is sold to the public only in those outside packages and it is the mark on the package that strikes the eye of the purchasing consumer before he comes to look at the inside bottle; and that very fact is of controlling importance with respect to the label on the bottle.

And I may here repeat with respect to the literature on the label of the bottle placed inside the wrapper, that it is a well settled rule that there can be no trade-mark right in the mere form, size or colour of a package containing an article used commercially.

It is also an established principle that there can be no trade-mark right in the direction, notices or usual advertising matter used upon or in the description of merchandise. Hopkins, pp. 280, 315 et seq.

Much more might be said in the same stress showing that each party is entitled to his trade-mark which cannot produce deception, but the case seems so simple and clear that I see no justification to add anything to what has already been said. Further comments are unnecessary.

I find the two marks perfectly distinct and not liable to create deception.

There will be judgment dismissing the action with costs.

*Judgment accordingly.*

HONEY DEW, LIMITED . . . PLAINTIFF AND PETITIONER;

AND

EDWARD JOHN RUDD ET AL

DEFENDANTS AND RESPONDENTS.

1928  
Oct. 29.  
Dec. 28.*Trade-Marks—Trade-Mark and Design Act—"Calculated to deceive"—  
User different from registered trade-mark*

Plaintiff was the owner of a registered trade-mark "*Honey Dew*" used in connection with the sale of a certain orange flavoured drink. The shops where it was sold had a characteristic interior arrangement and equipment and the mark had become well known to distinguish the beverage sold by plaintiff from that of others. The defendant subsequently registered the words "*Flora Dew*" as its trade-mark for a similar drink, displaying said trade-mark in and about its shops much in the manner employed by the plaintiff, and in a pronounced manner following the interior arrangement and equipment of the plaintiff's shops.

*Held*, on the facts, that the defendant could not be said to have adopted his mark with a view of giving a distinctive description to his beverage, but rather to take advantage of the business connections and efforts of a rival trader, and such trade-mark being liable to mislead, should be expunged from the Register.

2. That in considering whether one mark is an infringement of another resemblance between the two marks must be considered with reference to the ear as well as to the eye.
3. That the words of the Trade-Mark and Design Act "calculated to deceive" may mean either "intended to deceive" or "likely to deceive," and that the prohibition applies where the case falls within either meaning.
4. Plaintiff's trade-mark, as registered, consisted of the words "*Honey Dew*" in scroll, the word "*Dew*" being almost immediately under "*Honey*," whereas he has used the words "*Honey Dew*" in plain letters, and following one another.

*Held*, that although the practice of departing from the precise form of a trade-mark as registered is objectionable and dangerous to the registrant, inasmuch as here, the mark as used was not substantially different from the mark as registered, such deviation should not deprive the plaintiff of his right to protection.

**ACTION** by the plaintiff for an injunction against the defendant restraining it from infringing plaintiff's trade-mark.

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

*R. S. Smart, K.C.*, and *C. B. Henderson* for the plaintiff.

*L. McCarthy, K.C.*, and *A. Singer* for defendant.

The facts are stated in the reasons for judgment

1928

HONEY  
DEW, LTD.  
v.  
RUDD ET AL.  
Maclean J.

THE PRESIDENT, now (December 28, 1928), delivered judgment.

This is an action for infringement of a specific trade-mark. The facts of the case may be briefly stated. The plaintiff's trade-mark consists of the words "Honey Dew," and is applied to the sale of an orange flavoured soft drink, made, it is said, by some secret formulae. The manufacture and sale of this beverage was commenced some fifteen years ago, by two brothers named Ryan, and for two or three years was retailed by the glass in a small way, in or near Toronto, but not by or under any name. Later, it was sometimes sold in larger quantities in containers. Some twelve years ago the name "Honey Dew" was adopted by the Ryans, as a trade-mark to distinguish this beverage and the same has since been made and sold under that name, but the trade-mark was not registered until November, 1922. About this time the Ryans, with a view to the promotion of the sale of Honey Dew, embarked upon the policy of carrying on their business in shops of a special design and with distinctive characteristics; the exterior construction, and the interior panelling, lighting, furnishings and fixtures of these shops were to be so far as possible, alike. These premises became known as Honey Dew shops, and the beverage sold as Honey Dew was of course there prominently featured. On the outside and inside of each shop the words Honey Dew were conspicuously displayed, and among other advertising matter was to be found, "Honey Dew is the drink for you." A few articles of food were also sold. If Honey Dew was disposed of for consumption outside the premises, it would be placed in a special container whereon was printed the trade-mark, Honey Dew. The experiment proved quite successful, and in May of this year, the Ryan's sold their business and good will, including their trade-mark, to a corporation known as Honey Dew Ltd., for \$500,000, in cash, and a one-fifth interest in the capital stock of that corporation. They had, at the time of the sale, four shops in the city of Toronto, and two in the city of Hamilton. The purchasing company have pursued the same policy, and have since established additional Honey Dew shops in many of the larger cities of Canada, and altogether they now number twenty-eight. The business of the company is of sub-

stantial proportions; its sales now amount to about one million dollars per year, though this is not all attributable to the sale of Honey Dew. The trade-mark, Honey Dew has become well known in many parts of the country to distinguish the beverage made and sold by the plaintiff company, and this I think is not really in dispute. It apparently is not applied to other beverages.

1928  
 HONEY  
 DEW, LTD.  
 v.  
 RUDD ET AL.  
 Maclean J.

In July, 1927, the defendant company commenced the production and sale of an orange flavoured beverage which it sold under the name of "Flora Dew," and which words had been registered as a trade-mark by the defendant Rudd, now President of Flora Dew Company Ltd., in November, 1926. The defendant company now sell this beverage in at least two shops in Toronto. These shops are a very close representation of the plaintiff's shops, both inside and outside, and particularly is this true of the interior arrangements and colour scheme, and also of the furnishings, such as curtains, tables and chairs. A sign board on the exterior of the defendant company's shops on which appears its trade-mark, was made by an outdoor advertising company from a design furnished by the defendant Rudd, and it is exactly the same as that used by the Honey Dew shops. A firm of manufacturers of restaurant fixtures was once approached by the defendant Rudd, to design the interior of a shop similar to the interior of a Honey Dew Shop, but this firm refused to execute the order. I do not say that the defendants are in violation of any law, in imitating the Honey Dew shops, either inside or outside, that is not an issue here, but that fact may nevertheless be of importance in a determination of the issue in this action.

A private detective, at the instance of the plaintiff, recently visited a shop of the defendant company and asked to be served with Honey Dew, and he was served with the beverage sold and known in that shop, as Flora Dew. This request for Honey Dew was made to a waitress there, and by her passed on to another employee in the kitchen, which was immediately adjacent, and in doing so she designated the order as being "Honey Dew," although according to the evidence of the detective, she immediately, in an undertone restated the order as Flora Dew, to the kitchen employee. Another detective on a different occasion, ordered a glass of Honey Dew at one of the shops of the

1928  
 HONEY  
 DEW, LTD.  
 v.  
 RUDD ET AL.  
 Maclean J.

defendant company, and was served with the beverage there sold as Flora Dew. A third detective did the same thing, and with the same result. One of the employees of the defendant company stated in her evidence that she had a few requests for the drink called Honey Dew, and she said very frankly that this had no reference to the visits of the detective witnesses to the premises of her employer. The same witness also stated that persons frequently asked for Honey Dew, but she would promptly inform such persons, that they sold Flora Dew. Another employee of the defendant company said she was occasionally asked for Honey Dew, but would explain to the customer, that it was Flora Dew they sold.

If the trade-mark, Flora Dew, is calculated to deceive or mislead the class of customers who purchase goods of that description, into thinking that they are buying Honey Dew, by reason of the similarity of the marks, then it should be expunged. That, however, is the question to be decided, and it is one of the class of cases in which one person might take a view different to that which I am to express, in favour of the plaintiff's contention. Assuming that the defendant company has a perfect legal right to imitate the Honey Dew shops, that in itself operates towards the probability of deception or confusion, and is a reason for a differentiation in trade-marks, but if the trade-marks are at all similar, if the leading word is the same in each, if the marks are applied to an orange flavoured and orange coloured beverage, then the probability of some persons being deceived or misled is all the greater, and the stronger is the reason for a contrast in trade-marks. It is revealed by the evidence of the defendant company's own employees, and evidence could hardly come from a better source, that the probability of deception, is not fanciful. I mean to say, that if a person entering a Flora Dew shop, asks for the beverage called Honey Dew, he or she has been misled by some cause or other, and I should say that one of the probable causes is the similarity in the trade-marks. I cannot avoid the conviction that in employing the words Flora Dew as its mark for an orange flavoured drink, displaying that trade-mark in and about its shops much after the manner employed by the plaintiff, and in such a pronounced manner following the interior

arrangements and equipment of the plaintiff's shops, the defendants did not adopt the trade-mark, Flora Dew, with the view of giving a distinctive description to its beverage, but to take advantage of the business connections and efforts of rival traders. If I am justified in this conviction, then it is not even necessary I think, to prove that any one has been misled. The reason for this view was appropriately expressed by Parker J. in *Iron-Ox Remedy Co. v. Co-operative Wholesale Society* (1), as follows:—

1928  
 HONEY  
 DEW, LTD.  
 v.  
 RUDD ET AL.  
 Maclean J.

If the conclusion is once arrived at that the description was adopted not with the object of fairly describing the goods to which it is applied, but with the object either of actually misleading the public, or taking an undue advantage of the business connection, or the expenditure of a rival trader, it does not I think, require much further evidence to justify the conclusion that the public is likely to be misled; and, on the assumption that the goods are so described as to be likely to mislead the public, it is not necessary to prove that anyone has been actually deceived or misled; and, therefore, further, the person who supplies the goods with the misleading description may be liable to an injunction, even though the class of persons to whom he supplies them are certain to know what the goods are, and are not themselves likely to be in any way misled.

Perhaps another and practical way of looking at this matter, would be to ask oneself the question: if the original registrants of the two marks in question appeared on the same day, but in the order of their actual registrations, before the Commissioner of Patents, each applying for the registration of his respective mark and each declaring that the mark was to be applied to an orange flavoured beverage, and in truth that was what was in the minds of each of the registrants, what would the Commissioner do? With these facts frankly disclosed and fresh in the mind of the Commissioner of Patents, he would, I think, decide that on account of their similarity they were calculated to deceive or mislead the public, and he would allow registration only to the first applicant. If two orange flavoured beverages, which must and do look alike, or even other beverages of this character, are to have applied to them trade-marks, then they should not be at all similar or confusing, because they are to be applied to the same class of goods. Where a trade-mark is alleged to be calculated to deceive by reason of similarity to another trade-mark, a court must have respect to all the circumstances of the trade in which the trade-marks are employed, and the nature of the goods

(1) (1907) 24 R.P.C. 425 at p. 430.

1928  
 HONEY  
 DEW, LTD.  
 v.  
 RUDD ET AL.  
 Maclean J.

or article to which the marks are applied. See Parker J. in *Application of Pianotist Co.* (1). According to the evidence, many orange flavoured drinks are sold under various names, and to insure honest trading, it is desirable that the trade names under which they are sold, shall be as free from similarity as possible, so as to avoid the possibility of deceiving or misleading the public.

It should perhaps be observed, as is stated, in Kerley on Trade Marks, that it has been held, that the words "calculated to deceive" may mean either "intended to deceive" or "likely to deceive" and that the prohibition applies where the case falls within either meaning, although the latter, the more inclusive, is sufficient to dispose of most, if not all, of the questions that arise under the words of the statute "calculated to deceive or mislead the public." It is also to be observed that the resemblance between two marks must be considered with reference to the ear as well as to the eye, and in this particular case, there would be the tendency, I think, on the part of the public to abbreviate the trade-marks in question and refer to each of them as Dew. The words Aqua-Repela was refused registration as a trade-mark, owing to the probability of its being shortened to Repela, and therefore liable to be confused with Repellus, already registered. The mark "Stateroom" was refused registration, because the mark "State Express" was already registered in respect of the same class of goods and was often abbreviated to "State" by customers. *Fredrick Wilks Application* (2), and *United Kingdom Tobacco Co. Application* (3).

Another point developed during the trial, which must be referred to. The plaintiff is the user of its mark has departed somewhat from the actual form in which the same appears on the register. In the application for the registration of this mark, it was said to consist of a drawing having the words "Honey Dew" in scroll, the word "Dew" being almost immediately under the word "Honey." In the actual application of its trade-mark the plaintiff uses the words "Honey Dew" in plain letters, and following one another in the ordinary manner. Apparently this has been the practice of the plaintiff, and its predecessors in

(1) (1906) 23 R.P.C. 774, at p. 777.

(2) (1911) 29 R.P.C. 21.

(3) (1912) 29 R.P.C. 489.



title, at all times. The practice of departing from the precise form of a trade-mark as registered is objectionable, and is very dangerous to the registrant. The mark as used here is not however substantially different from the mark as registered. Nobody has been deceived, no injury could occur to anybody by the deviation from the form of the registered mark, and I do not think the plaintiff should lose his right to protection because of this. The defendants did not plead in their statement of defence, that on this account the plaintiff's mark should be removed and the register rectified. Deviation from the form of a mark as appearing on the register has been considered by the courts. It was held in the *Melachrino Case* (1), that the mere addition of something, as in that case a coat of armour, to a trade-mark, is not sufficient to disentitle a person who otherwise uses the whole of his trade-mark to sue for an injunction. The deviation from the registered mark in that case was much more substantial than in this case, here it goes only to the arrangement and form of the letters of words, there is no addition to or subtraction from the registered words.

1928  
 HONEY  
 DEW, LTD.  
 v.  
 RUDD ET AL.  
 Maclean J.

It was also contended that the mark "Honey Dew" was invalid because it was descriptive of the article to which it was applied. I do not think this defence is one of substance, or that the mark is at all descriptive of the article to which it is applied.

The mark "Flora Dew" is in my opinion calculated to mislead the public and too closely resembles a mark earlier registered. The plaintiff is entitled to the relief claimed in its statement of claim and petition, and its costs of action.

*Judgment accordingly.*

VAN HEUSEN PRODUCTS INC. ET AL. . . . PLAINTIFFS;

AND

TOOKE BROS. LIMITED. . . . . DEFENDANT.

*Patents—Invention—Vague and indefinite claim—Ingenuity of invention*

Plaintiff in his specification states that "the invention provides a collar of multiple-ply interwoven fabric which is sufficiently stiff to maintain its shape without the employment of starch, and is nevertheless suffi-

1927  
 Oct. 20-27.  
 1928  
 Oct. 9-13.  
 1929  
 Feb. 27.

(1) (1887) 4 R.P.C. 215.

1929  
 VAN  
 HEUSEN,  
 INC. ET AL  
 v.  
 TOOKER BROS.  
 LTD.

ciently pliable to assume the necessary curvature to fit the neck of the wearer without undue rigidity. Accordingly the collar may be washed and if desired, ironed without the supplemental use of starch, which therefore, becomes unnecessary in the laundry operation," and claim No. 1—the only claim alleged to be infringed—reads as follows: "A shirt collar, made up of fabric having a reinforce interwoven therein and inherently capable in an unstarched condition of receiving and maintaining a curvilinear set." No claim is made for the fabric or material, nor for the weave or the shape or form of the collar.

*Held*, that, as reinforce interwoven, as a means of stiffening a fabric was part of the prior art, it did not require ingenuity of invention to make a collar as claimed, it being only a matter of the degree of stiffness to be used.

2. That there is no invention in a mere adaptation of an idea in a well known manner for a well known or clear purpose in a well known art, without ingenuity, though the adaptation may effect an improvement which may supplant an article already on the market.
3. *Held*, further, that the description formulated in claim No. 1 above was too wide and vague in view of the prior art, and fails in that respect to comply with the statute, and is void.

ACTION to have it declared that Canadian patents Nos. 217,308 and 243,516 were valid and in force and were infringed by the defendant.

The action was tried before the Honourable Mr. Justice Audette, at Ottawa, on October 20 to 27, 1927, and was argued on October 9 to 13, 1928.

*Arthur Anglin, K.C.*, for the plaintiffs.

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

The facts are stated in the reasons for judgment.

AUDETTE J., now (February 27, 1929), delivered judgment.

This is an action whereby it is sought by the plaintiffs, among other things, to have a declaration that the two Canadian Letters Patents Nos. 217,308 and 243,516 are valid and in full force and effect, and for a further declaration that the defendant has infringed the same, and praying for the issue of an injunction restraining the said alleged infringement.

The defendant, by his statement in defence, denies any infringement, and by way of counter-claim seeks to impeach the said letters patents and to have the same adjudged as invalid, null and void.

The two patents are in respect of alleged improvements in shirt collars.

The letters patent first mentioned in the statement of claim is No. 217,308, bearing date the 28th March, 1922, in favour of John Manning Van Heusen, which said letters have been assigned and transferred to the plaintiff Van Heusen Products Inc.

The second letters patent, No. 243,516, upon which most of the issues turn, bear date the 7th October, 1924, and were granted to the said plaintiff, Van Heusen Products, Inc. as assignee of the said John Manning Van Heusen, who in turn was assignee of one John Blakesly Bolton, the alleged inventor. Most of the present controversy turns upon these last mentioned letters patents which will hereafter be called the Bolton patent.

The plaintiffs, the Cluett Peabody & Co. of Canada, and Canadian Converters Company, Limited, together, hold an exclusive license from the plaintiff, Van Heusen Products, Inc.

By the plaintiffs' supplementary particulars of breaches it is charged that the defendant has infringed claims Nos. 1, 2, 9 and 12 of the Letters Patent No. 217,308, and claim No. 1 of letters patent No. 243,516, the Bolton patent.

The novelty sought by the Bolton patent is the introduction upon the market of a semi-soft collar, as distinguished from what is known as a stiff and a soft or negligé collar. Or to make of a soft collar a stiff collar without using starch.

The specifications claim that the invention provides a collar of multiple-ply interwoven fabric which is sufficiently stiff to maintain its shape without the employment of starch, and is nevertheless sufficiently pliable to assume the necessary curvature to fit the neck of the wearer without undue rigidity. Accordingly the collar may be washed and, if desired, ironed without the supplemental use of starch, which, therefore, becomes unnecessary in the laundry operation.

Having thus summarily described by the specifications, the alleged invention, the patentee formulates his claim No. 1, the only claim charged to have been infringed, in the following language, viz:

1. A shirt collar, made up of fabric having a reinforce interwoven therein and inherently capable in an unstarched condition of receiving and maintaining a curvilinear set.

Before entering upon the consideration of the actual meaning of the language used in this claim it is thought

1929  
 VAN  
 HEUSEN,  
 INC. ET AL  
 v.  
 TOOKE BROS.  
 LTD.  
 Audette J.

1929  
 VAN  
 HEUSEN,  
 INC. ET AL  
 v.  
 TOOKE BROS.  
 LTD.  
 Audette J.

desirable to relate the circumstances under which the idea of the alleged invention was conceived and how the patent issued.

Van Heusen, relating these circumstances, says, that as he was (p. 117) wearing stiff and starched collars he thought them uncomfortable and conceived the idea he would like to get a collar made that would simulate a starched collar and be comfortable, and with that object in view he saw Bolton, a weaver and told him of his idea. As Van Heusen knew nothing about weaving, he employed Bolton to invent a fabric which would be sufficiently rigid to stand up and simulate a starched collar. Bolton said he could make such a fabric in his odd times, after hours and on holidays and the like, and he negotiated that with him (p. 118) on September, 1913.

Van Heusen then went to Europe in November, 1913, for one month, and left instructions to Bolton that if he got anything, that he was to get in touch with his (Van Heusen's) patent attorney.

On his return Bolton submitted some samples of fabrics. One of them (exhibit No. 27) had longitudinal wires weaved in the fabric and another (exhibit No. 26) along the line of his researches, and Van Heusen thought this latter sample had "a proper bottom sufficient to maintain its position without starch." Then Bolton made two applications for patent, through Van Heusen's patent solicitors and sought in 1917 to exploit his collars which were on the market in the United States not before 1921.

On the 7th April, 1914, (exhibit No. 29) the Crompton and Knowles Loom Works wrote to Bolton advising him that one Mr. Bardsley had produced some very good looking samples of his special fabrics and were mailing the same. The letter ended by inquiring as to what action they were to take and whether Bolton wanted them to further experiment along the lines suggested.

All of this discloses that Van Heusen is the one who first dimly conceived the idea of the collar above described; that Bolton was instructed by him to experiment in getting a material that would answer; that Mr. Bardsley had produced good looking samples and that Crompton and Knowles were also experimenting.

Who, under the circumstances, is the inventor? This is a question that was much mooted during the trial and suggestions were made that Van Heusen is the person who should have taken the patent for the collar in question and not Bolton or those working for him, as he was, or they were, only weavers who were working to get a fabric of such strength as might be used to make a semi-soft collar as described and harboured in Van Heusen's mind.

However that may be, the inventor is not the person who may say to himself that there may be some way of producing a fabric that would answer to a given idea. We remain with the question unsolved: Is it Van Heusen who conceived dimly the idea set out in claim No. 1 and sought and found the cloth to make it; or is it Bolton who, at Van Heusen's request, worked on the cloth, or is it the Crompton and Knowles Company, or is it Mr. Bardsley who really found a satisfactory fabric? That is a question which cannot be solved under the limited evidence in this respect spread upon the record, and if it is a fabric which Van Heusen directed Bolton and his patent attorneys to get patented, that was not done because the patent is not for the fabric. However, in the view I take of the case, the question becomes immaterial. Yet it must be taken that the plaintiff's claim is presented and formulated in a rather disquieting manner and in this new labyrinth of warps and wefts, one may again for a moment feel lost at the end of Ariadne's deceiving threads.

It is well here to bear in mind that the charge of infringement is only with respect to claim No. 1. Furthermore that the plaintiffs make no claim to the form or shape of the collar which is more or less common to all collars according to that kind in respect of shape. No claim either is made to the weave, fabric or material; but the only claim made is to the collar which Bolton claims to obtain through or by his fabric as set forth in claim No. 1.

The patent is in itself quite narrow—the dream of expert attributes—and therefore it must be narrowly construed.

The defendant first attacked the patent for disconformity with the statute with respect to the oath of the inventor and with respect to sec. 7; but it is found, under the circumstances of the case, unnecessary to specifically deal with

1929  
 VAN  
 HEUSEN,  
 INC. ET AL  
 v.  
 TOOKER BROS.  
 LTD.  
 ———  
 Audette J.  
 ———

1929  
 VAN  
 HEUSEN,  
 INC. ET AL  
 v.  
 TOOKE BROS.  
 LTD.  
 Audette J.

this question. Nicolas, on Patents, p. 72; *Floyd Smith Aerial Equip. Co. v. Irving Air Chute Co.* (1).

Turning again to claim No. 1, it is desirable to set out in a summary way the meaning attached by the evidence to the language used in it.

The word "*multiple-ply*," known only in recent years, has no technical significance in the weaving art, but witness Brown (p. 390) looks upon it as a very excellent generic word or expression to include a double cloth or clothes of any number of layers. And witness Haines (p. 201) thinks that claim No. 1 covers in its description any fabric wherein there is interwoven with the collar fabric a reinforce which will impart to that fabric the characteristics of assuming and maintaining a curvilinear set; and it may be a single-ply fabric in some cases if the reinforcement or the reinforce is interwoven with it, or it may be a multiple-ply fabric.

The word "*reinforce*" in the patent used in the case of multiple-ply or double-ply (p. 252) consists of the several plies of the material each reinforcing the other and bound together in a single unit, and in cases of fabrics other than multiple-ply being an interwoven material of some sort. It is the multiple-ply that constitutes the reinforcement (p. 158). It is just the woven fabric that exists without any wire, because there are several plies. Reinforce is constituted in the several plies, pp. 204, 205. Another witness (p. 391) testified that there is no such terminology in the literature of the weaving art and that a fabric is reinforced if it has connected with it any instrumentality for rendering it stiffer or firmer. If there is to be an interwoven reinforce, the reinforcing threads, whatever they may be, must be incorporated in the fabric as the result of the weaving operation. The binding, the reinforcing threads in a double, triple, quadruple fabric, etc., are made with two, three or four systems of warps and wefts or any extra number of the same, pp. 392, 161 *et seq.* It applies to single or double fabrics. *Northern Shirt Co. v. Clark* (2).

The expression "*curvilinear set*" would seem to mean nothing else than that the collar would fit around the neck and that is applicable to all collars. The expression "set"

(1) (1928) U.S. Av. R. 275.

(2) (1917) 17 Ex. C.R. 273 at 283.

has been defined by one witness (p. 396) as "anything which is moved to a position and remains in that position taken a 'set'". Bolton never got a curve in the fabric, p. 140. Patentees Bowen and Morgan are the persons who ultimately made the curve in the fabric (p. 135).

With these words and expressions of the patent fully explained and clarified there is no occasion to toil in search of the meaning of claim No. 1.

Therefore, coming to the crucial question of the scope and conception of the claim, and considering all has been said, and more especially that the patent is not for the shape or form of the collar, that it is not for the fabric, in the result we are faced with a claim placing an inhibition upon using in the manufacture of collars a fabric woven in the most ordinary manner and known to the trade for years back; and for the reason that it might be a fabric or material allowing a collar to be made out of it, that would be neither stiff nor soft, but that might be called semi-soft. Yet there is nothing new in the art of weaving brought out by the Bolton patent, and if Bolton were to make a claim for the weaving, his claim, under the evidence taken both in Canada and in England, would be clearly anticipated (see also p. 382 evidence).

While the plaintiffs clearly state they made no claim for the shape or the fabric—yet they claim they get the collar by means of the Bolton patent. Is it not somewhat difficult to reconcile these facts under the circumstances of the case?

Can any one place such a restraint upon commercial freedom by thus casting so wide a net as to unduly affect the weaving and textile market? The state of the art in our days is far too advanced and developed to allow a patentee making such a comprehensive claim which would put an embargo upon a weave or fabric produced quite lawfully in the usual manner which has been in use for many years back. Can a patentee at this stage come and say: You may manufacture that cloth as in the past, but you may not make any collars therewith. Another illustration of the characteristic casting of the net!

Bolton has failed to disclaim what belongs to the prior art. The claim is broad enough to cover the principle and all the known methods of carrying it out. Every element

1929  
 VAN  
 HEUSEN,  
 INC. ET AL  
 v.  
 TOOKE BROS.  
 LTD.  
 Audette J.

1929  
 VAN  
 HEUSEN,  
 INC. ET AL  
 v.  
 TOOKS BROS.  
 LTD.  
 Audette J.

described and upon which Bolton rests his invention in claim No. 1 is to be found in the prior art.

There is no subject-matter in the present case. What the plaintiffs are doing is nothing more than using a stiff material to produce a stiff collar. Is not Bolton's patent, as set forth, similar to the case where a merchant would go to a steel manufacturer and ask him to replace, in his warehouse, a wooden post by one of steel which would be strong enough to carry the very heavy stock he wished to store in his warehouse? Would this steel manufacturer—manufacturing this special pole especially strong in the usual manner known to his art, be entitled to a patent because he obtained a steel post which would be of such strength that would carry this or that weight? And would he be entitled to a new patent every time he manufactured a steel pole to meet other specific weights? There is certainly a fallacy in the granting of a patent under the present circumstances. The rights derived from such a patent would indeed stagger and bewilder the weaving and textile trader.

Is every one in the weaving trade entitled to get a patent for every kind of garment produced from a fabric woven, in a manner well known to the art, of many warps and wefts that would have a special stiffness and which would possess such given inherent strength suitable to a garment of the softness or stiffness desired?

The subject-matter of a patent must be something new, useful and involving ingenuity of invention. The novelty must be the outcome of skilful ingenuity and the primary test in invention and the question as to whether there has been invention is one of fact in each case. *British Vacuum* case (1), and *British Thompson-Houston Co. Ltd. v. Corona Lamp Works Ltd.* (2).

Bolton's dim exterior vision, seen through the cloudy vistas of the avenues of his imagination, induces him to claim the collar described in his claim to the exclusion of the rest of the world.

It is not sufficient that a patentee's utterance springs from his imagination, he must need carry with it the immediate warrant showing that what he has done was done in a manner new to the specific art.

(1) (1911) 29 R.P.C. 309.

(2) (1922) 39 R.P.C. 49.



Invention must not be of questionable import. To constitute invention it is not enough to disclose something but dimly visualized. There is wanting in the patent a clear result of ingenuity of invention.

There is no invention in a mere adaptation of an idea in a well known manner for a well known or clear purpose in a well known art, without ingenuity, though the adaptation may effect an improvement which may supplant an article already on the market. *Carter v. Leyson* (1).

The field of this patent is obviously in the well known weaving art. Yet no claim is made for the fabric which might produce the collar in question. No claim is made for the shape or form of the collar, but it is made for a collar that would, within a certain degree of stiffness, stand between a stiff and a soft collar.

Under the provisions of sec. 14 of The Patent Act (13-14 Geo. V, ch. 23) the patentee must correctly and fully describe the invention and its operation or use as contemplated, and must (shall) set forth clearly the various steps in a process or the method of constructing or making. The office of a claim is to define and limit with precision what it is that is claimed.

The description formulated in claim No. 1 is too wide and vague in view of the prior art and fails in that respect to comply with the statute. The patentee must not throw the net too wide, but must claim clearly what he has invented, but not more than he has invented, that is something which is the mere subject of his speculation of his endeavour to grasp more than he is entitled to. The public must know what they can infringe. *Incandescent Lamp Patent* (2); *Tyler v. Boston* (3). See also *British Thompson-Houston Co. v. Corona Lamp Works Ltd.* (*ubi supra*).

Now there is nothing new in the weave or in the manner the weave is to be made for this collar, it is only a question of degree of stiffness and weight in the material that will exactly correspond with the wide and vague description of claim No. 1. That is no meritorious step on the prior art. There is no specific degree of stiffness, no specific weight of the cloth or fabric to be used, disclosed or defined in the patent. Has the language of the patent been intentionally

1929  
 VAN  
 HEUSEN,  
 INC. ET AL  
 v.  
 TOOKE BROS.  
 LTD.  
 Audette J.

(1) (1902) 19 R.P.C. 473. (2) (1895) 159 U.S. 465 at 475.  
 (3) (1868) 7 Wall 327, 330 (74 U.S.).

1929  
 VAN  
 HEUSEN,  
 INC. ET AL  
 v.  
 TOOKE BROS.  
 LTD.  
 Audette J.

so used to allow this degree of stiffness and weight to be extended or restricted as occasion might arise in the interest of the patentee? *British Ore Concentration Syndicate Ltd. v. Mineral Separation Ltd.* (1). And I may add here that this is the reason why the case of *Power v. Griffin* (2), cited and relied upon at trial, has no appositeness. One clearly defines what he invented and the other does not show it satisfactorily.

There is no new element entered into the production of the collar in question. The adaptation of old fabric, woven in the usual manner well known in the art applied to the same class of articles cannot constitute invention. Terrell on Patents, 5th ed., 38. The application of an old device to a similar or analogous subject, with no change in the manner of application and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not been before contemplated. *Blake v. San Francisco* (3); *The Northern Shirt Co. v. Clark* (*ubi supra*) confirmed on appeal to the Supreme Court of Canada (4).

The collar described in the plaintiffs' claim does not lie out of the track of former use as to evolve invention, considering the state of the art disclosed by the patent, and especially the evidence taken in England under commission.

There is no sufficient invention in merely applying well known things, in a manner or to a purpose which is analogous to the manner or the purpose in or to which it has previously been applied. Nicolas, on Patent Law, 23 and cases therein cited.

The Bolton patent does not possess any element of invention and I can in no sense find any creative work of inventive faculty which the patent laws are intended to encourage and reward. *Ball v. Crompton Corset Co.* (5). There is no invention in devising a stiffer fabric, under a weave known in prior art, to make a stiffer collar.

(1) (1909) 27 R.P.C. 33.

(2) (1902) 7 Ex. C.R. 411, at p. 413; 33 S.C.R. 39.

(3) (1885) 113 U.S.R. 679, at p. 682.

(4) (1918) 57 S.C.R. 607.

(5) (1886) 13 S.C.R. 469, at p. 475.

The device claimed consists in nothing else than using a stiffer fabric to make a stiffer collar, and not only a person skilled in art—but any worker or rational being—would know that. *Eagle Lock Co. v. Corbin Cabinet Lock Co.* (1).

1929  
 VAN  
 HEUSEN,  
 INC. ET AL  
 v.  
 TOOKE BROS.  
 LTD.  
 Audette J.

A patent for the mere new use of a known contrivance, without any additional ingenuity in overcoming fresh difficulties, is bad, and cannot be supported. If the new use involves no ingenuity, but is in manner and purposes analogous to the old use, although not quite the same, there is no invention,

as said by Lord Lindley, in the case of *Gadd and Mason v. The Mayor, etc., of Manchester* (2).

I may further add that in the case of *Yates v. Great Western Ry. Co.* (3) it was held although the patented article was a most useful contrivance, that it could not be the subject of a patent as it was wanting in the element of invention. Commercial success is not sufficient. *Nicolas, On Patents*, 18.

See *Treo Company, Inc. v. Dominion Corset Co.* (4) confirmed by the Supreme Court of Canada; *Detroit Rubber Products Inc. v. Republic Rubber Co.* (5), confirmed on appeal; *Nieblo Mfg. Co. Inc. v. Reid* (6) confirmed on appeal; *Corbin Cabinet Lock Co. v. Eagle Lock Co.* (7); *Harvey Hubbell, Inc. v. General Electric* (8).

In *Smith v. Nichols* (9), it was held that:

Where a textile fabric, having a substantial construction and possessing essential properties, has been long known and in use, a patent is void when all that distinguishes a new fabric is higher finish, greater beauty of surface, the result perhaps of greater tightness of weaving, and due to the observation or skill of workman, or the perfection of the machinery employed.

The patent in the present case rests upon no other or better foundation.

The making of a device in whole or in part of materials better adapted for the purpose for which it is used than materials of which those of the prior art were made, unless the mode of operation is thereby changed, does not consti-

(1) (1894) 64 Fed. Rep. 789.

(5) (1928) Ex. C.R. 29.

(2) (1892) 9 R.P.C. 516 at 524.

(6) (1928) Ex. C.R. 13.

(3) (1877) 2 A.R. (Ont.) 226.

(7) (1889) 37 Fed. Rep. 339.

(4) (1918) 18 Ex. C.R. 115.

(8) (1920) 267 Fed. Rep. 564.

(9) (1874) 88 U.S. (21 Wall.) 112.

1929  
 VAN  
 HEUSEN,  
 INC. ET AL  
 v.  
 TOOKE BROS.  
 LTD.  
 Audette J.

tute patentable invention. *Cover v. American Thermo-Ware Co.* (1).

See also *Stahlwerk Becker Aktiengesellschaft* (2).

Now, the fact that a patent has been supported in a former action in the United States does not estop a new defendant questioning its validity. *Nicolas, On Patent 201.*

The two patents in question in this case have been passed upon in the United States in re *Van Heusen Products Inc. et al v. Earl Wilson* (3), whereby claim No. 1 of the Bolton patent has been declared valid and the Van Heusen patent anticipated.

Canadian courts, like the English courts, are accustomed to treat the decisions of the American courts with great respect, although they are in no manner bound by them. See per Halsbury L.C., In re *Missouri Steamship Co.* (4); per Brett L.J., in *Queen v. Castro* (5); and per Kekewich J., In re *De Nicols* (6).

Moreover, the plaintiffs' principal expert witness, heard at trial, differs in opinion with some parts of the Judgment of the Court of first instance in the United States. (Evidence, pp. 245, 235 and 237.)

I am unable to accept the finding of the judgment in the United States. Indeed, the evidence adduced before me may be entirely different from that offered before the United States Court.

Then, there is more in that case. The judgment of first instance, finding as above mentioned, was taken to the Court of Appeal and before the latter court rendered judgment, the case was settled without having the advantage of the pronouncement of the Appellate Court.

It is sufficient to say on the question of infringement that having passed on the question of validity and coming to the conclusion that the Bolton patent is null and void, it becomes unnecessary to pass upon the question of infringement.

Coming to the Van Heusen patent No. 217,308, which plaintiffs' witness Haines (pp. 190 *et seq*) places in the relation of juxtaposition of genus and the species, the Bolton

(1) (1911) 188 Fed. Rep. 670.

(2) (1918) 36 R.P.C. 13, at p. 18, 19.

(3) (1924) 300 Fed. Rep. 922. 936.

(4) (1889) L.R. 42 Ch. D. 330.

(5) (1879-80) L.R. 5 Q.B.D. 490, at p. 516.

(6) (1898) 1 Ch. D. 403 at 410.

patent being the genus, it is considered that if the Bolton patent fails the Van Heusen follows, for reasons that have already been mentioned and debated at trial, and which it is unnecessary to repeat here. The most that could be said of the Van Heusen patent is that it could only stand on sec. 9 of the Patent Act.

1929  
VAN HEUSEN, INC. ET AL v. TOOKE BROS. LTD.  
Audette J.

Therefore the two patents relied upon by the plaintiffs are found and adjudged invalid for want of subject-matter, or ingenuity of invention, and the action is dismissed, and with costs in favour of the defendant.

*Judgment accordingly.*

HIS MAJESTY THE KING..... PLAINTIFF;

1929  
Feb. 12.  
March 4.

AND

CONSOLIDATED DISTILLERIES LIM- ITED ET AL ..... } DEFENDANTS;

AND

CONSOLIDATED EXPORTERS COR- PORATION LIMITED ..... } THIRD PARTY.

*Practice—Jurisdiction—Third Party Notice—Subject and subject*

The Crown brought action on certain bonds executed by the defendants in its favour. The defendants, allege that by reason of an agreement between them and the third party, the third party agreed to indemnify them, and they now seek to bring the third party before this Court to have the issue between them determined here.

*Held*, that the matter in issue between the defendants and the third party is one over which the Exchequer Court of Canada has no jurisdiction, and that the third party notice filed and served herein should be set aside.

- 2. That rule 262 of the General Rules and Orders of this Court respecting third parties, was framed to meet the case where the Crown being defendant might be interested in having other parties than itself as defendant before the Court.
- 3. That the Court also has jurisdiction to entertain an issue between a defendant and a third party in cases where it is given jurisdiction as between subject and subject.

MOTION by the third party to have the third party notice herein set aside and the third party dismissed from the record.

1929  
 THE KING  
 AND  
 CONSOLI-  
 DATED  
 DISTILLERIES  
 LTD. ET AL  
 AND  
 CONSOLI-  
 DATED  
 EXPORTERS  
 CORP. LTD.

The case was heard before the Honourable Mr. Justice Audette, at Ottawa.

*R. S. Robertson, K.C.*, for third party.

*E. F. Newcombe, K.C.*, *contra*.

The facts are stated in the reasons for judgment.

AUDETTE J. now (March 4, 1929) delivered judgment.

This is an application by the Third Party to set aside the Third Party notice served upon him on the ground of want of jurisdiction of this Court to entertain and try the issues raised by such Third Party notice.

The action is brought on bonds executed by the defendants in favour of the plaintiff and the defendants aver, by their statement in defence, that they are entitled in any event to indemnity from the third party, by reason of an agreement to that effect entered into by the said defendants and the third party.

This, however, is an issue over which the Exchequer Court has no jurisdiction; it is a separate and distinct controversy from the one raised between the plaintiff and the defendant; it is resting upon a separate cause of action which must be tried and determined in the Provincial Court having jurisdiction over such matters. *The Queen v. Finlayson et al* (1); *The King v. The Globe Indemnity Co.* (2); Audette's Exchequer Court Practice, 2nd ed., p. 504.

The rule of court respecting third parties has its *raison d'être* and was framed to meet a case where it might be in the interest of the Crown to have other parties than itself defendant in an action before the Court. A rule of court, like a statute, must not be presumed to alter the existing state of the law beyond what is necessary for its valid and effective operation. Hence, the rule ought not to be held to apply when the matter involves an issue of indemnity between subject and subject, and one in which the Crown has no concern.

There is no doubt that the court would also have jurisdiction to entertain an issue between a defendant and a third party in a case where the court is given jurisdiction

(1) (1897) 5 Ex. C.R. 387.

(2) (1921) 21 Ex. C.R. 34 at 45.

as between subject and subject, that is in such matters as are provided by sec. 22 of the Exchequer Court Act (R.S.C., 1927).

THE KING  
AND  
CONSOLIDATED  
DISTILLERIES  
LTD. ET AL  
AND  
CONSOLIDATED  
EXPORTERS  
CORP. LTD.  
—  
Audette J.  
—

The application to dismiss the third party notice is granted; the third party is dismissed from this action, which of course, will not deprive the defendant company of such right of indemnity as may exist. The whole with costs in favour of the third party against the defendants.

*Judgment accordingly.*

|                                                                |             |                        |
|----------------------------------------------------------------|-------------|------------------------|
| EASTERN STEAMSHIP COMPANY }<br>LIMITED (DEFENDANT) . . . . . } | APPELLANT;  | 1928<br>—<br>Sept. 12. |
| AND                                                            |             |                        |
| CANADA ATLANTIC TRANSIT COM- }<br>PANY (PLAINTIFF) . . . . . } | RESPONDENT. | 1929<br>—<br>Feb. 16.  |

*Shipping—Limitation of liability proceedings—“ Engine room space deducted”—Canada Shipping Act (R.S.C. 1927, c. 186, sec. 904)—Tonnage*

*Held* (reversing the judgment appealed from), that the words “engine-room space deducted” as found in sec. 904, ch. 186, Canada Shipping Act, R.S.C., 1927, and in the corresponding provision of the Merchant Shipping Act, 1894, refers to the deduction allowed for propelling power as appearing in the certificate of registry.

2. That in calculating the tonnage of a ship in limitation of liability proceedings, the tonnage allowed for the power propelling space, must be added to the register tonnage.

APPEAL from the judgment of the Honourable Mr. Justice Hodgins, Local Judge in Admiralty for the Toronto Admiralty District, in limitation of liability proceedings.

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

*G. M. Jarvis* for appellant.

*Frances King, K.C.*, and *Mr. Pratt* for respondent.

The facts are given in the reasons for judgment.

THE PRESIDENT, now, this 16th February, 1929, delivered judgment.

This is an appeal from a judgment of Hodgins L.J.A., Toronto Admiralty District, in which he found the tonnage

1929

EASTERN  
STEAMSHIP  
Co., LTD.

v.

CANADA  
ATLANTIC  
TRANSIT  
Co.

Maclean J.

of the steamer *Dalwarnic*, in a limitation of liability proceeding, to be her register tonnage of 1,472·82, and in addition thereto the actual engine-room spaces 399·47 tons, making altogether 1,827·29 tons. The appellant claims that the addition to the register tonnage should be 766·15 tons, being the deduction allowed on account of space required for propelling power in ascertaining the register tonnage, and as appearing in the certificate of registry; this would make a total of 2,193·97 tons. The whole issue therefore is, does "engine-room space deducted," as found in sec. 904, ch. 186, Canada Shipping Act, R.S.C., 1927, and in the corresponding provision of the Merchant Shipping Act, 1894, here mean, only the actual engine-room spaces, or does it mean the deduction or allowance made "on account of space required for propelling power," as determined by sec. 78 of the Merchant Shipping Act, which in this case is 32 per cent of the gross tonnage, of the *Dalwarnic*, and considerably greater than the actual engine-room spaces. The learned trial judge was of the opinion that the only addition to be made to the register tonnage, was the actual engine-room spaces below the upper deck, and the light and air spaces above the upper deck, and not the deduction allowed on account of space required for propelling power, in ascertaining the register tonnage under sec. 78 (1) (a) of the Merchant Shipping Act.

It is provided by sec. 78 of the Merchant Shipping Act, 1894, as follows:—

78. (1) In the case of any ship propelled by steam or other power requiring engine-room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship ascertained as in the last preceding section mentioned, and the remainder shall (subject to any deductions hereinafter mentioned), be deemed to be the registered tonnage of the ship, and that deduction shall be estimated as follows;

(a) As regards ships propelled by paddle wheels in which the tonnage of the space solely occupied by and necessary for the proper working of the boilers and machinery is above twenty per cent and under thirty per cent of the gross tonnage of the ship, the deduction shall be thirty-seven one-hundredths of the gross tonnage; and in ships propelled by screws, in which the tonnage of such space is above thirteen per cent and under twenty per cent of the gross tonnage, the deduction shall be thirty-two one-hundredths of the gross tonnage.

It will be seen from this, that in the case of a ship propelled by power requiring engine-room, an allowance shall be made for the space solely occupied by and necessary for



the proper working of the boilers and machinery. The space required for propelling power, is the space occupied by and necessary for the proper working of the boilers and machinery. It would therefore appear that the actual space required for engine-room, or for propelling power, is one and the same thing, so far at least as the space or volume required for either is concerned. Then for registry purposes the statute arbitrarily fixes the tonnage of engine-room or propelling power spaces at 32 per cent of the gross tonnage, if that space is actually between thirteen and twenty per cent of the gross tonnage of the ship. The tonnage thus ascertained and fixed is the only space deducted in ascertaining the register tonnage of the ship.

Turning to Rule 3, Second Schedule of the Merchant Shipping Act, we find directions for the measurement of allowance for engine-room space in steamships. If the engines and boilers are fitted in separate compartments, the contents of each shall be measured severally according to the rules, and the sum of their several results shall be deemed to be the tonnage of the said space. In the case of screw steamers in which the space for propelling power is to be measured, the rule provides how the contents of the shaft trunk is to be ascertained. Here again, engine-room space, and space for propelling power, seem to be used as denoting the same thing. The net tonnage of the actual engine-room space having been ascertained according to the rules in the Act, the method of estimating the allowance to be deducted for the purposes of the register propelling power, is provided for by sec. 78 (1) of the Merchant's Shipping Act, 1894 and 1906.

The actual engine-room tonnage of the *Dalwarnic* was between thirteen and twenty per cent of the gross tonnage, and accordingly, the deduction for space required for propelling power was fixed at 32 per cent of her gross tonnage, or 766·15 tons. It is clear therefore, that it was necessary to ascertain the tonnage of the actual engine-room space in order to reach the deduction to be allowed in the register for the propelling power space, and that is why the tonnage of the actual engine-room space is to be found in the certificate of registry under Note 1, and not as was suggested, for the purpose of furnishing that information for use in actions for limitation of liability. It is plain, I think, that it was

1929  
 EASTERN  
 STEAMSHIP  
 Co., LTD.  
 v.  
 CANADA  
 ATLANTIC  
 TRANSIT  
 Co.  
 Maclean J.

1929

EASTERN  
STEAMSHIP  
CO., LTD.

v.

CANADA  
ATLANTIC  
TRANSIT  
CO.

Macleod J.

the 32 per cent deduction that was made in ascertaining the register tonnage of the *Dalwarnic*, and none other. Therefore "engine-room space deducted" can only refer to the deduction allowed on account of space required for propelling power, which was 32 per cent of the gross tonnage.

Further, in the printed instructions regarding the tonnage measurements of ships issued by the British Board of Trade, I find an enumeration of the items entering into engine-room tonnage under sec. 78 of the Act. This includes space below the crown of the engine-room; space between the crown and the upper deck framed in for the machinery or for the admission of light and air; space similarly framed in above the upper deck; and the contents of the shaft trunk or trunks in screw vessels. I do not say that this has any legal effect, but it is illuminating.

I think if it was intended by the statute to differentiate between actual engine-room tonnage, and the arbitrary tonnage allowance of 32 per cent for space for propelling power, in limitation of liability suits, there would have been some attempt made to express the distinction. It appears to me that the statute is to be taken as expressing the fact, that the deduction allowed for propelling power in the register tonnage, was the tonnage that was to be added in limitation of liability proceedings.

Counsel for the appellant produced a certified order made in the Admiralty Division of the High Court of Justice in England, in a limitation of liability proceeding, and from that it would appear that the addition made to the register tonnage, was the deduction allowed for the space required for the propelling power, as appearing in the certificate of registry. The point here in issue may not have been raised, or it may have been overlooked. I am only stating what appears upon the face of the order of the Court. Since this appeal was heard, there accidentally came under my notice a report of a similar proceeding published in the legal proceedings columns of the *London Times*, in 1928; this was the case of the steamship *The White Abbey*. I took steps to procure the gross tonnage of this ship and the deductions allowed on account of propelling space, and with that information before me I make the deduction from the order of the Court, that the tonnage calculated in making the decree for limitation of liability in that case, was

reached by adding to the register tonnage, the deduction allowed for spaces for propelling power. There being no authority upon the point, I am constrained to assume that in practice, in England, engine-room space, and space for propelling power are regarded as the same thing in limitation of liability proceedings. I think it will be found that there the universal practice is to calculate the tonnage of a ship in limitation of liability proceedings, by adding the tonnage allowed for the power propelling space, to the register tonnage. I think that was the intention of the legislature, and it does not seem an unreasonable provision.

1929  
EASTERN  
STEAMSHIP  
Co., LTD.  
v.  
CANADA  
ATLANTIC  
TRANSIT  
Co.  
Maclelan J.

I have reached the conclusion therefore that I must, with respect, differ from the conclusion reached by the learned trial judge, and I allow the appeal with costs.

*Judgment accordingly.*

CANADIAN RADIO PATENTS LIM- } PLAINTIFFS;  
ITED ET AL . . . . . }

1927  
June 13.  
July 8.

AND

HIGEL RADIO LIMITED . . . . . DEFENDANT.

*Practice—Patents—Further particulars—Rule 28—English Order LIII A.*

*Held*, that under Rule 28 of the General Rules and Orders of this Court, the Court or a judge thereof may order such further and better particulars as such Court or judge may see fit.

2. That the practice laid down in Order LIII A of the High Court of Justice in England has not so far been adopted in this Court. That, however, said Order was only declaratory of what the practice was previously.
3. That in an action for the alleged infringement of a radio receiving set the plaintiffs should give the following particulars, namely: showing what tuned radio frequency sets claimed to be infringements of plaintiffs' patent have been or are being sold and used by the defendant, so far as known to the plaintiffs; and also showing the claims of the said patent which are alleged to be infringed by the defendant.

APPLICATION by defendant for an order compelling the plaintiffs to give further and better particulars.

The action of the plaintiffs was for an injunction against the defendant restraining it from using a certain receiving set alleged to be an infringement of their patent. Plaintiffs' patent was for improvements in selective tuning systems.

1927  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL  
 v.  
 HIGEL  
 RADIO, LTD.

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

*W. D. Herridge, K.C.*, for the Motion.

*O. M. Biggar, K.C.*, *contra*.

The facts and points of law raised on the application are set out in the reasons for judgment.

THE PRESIDENT, now (July 8, 1927), delivered judgment.

In these two cases the defendants have applied by summons for an order directing the plaintiffs to furnish further and better particulars as follows:—

(a) Under paragraph 1 of the Particulars of Objection,—Shewing what tuned radio frequency sets are sold by the defendant;

(b) Under paragraph 1 of the Particulars of Objection,—Stating what Claims of the said Canadian Patent Number 208,583 are alleged to be infringed by the defendant.

Mr. Herridge appeared for the defendants in support of the summons in each case and Mr. Biggar, K.C., appeared for the plaintiffs, opposing the summons.

As the matter is one of importance in the practice of the Court in actions for the infringement of patents of invention, I asked each counsel to supplement his oral argument with a statement in writing of the points and authorities relied on by him. This has been done and I have had the advantage of perusing the same and considering the authorities.

Mr. Biggar's argument briefly stated is that the present Exchequer Court rules embody a practice in respect of particulars of breaches to be furnished by the plaintiff in an infringement action which is substantially the same as that prevailing in England under the Patent Act, 1883. He pointed out that this practice was superseded by the provisions of the English Order LIII-A made under the Patents and Design Acts of 1907 and 1919, and he contended that under this new practice more precision and exactitude is required from the plaintiff in furnishing particulars of breaches.

Before proceeding to compare the provisions of rule 25, of the General Rules and Orders of this Court with the present rules prevailing in England I will refer to Terrell on Letters Patent, 2nd Ed., 1889, cited to me by Mr. Biggar

as disclosing the English practice at that time. At page 222, section 29 (1) of the English Act, 1883, is quoted as follows:—

In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the Court or a judge at any subsequent time, particulars of the breaches complained of; (4) at the hearing no evidence shall, except by leave of the Court or a judge, be admitted in proof of any alleged infringement, or objection of which particulars are not so delivered; (5) particulars delivered may from time to time be amended by leave of the Court or a judge.

1927  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL  
 v.  
 HIGEL  
 RADIO, LTD.  
 Maclean J.

In his commentary upon this provision Mr. Terrell observes:— (p. 222).

Particulars of breaches are particulars of the times, places, occasions, and manner in which the plaintiff says the defendant has infringed his letters patent. The defendant must have full, fair, and distinct notice of the case to be made against him, *Needham v. Oxley* (1). In *Batley v. Kynock* (2), Sir James Bacon, V.C., said: "All that is required and provided by the Patent Law Amendment Act, 1852, which has made no alteration in the practice to be observed in these cases, is that the defendants shall not be taken by surprise, and it is the duty of the judge to take care that by the particulars of breaches they shall have full and fair notice of the case that they will have to meet."

It had undoubtedly prior to the passing of the Patent Law Amendment Act, 1852, been the practice of the Courts to compel plaintiffs to give particulars of breaches and the cases which were then decided as to the sufficiency of particulars are applicable now; for then, as now, the object was that the defendant should be warned with reasonable certainty of the case that was to be made against him. . . . If the particulars delivered are too general the defendant should apply for further and better particulars.

If this is a correct presentation of the practice prevailing before the English Order LIII-A was passed, and, further, if our Exchequer Court practice to-day is the same as that, then it would seem that I have power to entertain the application for an order directing further and better particulars of breaches in infringement actions. I may say too, that in arriving at this conclusion I am only following in the footsteps of other Judges who have sat in this Court.

Turning now to a comparison of the provisions of the English Order LIII-A with those of rule 25 of the practice of this Court I find that while rule 11 of the English Order cited is substantially the same as our rule 25, there is a new and more specific formulation of the duty of the plaintiff in respect of stating particulars of breaches in rule 14 of the English Order (See Annual Practice, 1927, p. 967). This rule has so far not been adopted in our practice, but I think

(1) (1863) 1 H. & M. 248.

(2) (1874) L.R. 19 Eq. at p. 231.

1927  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL  
 v.  
 HIGEL  
 RADIO, LTD.  
 Maclean J.

it clear from the authorities cited on page 968 of the Annual Practice that the present English rule is only declaratory of the practice recognized in the books for a very long period. For instance, there is a case cited at p. 968 in the work last mentioned which was decided in 1887, *Haslam & Co. v. Hall* (1), and which is relied on for the following proposition:—

It must be remembered that if the defendant is unable to ascertain from the particulars with sufficient precision what type of machine or process is complained of, the onus will lie on him to apply for further and better particulars, and to give some evidence to show that the information given is insufficient (*Haslam & Co. v. Hall*, (1887) 4 R.P.C. 203); he should not wait until the trial to complain.

In my foregoing observations I have made no reference to the very wide powers conferred upon me by rule 28 of the practice of the Exchequer Court. It provides that:—  
 “Further and better particulars may be ordered to be delivered as the Court or a Judge may see fit.” This rule refers to particulars in patent actions, and it seems to me that its terms could not be wider. I am of opinion that under this rule alone I have power to make an order for further and better particulars in such a case as the present.

Coming now to the merits of the application, I have examined the bearing upon the cases of the further particulars asked for, and I think that the interests of justice will be served if I direct that further and better particulars be given in each of these cases as follows:—

1. Showing what tuned radio frequency sets claimed to be infringements of plaintiffs' patent as set out in his statement of claim herein have been or are being sold and used by the defendant so far as known to the plaintiff.
2. Showing the claims of the said patent which are alleged to be infringed by the defendant.

In each case there will be an order accordingly in the usual form and terms. Costs of and incidental to the application to be costs in the cause.

*Judgment accordingly.*

FRITS RICDOLF CHRISTIANI ET AL . . . . . PLAINTIFF;

1928  
Dec. 6-8.

vs.

JOHN A. RICE . . . . . DEFENDANT.

1929  
Mar. 6.

*Patents—Date of invention—Anticipation—Impeachment—Conception of idea*

The invention in question herein was for a process of making cellular cement products suitable for building material and containing insulating properties.

*Held,* That the conception of an idea in some cases may be the merit of an invention, and may not require to be followed by any effort or experimental work of skill; but here the conceiving of the bare idea that voids or cellular spaces would be useful in concrete building materials, would be futile, unless the method or process for doing this successfully in a commercial way was made known. The invention must include and disclose the means of making commercially practical the idea.

- 2. That an antecedent publication ought not to be held to be an anticipation of a subsequent patent, unless it is clear that the antecedent publication discloses a practical mode of producing a result which is of the same effect as that disclosed in the subsequent patent. The mere publication of an idea that a practical article might be made, without sufficient information or means of knowledge communicated to the public, does not prevent a subsequent and independent inventor of those means, from taking out a patent.

ACTION to impeach Canadian Patent No. 252,546, to defendant.

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

*W. D. Herridge, K.C.*, for plaintiff.

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

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (March 6, 1929), delivered judgment.

This is an action to avoid Canadian patent no. 252,546, relating to cellular cement products, and the process of making the same. This patent was issued to the defendant Rice, in August 11, 1925, the application for the same having been filed on June 13, 1924. Rice applied for a patent in the United States on December 31, 1922, covering the same subject matter, and later he there received a

1929  
 CHRISTIANI  
 ET AL.  
 v.  
 RICE.  
 Maclean J.

patent therefor. Under the Patent Act, Rice's filing date in the United States is his Convention filing date in Canada.

The ground for this action is, that Rice was not the first and true inventor of the alleged invention mentioned in his Canadian patent here attacked. The plaintiffs claim that the first inventor was one Bayer of Copenhagen, Denmark, the assignor of the plaintiffs, and that Bayer received a patent for such invention in Denmark, upon an application filed on September 11, 1922, issued on June 19, 1923, and published on July 2, 1923. On November 9, 1926, a patent was granted to Bayer in Canada, on an application made in September, 1924. The issue for determination is limited as to who was the first inventor, Bayer or Rice; neither patent is attacked upon any other grounds. Both Bayer and Rice had the same idea in mind, which, each claims, resulted in an invention. Bayer preceded Rice in his conception of his alleged invention and in his experimental work developing the same. However, each was in good faith and they were working independently of each other.

The invention claimed by Bayer and Rice is a process of impregnating cement or a similar material, while in a soft or dry state, with air bubbles produced from a foam which will readily mix with the cement material and occupy space within the same; the purpose and object of this is to produce a cellular product, adaptable for use in building purposes. It is stated that the bubbles displace the cement or other material with which it is mixed, and that a product considerably lighter in weight than that produced in the ordinary way from concrete mixtures is obtained, and further, that the cellular voids improves the heat insulating and sound insulating properties of the finished material. Foam is the aggregate of an indefinite number of small air bubbles which retain their identity because they are surrounded by a film of water, but which ordinarily are not sufficiently elastic to remain so permanently, and therefore other substances are introduced to increase the surface tension around the bubbles, or in other words, to make them more elastic and durable while being mixed with concrete and other material and until its setting. After a time the air is released, and cells or voids are to be found in the cementitious material when set.



The specifications of Bayer are brief and it may be useful to state them in their entirety, particularly as so much turns upon the character of the disclosures made in the specifications of both Bayer and Rice. Bayer states what his invention relates to, and the method of making the same, in the following words:—

The invention relates to a method of manufacturing porous materials for building purposes, etc., from substances, which set when mixed with water or other fluids, for instance cement and gypsum, and the process consists of adding frothy substances in an indifferent manner during the treatment of the substance with the mixing fluid.

It has turned out that a suitable choice of such substances makes it possible to produce a foam, which during the ensuing shaping of the material is of such a durability that a great number of air bubbles are left in the mass.

The production may take place by adding the foam-developing substance to the setting fluid or to a mixture of same and the material, which is to be mixed with the fluid, thereafter the foam is developed either by stirring up the mass vigorously or by introducing compressed air, possibly carbonic acid. In most cases it will, however, be simplest to add foam already developed to the mixing fluid or to a mixture of same and the setting substance. By production on a large scale the foam may be prepared in a special machine, from which it is carried to a mixing machine of the usual construction, so that the foam is introduced into the mixture instead of or simultaneously with the sand or other expletives.

As foamy substance different kinds of mucilage, for instance the mucilage obtained from seaweed, the so-called tangin, may be used. The durability of the foam obtained from such substances may be increased by adding gelatine. The quantities required of these substances are inconsiderable, and consequently the manufacturing process is very cheap.

In certain cases it has been observed that the durability of the foam is further increased by adding small portions of formaldehyde.

On account of its structure the material produced will be light and heat-proof, and it may at pleasure be manufactured in shaped slabs, which are fastened on with cement or nails, or which are cast on the premises.

Rice, in his specifications, enters into very considerable detail in describing his invention and the process of making it. After stating what his invention relates to, he proceeds to set forth how the principle of his invention may be executed. He states

In the preferred form of my invention, I use a mixture comprising Portland cement, water and gas bubbles. The Portland cement or clay or magnesite or any other equivalent is preferably mixed with sand, either in the presence of water or in a dry state. The gas bubbles are preferably produced by whipping a gelatine mixture, such as a mixture of the following materials, viz:—

1% Glue,

98½% Water,

½ of 1% Formalin solution containing say about 40% formaldehyde.

Before whipping, this mixture is preferably allowed to age for twenty-four hours or longer, and is then whipped into a stiff foam or lather which will

1929  
CHRISTIANI  
ET AL  
v.  
RICE.  
Maclean J.

1929  
 CHRISTIANI  
 ET AL  
 v.  
 RICE.  
 Maclean J.

remain stable for a considerable length of time. It is well known that glue solution can readily be converted into a foam, e.g., by whipping, introduction of air or equivalent methods. The formaldehyde added greatly hardens the films surrounding the individual bubbles, by which the walls of such bubbles become strengthened sufficiently to stand up under the pressure of the cement grout, until the setting of the cement. The ageing also serves to increase the strength and persistency of the foam.

He then goes on to state that this foam is then mixed in suitable proportions with the cement mixture, and this results in the gas bubbles of the foam being thoroughly incorporated in the cement mixtures. where they remain without breaking until the cement is set, thereby producing a stable body with a large number of cellular voids therein. He then proceeds to say:—

In other cases I have found glue solutions of a much lower strength to be very suitable, thus a solution of about one part glue in 100 to 200 parts of water, and containing say 0.1 to 0.2% of the formalin solution, although rather less viscous than the 5% mixture above referred to, is found to give an excellent foam, which is very stable. I have also used glue mixtures much more concentrated and more viscous than above stated (e.g., 10% and 15% mixtures) with satisfactory results. I prefer the weaker solutions, because I find (particularly with Portland cement and some of the other hydraulic cements) that the large amounts of glue or other colloids tend to greatly retard the setting of the cement. While such retardation is sometimes useful, it is in other cases rather objectionable.

When using the dilute glue solutions, such as 0.5% it is usually necessary or advisable to give a long and vigorous beating, to give a tenacious and stable foam.

In place of glue, I can use various other colloids, e.g., gelatin, white of egg, or blood albumen (dissolved and preferably formalin added as above indicated) casein (dissolved in borax solution or other alkali). The above substances are all proteid matters, however other substances capable of forming suitable foams are dextrin solutions, starch paste (boiled) Irish moss, agar, soap bark, saponified rosin, cellulose acetate solution, viscose, silicic acid gel (along or with water glass).

Various additions can be made to the glue mixture to increase the foaming properties or to make the foam more stable and more tenacious. Examples of such mixtures follow:

A celluloid, rosin, copal, shellac, rubber, "Bakelite" or similar solution added to the above mentioned glue solution, and the latter then used to make a lather that is entirely proof against water and which has great strength and permanence. Such a foam mixed with Portland Cement mortar, even upon continued stirring, does not show any substantial tendency to break up. As an example of this, I may use to 10 parts of the glue-water-formalin mixture 0.02 parts of a 1% solution of rosin dissolved in acetone.

Of other substances which can be conveniently added to the glue mixtures, for this purpose, I mention soap bark, amole root, Senega root, various "soapweeds," chloroform, phenol, cresol rubber latex, common soap, amonium atearate, saponified beeswax, Japan wax, carnauba wax.

The above mentioned materials can also be used with starch and similar colloids, for forming the foam-producing compound. They can be added to various of the above mentioned colloids, with like results.

Particular mixtures giving very useful results were (a) Irish moss and glue, (b) soap bark and starch, (c) glue and 1 to 5% soap bark solution, (d) glue and 5-10% of chloroform, (e) glue and .05% of phenol or cresol, (f) rubber latex and glue, (g) casein (solution in alkali) and .002 to .005% cresol, (h) ammonium resinate and glue.

Further examples which have been found very suitable are the following:—

- (o) 500 parts by volume of 2% glue solution.  
6000 parts by volume of 2% cold water.  
25 parts by volume of 25% rosin solution in ammonia (about 0.5% solution).
- ½ part by volume of 2% Cresol Compound U.S.P.”

(k) 2,000 parts of 2% glue solution mixed with sufficient saponified rosin and beeswax to represent 1 part rosin and 1 part wax, well mixed and added to 1,800 parts of water. The amounts of rosin and wax can be increased to about 100 parts if desired.

(l) Adding enough dilute acid (H Cl or H<sub>2</sub> SO<sub>4</sub>) to gelatin, solution, give a neutral reaction to the solution, serves to control the size of the bubbles, and when used with Portland cement produces a harder product. Small amounts of alum; aluminum sulfate, aluminum chloride, iron chlorid or sulfate, gives similar effects. (m) 4 parts casein: soak in 12 parts water. Mix 1 part powdered rosin and 18 parts of water, add sufficient ammonia to dissolve. Mix the two solutions. Let stand several hours, when the casein will be thoroughly dissolved, add 7% of a 5% solution of A12 (SO<sub>4</sub>) 3 Stir well. Mix this with 80 volumes of water to produce the foaming solution. (n) Cellulose acetate solution in acetone was added to casein solution and the mixture produced a good foam. Viscose, was similarly used. Rosin soap could be used with both of these, if desired.

Specific formulas for additions to glue solutions which gave satisfactory results are:—

- (o) 1 part lysol, 0.3 parts phenol and 0.3 parts of glycerin, added to 0.1 glue solution.
- (p) Lysol, Bakelite varnish and formalin, dissolved, in alcohol and added to 20 parts of glue solution.
- (q) 2000 c.c. of 1% glue solution.  
4 c.c. of formalin.  
4 c.c. of liquid phenol.  
8 c.c. of copal solution in alcohol.

- (r) 8 casein, 1 rosin and 1 wax (in an alkaline liquid).

The amount of foam to be used with a given amount of plastic cement mixture will depend on the result desired, i.e., the degree of porosity wanted; and the amount of foam that can readily be made to stay in the mortar will depend on the kind of cement and the degree of stiffness of the mortar. I have used successfully, various ratios from one part of bubbles in six or eight of mortar to about five parts of bubbles to one part of neat cement mortar (by volume).

Reverting now to Bayer, what he in substance says is, that if you make a suitable choice of frothy substances it is possible to produce a foam of such durability that a great

1929  
CHRISTIANI  
ET AL  
v.  
RICE.  
Maclean J.

1929  
 CHRISTIANI  
 ET AL  
 v.  
 RICE.  
 Maclean J.

number of air bubbles will be left in the mass during the shaping of the material; that as a foamy substance, different kinds of mucilage, such as mucilage obtained from tangle (sea weed), may be used; that the durability of the foam may be increased by adding gelatine; and that in certain cases the durability of the foam may be further increased by adding small portions of formaldehyde. That sums up Bayer's description of his invention, and the various steps in the process or method of making or compounding his cellular building material. In fact in his specification Bayer says nothing more than I have stated. It is contended that Bayer does not sufficiently describe his invention in his specification and we must now enquire what the law requires in this respect.

The Patent Act, sec. 14 requires that:

14. (1) The specification shall correctly and fully describe the invention and its operation or use as contemplated by the inventor. It shall set forth clearly the various steps in a process, or the method of constructing, making or compounding, a machine, manufacture, or composition of matter. It shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege.

The difficult matter for determination here, is, did Bayer in his specifications comply with this statutory requirement. If Bayer had not more exact or detailed knowledge as to the method or process of making porous materials for building purposes, did he make an invention? If he had more specific knowledge and did not give it to the public in his specification, was he entitled to a patent? The duty of an inventor is a positive one, namely, with the fullest bona fides, to describe the best way known to him of carrying out the invention and to leave the public in no doubt as to what constitutes the invention which he claims as his monopoly. He must so draft his specification, that a person having a competent knowledge of the industry concerned, in this case the manufacture of cellular concrete material, will be able readily to ascertain from it the relation the invention bears to the existing knowledge in the industry, and so that one should not be called upon to do experimental work in order to discover how the invention may be made operative. There must be an open exposition by the patentee of everything that is necessary for the easy and certain procurement of the commodity for which the patent was granted. The patentee is not to tell a man

to make an experiment but to tell him how to do the thing. The books contain a wealth of authority supporting this position. All Bayer discloses, it seems to me, is the bare idea that you can make a foam from a mucilaginous substance (which was known), the durability of which may be enhanced by the addition of gelatine and in some cases by the addition of small portions of formaldehyde, and which when mixed with cementitious material will produce a porous building material possessing insulating properties. That seems to me a very meagre amount of information to give the public in the way of showing the steps in the process of making a durable foam that would survive a mixing with cementitious materials, and making ultimately a cellular building material. Would any competent person, after reading this specification and about to test the utility of the invention, feel that he was starting off with the expectation of forthwith making a commercial building material, or, that he was embarking upon an experiment or the beginning of a series of experiments. I think the latter. He would think that it would require more or less experimental work in order to succeed in making a commercial building material of the nature Bayer had in mind, if he succeeded at all. Perhaps many competent persons would fail altogether. Some persons might upon a reading of the specification cast it aside at once, because it was so obviously suggestive of experimental or research work. If Bayer knew more than was expressed in his specification, it should I think have been stated. If he had no more knowledge than the general idea stated in his specification, then I think he had no invention, or had not completed his invention. He might have, for example told the public, when, in his experience formaldehyde might be usefully used, because I infer, he used it in some instances when it did not prove useful. The reference to formaldehyde in the specification is thus expressed: "In some cases it was observed that the durability of the foam is further increased by adding small portions of formaldehyde." This does not convey the impression that the value of formaldehyde had been experimentally established by Bayer. There is some evidence in support of the view that Bayer had not completed his invention before applying for his patent, because the note book containing the results of the labora-

1929  
 CHRISTIANI  
 ET AL  
 v.  
 RICE.  
 Maclean J.

1929  
 CHRISTIANI  
 ET AL  
 v.  
 RICE.  
 Maclean J.

tory work of himself and his collaborators upon this alleged invention shows, that their work was continued for a month after Bayer filed his application for patent in Denmark. The proportions of materials used in the laboratory work must have been regarded as of importance in establishing the commercial utility of the general idea of making cellular concrete material, otherwise it would not have taken Bayer and his associates nearly two years, during which time a thousand and more experiments were made, to learn that they had definitely made an invention. Did they sometimes find, that a certain proportion of mucilage was unsatisfactory and tended to retard the setting of the cement, or, that a greater or less time of beating was required with some substances in order to obtain a tenacious and stable foam as compared with other substances? I think the specification should have in some degree disclosed the knowledge gained by Bayer from his experimental work, that is, if it was complete and conclusively established. The public should not be expected to travel the long experimental road which Bayer and his assistants had traversed, if Bayer was to be granted a monopoly. The specification as a whole, leaves me with the impression that Bayer's idea or invention was not a completed one, when the Danish specification was prepared.

The conception of an idea may be the whole merit of an invention, and its application when once conceived may require no effort or experimental work of skill. That, I think, is hardly this case. Conceiving the bare idea that voids would be useful in concrete building materials would be futile, unless the method or process for doing this by successful means, in a commercial way, was made known. The idea was valuable, but the invention lay in producing the process or means of making commercially practical that idea.

Defendant's counsel, urged, that the application of Bayer for patent in Denmark, until granted in June, 1923, did not constitute within the spirit of the Patent Act, a knowledge or use, adverse to Rice in his Canadian application. I am uncertain as to whether I properly understand or appreciate this point. Inasmuch as I have expressed the opinion that the sufficiency of the specification of Bayer is inadequate, I think I need not dwell further upon the point. I

might however observe, what in essence I have already stated, that an antecedent publication ought not to be held to be an anticipation of a subsequent patent, unless it is clear that the antecedent publication discloses a practical mode of producing a result which is of the same effect as that disclosed in the subsequent patent. It is necessary, in order that a prior document may invalidate, on the ground of want of novelty, a subsequent patent, that all the essential features of the subsequent patent be found in the prior document. The mere publication of an idea that a practical article might be made, without sufficient information or means of knowledge communicated to the public, does not prevent a subsequent and independent inventor of those means, from taking out a patent.

1929  
CHRISTIANI  
ET AL  
v.  
RICE.  
Maclean J.

This case is a very difficult one, and I fully realize the force of the plaintiffs' position so exhaustively and ably presented by their counsel. Briefly expressed, my view is, that any one knowing of Rice could practice his invention. I do not think that is true of Bayer, and there was some evidence to this effect given by one of the defendant's witnesses. If Bayer had actually translated his idea into a workable invention, on the date of his Danish application, then it is a pity he did not make distinct and clear that fact. I do not think that the plaintiffs are now entitled to ask that Canadian patent no. 252,546 be cancelled and set aside, on the ground of want of novelty in Rice, by reason of the prior publication of Bayer. In these circumstances the plaintiffs must be held to fail in their action and I order that the same be dismissed with costs to the defendant.

*Judgment accordingly.*

BETWEEN:—

HIS MAJESTY THE KING..... PLAINTIFF;

AND

FROWDE LIMITED ..... DEFENDANT.

1929  
Feb. 26, 27,  
and 28.  
April 18.

*Special War Revenue Act, 1915—Sales Tax—Proviso—Exemption from tax  
—Proof of export—Exportation to be by manufacturer*

The Special War Revenue Act, 1915, imposed a consumption or sale tax on all goods manufactured and produced in Canada, and there sold by the manufacturer or producer, provided however, that when such goods were sold and exported the sales tax was not payable.

1926  
 ~~~~~  
 THE KING
 v.
 FROWDE LTD.

Held, that the words sale and export as used in the Act, mean a sale and export by the manufacturer or producer, the exportation being an act consummating a transaction to which the tax does not apply.

2. That the language of the proviso relates only to exportation by the manufacturer, and cannot be extended to a case where the manufacturer loses control of the goods by selling and disposing of the same to a purchaser in Canada.

INFORMATION by the Crown to recover from the defendant certain sales tax for spirit and liquors manufactured and produced by the defendant in Canada.

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

N. W. Rowell, K.C., and *Gordon Lindsay* for plaintiff.

W. N. Tilley, K.C., and *W. Lawr* for the defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (April 18, 1929), delivered judgment.

This is an action to recover from the defendant company, the successors to Joseph Seagram & Sons Ltd., of Waterloo, Ontario, licensed manufacturers and producers of spirits, the sum of \$101,641.06 with interest, for sales tax, claimed to be due and owing by the defendant to the plaintiff under the provisions of the Special War Revenue Act, 1915, and amendments thereto. As the sales in question were made by Joseph Seagram & Sons Ltd., I shall refer to that company alone, and for convenience as Seagram. The plaintiff's claim for sales tax is in respect of sales of spirits made in the years 1921, 1922, 1923, and 1926. The sales tax upon spirits sold by Seagram in the years 1924, 1925, and a portion of 1926 was paid. The sales for the years last mentioned were of the same character as those sued upon. The provision of the Special War Revenue Act, of importance here, is as follows:—

19BBB. 1. In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of five per cent on the sale price of all goods produced or manufactured in Canada including the amount of excise duties when the goods are sold in bond, which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him;

Provided that the consumption or sales tax specified in this section shall not be payable on goods exported; or goods sold by a licensed manufacturer or producer to another licensed manufacturer or producer if the

goods are to be used in, wrought into, or attached to articles to be manufactured or produced for sale and which are articles subject to the consumption or sales tax;

1929
THE KING
v.
FROWDE LTD.
Maclean J.

The defence is that the spirits sold by Seagram were exported out of Canada, and that under the proviso contained in sec. 19BBB, just recited, the sales tax was not payable.

The evidence shows that the sales in question were, as a rule, made in the following manner. First, an order upon a printed form for a stated quantity of whiskey would be mailed by a customer, from a point in the United States, to Seagram at Waterloo, very frequently in the quantity of 100 cases; the quantity of whiskey and the name of the consignee would be typewritten or otherwise inserted in the printed order. An actual order put in evidence, dated at Detroit, U.S.A., Nov. 27, 1925, is as follows:—

JOSEPH E. SEAGRAM & SONS LTD.,
Waterloo, Ontario.

Please fill this order to be shipped via Port Lambton
100 cases Canadian 60z.

AMERICAN EXPORT Co.,
Marine City, Mich.

I shall call and supervise handling of this order.

DAVID A. ROSE.

In the above order the quantity of spirits, and the name of the consignee, seem to have been inserted by means of an ordinary rubber stamp which would indicate that precisely the same order was commonly forwarded. These orders would come to Seagram in apparently liberal quantities, that is to say, orders would be on file at its office to anticipate any demand. So far as the sales in question here are concerned, they were limited to a few purchasers, one of the largest being one Yarrows, and as several of his transactions were described in detail as typical of others, I shall use the Yarrows transactions as being descriptive of the others. Rose who signed the order above mentioned was a partner or agent of Yarrows, the latter, I think at all times material here, resided at Waterloo, though I understand he belonged to the United States. I might here say that Yarrows' purchases of whiskey from Seagram during the period in question ran into several millions of dollars in value, his accounts at two banks at Waterloo show the same to have been quite active accounts, involving considerable amounts.

1929
THE KING
v.
FROWDE LTD.
Maclean J.

They also show that frequently substantial amounts would be transferred to Yarrows' credit at his banks at Waterloo, from points such as Toronto, Hamilton and Windsor.

With such orders in the hands of Seagram, Yarrows would make purchases from Seagram at Waterloo as and when required, and these purchases would be noted in pencil on the order, as made and paid for. For example, the order from Rose, which I have mentioned was never fully filled. In the following January, upon three different dates, three different purchases and shipments of 25 cases each were made ostensibly upon that order, and these shipments are there noted, the last shipment or delivery being made on the 22nd of January, almost two months after the date of the order. In this way it seems any particular order would be filled, wholly or partially, according to the needs of Yarrows. Sometimes an order would be satisfied by delivery of a class of goods other than that mentioned in the printed order, if Yarrows or his representative at Waterloo so directed. After an actual purchase from Seagram was made and paid for by Yarrows, it would be delivered to him or his servants at the Seagram distillery, and there usually loaded on a motor truck belonging to or hired by Yarrows, and thus transported to some Ontario port such as Sarnia, Port Lambton, Windsor, Courtright, or some other port. No representative of Seagram accompanied the goods so transported by motor truck. Having been paid for the goods so issued from the distillery by permit, and free from excise duty, Seagram's interest and control in the goods ended, except possibly for the fact I am about to mention. Accompanying the shipment there would be an invoice of Seagram showing the name and address of the consignee, the nature and quantity of the goods, the port in Canada through which the goods were to be shipped to the United States, and the name of a boat which was to carry the goods from that point to their destination in the United States. A customs form, known as B. 13 also accompanied these motor truck shipments. This form was required by Customs from all Canadian exporters of goods as an entry for export, and for statistical purposes, as will appear from the printed matter on the back of such forms. This form would be filled in by Seagram and would contain the name and address of the consignee, a description of the goods together

with the quantity and the value; this form would be supplied by Seagram and delivered to Yarrows. It was not necessary that the form B. 13 should accompany the goods from Waterloo, to the Canadian port of exit, and it had no significance whatever until the goods reached the port of exit and the form was lodged with Customs there as an export entry. The requirements of the Customs Act and its regulations in this regard, would have been complied with by the completion and filing of this form with Customs at the last port in Canada through which the goods passed, en route to their foreign destination. The goods on reaching the designated port of exit would be there warehoused by Yarrows or his agent. This warehouse was not one under the control of Customs, and was not one selected by Seagram; the goods themselves would not by such warehousing come under the control of Customs authorities. The goods would be taken from the warehouse when and as required by Yarrows. In some instances, it was shown in evidence, the goods would remain in warehouse for some months. When the goods were removed from the warehouse to be laden in a boat or train, ostensibly for export to another country, the form B. 13 would be presented by Yarrows representative directing the export, not Seagram or its agent, to Customs, and it would then be stamped by Customs at port of exit, the same indicating that the goods were exported at that port. The words "exported at," followed by the name of the port appears on the customs stamp, but I am not aware of any authorization for the use of such words in this connection. There was no other entry outwards of the goods and apparently none was required by Customs. This form would then be returned to Seagram, by Yarrows or his servants, by hand or mail; in a few cases it would appear the form was returned by mail to Seagram by Customs. If any declaration or certificate was required by Customs referable to one of Yarrows' shipments, which had not been supplied by Seagram, this would be supplied by a Customs broker at the port of exit upon power of attorney executed by Seagram to such broker. This broker would be unknown to Seagram and his services would not be retained or paid for by Seagram, but by Yarrows, or whoever happened to be the purchaser of such goods from Seagram. The Yar-

1929
 THE KING
 v.
 FROWDE LTD.
 Maclean J.

1929
THE KING
v.
FROWDE LTD.
Maclean J.

row shipments, and in fact all others, according to the shipping documents, were destined for the United States, but in some few cases for Mexico.

If the goods ordered were shipped by rail from the Seagram distillery at Waterloo, as they occasionally were, the goods would be routed for movement by a Canadian railway to an Ontario Lake Port, and thence by some boat named as at that port, to a stated destination in the United States. In some cases, the evidence reveals, the rail shipment would remain in a warehouse at the Ontario Lake Port for some days, weeks, or months, the goods in the meanwhile being entirely out of the control of Seagram and in that of Yarrows. One shipment of 305 cases of whiskey consigned to one Girrard of Port Huron, Michigan, went forward from Seagram by rail to Courtright, Ontario, from thence to be shipped by the boat *Elliott* to destination in the United States. This shipment was received by the railway on July 22, 1925, and on the day following some eighteen of the forms B. 13, were made out by Seagram and delivered to Yarrows or his agent, and in some way they would get to the Canadian border and into the possession of Yarrows or his agent. On reaching Courtright this particular shipment went into warehouse and was taken therefrom in eighteen different lots or parcels, and at different dates, the first being about August 2, and the last about October 12; this would represent eighteen different purchases made from Yarrows according to the evidence of an officer of Seagram conversant with the matter. While the bill of lading and all the B.13's indicated that this shipment was to go forward from Courtright to destination in the United States, portions of the same were shipped from ports other than Courtright, some going from Port Lambton, others from Sarnia. The goods were entirely in the control of Yarrows at the border point, and the shipping directions on the bill of lading and the forms B.13 were varied by him without any authorization from Seagram. There was no reason so far as I know, why Yarrows might not have removed the entire shipment from Courtright to any port in Canada. It is conceded that Seagram had no further interest or control in the goods and did not know why the goods in this instance did not go forward at once to the consignee.

A few further facts may be stated. The Customs form B.13 and the invoices on bills of lading accompanying shipments by motor truck or rail from Waterloo, did not contain the true selling price of Seagram to Yarrows, but an advanced value was put upon them by Seagram upon the directions of Yarrows. Again, it was established at the trial that the importation of liquor into the United States at the times material here, was prohibited by law. The evidence I think also shows that Seagram knew that such a law was in force in the United States. Then there was an agreement or contract entered into between Seagram and Yarrows, in April, 1922, which must be referred to. This agreement is witnessed by an officer of Seagram who gave evidence in this case, and therefore I assume it was executed at Waterloo, Ontario, although the place of execution strangely does not appear in the agreement itself. This agreement was entered into at the request no doubt of Seagram. In this document Yarrows is referred to as purchasers, and Seagram as exporters. The agreement in part is as follows:—

1929
 THE KING
 v.
 FROWDE LTD.
 Maclean J.

WITNESSETH that in consideration of the delivery by Exporters to the agent or carrier of the Purchasers of whiskey for exportation from Canada at such times and in such quantities as the Purchasers shall require and direct the Purchasers do hereby covenant and agree with the Exporters as follows:

(1) That they will forthwith after delivery of the said whiskey to their said agent or carrier transport the same out of Canada.

(2) That they will comply with all regulations of the Canadian Department of Customs, respecting customs entries, and statistical returns of goods exported from Canada, and in particular that they will have an entry form B. 13 furnished them in triplicate by the Exporters duly stamped by the proper Customs Officer as required by said regulations and will forthwith deliver or transmit to the said Exporters one of the said duly stamped triplicate entry forms.

(3) That the purchasers will from time to time and at all times hereafter well and truly save, defend and keep harmless and fully indemnify the said Exporters, of, from and against all fines, costs, charges, damages and expenses which the said Exporters may at any time or times hereafter bear, sustain, suffer, be at or be put unto for or by reason or on account of the sale of whiskey to them and delivery of same to their agent or carrier as aforesaid or anything in any manner relating thereto.

(4) That the purchasers will pay unto and leave with the Exporters Three Thousand Dollars as a security or guarantee for the faithful performance by the purchasers of the covenants and agreements hereinbefore set out which said last mentioned sum shall upon the breach by the purchasers of any of the said covenants or agreements be forthwith forfeited to the Exporters as liquidated and ascertained damages.

1929
THE KING
v.
FROWDE LTD.
Maclean J.

(5) It is further understood and agreed in case of breach by the purchasers of any of the said agreements or covenants this agreement shall be determined and no whiskey shall after notice to the Exporters of such breach be supplied to the Purchasers.

(6) That this agreement may be determined by either party at any time upon ten days notice to the other party hereto and upon such determination of this agreement the amount so deposited by the purchasers with the Exporters shall in case there has been no breach by the purchasers of the covenants or agreements aforesaid be repaid by the Exporters to the Purchasers within six weeks after the determination of this agreement as aforesaid.

Similar agreements were entered in by Seagram with other purchasers.

It is appropriate now to refer to the provisions of the statute upon which the plaintiff's action is based. It was the purpose of the statute to impose a sale tax on all goods manufactured and produced in Canada, if and when there sold, by the manufacturer or producer. If the goods so manufactured or produced in Canada, were sold and exported, the sales tax was not payable. This means however, in my opinion, a sale and export made by the manufacturer or producer, the exportation being the act consummating the sale. It means a definite sale of goods which were in fact exported by the manufacturer. The language of the proviso can relate only to the manufacturer and to no one else. That I think, is what the statute means, otherwise it would largely fail in its purpose. The purpose of the statute was to collect the tax at the source of production and primary sale in so far as was possible, and thus make the statute effective and easy of administration. The statute never could have contemplated that a manufacturer might sell and deliver goods in Canada to a purchaser, who might or might not export the same, and over which the manufacturer had lost control, and thus so very casually be relieved of the sales tax. If that was the intent of the statute it would hardly be operative, in a practical sense. A contingent or problematical export by a purchaser from a manufacturer, was not the kind of export intended by the statute to relieve a manufacturer of the sales tax, upon a sale of goods produced by him. See *Rex v. Gooderham & Worts Ltd.* (1). I do not mean to say that a purchaser of goods from a manufacturer, subsequently himself exporting

(1) (1928) 62 O.L.R. 218.

such goods might not be entitled to a refund of the sales tax if it entered into the computation of his purchase price. That is another case.

1929
 THE KING
 v.
 FROWDE LTD.
 Maclean J.

From the facts I have stated, can it be said that Seagram was an exporter of the goods in question, in fact, or within the meaning of the Special War Revenue Act? I do not think Seagram was in any sense an exporter of the goods. It made unconditional sales and deliveries of the goods in Canada, not only without any obligation on its part to export the goods to any named consignee in the United States, but, I think, under the stipulation that the export, if made, was to be the undertaking and liability of the purchasers. I do not regard the orders mailed from the United States as of importance or relevancy. The sales were not made in my opinion on bona fide orders received from outside of Canada. The use of these orders was adopted as a mere subterfuge. They were unnecessary, purchases for export might have been made without them, and the evidence shows that they were frequently disregarded. The actual purchases were determined upon and made, as a rule, on verbal orders communicated by the purchaser to Seagram at the distillery; the mere fact that a notation of actual sales were made on such printed orders really means nothing. The fact that the buyers, or most of them, went through the form of printing and forwarding these orders, and of having made rubber stamps bearing the names of consignees and the quantity of whiskey required, is suggestive of the fact that all this was done for a purpose, other than that appearing on their face. These orders were invented and intended as a shield, for the protection of Seagram, against any possible charge of a sale of this class of goods being made in violation of the laws of Ontario. And this was because of the fact, that after the sale and delivery of the goods at Waterloo to a purchaser, the same were not delivered, as a rule, to a common carrier and routed to the consignee as is usual in the case of goods sold for export; they were delivered to the purchaser who generally transported them by motor truck many miles to a warehouse as described. Seagram thereafter had no control or direction over the goods, and anything might happen to them. I have no doubt it was believed by Seagram that the invoices and the B.13's might, along with the orders,

1929
THE KING
v.
FROWDE LTD.
Maclean J.

in the event of the seizure or arrest of the goods by provincial authorities while thus in transit, offer plausible evidence of intention on its part of a sale of goods for export and not for resale in the domestic market. The B.13's had no significance whatever, until the goods reached the port of exit from Canada, and were turned over to some carrier to be forwarded to a foreign destination, and the form concurrently stamped at Customs. Neither do I believe that the consignees named in the shipping and customs documents were bona fide consignees of Seagram, as an exporter. If they were, Seagram would have taken steps to protect the interests of such consignees, and his own as well, by delivering always the goods to some common carrier, and not to a third party over whom it had no control and who was under no restraints. The purchaser had undisturbed control of the goods, even when in the warehouse at the lake ports; at this point neither Seagram nor the consignee presumed, so far as I know, to exercise any direction or control over the goods, in fact they could not. The goods went out of warehouse when and as determined by the purchaser. They may have been again sold there, very probably they were, in some instances they were moved from the port mentioned in the shipping documents to another port as already explained; anything it seems might have been done with the goods by the purchaser. I do not wish to be understood as saying that it is my view, that the goods, in the hands and control of the purchaser, were in the wrong person. I think they were in the possession and control of the owner, he had purchased and paid for them and was free to do almost anything he wished with them. All the circumstances I have related dispel the existence of the usual relation obtaining between bona fide exporters and importers. The procedure adopted in the transactions here in question, was consistent only with the fact that those who bought and paid for the goods at Waterloo and who directed their movements throughout became the owners of the goods, and that no other person, exporter or consignee, was in fact thereafter connected with the transactions. I am satisfied that Seagram allowed its name to be used in the shipping documents relating to these transactions, first for its own protection, then to assist the purchasers in their venture, the precise nature of which it well understood, and

also to encourage a continuance of a business connection for the monetary advantage it yielded. This view is fortified by the fact that the value of the goods as expressed in the invoices, and the B.13's, was fixed not by Seagram, but by the purchasers. Then, Seagram it is admitted, did not apply to have the invoices certified by a consular officer of the United States, as required by the laws of that country in connection with exports thereto. I cannot believe that Seagram would not have known of this requirement; never having any intention itself to export the goods, it would leave this to the purchasers to obtain, if at any time an export of the goods was to be made. The whole course of dealing between Seagram and the purchasers, and every circumstance connected with these transactions, make it quite clear to me, that Seagram made domestic sales and deliveries of the goods in question, without any intention on its part to export or to become responsible for the export of the same to the United States or elsewhere, and it did not and could not know if, in fact, the goods would ever reach the United States. I see no grounds for believing other than that, Seagram sold goods in Canada, which it had there manufactured and produced and which it did not export.

The agreement between Yarrows and Seagram, which I have already mentioned, is I think, in itself conclusive as to the real facts of this case, and as to who was the exporter of the goods if, in any proper sense there were exports at all. It makes quite clear the fact that Seagram at least was not an exporter of the goods. This agreement entered into no doubt at the instance of Seagram, in effect means, that Seagram was to sell and deliver whiskey to Yarrows or his agent at Waterloo, in such quantities as required by the latter, who in turn undertook to carry the same out of Canada, and furnish Seagram with the forms B. 13, duly stamped by Customs. The preamble of the agreement recites that the whiskey was to be delivered to Yarrows for exportation from Canada, which means that whiskey was to be sold to Yarrows and that he was to undertake to export the same. Had Seagram been the exporter this protective agreement would have been unnecessary. This strange agreement seems foreign to a commercial transaction between two persons involving merely an export of

1929
 THE KING
 v.
 FROWDE LTD.
 Maclean J.

1929
 THE KING
 v.
 FROWDE LTD.
 Maclean J.

goods from one country to another. It seems to me that the agreement, with the evidence adduced indicates clearly that domestic sales of goods in question were made directly by Seagram to Yarrows and others at Waterloo; that Seagram was not expected to and did not undertake or attempt to export the same, and that when the sales were made the only assurance it had that the goods would be exported was an agreement not enforceable in law. The fact that Seagram chose to designate itself as "exporters" in the agreement is of course of no weight. The deposit made with Seagram and forfeitable as liquidated damages in the event of a breach of the agreement, negatives any suggestion that Seagram was to export the goods, and indicates that it had doubts that the purchasers would.

The defence being that the goods were exported, and by Seagram, and my expressed view being that Seagram made no sale for export but only a domestic sale, it is not necessary to discuss the question as to whether the goods were subsequently exported by others, or whether they ever reached the United States or not.

Accordingly I am of the opinion that the plaintiff is entitled to judgment for the amount sued upon and interest as claimed, and also his costs of action.

Judgment accordingly.

1928 BETWEEN:—
 May 7 to 11. HIS MAJESTY THE KING..... PLAINTIFF;
 1929
 Apr. 16 to 29. AND
 CARLING EXPORT BREWING AND }
 MALTING COMPANY LIMITED... } DEFENDANT.

Sales Tax—Exportation—Special War Revenue Act, 1915—Proof of Exportation

The Dominion Government sought by information filed by the Attorney-General to recover from the defendant certain moneys alleged to be due to the Crown for the sales tax and gallonage tax on beer manufactured and sold in Canada. The defendant pleaded that the beer in question was sold for export to a purchaser in the United States and was in fact actually exported to the United States in conformity with such sales.

Held, that the exportation of goods from Canada under the proviso to section 19 B.B.B. of the Special War Revenue Act, 1915, (now para-

graph "A" of subsection 2 of section 86 of the R.S.C., 1927, chap. 179), is a question of fact to be determined on the evidence.

2. That where it is established that goods were sold to a person residing in the United States, and invoiced to him there via train to an outport in Canada, and there loaded on a vessel under the supervision of the Customs officer, who then stamps the B. 13, and clears the vessel for some United States port, such goods are duly exported within the meaning of the statute and regulations made thereunder.

1929
 THE KING
 v.
 CARLING
 EXPORT
 BREWING
 AND
 MALTING
 Co., LTD.

INFORMATION by the Attorney-General of Canada to recover from the defendant certain sales and gallonage taxes on the manufacture and sale of beer in Canada.

The action was tried before the Honourable Mr. Justice Audette at Toronto.

N. W. Rowell, K.C., D. Urquhart, K.C., and Gordon Lindsay for the plaintiff.

W. N. Tilley, K.C., and J. H. Clark for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now (April 29, 1929), delivered judgment.

The hearing of this case has been somewhat long, but after all, the controversy resumes itself into a question of fact, controlled by the laws of this country. And because the case deals with liquor, it is no reason why it should not be approached with an open mind free from any bias one way or the other.

The action is for the recovery of sales tax and gallonage tax upon Carling beer manufactured by the defendant. The facts of the case are all, at this stage, present in our minds and it becomes unnecessary to review or relate them again in detail, and the questions of law arising therefrom have been extensively discussed from all angles in the course of the argument of the respective counsel, the court expressing its view on most points.

The whole question resumes itself in determining as to whether or not the goods in question have been duly exported and whether they have been exported in the manner provided by our Canadian laws.

To that question I am of opinion that there can be but one answer and that is the greater portion of these goods and merchandises have been lawfully and *de facto* duly exported to a foreign purchaser, and did not return to Can-

1929
 THE KING
 v.
 CARLING
 EXPORT
 BREWING
 AND
 MALTING
 CO., LTD.
 Audette J.

ada, and that with respect to the same the defendants are exempted from paying any such taxes or duty.

The fact that these goods were exported to the United States is amply proved by the B.13's, which are the manner and the forms provided by law in that behalf to show that the goods were duly exported according to the usual practice. There is more, the evidence clearly discloses that these goods were actually placed on board vessels for foreign destination, after due clearance from the Customs. The boats came in, reported inward to the Canadian Customs, reported outward, and they obtained their clearance after the goods on board had been duly verified by the Customs officer.

Corroborating this exportation to the United States we have the evidence establishing that Rice Beer or Lager—which constituted the largest proportion of the exportation—is very little used in Canada and that it is the preferred beverage in the United States. Moreover, also by way of corroboration a large quantity of Carling's special bottles and kegs were returned empty to Canada through the Customs, and upon which a duty was duly paid. The identification of the kegs is ascertained by the special bungs marked with specific cut figures for that purpose.

One witness stated that after seeing some boats clear from the Canadian shore with the goods, he saw them being unloaded on the American shore. Another witness testified he saw the Carling beer in the road-houses in the American towns.

Coming now to the other branch of the case with respect to the sales without B.13, I find that the defendants are liable for the sales tax and gallonage tax upon such sales of strong beer,—as the real and only lawful evidence or acknowledgment of exportation is established by such B.13. The defendants are also liable for these taxes upon the sales mentioned in the evidence of witness Bannon, as having been sold to him and resold in Canada. Moreover, they are liable for such taxes upon the cash sales in Canada of the strong beverage.

The invoices from London did not show the true selling prices and the goods were sold at an advanced price. Therefore I find that the tax, when payable, must be calculated on such advanced prices—with such deduction, if any, as is customary for the Crown to allow.

I take it that these amounts can be easily ascertained between the parties (as so many accountants have already been working upon the books of the defendants). If, however, the parties fail to come to any agreement upon these amounts, leave is hereby reserved to either party to apply, upon notice, to the court for further direction in respect of the same.

THE KING
v.
CARLING
EXPORT
BREWING
AND
MALTING
Co., LTD.
Audette J.

There will be judgment accordingly, with costs in favour of the plaintiff.

Judgment accordingly.

HIS MAJESTY THE KING..... PLAINTIFF;
AND
MILN-BINGHAM PRINTING COM- }
PANY LIMITED } DEFENDANT.

1929
April 30.
May 14.

Special War Revenue Act, 1915—Sales Tax—Magazine—Exemption—Advertisement

The defendant printed a pamphlet for the Canadian Kodak Company called "Kodakery" for which it was paid from \$1,100 to \$1,200 a month. It refused to pay sales tax on the ground that the pamphlet in question was a "magazine" and as such exempt therefrom. The pamphlet was nothing but one of the numerous means of advertising, and the articles and advertisement therein referred only to the goods sold by the C.K. Co., and such articles with their illustrations were all intended to draw the attention of the public to the superiority of their goods. This pamphlet was given away with each kodak sold, and only brought in a sum of between \$30 and \$40 a month by way of subscription.

Held, that such a pamphlet was a mere advertisement for the Kodak company's goods which was meant to increase their sales and was not a "magazine" within the meaning of subsection 4 of section 19 B.B.B. of the Special War Revenue Act, 1915.

- 2. That as both the Customs Tariff Act and the Tax Act are revenue acts, a clear definition in one of these enactments of a term common to both may reasonably be referred to for the purpose of dispelling any ambiguity of meaning in the other. [*Bradshaw v. Minister of Customs and Excise* (1927) 2 D.L.R. 490; (1927) 4 D.L.R. 278; (1928) 2 D.L.R. 352 referred to.]

INFORMATION exhibited by the Attorney-General of Canada seeking to recover the sum of \$2,426.42 for sales tax.

The action was tried before the Honourable Mr. Justice Audette, at Toronto.

1929
 THE KING
 v.
 MILN-
 BINGHAM
 PRINTING
 Co. LTD.

G. Wilkie, K.C., and Mr. Hill for the plaintiff.

W. N. Tilley, K.C., and Mr. Boland for the defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. now, May 14, 1929, delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it is sought to recover from the defendant the sum of \$2,426.42, as sales tax.

The defendant company prints for the Canadian Kodak Co. Limited "Kodakery" (Ex. "A"), a pamphlet intituled "a magazine for amateur photographers." This publication started in 1913.

The tax is claimed thereon under sec. 19BBB of the Special War Revenue Act, 1915, and amendments thereto; but the defendant claims, under subsection 4 of this section 19BBB, that the tax does not apply to a pamphlet such as this, being a magazine coming within the enumerated exceptions mentioned in said subsection, such as:—newspapers and quarterly, monthly, and semi-monthly magazines and weekly literary papers unbound.

Therefore, the question to be determined is whether or not the printed matter known as "Kodakery" filed as exhibit "A" at trial, is a "magazine" within the contemplation and meaning of the statute.

A number of dictionary definitions of the word magazine were quoted at trial. These definitions are all more or less in harmony, but I am prepared to accept as authoritative that which is given in the Oxford Dictionary, namely:

A periodical publication containing articles of various writers; chiefly, a periodical publication for general rather than learned or professional readers and consisting of a miscellany of critical and descriptive articles, essays, works of fiction, etc.

I find that exhibit "A", the "Kodakery" does not fall within that definition. It is nothing but one of numerous means used to advertise directly and indirectly its Kodaks, its photographic machines, etc. All through the pamphlet, the Kodak is advertised, most of the illustrations therein mentioned are entered as having been made from a Kodak or enlarged by a Kodak, etc. This word Kodak appears all through the book. Some pages are entirely used for advertising the Kodak Company.

The defendants are paid by the Kodak Company for printing this pamphlet between \$1,100 and \$1,200 a

month and the Kodak Company gets in return between \$30 and \$40 a month.

The subscription is sixty cents a year, or one dollar for two years and five cents a copy.

It is sent to retailers, who handle the "lines" of the Canadian Kodak Company, and who charge dealers. Each purchaser of a kodak takes a copy of Kodakery for each camera and gets a six months subscription free, which can be renewed for another six months, upon his signing the form provided in exhibit "B."

The pamphlet advertises the cameras, the kodaks, of the description sold by the Kodak Company and is also applied to the purpose of giving directions for obtaining good results from the proprietors' own machines.

The expense of the publication is charged up by the company as part of their "selling expenses."

The publication is not sold to news dealers as a magazine.

The publication is not a publication coming within the class of magazines covered by the statutory exemption; it is more in the nature of an advertising pamphlet, and were it not so, it is quite obvious that the publication of such work at such great loss would not be maintained. It is maintained because it advertises the goods of the Canadian Kodak Company Limited.

Filed as exhibit "F" items Nos. 184, 178 and 171 of the Canadian Customs tariff (filed for convenience sake) we find therein pamphlets of the same nature therein described and as exhibits No. 2 and No. 3 a ruling of the Board of Customs, confirmed by an Order in Council, as to the nature of periodical publications entitled to entry free under item 184, defined as follows:—

Declared that periodical publications consisting almost wholly of fiction and not containing a reasonable amount of critical and descriptive articles, news, items or articles relative thereto or to current topics, are not entitled to entry under tariff item 184 as magazines.

The *Kodakery* would therefore come under item 178 of the Customs Act, and would be subject to taxation. The company could not escape the tax under the Customs Tariff Act, and attaching the same meaning under the Special War Revenue Act, it must meet the same fate.

1929

THE KING

v.

MILN-
BINGHAM
PRINTING
Co. LTD.

Audette J.

1929
 THE KING
 v.
 MILN-
 BINGHAM
 PRINTING
 CO. LTD.
 Audette J.

Now both the Customs Tariff Act and the Tax Act are revenue Acts and a clear definition in one of these enactments of a term common to both may reasonably be referred to for the purpose of dispelling any ambiguity of meaning in the other. *Bradshaw v. Minister of Customs and Excise* (1).

The name of the publication embodies the very name of the articles the company sells. The company did not earn any profit from the subscription to the publication, but from the advertising it contains.

There will therefore be judgment in favour of the plaintiff for \$2,426.42 and costs.

Judgment accordingly.

1928
 Dec. 17.
 1929
 May 14.

ROGER MILLER & SONS LIMITED.....CLAIMANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Contract—Cost plus—Rent of plant—Interest on money borrowed—Interest on drawback and on deposit by contractor.

Claimant contracted to construct certain public works in the harbour of Toronto, on a cost plus basis. It was, inter alia, agreed that the claimant would furnish the plant, for which he was to receive as rental thereof a certain percentage of its value per annum for a working season of 150 days; this to be payable when each piece commenced operation, and to cease when determined by the respondent's engineer. A portion of this rented plant became locked in behind a coffer-dam constructed in connection with the works in question. It was properly there engaged on the works, but it could not be removed when its work was completed on account of the coffer-dam, and while so retained was not available for use, which condition of affairs was not due to any fault of the contractor.

Held, that said portion of the plant never ceased to be part of the rented plant under the terms of the contract and was still retained for use on the works by the respondent's engineer, and the claimant was entitled to recover rent therefor.

On some occasions, payments due by respondent to the claimant under the contract were delayed, compelling him to borrow from banks and pay interest on such loans.

Held, that the claimant was entitled to recover such interest from respondent under the contract as part of the cost of the work.

Under a clause of the contract the Crown was permitted to abandon the works and terminate the contract. The Crown suspended opera-

(1) (1927) 2 D.L.R. 490; (1927) 4 D.L.R. 278; (1928) 2 D.L.R. 352.

tions for a time, but retained contractors' drawback during this period, which consisted of a stated percentage of the total monthly costs retained as security for performance of the contract.

Held, that the contractor was not entitled to claim interest on this amount for the period of suspension, such drawback being in the nature of capital employed, upon which no interest was allowed by the contract.

Held, further that the contractor could not claim interest on the security deposit made by him with the Crown, for the time the same was held by it, it being in the nature of a guarantee for carrying out of the contract, and a condition which it had to fulfil.

1929
 ~~~~~  
 ROGER  
 MILLER  
 & SONS LTD.  
 v.  
 THE KING.  
 \_\_\_\_\_  
 Maclean J.

REFERENCE by Minister to the Exchequer Court of Canada under section 37 of the Exchequer Court Act.

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

*A. R. McMaster K.C.* and *H. L. Steele* for the claimant.

*M. H. Ludwig K.C.*, *F. P. Varcoe* and *F. W. Fisher* for the respondent.

The facts are stated in the reasons for judgment.

The PRESIDENT now (May 14, 1929) delivered judgment.

This is a reference under sec. 37 of The Exchequer Court Act. The claimant in these proceedings sought to recover from the respondent several different amounts, as set forth in its statement of claim, under the terms of a contract entered into between the parties hereto, and under which contract the claimant was to construct certain public works in the harbour of Toronto. At the trial, all but two of the claims were settled between the parties; of the remaining claims, one relates to a balance said to be due the claimant for the rental of plant employed by the claimant on the works in question, and which claim amounts to \$47,298.21; the other claim is for interest, and comprises three different items all of which will be later explained.

The claimant whom I shall hereinafter refer to as the contractor, was to construct certain public works in the harbour of Toronto, upon the basis of the cost of the same to the contractor, plus a fee of seven and one-half per cent of such cost. The only qualification to this was, that the plant necessary to the construction of the works, generally speaking, was to be supplied by the contractor upon a

1929  
 ROGER  
 MILLER  
 & SONS LTD.  
 v.  
 THE KING.  
 Maclean J.

rental basis, the rental being fixed at a certain percentage of the value of the plant, for a working season of 150 days in each year; the value of the different units of the plant to be employed was agreed upon between the parties and formed a part of the written contract.

The first contract entered into between the parties in connection with the works in question was in March, 1919; this was followed by another contract, entered into in August, 1920. The provisions of the latter contract, which must be considered in connection with the claim for plant rental, are as follows:—

(c) Rental to be paid to the Contractor on plant used in the work as hereinafter provided; said rental to be payable only when each individual piece of plant commences operation and to cease when determined by the Engineer *on the following basis*, namely:

Twenty per cent per annum on the value of the plant as set forth in the schedule hereto and forming part of this contract in respect of all work performed in the year 1919, and 15 per cent per annum on said valuation after necessary additions, deductions or other amendments in respect of all work performed thereafter under this contract.

\* \* \* \* \*

The payment for rental of plant shall be calculated on the basis of 150 days of elapsed time in each calendar year.

\* \* \* \* \*

No rental on any unit of plant shall exceed 20 per cent of the value for 1919, or 15 per cent for the years or portions of years following, and rental charged for plant for a lesser time than the full rental season in any year shall be calculated in the proportion that the days the plant be retained or used bear to the full rental season of 150 days.

The whole question relating to the claim for plant rental is, whether the contractor is entitled to receive the stipulated rental only when the plant was in actual use in any rental season or whether he is entitled to the rental if the plant was retained on the works, whether always in actual use or not. If the latter is found to be the proper construction of the contract, then it is agreed that the amount claimed is due the contractor. Certain units of the plant were definitely released from time to time, and there is no dispute as to this; the real issue therefore, in respect of this item of the contractor's claims, rests upon a construction of the contract.

The issue, as I understand it, largely arises from the fact that a portion of the contractor's plant was imprisoned for a time within a coffer-dam on the works, and was not during that period available for use. The contractor's contention is that the plant thus rendered unavailable for

use was not due to it; that the plant was in any event retained for use by the respondent; and that it is entitled to the agreed rental even if this portion of the plant was for a time idle. The contract means that the contractor was to rent its plant for a working season of 150 days in each calendar year, on the basis already stated. A plant valued at \$400,000 could not well be rented upon any equitable basis without a stipulation that it would be reasonably employed during each working season, that is to say, the owner of a large and valuable plant could not afford to rent to another that plant without the assurance that it would be retained and used substantially during any working season, and for this reason 150 days was adopted as the rental season of each year while the works were under construction. The respondent must have considered that the plant mentioned in detail in the schedule to the contract was necessary in the execution of the work; and the logical provision was made, that as any units of the plant became unnecessary in the construction and completion of the work, it was within the power of the respondent's engineer to determine when such units became unnecessary and should cease to comprise a part of the rented plant. If and when any portion of the plant was determined by the engineer to be unnecessary, the rental therefor was to be calculated in the proportion that the days that portion of the plant was retained or used, bore to the full rental season of 150 days. This of course was a provision one would expect to find in the contract. The rental season was 150 days, but if, say a dredge, became unnecessary in the further completion of the undertaking, it was only but equitable that it should cease to be a part of the rented plant and it would thereupon be released to the contractor when and as by the engineer determined; the contractor would then be at liberty to rent the same to others, or to employ it itself on some other work. The plant was subject to the rental terms so long as it was retained for use by the respondent; when any portion of it was determined to be no longer necessary and was released to the contractor, the rental ceased. That I think is the plain meaning of the contract in so far as the rental of plant is concerned. To attach any other meaning to it would seem to be unreasonable, and nothing else I believe was ever intended by the parties to the contract;

1929

ROGER  
MILLER  
& SONS LTD.  
v.  
THE KING.  
Maclean J.

1929

ROGER  
MILLER  
& SONS LTD.

v.

THE KING.

Maclean J.

one could hardly understand the rental of a large and valuable construction plant except upon that or a similar basis.

The respondent's engineer stated at the hearing that at the commencement of each season, he instructed the contractor to put on the work such plant as he considered necessary for that season, and with few exceptions that plant would remain on the work till the end of the season, and what was the end of the working season was usually agreed upon by the engineer and the contractor. According to the evidence of the engineer, if any unit of the plant was temporarily not in actual operation, say in the middle of a working season, it was not thereupon struck off from the plant rented and formally released to the contractor; this of course would only seem rational. The plant rented was what was deemed necessary for the work as a whole, and the engineer stated it was there to be drawn upon, as and when required. With a few exceptions, when certain units of the plant were definitely released, the plant under rental would at the end of a season largely be left on the works, to come into use again at the opening of the next working season; in the interval between the working seasons the plant was repaired by the respondent. There seems to have been no dispute about all this, as between the engineer and the contractor. The principal point of difference regarding this claim arises from the fact, that a portion of the rented plant as already stated, became locked in behind a coffer-dam which was constructed in connection with the works in question; the rented plant was properly there engaged on the works, but it could not be removed when its work was completed on account of the coffer-dam, and while so detained there it was not available for use. The engineer says that this was not the contractor's fault. This portion of the plant had not in my opinion ceased to be under rental. It had never ceased to be a part of the rented plant under the terms of the contract; it was still retained for use on the works by the respondent's engineer, and I do not believe anything else was ever in the engineer's mind. Altogether I have no hesitation whatever in concluding, that upon this point, the contractor's contention is the correct one.

The remaining point for determination in fact comprises three different items. The first one is whether the

contractor is entitled to interest payments it disbursed on moneys borrowed on account of the works, and which interest payments, it is said, were caused by delays in payments of moneys previously earned and due under the contract. This claim is put upon the basis that the interest payments so made were a part of the cost of the works, which the contractor incurred, just as he might for anything else which was necessary in the prosecution of the work, such for example, as his engineers or time-keepers.

The contractor and engineer, on or about the first day of each month, were required by the contract to prepare a statement showing as completely as possible, the cost of the works up to and including the last day of the previous month, and the respondent was to pay on the fifteenth day of each month the cost of the work mentioned in such statement. The contract provides that interest on capital employed, or on borrowed money, shall not be included in the cost of the work. I do not think this is a bar to this claim. The payments constituting this claim were costs incurred by the contractor in extending loans that would have been liquidated had the respondent promptly paid to the contractor the sums due it, on the fifteenth day of each month; and I have reference only to cases where the cause of the delay was not attributable to the contractor. I am satisfied that in any case where the delay in payment was chargeable to the contractor, no claim is being made. The initial borrowing was capital employed in the works, but it ceased to be such within the meaning and spirit of the contract, when it went into the works and became a debt due the contractor. It then became a charge entering into the cost of the work to the contractor. It is suggested, and there is some evidence to support it, that payments were delayed in order to force the contractor to vary the terms of the contract. It matters little what was the reason for the delay in payments due the contractor; the question is whether these interest payments should be included in the cost of the works, within the meaning of the contract. The respondent allowed the contractor interest upon amounts due under the contract, where any delay in payment was due to the lack of a Parliamentary expropriation. The claim for interest charges, which the contractor was obliged to pay on monies borrowed, owing to amounts due to the contractor by the respondent being

1929  
 ROGER  
 MILLER  
 & SONS LTD.  
 v.  
 THE KING.  
 Maclean J.

1929  
 ROGER  
 MILLER  
 & SONS LTD.  
 v.  
 THE KING.  
 Maclean J.

deferred, is not, I think, distinguishable from the cases where interest was paid upon overdue payments caused by lack of a Parliamentary expropriation. The contract provides that the cost of the work should include any item which in the opinion of the engineer should be so included, and it was not contended that the engineer had refused to include such expenditures as are here claimed in the cost of the work. The contractor was bound to take advantage to the extent of his ability of all discounts available, and if he was unable to do so, he was obliged to notify the engineer of his inability in this regard, and his reasons therefor. It is a fair inference from this, that if the contractor was to use borrowed capital to obtain discounts for materials purchased for the works, he should be paid for the cost of such materials as and when due under the terms of the contract, and should not be obliged to bear the expense of extending a loan originally made for the particular purpose of obtaining such discounts. Such disbursements, in my opinion, properly constitute a part of the cost of the work. The essence of the contract was that the contractor was to be paid for the cost of the work to him, and as compensation for his services, he was to receive a fee of seven and a half per cent upon the cost of the work, as defined by the contract. I think that interest charges incurred by the contractor, owing to delayed payments by the respondent, as in the circumstances here, should in all justice enter into the computation of the cost of the work. To refuse payment of such a claim, would in my opinion, be contrary to the spirit and intent of the contract. The evidence as to the precise amount due under this claim is perhaps not clearly established, and I reserve the right to refer the same to a referee for inquiry, if the parties are unable to agree upon the amount. I hope however that this shall not be necessary.

There is another claim for interest. The contract for the construction of the works in question was first entered into in March, 1919, soon after the termination of the war, and a clause was introduced into the contract, permitting the respondent to abandon the works and terminate the contract. From November 18, 1919, to August 12, 1920, the respondent suspended operations under the contract, but retained the contractor's drawback during the period of suspension. The drawback consisted of a stated per-

centage of the total monthly cost of the works retained by the respondent, as security for the performance of the contracts. The contractor makes claim to interest upon the amount of the drawback for this period on the ground that the drawback had lost the character of a drawback; that the contract might never have been proceeded with; and that the right to abandon the contract required payment to the contractor of the cost of the work up to the time of the abandonment, plus its fee. It is urged that the respondent should not be heard to say that the contract was at an end, and also that he was entitled to the drawback.

The retention of the drawback was a matter of contract, and no provision was made for the payment of interest thereon in any circumstance. I cannot read from the contract that the amount of the drawback constitutes a part of the cost of the work, which was determinable by sec. 6 of the contract of March, 1919. I think that the drawback, which was retained by the way of security for the performance of the contract, was in the nature of capital employed in the cost of the work and upon which the contractor was not entitled to interest under the terms of the contract. I assume it remained in the hands of the respondent, because it was anticipated by the parties to the contract that the work would sometime be resumed, even if under a new contract. There is no evidence that the amount of the drawback was ever demanded by the contractor upon the abandonment of the work. I know of no principle upon which I might allow this claim, although as a matter of simple justice it perhaps should be paid.

There is still another claim for interest. Under the contract of August, 1920, the respondent held a security deposit or drawback of \$50,000. On November 26, 1925, the sum of \$40,000 was returned to the contractor, and on March 27, 1926, the balance of \$10,000 was returned. This claim is for interest at the rate of three per cent on the principal amount and the balances. It seems to be admitted that the respondent recovered interest at the rate of three per cent on these amounts during the time it was in his hands, and the contractor is claiming the payment of interest at the same rate. It seems to me that this deposit cannot be regarded as a portion of the cost of the work, as

1929  
 ROGER  
 MILLER  
 & SONS LTD.  
 v  
 THE KING.  
 Maclean J.

1929  
 ROGER  
 MILLER  
 & SONS LTD.  
 v.  
 THE KING.  
 Maclean J.

defined by the contract; it was in the nature of a guarantee for the carrying out of the contract, and was a condition which the contractor had to fulfill. In the absence of any provision in the contract, whereby the respondent was to pay the contractor interest upon deposits of this character, I do not see how this claim can be allowed. It may be, that the failure of a statutory provision enabling the payment of interest upon sums of money deposited in such circumstances as found here, may work a hardship upon those required to make such deposits. However, I can find no authority which would justify me in allowing this claim. In fact the authorities are, I think, the other way.

The claimant will therefore have judgment for the amounts I have allowed, together with his costs of this reference.

*Judgment accordingly.*

1927  
 Sept. 12, 13,  
 16.  
 1928  
 Sept. 10.  
 1929  
 May 16.

WILLIAM HENRY FARES ET AL. . . . . SUPPLIANTS;  
 AND  
 HIS MAJESTY THE KING. . . . . RESPONDENT.

*Grant by the Crown—English Common Law—Dominion Lands Act—Title to land of inland lake—Riparian rights—North West Territories.*

*Held*, that the English Common Law, as it was established on the 15th July, 1870, was introduced into the North West Territories by Statute of Canada, 1886, ch. 25, sec. 3, and that the same was neither expressly nor by implication altered or amended, in its application to riparian rights, by any subsequent Canadian legislation.

2. That a grant from the Crown of land bounded on one side by the waters of an inland non-tidal and non-navigable lake carries with it the ownership of the land covered by water to the centre of the lake.

PETITION OF RIGHT by suppliants to have it declared that the grant to them of property on the shores of Rush Lake carried with it the title to the land under the water of the Lake to the middle thereof, and for an order that the certificates of entry for soldiers' grants to certain persons of said land are invalid and that they be cancelled, and for possession of the land in the lake in front of their property.



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

1929  
 FARES  
 v.  
 THE KING.

*H. A. Robson, K.C.*, and *W. F. Hull, K.C.*, at hearing in Winnipeg and Regina, and *E. F. Newcombe, K.C.*, at Ottawa for the suppliants.

*R. V. Sinclair, K.C.*, for the respondent.

The facts are stated in the reasons for judgment.

The PRESIDENT, now (May 16, 1929), delivered judgment.

In 1888, 1889 and 1890, the Crown, in the right of the Dominion of Canada, granted and assured to the Canadian Agriculture Coal and Colonization Company Ltd., and to the Canadian Pacific Railway Company, and their assigns, certain whole and fractional sections of land situated in the North West Territories, and now within the province of Saskatchewan. The suppliants are the assignees of the Canadian Agricultural, Coal and Colonization Company Ltd., and the Canadian Pacific Railway, directly or through intermediate transfers. The fractional sections of land so granted, abut on one or more sides of Rush Lake which will later be described; and the subject of the controversy here, had its origin in the granting of fractional sections of land abutting on Rush Lake. The following taken from one of the grants conveying a fractional section only, illustrates the practice then prevailing in describing a fractional section.

All that parcel or tract of land situate lying and being in the Seventeenth Township, in the Eleventh Range West of the Third Meridian in the Provisional District of Assiniboia in the North West Territories in our Dominion of Canada, and being composed of the whole (fractional) of Section Twelve of the said Township containing by admeasurement one hundred and twenty-seven acres, more or less.

The original survey plans of the territory within which the grants in question were made, indicate the water line of Rush Lake at that time in relation to the land purporting to be granted, but no mention is made of such plan of survey, or Rush Lake, in any of the grants. It is agreed that the acreage of land mentioned in the several grants, was in fact satisfied without including any portion of Rush Lake, and that the original grantees paid the Crown only for the precise acreage mentioned in the grants.

1929  
 FAREB  
 v.  
 THE KING.  
 Maclean J.

The reservations contained in the grants may be of importance and perhaps should be referred to. In one of the grants to the Canadian Agricultural, Coal and Colonization Company Ltd., the reservations are as follows:—

Saving and reserving nevertheless, unto Us, Our Successors and Assigns, the free uses, passage and enjoyment of, in, over and upon all navigable waters that now are or may be hereafter found on, or under, or flowing through or upon any part of the said Parcel or Tract of land; also reserving all mines and minerals which may be found to exist within, upon, or under such lands, together with full power to work the same, and for this purpose to enter upon, and use and occupy the said lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals, or the mines, pits, seams and veins containing the same; and also reserving thereout and therefrom all rights of fishery and fishing and occupation in connection therewith upon, around and adjacent to said lands, and also the privilege of landing from and mooring boats and vessels upon any part of the said lands and using the said lands in connection with the rights of Fishery and Fishing hereby reserved, so far as may be reasonably necessary to the exercise of such rights.

In one of the grants to the Canadian Pacific Railway Company the reservation is somewhat different, and is as follows:—

Subject to the reservation unto Her Majesty, Her Successors and Assigns, the free uses, passage and enjoyment of, in, over and upon all navigable waters that now are or may hereafter be found on, or under or flowing through or upon any part of the said Parcels or Tracts of Land.

It is perhaps convenient here to describe briefly, Rush Lake. It is irregular in shape, and said to be approximately five and a half miles long, and from one and three-quarters to two and a half miles wide, and contains approximately about six thousand acres. It is largely fed by snow and rain through small creeks, and is also drained by a small creek. When the grants in question were made by the Crown, marsh grass grew around the shores of the lake, and out into the lake quite a distance, the surrounding land being for the most part low and marshy; rushes grew promiscuously all over the lake. There were however limited spaces of open clear water in parts of the lake, particularly at the eastern end, where the land was highest; the open spaces of water would constitute it is said, about one-third of the entire lake. In the summer season, the waters of the lake fell considerably, according to the snowfall of the previous winter, and marsh hay was annually cut around the shores of the lake upon the land thus exposed by the recession of the water. The depth of water presently in the lake varies, the greatest depth being from

eight to ten feet but in spots only; in many places the depth varies from one to two feet. At the time the grants of the lands in question were made, the average depth was considerably greater than at present. The Canadian Pacific Railway, in a revision of its main line in this region, in the year 1903, constructed its road bed across a section of Rush Lake for a distance of about two miles, and in order to construct the road bed through the lake with the minimum of material, it lowered the level of the lake by straightening and deeping a small creek leading out of Rush Lake into another lake called Reed Lake; this lowered the water of Rush Lake somewhere between two and three feet. At the north and west ends of the lake, where the banks were low and the water was ordinarily shallow, a considerable area of lake bed became dry; at the east and south ends of the lake where the banks were higher, the recession of the water was not so great, in some places it was I think hardly noticeable. By reason of the recession of the waters of Rush Lake some 3,900 acres of land, it is said, have been reclaimed since the date of the original grants, and this chiefly at the northwest end of the lake. The only boats ever used on the lake, were shallow punts or boats taken there occasionally by hunters. I do not think that in any sense whatever, Rush Lake can be said to be navigable, nor was it at any time since the lands in question were granted by the Crown.

In December, 1918, the Crown, purported to give to one Mason and one Becksfield, certificates of entry as Soldiers' Grants for portions of the land which had been reclaimed owing to the recession of the waters of Rush Lake, but which at the date of the grants of land here in issue was land ordinarily covered by water. These certificates of entry, it is pleaded, entitled the holders to occupy and cultivate the several pieces of land entered for and to hold possession thereof to the exclusion of any other person. The suplicants claim that certain fractional sections mentioned in the original grants, were bounded on one or more sides by Rush Lake, which was not a tidal water, and was not navigable, and that the said fractional sections are riparian lands; that upon a true construction of the grants from the Crown, they are the legal owners of all the lands reclaimed in front of the granted fractional sections abutting on Rush Lake,

1929  
 FARES  
 v.  
 THE KING.  
 Maclean J.

1929  
 FARES  
 v.  
 THE KING.  
 —  
 Maclean J.

to the centre of that lake; and that the certificates of entry for Soldiers' Grants are invalid and constitute clouds upon the suppliants' lands. The suppliants invoke the common law of England relating to the rights and title of riparian owners to the beds of adjacent non-tidal and non-navigable waters which they say is here applicable, and they ask that it may be declared that they are the owners of all the reclaimed lands in front of certain mentioned fractional sections and out to the centre of Rush Lake, or alternatively to the projected boundary lines of the whole sections within which they were granted a fractional portion only, and that the mentioned certificates of entry for Soldiers' Grants be declared invalid and cancelled.

The case for the respondent is, that where fractional sections were granted, the specific number of acres mentioned as granted in each of said fractional sections, and no more, was granted; that the grantees or their assigns the suppliants, upon a true construction of the said several grants, did not acquire any right or title to the lands covered with water in front of the fractional sections abutting on Rush Lake, to the centre of the lake; and the respondent has the right to possession, and to grant, the lands in front of such fractional sections which have been reclaimed by the subsidence of the water as described. The respondent contends that the principle of the common law of England here invoked by the suppliants, was never introduced into the North West Territories, and that the same was not there applicable at the time the grants were made, or since.

It becomes necessary now to inquire, if the law of England was applicable to Dominion Lands in the North West Territories, when the lands involved in these proceedings were granted by the Crown. English Law, as it was established on the 15th day of July, 1870, and in so far as the same was applicable, was introduced into the North West Territories by Chap. 25, sec. 3 of the Statutes of Canada, 1886, 49 Vict., and which is as follows:

Subject to the provisions of the next preceding section the laws of England relating to civil and criminal matters as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been, or may not hereafter be, repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Terri-

tories, or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor in Council.

I have considered carefully the provisions of the Dominion Lands Act, Chap. 54, R.S.C., 1886, which was in force at the time the grants of the lands in question were made and long prior thereto, with a view of ascertaining if that Act expressly or by implication altered or affected the English common law rule applicable to riparian lands, or if in any way its provisions prevented the application of that rule in the circumstances of this case. Some sections of that Act, under which the Dominion Lands owned by the Crown in the right of the Dominion were to be administered and managed, might feebly suggest, that under the elaborate system of survey and division of lands required by the Act, the lands to be granted thereunder would be definitely limited to the quantity actually surveyed and granted; if this were its effect the common law rule would be altered in an important particular. On the other hand the Act expressly reserved from ordinary sale, "water powers; harbours and stone quarries," which could only be disposed of on such terms and conditions as were fixed by the Governor in Council. The title to the public highways was not to be vested in adjacent owners, and the right to the fisheries and minerals was reserved to the Crown. The free use and enjoyment of navigable waters was also reserved to the Crown. The silence of the Act as to any suggested repeal or alteration of the common law rule relating to the beds of non-navigable inland waters and streams, is emphasized by the fact that by Chap. 35, sec. 5 of the North West Irrigation Act, enacted in 1894, it was provided, that except in pursuance of some agreement or undertaking existing at the time of the passage of that Act, no grant should thereafter be made in such terms so as to vest in the grantee any property or interest in the bed or shore of any lake, river, or stream, or other body of water, or the water flowing therein. This enactment cannot I think be regarded as declaratory of the law, but rather as an alteration of the law. I am of opinion that there is nothing to be found in the Dominion Lands Act, which can be construed as altering the law as it was in England in 1870.

Mr. Sinclair very ably argued that the law of England, in respect of the matter in issue here, was not applicable to the North West Territories in 1886, and that upon a true

1929  
 FARES  
 v.  
 THE KING.  
 Maclean J.

1929  
 FARES  
 v.  
 THE KING.  
 Maclean J.

construction of the grants, only the quantity of land mentioned in the grants, and which was the amount paid for, passed to the grantees. I have concluded, after careful consideration, that binding authority compels me to hold to the contrary. I need only refer to *Maclaren v. Attorney General for Quebec* (1). There, their Lordships of the Judicial Committee of the Privy Council were of the opinion that the presumption that the bed of a stream *ad medium filum aquae* was included in a grant—a presumption well established in English law and said by Moulton L.J. to be rather a rule of construction—was not negatived by the fact that the metes and bounds of the parcels of land described in the patent or grant make them terminate at the bank of a river or stream; and that it is precisely in the cases where the description of the land, whether in words or in plan, makes it terminate at a highway or stream that the rule is needed, and if there is any indication of the land going further there is no place for its operation. Their Lordships further held that in construing a grant or document affecting land, the law treats the parties as describing the land of which the full use and enjoyment is to pass to the grantee; that in cases where the possession of the land so described would raise a presumption of ownership of the land in front of it *ad medium filum aquae or viae*, the law holds that it is the exclusion of that land which must be evidenced by the terms of the grant and not its inclusion, and that if not so evidenced that land will be deemed to have been included in the grant if the grantor had power to include it; that no description in words, or by plan, or by estimation of area is sufficient to rebut the presumption that land abutting on a stream carries with it the land *ad medium filum* merely because the verbal or graphic description describes only the land that abuts the stream, without indicating in any way that it includes the land under the stream. In the case under discussion it is not disputed that certain fractional sections of land when granted to the predecessors of the suppliants, abutted on Rush Lake, and the whole dispute had its origin in this fact. The law of England as judicially interpreted therefore, if it was applicable to the North West Territories, is conclusive upon this phase of the respondent's case.

(1) (1914) A.C. 258.

Considering now the point whether the law of England was applicable to the North West Territories. I do not think that the respondent's contention, that the law of England in regard to the point under discussion was not applicable to the North West Territories, can be sustained. The laws of England were by statute made applicable to the North West Territories. There does not appear to be any statute enacted before or since, altering or modifying those laws, in so far as this case is concerned. There was nothing so unusual in the conditions prevailing in the Territories, as of the date of the grants, as to convince me that the presumption of English law which I have discussed, was inapplicable or unsuitable to the Territories. Some law had to prevail, and in the failure to provide another I know of no reason why the law of England should not apply. I am inclined to the belief that at the time the grants in question were made, those responsible for the administration of Dominion lands were of that opinion also, and their directions to surveyors implied this. That of course, could not affect the law, whatever it was, but it is some evidence of the fact that conditions greatly contrasting with those in England were not believed to exist in the Territories, so as to make the rule of English law under consideration obviously inapplicable to the conditions found there. If conditions in the Territories were in marked contrast to those in England, or those to be found in other sections of Canada, one would expect that this would have been realized by the legislature having jurisdiction in the premises, and that the law would have been altered, or that a law would have been enacted to fit the unusual conditions to be found in the Territories so as to ensure certainty as to what was the law.

In England the land of the riparian owner bordering on the sea or navigable rivers—navigable waters being those in which the tide ebbs and flows—extends to high water mark, and the title to the bed of the sea or river is in the Crown, and extends to high water mark. If by the recession of the sea, the high water mark moves downward towards the sea, or downwards from the banks of a navigable river or stream, the riparian owner acquires that part of the shore which has become dry, whatever the cause may be. If by encroachment of the sea the high water mark is moved up

1929  
 FARES  
 v.  
 THE KING.  
 Maclean J.

1929  
 FARES  
 v.  
 THE KING.  
 Maclean J.

upon the lands of the riparian owner, such portions of his former lands as are so encroached upon by the sea becomes the property of the Crown, and the same rule applies to land bordering on tidal and navigable streams. But the rule relating to inland non-tidal streams is different. Mr. Sinclair for the respondent argued that in England the title of the riparian owner of lands bordering on non-tidal streams such as inland lakes, extends by presumption of law to the centre of the lake, and that the riparian owner does not acquire title to any land that has become dry by accretion or dereliction, because the land was his before the recession of the water, and it remained his after the recession of the water, because by common law his title extended to the centre of the lake. From this, Mr. Sinclair argued, that in the North West Territories the title to all lands, including the beds of all non-navigable lakes and streams, belonged in fact to the Crown, and so remained until granted, and that when a grant was made bordering upon any non-navigable lake, the riparian owners' title stopped at the water's edge and the bed of the lake remained in the Crown; this, it is contended, differentiates this case from the corresponding situation in England, where the title to the bed of non-tidal inland streams, whether navigable or not, presumptively never belonged to the Crown. For this reason Mr. Sinclair contended that English law was not therefore applicable to inland streams in the North West Territories.

This line of argument, it is to be observed, proceeds upon the admission that under English law the title of the riparian owner extends to the thread of the stream, in the case of inland non-tidal streams. That I think is a correct statement of the law in England. There, in the case of inland lakes whatever the size of the water space may be, the Crown is not of right entitled to the soil of the lake. *Bristow v. Cormican* (1); *Johnston v. O'Neill* (2); *Lord v. The Commissioners for the City of Sydney* (3); and *Hardin v. Jordan* (4). If the law of England is therefore what I apprehend it to be, and is applicable here as I think it is, then that is the end of this point: the bed of an inland non-

(1) (1878) 3 A.C. 641.

(2) (1911) A.C. 552.

(3) (1859) 12 Moore P.C. 473;  
 33 L.T.R. 1.

(4) (1891) 140 U.S.R. 371.



tidal lake is presumptively in the riparian owners. The point taken by Mr. Sinclair is ingenious, but I think where the rule of English law was made applicable to the North West Territories by statute, it must prevail.

1929  
 FARES  
 v.  
 THE KING.  
 Maclean J.

Mr. Sinclair further contended that under English law, any land formed by alluvium, or land gained by dereliction, belongs to the owner of the adjoining terra firma, but the increase must be gradual or imperceptible in its progress; but here a large area of dry land has been recovered, and the progress of the subsidence of the water was at least partially perceptible if not sudden, and it is claimed that for this reason the land so perceptibly gained belongs to the original owner, the Crown. The water level of Rush Lake varied each season according to the rain and snow fall, but in addition to that, there was a perceptible recession of the water at one end of Rush Lake particularly, upon the Canadian Pacific Railway Company straightening and deepening the creek flowing out of Rush Lake; it is not open to question that the lake level has been much lower since that time. However, if I am correct in my interpretation of the law of England in respect of the inland and non-tidal lakes, and if it is applicable here, then the title of the original grantees presumptively went to the centre of the lake in any event, so that the doctrine of accretion, whether perceptible or otherwise, does not apply, and the shifting of the shore line is therefore of no importance. There would also seem to be practical reasons why the degree of progress in gaining new land by alluvium or dereliction, should not apply in the case of an inland non-tidal lake; ordinarily accretions to the shore line of a lake are negligible as is also the recession of water. In the case of land bordering on the seas or the banks of rivers, both accretion and erosion are always imminent, and I think that all references to the perceptible or imperceptible changes in the shore line, to be found in the authorities, refer to cases of the kind where accretion and erosion are the natural consequences of waters where there is a tide or current. The principle of law under discussion in regard to accretion is founded upon security and general convenience. Ordinarily there is not the same necessity for the existence of the same principle in reference to non-tidal lakes, because there, usually there is no current, and accretion or erosion is not ordinarily to be

1929  
 FARES  
 v.  
 THE KING.  
 Maclean J.

found in any appreciable degree. Therefore I do not think that this case is affected by the fact that the accretions to the suppliants lands were perceptible or sudden, nor do I think it is affected by the fact that the lowering of the water of Rush Lake was in part caused by artificial causes, whether lawful or unlawful, but to which the suppliants were not parties.

The case is a difficult and important one, and I cannot say that I am entirely free from doubt in the conclusions which I have reached. Had the dry land reclaimed been due to natural causes, and if it had been much smaller in quantity, probably the case would never have been heard of. But no new principle of law can be invented or enacted by the Courts to meet the unusual state of facts brought about by the lowering of Rush Lake, by the Canadian Pacific Railway Company, which may have been an unauthorized and unlawful act. Possibly the suppliants might successfully question, even at this date, the right of that railway company to dispossess them of the privileges of having the waters of Rush Lake contiguous to their lands, if in law the recovered land has been lost to them; the fact that the quantity of land recovered is unusually large is no justification for departing from the proper principle of law, applicable to the case, if that can be ascertained. I do not think I need concern myself with possible difficulties which may arise in determining the rights of riparian owners around Rush Lake, when the boundaries of their respective properties are projected into the lake. Mr. Newcombe, for the suppliants, argued that the proper boundary lines to be projected, are the lines of the incomplete or fractional sections. On the ground of convenience there is much to be said in favour of this. Whether it has any legal basis I do not think I need determine.

I feel bound by authority to decide that the suppliants are entitled to the relief sought in the prayer of their petition. They are also entitled to the costs of their action.

*Judgment accordingly.*

---

HIS MAJESTY THE KING ..... PLAINTIFF;

AND

BANK OF NOVA SCOTIA ..... DEFENDANT.

1929  
May 6.  
May 17.

*Special War Revenue Act, 1915—Consumption or sales tax—Goods manufactured for person's own use—Sections 86 and 87.*

The plaintiff, by his Information, claims a consumption or sales tax on certain books, forms, etc., printed and made by the defendant for the use of its various offices or branches throughout Canada and elsewhere.

*Held*, that sections 86 and 87 of the Special War Revenue Act (R.S.C., 1927, c. 179) must be read together. That under section 87, when goods are manufactured and produced in Canada, not for sale, but for the use of the manufacturer or producer, such transactions are for the purposes of the Act to be regarded as sales, and that in consequence, the books, forms, etc., referred to are subject to the sales or consumption tax.

INFORMATION to recover from the defendant the consumption or sales tax upon certain books, forms, etc., printed by it for use in its various branches and offices.

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

*M. H. Ludwig K.C.* for plaintiff.

*W. N. Tilley K.C.* for defendant.

The facts are stated in the reasons for judgment.

The PRESIDENT now (May 17, 1929) delivered judgment.

This is a case stated for the opinion of the Court by the parties hereto. The defendant is a chartered bank with its head office at Halifax, N.S., and its chief executive office in the city of Toronto, Ontario. At the times material here, the defendant in connection with its chief executive office at Toronto, maintained at Toronto a stationery department through which it supplied its various offices, including head office, executive office, and branch offices, with the stationery and supplies required in the conduct of the bank's business. For convenience and expedition, and to ensure secrecy, the bank has had for upwards of thirty years in its stationery department a printing plant, with which it prints and makes up ledgers, tellers' cash books, legal forms, by-laws, letter paper, ruled and printed forms, return forms of branches to the head office, minute books,

1929  
 THE KING  
 v.  
 BANK OF  
 NOVA SCOTIA.  
 Maclean J.

pamphlets and other printed material required in carrying on the bank's business at its various offices throughout Canada and elsewhere. In the bank's system of accounting, every office bears its share of all expenses incurred by the bank for such office, including cost of stationery and supplies. The stationery and supplies are furnished to the various offices on their requisitions sent to the stationery department, and are shipped to such offices direct from the stationery department. On making the shipment, the stationery department renders statements to the receiving office, showing the amount to be charged against the receiving office, as the cost or estimated cost of the articles furnished.

Under the provision of the Special War Revenue Act 1915, now Chap. 179 of the Revised Statutes of Canada, 1927, there was assessed and levied on the defendant a consumption or sales tax of \$10,205.72 in respect of stationery, etc., supplied to its various offices as described, and the question for decision here is, whether under the provisions of the Special War Revenue Act, the defendant is liable for such consumption or sales tax.

The provisions of the statute bearing upon the issue are the following, and as found in Chap. 179, R.S.C. 1927:—

86. . . . there shall be imposed, levied and collected a consumption or sales tax of four per cent on the sale price of all goods.

(a) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the sale thereof by him.

\* \* \* \*

87. Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because

\* \* \* \*

(d) such goods are for use by the manufacturer or producer and not for sale.

The Minister may determine the value for the tax under this Act and all such transactions shall for the purposes of this Act be regarded as sales.

Sections 86 and 87 of the Special War Revenue Act, Chap. 179, R.S.C. 1927, must be considered together. The former section imposes a consumption or sales tax upon the sale price of goods produced or manufactured in Canada, at the time of the sale thereof by the producer or manufacturer. That much is clear. Sec. 87 obviously refers to the same subject matter and might have been enacted as a part of the preceding section. It attempts to provide, that when goods are manufactured and produced

in Canada, not for sale, but for the use of the manufacturer or producer, that such transactions shall for the purposes of the Act be regarded as sales; and the Minister is empowered in such circumstances to determine the value of the goods so used by the manufacturer or producer for the tax under the Act. It seems clear that it was the definite aim and purpose of the Act, as set forth in these two sections, that when goods manufactured or produced in Canada were used or consumed by the manufacturer or producer, they were to be regarded as sales. That possibly was the reason for the introduction of the word "consumption" into these sections, as being partially descriptive of the tax, which is throughout referred to as a "consumption or sales tax." It is easy to imagine many instances in which the failure to impose the sales tax upon goods consumed by the producer would make the incidence of the tax appear most invidious and inequitable as to others paying the tax. Reading these two sections together, I think it is plain that it was the intention of the legislature to provide for the taxation of goods consumed by the manufacturer or producer. If not, then sec. 87 (*d*) was unnecessary, but it was enacted for a purpose, and what else could it be intended to mean except that which I venture to think it does mean. There cannot, I think, be any doubt but that in this case goods were manufactured or produced by the defendant. It is true the goods were distributed to the receiving offices at cost, but it was just to meet such cases that sec. 87 was enacted. I do not think the situation would be different, if the goods were distributed among the different branches of the defendant bank free of charge. They were transactions which are to be deemed to be sales of goods made by the defendant, as manufacturer or producer, for the purposes of and within the intendment of the Special War Revenue Act. I do not think much more can or need be said. A casual reading of the taxing sections of the statute might well leave the impression contended for by the defendant. However, a careful consideration of the two clauses together, leaves me entertaining no doubt as to their purpose and meaning, and that is, in this case, to impose a sales tax upon the defendant upon the transactions which have been described.

1929  
 THE KING  
 v.  
 BANK OF  
 NOVA SCOTIA.  
 Maclean J.

1929  
 THE KING  
 v.  
 BANK OF  
 NOVA SCOTIA.  
 Maclean J.

There will therefore be judgment for the plaintiff against defendant in the amount of \$10,205.72 for the consumption or sales tax, and for the sum of \$10 the amount of the license fee mentioned in paragraph 5 of the stated case, together with interest as stated in paragraph 9 (3) of the stated case.

This case was stated by the parties for the opinion of the Court, because the meaning of the statute was claimed to be reasonably open to doubt. In the circumstances, I think I am justified in refusing any order as to costs.

*Judgment accordingly.*

1929  
 April 30.  
 May 20.

GEORGE HOPE.....APPELLANT;  
 AND  
 THE MINISTER OF NATIONAL }  
 REVENUE.....} RESPONDENT.

*Income War Tax Act, 1917—Undistributed Profits—Dividends—Reserve fund—14-15 Geo. V, c. 46, sec. 5, sub-sec. 9.*

The H. P. & L. Co. sold to H. & E. M. Co. its entire assets which were composed of shares, plus a "reserve fund," representing an accumulation of undistributed profits and gains from 1917 to 1926, set aside for the exclusive benefit of holders of permanent shares, to be from time to time divided and paid to shareholders. For the purpose of this agreement, the value of a share was fixed at \$227, being \$100 for the share and \$127 being the proportion of the reserve coming to each shareholder per share held, the \$100 paid cash, and the reserve was only finally paid after all liabilities had been discharged. The assessment herein was made in respect of the payment of \$10,127.95 to the appellant, during the taxation period of 1926, coming to him as a shareholder of H. P. & L. Co., out of the distribution of the proceeds of the said sale of its property and assets, in the form of a dividend, to the extent that the company had on hand undistributed profits. Payment was refused on the ground that this amount was capital, and that even if it was not capital then only that part of the reserve accumulated since 1921 should be taxed.

*Held*, that by the mere setting of these figures of \$227 per share, the company could not change the fact of the existence of a fund which under its by-laws could and would have been distributed as dividends, and that a shareholder receiving this sum must pay income tax on that portion of the price which represents the distribution of the reserve or accumulated profits.

2. That under sec. 5, ss. 9 (14-15 Geo. V, ch. 46), dividends made up of undistributed profits and paid or payable after 1921, whether accrued before 1921 or not, as under the circumstances of this case, are liable to income tax.

3. That the reserve fund herein being made up of gains and profits, it would, even prior to the amendment (14-15 Geo. V, c. 46, sec. 5, ss. 9), under secs. 3 and 4 of the Act, be treated as a dividend made up of profits and gains and thereby become liable to the tax. That the said amendment of the Act in 1924 was enacted for the purpose of removing any possible doubt or contention—*ex majore cautela*. (Re Judges' Salaries (1924) Ex. C.R. 157, referred to.)

1929  
 GEORGE HOPE  
 v.  
 THE  
 MINISTER OF  
 NATIONAL  
 REVENUE.

APPEAL from the decision of the Minister under The Income War Tax Act, 1917.

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

*N. W. Rowell, K.C.* and *Mr. Langford* for appellant.

*C. Fraser Elliott, K.C.* for respondent.

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

AUDETTE J., now May 20th, 1929, delivered judgment.

This is an appeal, under the provisions of The Income War Tax Act, 1917, and amendments thereto, from the appellant's assessment, for the year ending 31st December, 1926. This assessment was made in respect of a payment of \$10,127.95 during the taxation period of 1926, coming to him as a shareholder of The Hamilton Provident and Loan Corporation, out of the distribution of the proceeds of the sale of its property and assets in the form of a "dividend" to the extent that the Company had on hand undistributed income or profits as set forth in exhibit No. 3—14-15 Geo. V, ch. 46, sec. 5, subsec. 9.

This sum of \$10,127.95 so paid to the appellant represents an accumulation of undistributed profits and gains from 1917 to 1926, and of which \$6,669.25 would be an accumulation of profits from 1917 to 1920, but distributed as part of the \$10,127.95 on the 15th July, 1926. This Reserve Fund, under the powers given the directors by by-law 38, consists of profits accumulated for the exclusive benefit of the holders of permanent shares, to be from time to time divided and paid to such holders of permanent shares in proportion to the amount of their shares—in other words to pay a dividend out of this fund of accumulated profits. This fund composed of accumulated profits is therefore quite distinct from the permanent shares of the company which the appellant still holds; and in this sale between

1929  
 GEORGE HOPE  
 v.  
 THE  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Audette J.

the two companies, the shareholder gets the value of his shares plus the value of this reserve fund made up of profits. The moneys of the shares are alone capital, and under the agreement the moneys representing the reserve are segregated from the capital, and finally paid only after all debts and liabilities are discharged.

Section 5, subsection 9 (14-15 Geo. V, ch. 46), by section 8 of the same Act was

deemed to be applicable to the income for the taxation period 1921 and subsequent periods.

and the appellant contends that the part of the accumulated profits earned before that date is not subject to such taxation, and moreover contends, in the alternative that the whole of that sum is capital and not subject to taxation.

By the agreement of the 15th July, 1926, exhibit No. 3, above referred to, the Hamilton Provident and Loan Corporation, sold to the Huron and Erie Mortgage Corporation *its entire assets* which are composed of shares and the "reserve fund" in question, and by agreement the measure of payment is determined. Section 2 of the agreement, it is true, provides that "for the purpose of this agreement" the value of the shares is fixed at \$227; and that is what gives rise to the appellant's contention that all of the payment of \$10,127.95 is capital and part of the value of the share. But in face of the actual facts this contention falls to the ground since it is common ground that besides the shares there was this reserve fund made up of accumulated profits and gain of the company since 1917 under by-law 38. Moreover, by sub-par. (b) of the 2nd clause the purchaser pays \$100 a share and the reserve is paid in the manner provided further on in the agreement. The purchase price of the segregated assets amounts to the adjusted figure of \$227, but does not make the assets capital to that extent, in view of the facts of the case more especially set forth in the agreement. By the mere setting of these figures of \$227 the company cannot change the fact of the existence of the fund which could and would under by-law 38, have been distributed as dividend. The company cannot by winding up and discontinuing business, avoid paying tax on this distribution of profits. *Verba fortius accipiuntur contra proferentem.*

The shareholders are not parties to this agreement between the two companies. They remain shareholders



for five years from the date of the agreement or until the reserve fund is adjusted and final payments made, and they receive this payment out of these accumulated profits forming the Reserve, by way of dividend, besides the payment of their shares, but according to the number of their shares, the whole coming from the sale of the assets of the company. It was the capital of these shares that earned by way of profits and gain the accumulated moneys in the Reserve now being paid out by way of dividend and measured by the number of shares. This exhibit No. 3 is nothing but an agreement to sell the assets of the company, confirmed as such by the Attorney General of the Province. The vendors sold the shares and the Reserve, but the transfer of the shares is not to be made until full payment of the Reserve has been made.

In the Annual Reports of the company, exhibit No. 2, the Reserve Fund is always entered as a liability to the shareholders and distinguished from the shares themselves.

It is true that sec. 5, subsec. 9 (14-15 Geo. V, ch. 46) reads as follows:—

5. On the winding up, discontinuance or reorganization of the business of any incorporated company the distribution in *any form of the property* of the company shall be deemed to be a payment of a *dividend* to the extent that the company has *on hand* undistributed income. and that this section came into force for the taxing period of 1921; but it is found that it is the time of payment of such dividend that must govern. That is to say, without any further qualification any such dividend paid in the ordinary course after that date will fall within the ambit of the section. It is a dividend paid in 1926 and which must be paid according to the law in force at that date, which does not require an investigation as to how the company came to pay the dividend.

By sec. 4, subsec. 5 (9-10 Geo. V, ch. 55) 1919, it is further provided that:

*Dividends* or shareholders' bonuses paid or *credited* to its shareholders by a corporation on or *after the 1st day of January, 1917*, shall be taxable as income of the shareholders *in the year in which the same are received* or credited unless paid *exclusively* out of a surplus or accumulated profits on hand prior to 1st January, 1917.

This section was in force in 1919 and is applicable to the present case and it would result therefrom that the words *accumulated profits on hand* mean those which arose since the passing, in 1917, of The Income War Act.

1929  
 GEORGE HOPE  
 v.  
 THE  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Audette J.

1929  
 GEORGE HOPE  
 v.  
 THE  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Audette J.

Dealing with internal Revenue, it was held in the case of *Stoffregen v. Moore* (1) that

the "income" of a stockholder of a corporation includes dividends received by him during a tax year, although declared and paid in whole or in part from the accumulated surplus of prior years.

See also *Lynch v. Hornby* (2).

Then in 1920, by 10-11 Geo. V, ch. 49, sec. 3, it was enacted that:

Dividends declared or shareholders' bonuses voted after the 31st December, 1919, shall be taxable income of the taxpayer *in the year in which they are paid or distributed.*

See *Gagné v. The Minister of Finance* (3); *Smith v. Attorney General of Canada* (4); *Plaxton and Varcoe*, Dominion Income Tax, 166. See also sec. 8 (8), (9), (10), (11) and (12) of the Act of 1926.

The plain intention of this section 5, subsec. 9 (14-15 Geo. V, ch. 46) is that dividends made up of undistributed profits and paid or payable after 1921 as under the circumstances of the case, are liable to tax. The Act primarily imposes a tax upon all incomes made up of profits and gain and that is intended to be taxed in this case. And failing to come within any of the statutory exemptions, the appellant must pay. The wording of subsec. 9 of sec. 5 is clear and unambiguous in its grammatical meaning and that should be adhered to. Clear language would have to be found to support the contention that—notwithstanding the dividend is paid in 1926 when the section is in full force and effect—the section would not apply because some of the moneys forming part of that dividend were earned before that date and should be exempted. In so finding one would have to add or to distort the plain meaning of the section. There is no reason and no right to assume that there is any governing object which the taxing Act is intended to attain other than that which it has expressed. *Tennant v. Smith* (5).

We have a clear and unambiguous section in the Act summarizing all the exemptions and it does not cover the present case or the appellant's contention, while the respondent brings the appellant within the letter of the law.

(1) (1920) 264 Fed. R. 232.

(3) (1925) Ex. C.R. 19, at p. 22.

(2) (1918) 247 U.S.R. 339.

(4) (1924) Ex. C.R. 193, at p. 195.

(5) (1892) A.C. 150, at p. 154.

This finding is moreover supported by sec. 4, subsec. 5 (9-10 Geo. V, ch. 55) passed in 1919 and hereabove recited, declaring that dividends are taxable as income of shareholders in the year in which the same are received or credited. Furthermore sec. 3 of 10-11 Geo. V, ch. 49, enacts that dividends declared after the 31st December, 1919, shall be taxable in the year in which they are paid or distributed. Section 8, subssecs. (8), (9), (10), (11) and (12) of the Act of 1926 go also to support and bear that meaning and contention. A Taxing Act must be read as a whole, and any particular section must be read in conjunction with the meaning of the words used in the context.

1929  
 GEORGE HOPE  
 v.  
 THE  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Audette J.

On the whole I fail to see any ground upon which the appellant should be treated in any more favourable way than the other citizens or public of Canada in relation to liability for a tax of the nature here in question. See *Hollinshead v. Hazelton* (1).

Moreover, I must find that this amendment of the Act in 1924 (sec. 5, subsec. 9) was enacted for the purpose of removing any possible doubt or contention—*ex majore cautela*—because the reserve fund in question in this case, made up of gain and profits, would, prior to such amendment, under secs. 3 and 4 of the Act, be treated as a dividend made up of profits and gains and thereby become liable. The amendment is of the same nature as the one made with respect to the Judges' salaries. See *In re Judges' Salaries* (2), confirmed on appeal to the Supreme Court of Canada.

Indeed, by The Interpretation Act, ch. 1, R.S.C. 1927, sec. 21, it is provided that the amendment of an Act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law, and it shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by Parliament, to have been different from the law as it has become under such Act as so amended.

For the reasons above mentioned I feel myself unable to follow the decision in *re Anderson* (3), with respect to the tax as between a life tenant of share and remainderman,

(1) (1916) 1 A.C. 428 at 436 & 461. (2) (1924) Ex. C.R. 157.

(3) (1925) 4 D.L.R. 116.

1929  
 GEORGE HOPE  
 v.  
 THE  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Audette J.

and moreover because of by-law 38 of the Company which qualifies and determines the fund in question in this case.

A number of English cases were cited at trial; but I find that the laws in England with respect to winding up and the circumstances of this case are entirely different from our Canadian Taxing Act.

There will be judgment dismissing the appeal with costs.

*Judgment accordingly.*

1929  
 May 8.  
 May 29.

DOBBS AND COMPANY.....PETITIONER.

vs.

ROBERT CREAN AND COMPANY, }  
 LIMITED.....} RESPONDENT.

*Trade Marks—misleading—expunging—Trade Mark and Designs Act.*

In 1923 the respondent registered, and began using in Canada, a trade mark consisting of a triangle bearing the words "Deer Skin Finish" above the words "Dan Dobbs", and a triangle below bearing the words "Character Hats", for use in the sale of felt and straw hats. Some years before, namely, 1913, the Petitioner, who was in similar business adopted its president's name "Dobbs" as a trade mark, to be used in the sale of its hats, and has since used the name to the present in Canada, and now by its petition asks that the respondent's trade mark be expunged.

*Held*, that the words "Dan Dobbs" and "Dobbs" are obviously words as applied to a particular kind of goods that can be confused and would tend to deceive the ordinary purchaser. The name "Dobbs" having acquired a secondary meaning as distinguishing petitioner's goods from that of other merchants and having been used in Canada long before the use made by the respondent of his trade mark, the respondent's trade mark should be expunged.

(2) That the applicant for registration of a trade mark in Canada must be the first user thereof in Canada.

A PETITION by the petitioner to have the trade mark of the respondent expunged from the register of Trade Marks.

The action was tried before the Honourable Mr. Justice Audette at Toronto.

*Harold G. Fox* for the petitioner.

*C. A. Thompson* and *H. J. Stuart* for the respondent.

The facts are as stated in the reasons for judgment.

AUDETTE J., now (May 29, 1929) delivered judgment.

1929

This is an action whereby the petitioner seeks, *inter alia*, to expunge, from the Canadian Register of Trade Marks, the objecting party's

DOBBS AND  
COMPANY  
v.  
ROBERT  
CREAN AND  
COMPANY,  
LIMITED.

Specific Trade Mark to be applied to the sale of men's felt and straw hats, and which consists of a triangle bearing the words "Deer skin Finish" above the words "Dan Dobbs", and a triangle below bearing the words "Character Hats".

Audette J.

The trade mark was registered in Canada, on the 1st May, 1923, upon the usual declaration, as required by sec. 13 of The Trade Marks and Designs Act,

that the said specific trade mark was not in use to our knowledge by any other person than ourselves at the time of our adoption thereof.

At the time the objecting party subscribed to this declaration it was wrong to state that it was the first to make use of the trade mark, as is now well established by conclusive evidence. Even if the statement were made in good faith, to maintain the purity of the Register it is evident that the statement should not remain unchallenged. *Billings, et al v. Canadian Billings* (1).

The question as to whether or not part of this trade mark consisting of the words "Deer Skin Finish" and the words "Character Hats" is both descriptive and intended to convey the notion that the goods in connection with which they are used are as described and of high class or superior quality or acknowledged merit—and if so the said trade mark does not contain

the essentials necessary to constitute a trade mark properly speaking, as required by subsec. e of sec. 11 of the Trade Mark Act.

is a question I need not decide as it has not been raised by either party. See *Standard Ideal Co. v. Standard Sanitary Co.* (2).

Now it is the use of a trade mark, not its invention, that creates a right to it.

The test in all cases of conflict as to the priority of adoption is, which claimant was first to use the mark as to fix on the market a conviction that the goods so marked had their origin with him.

Paul on Trade Marks 148 and 153, sec. 92. See also *Candee, Swan and Company v. Deere and Company* (3).

The applicant for the registration of a trade mark in Canada must be the first user in Canada. *Vess Jones v. Horton* (4). The law upon this question is well settled.

(1) (1921) 20 Ex. C.R. 405.

(3) (1870) 54 Ill. Rep. 439.

(2) (1911) A.C. 78, at p. 85.

(4) (1922) 21 Ex. C.R. 330.

1929

DOBBS AND  
COMPANY  
v.

ROBERT  
CREAN AND  
COMPANY,  
LIMITED.

Audette J.

The recent observation of Tomlin J. upon this subject in re *Impey Electrical Ltd. v. Weinbaum* (1) is quite apposite and reads as follows:—

. . . foreign markets are wholly irrelevant, unless it be shown by evidence that in fact goods have been sold in this country with a foreign mark on them, and that the mark so used has thereby become identified with the manufacturers of the goods. If a manufacturer having a mark abroad has made goods and imported them into this country with the foreign mark on them, the foreign mark may acquire in this country this characteristic, that is distinctive of the goods of the manufacturer abroad. If that be shown, it is not afterwards open to somebody else to register in this country that mark, either as an importer of the goods of the manufacturer or for any other purpose. The reason of that is not that the mark is a foreign mark registered in a foreign country, but that it is something which has been used in the market of this country in such a way as to be identified with a manufacturer who manufactures in a foreign country. That, I venture to think is the basis of the decision in the *Apollineris* case. It seems to me to be the basis of the decision in the case before Mr. Justice Clouston of *Lacteosote Limited v. Alberman*, and it seems to me to be consonant with good sense.

It has been abundantly established, by conclusive evidence, that the petitioner, as far back as 1913, to the present day, sold and is selling in Montreal, Canada, his hats with his trade mark thereon and he further sold them in Vancouver, B.C. in 1917 and during some time subsequent thereto.

The objecting party's goods with his trade mark was not put on the market in Canada before 1922 or 1923. Samples were sent in 1922 to one witness, and he placed orders for some of these goods in 1923; but this purchaser failed before the delivery of the goods.

Possibly something should be said about the origin of such trade marks. William H. Dobbs was president and founder of the petitioner company and has honestly adopted and used his own name in devising this trade mark. Moreover the name Dobbs, through its long and continuous user has acquired a secondary meaning. It is a word or name that has been advertised and given great publicity. Re *Elkington and Company* (2); *Christie Brown and Co.* (3); Re *Pacific Lime Company* (4); Re *Horlick* (5); *Hurlbut Shoe Co. v. Hurlbut Shoe Co.* (6).

(1) (1927) 44 R.P.C. 405 at 410.

(2) (1908) 11 Ex. C.R. 293.

(3) (1929) 20 Ex. C.R. 119.

(4) (1920) 20 Ex. C.R. 207.

(5) (1917) 64 S.C.R. 466.

(6) (1925) S.C.R. 141.

These goods have been sold in Canada under the License (filed as exhibit No. 13) and were so sold under that name as per such license. *Qui facit per alium facit per se.*

1929  
 DOBBS AND  
 COMPANY  
 v.  
 ROBERT  
 CREAN AND  
 COMPANY,  
 LIMITED.  
 Audette J.

Suffice it to say with respect to the origin of the objecting party's trade mark, as disclosed by the evidence, that it is a story of extraordinary character. *Se non è vero è molto ben trovato.* With the "Dobbs" hat already on the Canadian market it would require the credulity of a Judaeus Appella to believe that the objecting party was not influenced in adopting the mark "Dan Dobbs" by a desire to benefit by the reputation that the petitioner's hats had acquired in the trade. "The world is wide," said Lord Bowen in *John Harper & Co. Ltd. v. Wright & Butten Lamp Mfg. Co. Ltd.* (1) "and there are many names. There is really no excuse for imitation."

"Dan Dobbs" and "Dobbs" are obviously words as applied to a particular kind of goods that can be confused and would tend to deceive the ordinary purchaser.

Having found that the petitioner was the first to use his trade mark in Canada and much before the time the objecting party registered his trade mark, I am forced to the conclusion that the petitioner is thereby entitled to the mark as against all others in this country.

Having so found, it becomes unnecessary to say any more and to pass upon secondary questions raised at trial.

Therefore there will be judgment ordering the expunging from the entry in the Canadian Trade Mark Register of the objecting party's specific trade mark, under No. 147, Folio 33279, in accordance with the Trade Mark and Design Act. This being done, the petitioner will be at liberty to renew or proceed with his application for the registration of his own trade mark, as alleged in par. 4 of his petition.

See *Jones v. Horton* (2); *Gold Medal Furniture Co. v. Gold Medal Camp Furniture Mfg. Co.* (3); *Williamson Candy Co. v. W. J. Crothers Company* (4).

The whole with costs against the objecting party.

*Judgment accordingly.*

(1) (1895) 2, Ch. 593.

(3) (1928) Ex. C.R. 65; (1928) S.C.R. 575.

(2) (1922) 21 Ex. C.R. 330.

(4) (1924) Ex. C.R. 183; (1925) S.C.R. 377.

1929  
April 15.  
June 19.

JOURNAL OF COMMERCE PUBLISH- } PLAINTIFF;  
ING COMPANY LIMITED..... }

AND

RECORD PUBLISHING COMPANY } DEFENDANT.  
LIMITED..... }

*Trade Marks—Name of newspaper—Section 5 of Trade Mark and  
Designs Act—“Trade Marks”—“Trade”—“Manufacture,  
product or Article.”*

*Held*, that the name of a newspaper is not a proper subject of a trade mark susceptible of being registered under the provisions of the Trade Mark and Designs Act (R.S. 1927, chap. 201).

- (2) That the words “trade mark” have reference to marks applied to goods that are the subject of trade, trade signifying the business of exchanging commodities by barter or by buying and selling for money, and not in the sense of the word as applied to the mechanical arts.
- (3) That a newspaper is not a “manufacture, product or article” within the meaning of section 5 of the Trade Mark and Designs Act.

Hearing on the questions of law raised by the pleadings.

The matter was heard before the Honourable Mr. Justice MacLean, President of the Court, at Ottawa.

*W. D. Herridge, K.C.* for the plaintiff.

*W. F. Schroeder* for the defendant.

The facts are as stated in the reasons for judgment.

THE PRESIDENT, now (June 19, 1929), delivered judgment.

This matter comes up by way of hearing before trial on a point of law raised by the pleadings. An order that it be so heard has been duly made.

Shortly stated, the question is as to whether or not the name of a newspaper—the “Canadian Journal of Commerce”—is the proper subject of a trade mark susceptible of being registered under the provisions of the Trade Mark and Designs Act (R.S. 1927, chap. 201). As a matter of fact the name is now registered in the name of the plaintiff as a specific trade mark. The Act provides that “a specific trade mark” means a trade mark used in connection with the sale of merchandise of a particular description. Section 5 describes what shall be deemed to be trade marks, and as such registerable. That section reads:—



All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade marks.

1929  
 JOURNAL OF  
 COMMERCE  
 PUBLISHING  
 COMPANY  
 LIMITED  
 v.  
 RECORD  
 PUBLISHING  
 COMPANY  
 LIMITED.

That it is possible in the present state of the newspaper business to argue that the newspaper in its common form is an article "manufactured or produced" must be admitted. But it is only a plausible argument as related to a correct interpretation of the Act in question when it was passed by the legislature.

Maclean J.

The very words "trade mark" are not without significance. It has reference I think to marks applied to goods that are the subject of trade. And I use the word "trade" here as signifying the business of exchanging commodities by barter or by buying and selling for money; not in the sense of the word as applied to the mechanical arts. I venture to observe further that the legislature when enacting the Trade Mark Act, had in mind that a commercial meaning attached to the word "trade," that is, that it related to merchandise, goods, or manufactured articles, all of which words are used in the Act, and that it never considered a newspaper as a commodity of trade and commerce, or something that was traded in. I do not think that section 5 of the Act ever contemplated the inclusion of a newspaper as a "manufacture, product or article," the name of which might be registered as a trade mark. One does not ordinarily refer to a newspaper as a manufactured article or as a class of merchandise, and these words afford, in my opinion, the best key as to what things it was intended a trade mark might be applied to, within the meaning of the Trade Mark Act. The words "marks, names, labels, brands, packages or other business devices," do not seem to suggest the name of a newspaper as a trade mark, but rather something that might be applied to what is undeniably an article manufactured or produced as a commodity of commerce. The words "manufactured, produced, compounded, packed or offered for sale" would seem to have reference to ordinary articles of commerce rather than a newspaper. The provisions of the Inter-

1929

JOURNAL OF  
COMMERCE  
PUBLISHING  
COMPANY  
LIMITED

v.

RECORD  
PUBLISHING  
COMPANY  
LIMITED.

Maclean J.

national Convention which relate to trade marks, distinctly leave one with the impression that "trade marks" was there understood as something to be applied to "goods," in fact that word is frequently there to be found. I do not think that that word can be appropriately applied to newspaper. A newspaper is a record of facts or representation of facts, events, opinions, speeches, advertising matter, etc., and this, printed upon paper, is sold to the public under a certain name. A newspaper is fundamentally different from the ordinary articles of commerce. I think that the name of a newspaper is the name of the thing itself which is different from a name used as a trade mark. In practice some name has to be given a newspaper, and the name of a thing is not usually registerable as a trade mark; it may be, if it happens to be a fancy or invented word or name applied to a new article of commerce being introduced to the public. Invented names are not so easily applied to newspapers, as to manufactured goods or commodities of commerce. I do not think the Act ever contemplated that the name of a newspaper was registerable as a trade mark, although it is conceivable that a newspaper might adopt a trade mark other than its name.

There are practical difficulties in the way of the registration and user of the names of newspapers as trade marks, and that is one of the reasons which influence me to the conclusion that the legislature never intended that the names of newspapers might be registered as trade marks. Usually newspaper names are descriptive, or at least suggestive, of what a newspaper is, a purveyor of news. For instance, such names as "News," "Herald," "Journal," or "Gazette," and many others, indicate that the newspaper carries, records, gazettes, or heralds in printed form what is popularly spoken of as news of the day or time. The appropriate names available to newspapers to-day are therefore limited. There is therefore to be found a great similarity the world over in the names of newspapers, and this is true also of any particular country. If such names might be registered as trade marks great confusion would arise because so many newspapers have already adopted the same in Canada, and I doubt very much, if one newspaper is entitled to a monopoly of a word or words, such as is commonly used as newspaper names.

I also doubt if it would be possible to satisfactorily administer the Trade Mark Act, in respect of newspapers, if their names were registerable as trade marks. For instance how would the International Convention be made operative or practical, if it was found that twenty newspapers in twenty different countries registered the same name. Newspapers bearing the same name, and published in substantially separate localities, rarely if ever cause confusion to their respective readers. I do not say that this may be true of this case because I have not yet heard the facts. There is usually something in the make-up of newspapers which distinguish them, even to the most casual. In this fact there is again found something, which seems to place newspapers in a different category to that which the world regards as articles of commerce. It was not therefore intended, I believe, to include newspapers as articles to which trade marks might be applied, and for the reason, that at the time of the passage of the Act, newspapers were not regarded as merchandise or manufactured articles or matters of trade and commerce; a registered trade mark was not regarded as necessary for newspapers.

The names of newspapers are apparently not registered as trade marks in England, but I was informed that newspapers are there required to be registered at Stationer's Hall, but what this means was not made clear to me. It is probably a practice of ancient origin and in the nature of a license. English cases were cited to me in which the names of newspapers were regarded by courts as trade marks. The name of a newspaper is, in a certain sense, a trade mark, that is, it is what is known as a common law trade mark. Courts of equity in England, in long past years, in the exercise of their jurisdiction in the matter of fraud, had been in the habit of issuing injunctions against the false use of a trade name—which would include the name of newspapers—practised for the purpose of "passing off" goods as those of another person. It is not now necessary to aver or prove fraud, to sustain passing off actions. It is sufficient to show that the act complained of is calculated to deceive the public, and cause probable injury to the complainant. That was and is also true of the Courts of the United States, and almost every American decision cited to me in this proceeding were actions of this kind.

1929  
 JOURNAL OF  
 COMMERCE  
 PUBLISHING  
 COMPANY  
 LIMITED  
 v.  
 RECORD  
 PUBLISHING  
 COMPANY  
 LIMITED.  
 Maclean J.

1929  
 JOURNAL OF  
 COMMERCE  
 PUBLISHING  
 COMPANY  
 LIMITED  
 v.  
 RECORD  
 PUBLISHING  
 COMPANY  
 LIMITED.  
 Maclean J.

Unregistered trade marks notwithstanding the prohibiting sections of the Act, which purport to make registration a condition precedent to litigation to restrain or to obtain damages for infringement, are protected in passing off actions, upon the equitable principle that no man shall pass off his goods as the goods of another. Clear of the statute therefore, what is known as a common law trade mark, is entitled to protection in equity, in case of another using that mark in such a way as to deceive the public and to do injury to another. And the common law is probably ample, in the domain of the press to afford all necessary protection in respect of newspaper names. The reported decisions in England and the United States, upon what is known in both countries as common law trade marks, must be distinguished from those referable to statutory trade marks.

The case of the *New York Herald Co. v. The Ottawa Citizen Co.* (1) was pressed upon me as conclusive of the issue here. The real issue there was so different from that with which I am dealing, that I can hardly regard that case as relevant or authoritative in this matter. A case is only useful for the principle it decides, and what was actually decided in that case does not seem related to the matter before me.

My conclusion is that the Trade Mark and Designs Act does not contemplate or intend the names of newspapers, to be trade marks, and they are not therefore registerable as trade marks. The trade mark in question is not in my opinion proper subject matter for trade mark registration. I reserve for the present the matter of the cost of this proceeding.

*Judgment accordingly.*

1929  
 June 12.  
 June 28.

HIS MAJESTY THE KING.....PLAINTIFF;

vs.

MIRAMICHI LUMBER COMPANY }  
 LIMITED.....} DEFENDANT.

*Revenue—Special War Revenue Act, 1915—Sec. 19 B.B.B., ss. 4—Sales Tax—“Manufactured”—“Leads.”*

The defendant carried on both the business of a saw mill and the business of coal mining, and manufactured at its mills “Leads” for use in its mining operations. In some isolated cases it would purchase such

(1) (1908) 41 S.C.R., 229.

"Leads" in the market for the same purpose. It now refuses to pay sales tax upon these "Leads" manufactured by it, claiming that they come within the exceptions contained in ss. 4 of sec. 19 B.B.B. of the Special War Revenue Act, 1915. These "Leads" are logs put through the mill, sawn in half longitudinally and again into the required lengths for the use aforesaid.

1929  
 THE KING  
 v.  
 MIRAMICHI  
 LUMBER  
 COMPANY  
 LIMITED.  
 Audette J.

*Held*, that such "Leads" are manufactured at the defendant's mill and used by them not in the course of manufacturing the same, but are used in a different and distinct undertaking or operation quite apart from manufacturing of the same at their mill, and that they are manufactured articles bought and sold on the market, and clearly come within the provisions of section 19 B.B.B. aforesaid, and do not fall within the ambit of ss. 4 of said section of said Act, and are subject to the sales tax.

INFORMATION by the Attorney General of Canada to recover from the defendant the sales tax alleged to be due on the sale of certain "Leads" used in mining operations.

Action was tried before the Honourable Mr. Justice Audette at Saint John, N.B.

*J. Winslow, K.C.* and *A. Lawson* for the plaintiff.

*P. J. Hughes, K.C.* for the defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now (June 28, 1929), delivered judgment.

This is an information exhibited by the Attorney General of Canada, whereby it is sought to recover from the defendant the sum of \$215.55, being the balance of the amount claimed for unpaid sales tax and penalties.

The defendant carries on both the business of a saw mill and the business of coal mining and manufactures at its mills, or purchases in some isolated cases, *leads* for the purpose of its mining operations; a sample lead is filed as *Exhibit No. 1*. It is a sawn piece of lumber going through the mill; but has been manufactured of certain size and lengths. It is very much like a railway tie, which is subject to the tax but which, however, is exempted when it is the product of the forest produced and sold by the individual settler or farmer.

The tax is claimed upon the leads under section 19 B.B.B. of the Special War Revenue Act, 1915, and amendments

1926  
 THE KING  
 v.  
 MIRAMICHI  
 LUMBER  
 COMPANY  
 LIMITED.  
 Audette J.

thereto; but the defendant claims, under subsection 4 of this section, that the leads are not subject to sales tax being:

- (a) Logs and round unmanufactured lumber; or
- (b) Materials, including plant equipment, commenced in the process of manufacture or production which enters directly into the costs of goods subject to sales tax produced by the defendant which licensed as manufacturers or producers under the provisions of the Act; or
- (c) Articles and materials, not being permanent equipment, which enter into the cost of production of goods produced by the defendant as a licensed producer as aforesaid; or
- (d) Not being liable to sales tax under any provision of the said War Revenue Act.

In answer to these four grounds of defence, I find that none of them apply to the case in question. Obviously it does not come within the classification (a). Then it must be borne in mind that these leads are manufactured at the defendant's mills and used by them not in the course of manufacturing the same, but are used in a different and distinct undertaking or operation, quite apart from the manufacturing of the same at their mill. They hold a license as such manufacturer but no license is necessary for coal mining as coal is not subject to taxation.

The subject matter of this case comes clearly within the provisions of section 19 B.B.B. and does not fall within the ambit of subsection 4 thereof. These leads are manufactured articles and are bought and sold on the market and are therefore subject to the tax.

The particulars of the claim, as set forth in the information, have been admitted by the defendant's witness.

Therefore there will be judgment as prayed for the sum of \$215.55 and costs.

*Judgment accordingly.*

---

BIRMINGHAM JEWELLERS AND } PETITIONER;  
 SILVERSMITHS' ASSOCIATION.. }

1929  
 June 10.  
 July 17.

AND

W. N. STOCK.....RESPONDENT.

*Trade Marks—Party aggrieved—Locus standi—Convention for the Protection of Industrial Property, 1925—18-19 Geo. V, c. 10.*

The petitioner asked that the trade mark of the objecting party, registered in Canada in 1902, consisting of three panels placed side by side, the maple leaf with the letter "E" thereon constituting the central panel, the left panel having the representation of an anchor and the right one that of a lion, be expunged as likely to be confused with the Birmingham Hall or Assay Office mark, consisting of an anchor to indicate that particular assay office, and a lion passant to indicate standard or quality, and as being calculated to deceive.

The petitioner is a mutual non-trading association of manufacturers of and wholesale dealers in silverware, etc. It is not itself a manufacturer or seller or user of Hall Marks and has no trade mark.

*Held*, that the petitioner is not a party aggrieved within the meaning of the Trade Mark and Designs Act.

2. That the amendment of the Trade Mark and Designs Act passed in 1928 (18-19 Geo. V, c. 10), adding paragraph (g) to sec. 11 of R.S. (1927), c. 201, was intended as a partial adoption of the terms of Article 6 (ter) of the Convention for the protection of Industrial Property, signed at The Hague in 1925, and to which Canada was a signatory.
3. That the effect of the addition of said paragraph (g) to sec. 11 of the Trade Mark Act was merely to add to the grounds upon which the Minister might refuse to register a mark. The fact that the Minister is now empowered, by said paragraph, to refuse to register trade marks which consist in whole or in part of "official control or guarantee signs or stamps" adopted by another country, is indicative of the fact that prior to 1928 it was not intended by the Trade Mark Act that a trade mark might be refused registration upon the ground that it consisted of "official control and guarantee signs or stamps."

PETITION by the petitioner to have a certain trade-mark of the respondent, comprising Armorial bearings and Emblems, expunged.

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

*H. J. McNulty* for the petitioner.

*George Wilkie, K.C.*, for the respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (July 17, 1929), delivered judgment.

1929  
 BIRMINGHAM  
 JEWELLERS  
 AND SILVER-  
 SMITHS'  
 ASSOCIATION  
 v.  
 W. N. STOCK.  
 Maclean J.

In this proceeding by way of petition, the Birmingham Jewellers' and Silversmiths' Association of the City of Birmingham, England, ask that a specific trade mark, registered in 1902 by P. W. Ellis & Co. Limited of the City of Toronto, manufacturers of silver goods, be expunged. The mark consists of three panels placed side by side, a maple leaf with the letter "E" thereon constituting the central panel, the panel to the left having the representation of an anchor, and the one to the right the representation of a lion. The mark was to be applied to sterling silver, jewellery, flat and hollow ware, medals, and other sterling silver goods. The business of Ellis & Co., and also the trade mark in question, has been recently acquired by W. N. Stock who now carries on the business as "W. N. Stock successor to P. W. Ellis & Company Limited," I should perhaps state, that the letter "E" in the central panel of the registered trade mark indicates the name of Ellis, and also that Stock appeared in opposition to the petition to expunge the mark in question.

In Great Britain, four marks are generally to be found upon gold and silver goods; the standard or quality mark indicating that the article is of gold or silver of the standard indicated; a hall-mark indicating the particular Hall or Assay Office at which the goods were tested and marked, and there are about six of such Halls or Assay Offices in Great Britain to-day, each having a different mark; the date letter indicating the year in which the article was assayed and marked; and lastly the initials of the maker of the article. The issue here relates to the Birmingham Hall or Assay Office marks, which consists of an anchor to indicate that Assay Office, and a lion passant to indicate the standard or quality; in practice then would follow the mark of the year of assay, and the makers mark. As I understand it, the only marks placed on an article by the Birmingham Assay Office are the anchor and the lion, the other marks if used are afterwards placed on the article by the maker, but as I understand it, such marks are not strictly speaking hall-marks; hall-marks are those marks placed on articles at the Assay Offices

The petitioner's case is that two of the symbols employed on the Ellis mark are identical with the symbols used by the Birmingham Assay Office, namely, the anchor and the





*MEMORANDUM*

The name "A. R. McMaster" on page 137, should read  
"A. C. McMaster."

lion, and that this mark is therefore calculated to deceive the public, because, it is said, that marks of this kind are generally understood throughout the world as hall-marks and to be the marks of the British standard, for standard and sterling silverware.

1929  
 BIRMINGHAM  
 JEWELLERS  
 AND SILVER  
 SMITHS'  
 ASSOCIATION  
 v.  
 W. N. STOCK.  
 Maclean J.

Several difficult questions arise here, altogether apart from the merits of the case, and perhaps the first to decide is whether or not the petitioner has a *locus standi* in this proceeding. It was not pleaded by Stock, the respondent, that the petitioner was not a person aggrieved. The Trade-Mark Act, sec. 45 states:—

The Exchequer Court of Canada may, on the information of the Attorney General or at the suit of any person aggrieved . . . make such order for making, expunging or varying any entry in any such register as the Court thinks fit; or the Court may refuse the application.

However, on the hearing of the petition, counsel for Stock urged that the petitioner was not a party aggrieved, and that upon this ground alone the petition should be dismissed. As this point is one relating to the jurisdiction of the Court, it is no objection to entertaining this defence, I think, that this provision of the Trade Mark Act was not pleaded. *Brunning v. Odhams Bros. Ltd.* (1). I shall allow the necesasry amendment to be made to the pleadings, so as to comprehend the objection that the petitioner is not a party aggrieved.

Upon a consideration of this objection to the petition, I am of the opinion that the petitioner is not a party aggrieved. In a printed publication, put in evidence, the Birmingham Jewellers' and Silversmiths' Association is said to have been founded in 1887, and is there described as a mutual non-trading association of manufacturers of and wholesale dealers in jewellery, silver and electroplate wares, rolled, gold, gilt and imitation jewellery, cases, fancy leather, and optical and all allied articles. The Association is therefore representative not only of those who manufacture but also of those who deal, in silver goods of a standard quality; it includes also manufacturers of and dealers in electroplate wares, imitation jewellery, leather goods, etc. The members of the Association are not necessarily manufacturers of and dealers in standard silver goods bearing the Birmingham hall-marks, because a Birmingham manu-

(1) (1896) 75, L.T.R. 602.

1929  
 BIRMINGHAM  
 HAM  
 JEWELLERS  
 AND SILVER-  
 SMITHS'  
 ASSOCIATION  
 v.  
 W. N. STOCK.  
 Maclean J.

facturer may, according to the evidence, have his goods assayed and marked at the London Assay Office, or at any other Assay Office in England. The Association does not manufacture or sell goods. It is not an Association of users of hall-marks. It has no trade-mark. I do not see how it can be said that the petitioner is a party aggrieved; it may be that some of its members might be persons aggrieved within the meaning of the Trade Mark Act. I should have some doubt, even if the Association were avowedly composed only of persons using the Birmingham hall-marks, that it would be a person aggrieved. The petitioner here asks that the Ellis mark be expunged, because it comprises the two hall-marks of Birmingham, the anchor and the lion, which are not trade marks either under the statute or by common law, here or in England, and it is these two marks—official marks of place and quality—that are asked to be expunged. Now can it be said that the Trade Mark Act of Canada ever contemplated that such marks—not trade marks in any sense—would make a person upon whose goods such marks were officially stamped, a person aggrieved, and entitle him to ask that a trade mark belonging to a third person should be expunged? To give one a *locus standi* in an action under the Trade Mark Act, one should I think own or claim to own, a trade mark registered or unregistered. No such claim is made here; what is claimed is that certain hall-marks so-called, markings required by law in one country to denote the quality of an article are not properly registerable as a trade mark in another country. It may be quite undesirable to permit the nationals of one country to use as trade-marks, any mark corresponding to the hall-marks in question, and which have been adopted for a purpose other than trade marks in another country. That I think can only be prevented by adequate legislation. And this leads me to the point whether this was done or not.

Section 11 of the Trade Mark Act, chap. 201, R.S.C. 1927, was amended by chap. 10 of the Statutes of Canada 1928, by adding thereto the following subsection:—

(g) If the trade mark consists in whole or in part of coats-of-arms, flags, and other state emblems of countries which by treaty, convention or agreement affords similar protection to nationals of Canada, official control and guarantee signs and stamps adopted by such countries, and imitations from a heraldic point of view, the registration of official control

and guarantee signs and stamps to be refused only in cases where such signs and stamps are intended to be used on merchandise of the same or a similar nature.

I think it is fairly clear that a portion of paragraph (g) has reference to hall-marks as used in England, that is to say, that hall-marks are "official control and guarantee signs and stamps." I think that such words were intended to refer to marks of that nature. The enactment of this provision of the statute was, I think, in consequence of some provisions of the International Convention for the Protection of Industrial Property which was signed at The Hague in May, 1925, and to which Canada was a signatory, and which made certain modifications to the International Convention signed at Paris in 1883, revised at Brussels in 1900 and at Washington in 1911. The Convention and the accession of Canada thereto may be referred to by the Court as a matter of history, in order to enable it to understand in what circumstances this provision of the Trade Mark Act was enacted; but the terms of the Convention cannot be employed as a guide to interpret the statute, because a treaty with another State binds, the citizens of Canada, only in so far as it has been embodied in legislation enacted in the ordinary way. *Carter Medicine Co's. Trade-Mark* (1), North J.; *California Fig Syrup Co's. Trade-Mark* (2), Stirling J.; and *Walker v. Baird* (3). I think it is clear that this particular amendment to the Trade-Mark Act under discussion, was intended as a partial adoption of the terms of Article 6 (ter) of the Convention. This I think will appear clear from a reading of the first paragraph of that Article where the words "official signs and hall-marks indicating control or warranty adopted by them" are used. The effect of the addition of this paragraph to sec. 11 of the Trade Mark Act, is merely to add to the grounds upon which the Minister might refuse to register a mark. The fact that the Minister is now empowered by paragraph (g) of the Statute of 1928 to refuse to register trade marks which consist in whole or in part of "official control and guarantee signs and stamps" adopted by another country—and they are not now being registered—is indicative of the fact, that prior to 1928, it was not intended by the Trade Mark Act that a trade mark

1929  
 BIRMING-  
 HAM  
 JEWELLERS  
 AND SILVER-  
 SMITHS'  
 ASSOCIATION  
 v.  
 W. N. STOCK.  
 Maclean J.

(1) 1892) 9 R.P.C. 401.

(2) (1888) 6 R.P.C. 126.

(3) (1892) A.C. 491.

1929  
 BIRMING-  
 HAM  
 JEWELLERS  
 AND SILVER-  
 SMITHS'  
 ASSOCIATION  
 v.  
 W. N. STOCK.  
 Maclean J.

might be refused registration upon the ground that it in whole or in part consisted of "official control and guarantee signs and stamps" adopted by another country. If I am correct in that conclusion then the registration of the trade mark of Ellis & Co. in 1902 was not an invalid registration under the Trade Mark Act of that date. It is also to be observed that this statutory provision is available only to the nationals of such other countries as afford similar protection to nationals of Canada, and it was not therefore intended to be of general application, which but adds force to the view that no such provision was by intendment to be found in the Trade Mark Act prior to 1928. If there be any doubt as to the proper construction of this provision of the Trade Mark Act, it should be construed in favour of those holding vested rights in the registered mark here sought to be expunged. That mark was used by Ellis & Co. for about twenty-seven years, and applied in that period to millions of dollars worth of goods, and it was recently acquired by Stock, by assignment, along with the business and good will of P. W. Ellis & Co. It would only be by very plain and apt words to be found in the statute, that I would feel justified at this date in ordering a cancellation of the mark.

The petition is therefore dismissed and the costs will follow the event.

*Judgment accordingly.*

1929  
 March 27-28.  
 May 29.

THE SASKATCHEWAN CO-OPERATIVE WHEAT PRODUCERS, LTD.. } APPELLANT;

AND

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

*Revenue—Income Tax—Voluntary association—Gain and profit—Agency—Income War Tax Act, 1917, and amendments*

The appellant is a voluntary association of people,—incorporated under the Saskatchewan Companies' Act, pursuant to a memorandum of association, confirmed by Act of the Legislature—who pool together their wheat or grain crops so as to dispose of them to best advantage, with the idea of obviating and reclaiming the waste experienced when each farmer personally disposed of his crop. The officers and employees are paid wages, as part of the operating expense, which

are not gains or profits depending on the state of the market. A farmer takes his grain to the elevator, obtains a certificate or receipt for the same together with a first instalment payment, previously adjusted, until he finally gets the last instalment, subject to three deductions: *First*, a deduction for operating expense. *Second*, one for elevator reserve, and *third*, one for commercial reserve. The Crown has assessed the last two for income tax as being income, gains or profits of the association. Hence the appeal. These deductions belong to the farmer and must be accounted for to him and the association retains nothing but the expense, including capital to acquire elevators for the farmers to handle the grain in question, the said deductions being made solely to earn income to the farmers and not to the association.

1929  
 THE  
 SASKATCHEWAN CO-  
 OPERATIVE  
 WHEAT  
 PRODUCERS,  
 LTD.  
 v.  
 THE  
 MINISTER OF  
 NATIONAL  
 REVENUE.

*Held*, that the deductions in question are but loans or advances under contract made by the farmers out of the price of their grain to the appellant for carrying on the business and acquiring elevators, which are all repayable to the grower, and are not gains or profits of the association within the meaning of the Income War Tax Act, 1917, and are not taxable under the said Act.

(2) That "profits and gains" must not be regarded loosely, the words as used in the taxing Act must be read in conjunction with the meaning of the words used in the context.

APPEAL under the provisions of the Income War Tax Act, 1917, from appellant's assessment for the years 1925 and 1926.

The appeal was heard before the Honourable Mr. Justice Audette at Regina.

*O. M. Biggar, K.C.*, and *R. H. Milliken, K.C.*, for appellant.

*C. F. Fraser, K.C.*, and *Mr. Fisher* for respondent.

The facts are as stated in the reasons for judgment.

AUDETTE J., now (May 29, 1929), delivered judgment.

This is an appeal, under the provisions of the Income War Tax Act, 1917, and amendments thereto, from the appellant's assessments for the year 1925 at the sum of \$154,143 and for the year 1926 at the sum of \$302,489.61.

The appellant was duly incorporated under the Saskatchewan Companies Act in 1923, pursuant to a memorandum of Association (exhibit No. 4), and this incorporation was confirmed by a Special Act of the Legislature (chap. 66 of 1924), assented to on the 25th March, 1924. The object of the company, generally speaking, consists in establishing and carrying on the business of the buying, selling, marketing and handling of grain and its products

1929  
 THE  
 SASKATCHE-  
 WAN CO-  
 OPERATIVE  
 WHEAT  
 PRODUCERS,  
 LTD.  
 v.  
 THE  
 MINISTER OF  
 NATIONAL  
 REVENUE.  
 Audette J.

and the general business of elevator operators and warehousemen, and to operate a pool or pools for grain, as more fully set forth in the preamble of the Act and sec. 4 thereof, and to enter into contracts incidental to this co-operating, selling and marketing of grain, etc.

Under sec. 6 no dividend can be declared or paid to the shareholders.

In the result the appellant is a voluntary association of people who pool together their wheat or grain crops so as to dispose of them under a particularized system with the idea of obviating and reclaiming the waste which was experienced when the farmers or growers personally sold or disposed of such crops,—and to get the best prices for the same.

It is an economic organization with modalities superior to the possibilities of the individual handling of such a large business.

This pool, or collectivity of grain producers, formed on a syndical basis through officers selected from men of experience in their business, entrusts the association, upon consideration in the form of salaries to its officers (paid out of the hereafter mentioned “deduction” for operation) with the carrying on and the administration of its business or enterprise, obviously involving, as agent, the discharge of fiduciary and constructive task.

The pool or association may be likened to an agent or factor who intervenes in the sale of goods and who conveys the same, which are in process of exchange, between the producer and the purchaser. In effect the growers have constituted the association as their agent to sell their grain under the conditions mentioned in the Act and the contract made thereunder.

An analysis of the relations subsisting between the pool and the producers discloses that the Association’s officers and employees are paid wages, as part of the operating expenses, which are in no sense gains or profits dependent on the state of the market. In other words the amount of wages is unaffected by profits or loss, as neither of them arise under the adopted system.

The farmer, in the first place, takes his grain to the elevator, he gets a certificate or receipt for the same together with a first instalment payment, previously adjusted, until



he finally gets the last instalment, subject to three distinct deductions. First a certain deduction for operating expenses which have already been mentioned and do not come in question in this case. As one will readily understand these expenses are constantly incurred and are paid currently throughout the year.

Then there is also a percentage of deduction for the Elevator Reserve and another for commercial reserve.

The only question which is the subject of the present controversy, is whether or not the amounts of these two last deductions are income and gains or profits to the appellant and are subject to taxation.

It is well to bear in mind that these deductions are so much less of the price, the proceeds of the sale, of the farmer's grain which he leaves, by agreement, in the hands of such association for the purpose of handling his grain to his best advantage in giving the pool, his agent, the commercial facilities necessary, that is the capital or moneys necessary to finance expenses and carry on; together with the other deduction for the establishment of elevators to handle the grain. Both deductions belong to the grower and are to be accounted to him at a time to be decided by the Directors, as agreed upon.

These moneys are in the hands of the pool (the membership of which being entirely farmers), the agent of the farmer, for a certain time; but they are to be accounted to the farmer and will be in the end retained as his property.

The perusal of exhibit No. 6 will show how all of this is done.

The Association, acting in a fiduciary capacity for the growers, accounts for every cent it receives and retains nothing that could amount to a gain or profit. See subsec. cc. of sec. 4 of ch. 66, Sask., and clause 26 of the contract exhibit No. 2.

If the Association were to pay the tax claimed upon these deductions, it could not live up to the contract with the grower and pay back these temporary deductions when the time comes,—they would not have the money to do it.

The deductions are nothing but loans or advances under the contract, for the purposes of carrying on and in addition it is repayable to the grower, the person who voluntarily permits it.

1929

THE  
SASKATCHE-  
WAN CO-  
OPERATIVE  
WHEAT  
PRODUCERS,  
LTD.

v.  
THE  
MINISTER OF  
NATIONAL  
REVENUE.

Audette J.

1929  
 ~~~~~  
 THE
 SASKATCHE-
 WAN CO-
 OPERATIVE
 WHEAT
 PRODUCERS,
 LTD.
 v.
 THE
 MINISTER OF
 NATIONAL
 REVENUE.
 ———
 Audette J.
 ———

It is the whole amount received from the sale of the grain that is placed to the credit of the grower, including the amount of deductions. It is true the pool, under the Act and the contract, has for a time legal title to this money, that is capital to carry on and capital to acquire elevators; but that was necessary to permit the pool to properly contract for that purpose. That kind of ownership however is determined by the Statute and the contract. And the pool has bound itself to pay these moneys or what they represent back to the farmer. These deductions are part of the purchase price of the grain which must be accounted for in full and paid into the hands of the grower at the proper time, and it could not in any case be considered a profit or gain to the Association.

The Association, the collectivity of grain growers, derives no benefit from these transactions, other than the salaries that are paid to its officers and employees; it is the individual farmer who derives the benefit from such organization.

Possibly special mention should be made with respect to the Elevator Reserve. This amount—we must bear in mind is taken from part of the price of wheat belonging to the grower—and is turned over to the Saskatchewan Pool Elevator, as capital for the purpose of acquiring elevators to handle this very grain. That capital, which belongs to the grower, is credited to him and it is a liability of the pool to him.

Moreover, it is well to mention that these deductions,—the amounts representing these individual deductions for commercial reserve and Elevator—have already in certain cases been dealt with and returned to 119 growers or contributors in connection with estates; that is when a grower died and left a family in poor condition, the reserve has been refunded in full; as will be done with all other contributions when the Directors have decided the time has come to do as per the Act and the contract.

There was no profit or gain realized by the association. Its business was merely marketing and selling the farmers' grain and retaining from the price obtained for such grain a certain amount to be used as a fund to purchase elevators which were being used for the farmers' grain, and which belonged to the farmers, credited to them, and their

value to be at a given time distributed among them. The deductions were made for the purpose alone of earning income to the farmers and not to the association.

Indeed, if transactions in the nature of those in question had been carried on in due course between a farmer and a broker, no question would have arisen suggesting that such deductions were profits and gains, and were subject to taxation. What might have been the subject of taxation would be the commission charged by the broker, which could be considered as part of his own income; as it is here the case with respect to the officers and employees of the association; but it could in no case be considered a gain or profit of the association and much less subject to taxation, as it could by no means be construed as its income.

The facts of this case fail to bring the appellant within the scope of the law imposing a tax upon an income showing gain and profit. There is no equitable construction of a taxing statute in favour of the Crown, the exact meaning of the words in the Act used must be adhered to. *Partington v. Attorney-General* (1).

The elevator deduction is made up of nothing but a certain portion of the price or proceeds from the sale of the farmer's wheat, which he sets aside temporarily as capital. If it is capital it cannot be treated as income. "Profits and gains" must not be regarded loosely, the words as used in the Taxing Act must be read in conjunction with the meaning of the words used in the context. See per Halsbury L.C. in *Y. & P. Main Sewerage Board v. Bensted* (2).

No one can be held to make a profit or gain by dealing with himself only; two parties are needed, and under the pool scheme, the associations being the agent of the farmer, they are one and the same.

In the absence of facts bringing the case within the statute, it is perhaps well to recall the rules of taxation as laid down by Sismondi, following Adam Smith, and that is that: Every tax should fall on revenue and not on capital; that in the assessment of taxation gross produce should not be confounded with revenue; that taxation should never touch what is necessary for the existence of the contributor and that taxation should not put to flight the

1929
 THE
 SASKATCHE-
 WAN CO-
 OPERATIVE
 WHEAT
 PRODUCERS,
 LTD.
 v.
 THE
 MINISTER OF
 NATIONAL
 REVENUE.
 Audette J.

(1) (1869) L.R. 4 H.L. 100 at 122.

(2) (1907) A.C. 264.

1929
 THE
 SASKATCHE-
 WAN CO-
 OPERATIVE
 WHEAT
 PRODUCERS,
 LTD.
 v.
 THE
 MINISTER OF
 NATIONAL
 REVENUE.
 Audette J.

wealth which it strikes. See C. F. Bastable's Public Finance, 3rd ed., 1903, p. 416.

Now what is sought to be taxed here is gross revenue placed as capital to buy elevators for the purposes of the farmer's trade and business, such advances to be hereafter accounted and paid back to him. The pool was organized in aid of the grain farmers of Saskatchewan who severally and individually suffered loss and inconvenience in handling the produce of their farms. By pooling their grain, it was sold to advantage. If the appellant were to be subjected to an income tax when its dealings have shown no such income or gain from third parties, then this tax would prove a burden beyond justification upon the grain growers of Saskatchewan.

Capital must not be confused with income which is equivalent to the expression of "balance of gains and profits." *Taxation Commissioner v. Antill* (1).

Under all the circumstances of the case, I find that the deductions in question are but temporary loans and advances made by the farmer, out of the price of his grain, to the pool as capital for carrying on and acquiring elevators—the value thereof being credited to him as his own, having been his own all through under the true meaning of the Provincial Act and the contract made thereunder, and that the association, acting in such fiduciary capacity for the grain growers, accounts for every cent it receives and retains nothing that could amount to gain or profit.

The appeal is allowed and with costs.

1929
 June 25.

QUEBEC ADMIRALTY DISTRICT

JAMES RICHARDSON AND SONS } PLAINTIFF;
 LIMITED

v.

THE STEAMER BURLINGTON.....DEFENDANT.

Shipping—Bill of lading—Law of United States—International Law.

The plaintiff contracted with the defendant ship for the carriage of a cargo of wheat from Buffalo to Montreal. The plaintiff was an American, the ship was an American ship, and the contract was made in the United States. The defendant alleged that the contract or bill of

(1) (1902) A.C. 422, at 427.

lading was issued subject to an Act of Congress of the United States known as the Harter Act, the terms and conditions of which applied to and formed part of such contract, while the plaintiff alleged that as this Act was not referred to or made part of the contract it did not apply.

1929
 JAMES
 RICHARDSON
 & SONS, LTD.
 v.
 STEAMER
Burlington.

Held,—That, under the circumstances, the obligations of the parties under this contract were governed by the laws of the United States.

2. That under the laws of the United States the Harter Act did not need to be referred to in the bill of lading to become binding on the parties and that the said Act is to be applied in this case.
3. The bulkhead of the *B.* was watertight up to the main deck, which was 17½ feet above the keel.

Held,—That, as the *B*'s draught was 13 feet 11 inches and had a freeboard of 3 feet 7 inches above water line, she was seaworthy for the voyage in question.

ACTION by consignees of certain cargo of grain against the defendant ship for loss and damage to the cargo whilst on the ship.

The action was tried by the Honourable Mr. Justice Demers at Montreal.

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

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

The facts are stated in the reasons for judgment.

DEMERS L.J.A., now (June 25, 1929), delivered judgment.

This is a claim of \$100,000 loss of and damage to a cargo of grain which the defendant steamer *Burlington* had undertaken to transport from Buffalo to Montreal, in the month of August, 1927, which cargo belonged to the consignee, the plaintiff in this cause.

The loss and damage are not denied.

The plea is—

That shortly after arrival of the said ship, the Chief Engineer thereof instructed one of the oilers named Montroy to pump up the boilers, close the sea-cock valve off and to take certain covers off the air pump;

That the said Montroy by mistake removed the cover or bonnet off the seacock thus admitting water into the said defendant ship;

1929
 JAMES
 RICHARDSON
 & SONS, LTD.
 v.
 STEAMER
Burlington.
 Demers
 L.J.A.

That the water so admitted into the said defendant ship caused the ship to list and placed her in grave danger of stranding;

That shortly thereafter on the said date the said defendant ship was beached at the Guard Pier at the Port of Montreal with a severe list to port;

That at the commencement of the said voyage and prior thereto and during all stages thereof, the defendant ship, the said SS. *Burlington*, was, in all respects, seaworthy and properly manned, equipped and supplied;

That the owners of the said SS. *Burlington* at the commencement of the said voyage and prior thereto and during all stages thereof from Buffalo to Montreal exercised due diligence to make the said vessel, in all respects, seaworthy and properly manned, equipped and supplied;

That any contract of carriage or affreightment and any Bill of Lading if issued to the plaintiffs or owners of the said cargo, covering the carriage of the said cargo from Buffalo to Montreal, was issued subject to an Act of Congress of the United States of America approved on the 13th day of February, 1893, and entitled "An Act relating to navigation of vessels, Bills of Lading—" and commonly known as the "Harter Act," the terms and conditions of which Harter Act apply to and form part of any such contract of carriage or affreightment, or Bill of Lading;

That the said mentioned Act of Congress enacted as Section 3 thereof as follows:

Section 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel; nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

That the casualty, loss or damage alleged in the Plaintiff's Statement of Claim was caused and attributable to a fault or error in navigation or in the management of the SS. *Burlington*.

The decision in this case involves questions of law and questions of facts to which the lawyers of both parties have given the best consideration.

The first question to decide is a question of International Law: is this case governed by the laws of the place where the contract was made, or is it governed by the laws of the complete performance of the contract?

The solution of this question depends upon the intention of the parties.

The general principle is that the interpretation of the contract and the extent of the obligation of the parties are generally governed by the law of the place where the contract was made.

In the contract of affreightment, the rule is to follow the law of the flag—Dicey's, 4th Edition, p. 644—and this is considered an application of the general rule.

In the contract for the carriage of goods, it is the law of the place where the contract is made and in certain cases, the law of the flag—*ibidem*, p. 649. It is only when there are special circumstances to show a different intention, that the law of the performance can be admitted.

In this case, the contract was made in the United States; the shipper was an American, and the ship is also American.

Under the circumstances, the Court arrives at the conclusion that the obligations of the parties under this contract are governed by the laws of the United States.

In its Memorandum, the plaintiff says that the Harter Act of the United States, having not been referred to or made part of the contract in question, is therefore not applicable.

It is very seldom that a contract covers every eventuality. The parties are presumed to rely on the laws of their country. A shipper and the owner of the ship are presumed to know the laws of their trade. When by these laws there is a limitation to the responsibility of the ship owner, it is implied in contracts—*ibidem*, p. 645.

Moreover, there is no doubt that, by the laws of the United States, the Harter Act does not need to be referred to in the Bill of Lading.

It has been contended by Mr. Longley, an expert witness for the plaintiff, that the Harter Act had no effect outside of the United States. He admits, p. 90:

1929
 JAMES
 RICHARDSON
 & SONS, LTD.
 v.
 STEAMER
 Burlington.
 Demers
 L.J.A.

1929
 JAMES
 RICHARDSON
 & SONS, LTD.
 v.
 STEAMER
Burlington.

Demers
 L.J.A.

I know of no decision than the *Irawaddy* case, 171 U.S.R., p. 197 and 193, which has more clearly expressed the point made than this.

I do not find anything in that report to justify this view. The Harter Act is filed and its terms do not admit of such an interpretation, on the contrary. (See on this point 36 Cyc. p. 282.)

It has also been stated by the same witness that, though the Federal Courts have decided that Section 3 of the Harter Act applied to private carriers, he is of opinion, if that question is presented to the Supreme Court, there is a very fair chance it will be held that Section 3 of the Harter Act does not apply to a private carrier.

It is admitted that all the Federal Courts and all the Judges of this Court have agreed and had agreed at the time of the contract, that Section 3 should be applied equally to the private and common carriers.

These Courts, it is true, have been unanimous as to Sections 1 and 2, to distinguish between the two kinds of carriers, as they have been in not admitting any distinction as to Section 3.

At the moment of the contract there was jurisprudence which is presumed to be known to the contracting parties, and that jurisprudence should be followed by this Court, otherwise nothing would be sure.

The Court is of opinion that Section 3 of the Harter Act Applies in this case. (Carver, *Carriage by Sea*, 7th ed., p. 163, note 's'.)

There remains, then, in this case two questions of fact:—

First, have the owners of the *Burlington* exercised due diligence to make the said vessel in all respects seaworthy, and properly manned, equipped and supplied?

Second, is the damage or loss resulting from faults or errors in navigation or in the management of the said vessel?

The defence has established that their vessel was duly classified as a first-class vessel to transport goods on the lakes, and that she had also been duly inspected by the proper inspectors, and it is proved that the owners had made the repairs asked for.

To this evidence, which made a *prima facie* case in favour of the *Burlington*, the plaintiff objects, that the vessel was not seaworthy, specially because the bulkheads between the machinery and cargo were not watertight to the spar deck.

It is proved and it appears in Exhibit D-13, p. 86, that the bulkheads are required by the Laws of the United States only on vessels carrying passengers, and it is also provided by these rules that the rules of the American Bureau of Shipping respecting the construction of hulls, boilers and machinery, and the certificate of classification referring thereto, shall be accepted as tendered by the Inspectors of this Service.

1929
 JAMES
 RICHARDSON
 & SONS, LTD.
 v.
 STEAMER
Burlington.
 —
 Demers
 L.J.A.
 —

There has been some controversy as to the rules of the American Bureau of Shipping, and it is doubtful if the old rules of the Great Lakes Register do apply, but even taking those rules, I see that the approval of a ship could be given, though not built in every respect according to the rules and tables of the Register, Article 4, Section 1, p. 19.

It is true that Section 44 states that all watertight bulkheads should extend to the upper deck, but it is added, in conformity with Rule 4 already quoted, that when the construction is such that special arrangements are desired, plans for same must be submitted to the Committee.

This shows that the Committee can approve of a boat where the bulkhead is not watertight to the spar deck.

In this case, the bulkhead was watertight up to the main deck which was seventeen feet six inches (17' 6") above the keel and inasmuch as the ship's draught was thirteen feet eleven inches (13' 11"), the *Burlington* had a freeboard of three feet seven inches (3' 7") above the waterline.

It would then have been necessary to load down the *Burlington* three feet seven inches (3' 7") deeper before the water would have reached the top of the main deck, which would not have been done because the canal draught is only fourteen feet (14').

There is no question that the removing of the boards of the spar deck could not, under the circumstances, have any effect on the seaworthiness of the ship.

The second objection made by the plaintiff is that the *Burlington* was not seaworthy because there were no extension control rods of the sluice valves.

It is proved that no such extension rod exists on any lake vessel. The only witness who has said the contrary is unable to name a single lake boat which has such extension rods, and even the witness Drake for the plaintiff, says he never saw the requirement for one.

1929
 JAMES
 RICHARDSON
 & SONS, LTD.
 v.
 STEAMER
Burlington.
 —
 Demers
 L.J.A.
 —

The third complaint was that the *Burlington* was not seaworthy because the boiler pan or flooring on which the boiler fitting rests was corroded.

This is contradicted and the same witness Drake, who pretends that the boiler pan was in a corroded condition, adds: "but not seriously enough to affect it," and in my opinion this disposes of that objection.

In short, the defendant has proved diligence, and more than that, it is proved that the *Burlington* was fit for the transportation of that cargo to Montreal.

As to the second question, to wit, is the damage or loss resulting from faults or errors in navigation or in the management of the said vessel, though I might feel inclined to have great doubts on that question if there had been no jurisprudence, the Court considers that this point is also well settled in favour of the defendant, and that the fault was a fault in the management of the ship.

Judgment will go accordingly in favour of the defendant, and the action will be dismissed with costs.

Judgment accordingly.

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

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

1929
 Aug. 6.
 Aug. 16.

PRINCE EDWARD ISLAND ADMIRALTY DISTRICT

BRUCE STEWART & COMPANY, LTD.... PLAINTIFF;

v.

THE SHIP *AMLA*..... DEFENDANT.

Shipping—Practice—Jurisdiction—Material men

The *A.* was under arrest by process of the Court, in a joint action for master's and seaman's wages, when she was re-arrested by the plaintiffs, under three separate warrants, in actions for necessaries and supplies furnished to the *A.* in the port of Charlottetown, to which she belonged and the owners of which were domiciled in Canada.

Held,—That the ship being under arrest of the Court, this Court had jurisdiction in the matter, but that the issuing of warrants and the re-arrest was unnecessary.

Semble.—That where a ship has been sold and its proceeds are in Court, material men can bring their claim before the Court by petition, and the fact that the *A.* had not yet been sold afforded no ground for a different course.

1929
 BRUCE
 STEWART &
 Co., LTD.
 v.
 THE SHIP
Amla.

ACTION by plaintiff to recover for ships necessaries and supplies furnished to defendant ship.

The action was tried before the Honourable Mr. Justice Stewart at Charlottetown, P.E.I.

J. J. Johnston, K.C., for plaintiff.

Donald McKinnon, K.C., for defendant.

The facts are stated in the reasons for judgment.

STEWART L.J.A., now (August 16, 1929), delivered judgment (1).

These cases are brought by three several plaintiffs to recover ships necessaries and supplies furnished by them to the *Amla* in the port of Charlottetown, to which she belongs and the owners of which are domiciled in Canada.

This Court takes jurisdiction in the matter from the fact that the *Amla* had been before the commencement of this suit and still is under arrest by the process of this Court in the joint action of William Patrick Burke and others against the said ship for master's and seamen's wages.

The plaintiffs have made due proof before me of the necessaries which they severally supplied the *Amla*, as follows: The said Bruce Stewart & Co., Ltd., to the amount of \$631.24, which I allow; the said Joseph K. Stanley and others to the amount of \$97.05, which I allow; and the said Moore & McLeod, Ltd., to the amount of \$104.27, which I allow, and for which several sums with costs I give judgment against the said ship *Amla* and her proceeds when sold and paid into court after satisfying the judgment obtained against her in the said suit of William Patrick Burke and others.

In these three cases three several warrants were issued under all of which the ship *Amla* was arrested, although held under previous arrest in the Burke case.

The practice here followed is cumbrous and adds unnecessarily to the cost of the proceedings.

(1) Two other cases of Joseph E. Stanley and Moore & McLeod were tried at the same time, and a similar judgment given.

1929
 ~~~~~  
 BRUCE  
 STEWART &  
 CO., LTD.  
 v.  
 THE SHIP  
 Amla.  
 ———  
 Stewart  
 L.J.A.  
 ———

The law under which the claims in these cases have been made is Sec. 4 of the Act of 1861, which reads:

The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping or repairing of any ship if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court.

Apart from Sec. 4 the Court of Admiralty has no jurisdiction in the case of necessaries supplied to a ship in the port to which the ship belongs or where at the time of the institution of the cause the owner or part owner of the ship is domiciled in Canada. The arrest of the *Amla* in the action of Burke and others for seamen's wages alone permitted the plaintiffs in this case to invoke the jurisdiction of the Court to deal with their claims. These claims could have been brought to the attention of the court and enforced without the necessity of issuing summons and warrants for the arrest of the ship.

The filing of a petition embodying the claims, notice to the owners of the ship and the due proof of claims in Court would seem to be all that is necessary to safeguard the material men's rights.

If the ship had been sold and its proceeds in Court before the material men had begun their actions the practice to be followed would surely be by petition and proof and not by the issue of a warrant to arrest. The fact that the ship was still under arrest and unsold affords no grounds for a different course. I would suggest that the practice adopted in this case be not followed.

*Judgment accordingly.*

1929  
 ~~~~~  
 July 30,
 Aug. 2 & 6,
 Aug. 16.
 ———

THE PRINCE EDWARD ISLAND ADMIRALTY DISTRICT

WILLIAM PATRICK BURKE ET AL. PLAINTIFFS;

v.

THE SHIP *AML*A. DEFENDANT.

Shipping and Seaman—Arrest for wages—Practice—R.S.C. (1927), c. 42, sec. 183

The captain, mate and certain seamen of the *A.* had the ship arrested in a joint action *in rem* for wages. The claim made was for one month and some days, being not only the amount actually earned, but also for substantial sums not earned, which were more in the nature of damages.

Held,—That wages cannot be sued for until earned, and that where a hiring at so much a month is made, no wages are or can be earned until the whole month's service is performed.

The owner of the ship defendant appeared unconditionally and later raised a question of jurisdiction.

Held,—That in Admiralty where the defendant wishes to raise an objection to the jurisdiction of the Court, in a case where the Court has jurisdiction over the subject matter, he should appear under protest whether the action be *in rem* or *in personam*.

Held,—That a Master suing for wages and disbursements is bound to furnish accounts before bringing his action, otherwise he will not be entitled to his costs. [*The Fleur de Lis* (L.R. 1 A. & E. 49) referred to.]

1929
 BURKE ET AL
 v.
 THE SHIP
 Amla.

ACTION *in rem* for wages paid by the Captain, Mate and Seaman of the defendant ship.

The case was tried before the Honourable Mr. Justice Stewart.

J. J. Johnston, K.C., for plaintiff.

Donald McKinnon, K.C., for defendant.

The facts are stated in the reasons for judgment.

STEWART L.J.A., now (Aug. 16, 1929), delivered judgment.

1. This is a joint action *in rem* for wages brought by the Captain, the Mate, the Engineer, two firemen, two seamen and the cook of the ship *Amla* against the defendant ship—a steamship of 141·59 gross and 57·90 register tonnage, registered in Charlottetown and owned and operated by the International Fish Corporation, Limited, of Georgetown, Prince Edward Island.

2. The plaintiff, William Patrick Burke, in his affidavit to lead to warrant, claims \$197.75 for wages due to him as master on board the defendant ship for one month and sixteen days at \$150 per month.

[The learned judge here gives the details of the seven other claims of the same nature as that of Burke.]

10. All the said plaintiffs in their evidence given in Court spoke of being hired by the month.

It is a well established legal principle that wages cannot be sued for until earned, and that if a hiring at so much a month is made, no wages are or can be earned until the whole month's service is performed. This is so well known that it is difficult to understand why the plaintiff in this

1929

BURKE ET AL

v.

THE SHIP
Amla.Stewart
L.J.A.

case should have set the law in motion to arrest the defendant ship, not only for the amount due for the several months that had been earned but for substantial sums that had not been earned. If such an attempt had been made in the case of the issuing of a bailable writ or an attaching order in pursuance of the powers conferred by the Garnishee Act, such a writ and such an order would surely be set aside. The unfairness of the thing consists in this, that no debtor should have either his property or person placed under arrest for a larger claim than is justly due. The contention of all the plaintiffs at the trial was that they had never been discharged from their several positions in the defendant ship and that they still held these positions. By what right or authority can the owner of the ship be placed in the position of being compelled to pay wages that have not been earned in order to recover possession of his ship? If the crew had been improperly dismissed, they might recover for the extra days, but that would be in the way of damages. If an application had been made on behalf of the ship in proper time to have the arrest set aside, it is difficult to see by what means this could have been successfully avoided, but such an application, after the parties have come prepared to have the case tried on the merits, appears to be too late. The owner of the ship instead of applying in time filed an absolute appearance to the action. In Admiralty practice, if the defendant wishes to raise an objection to the jurisdiction of the Court in a case where the Court has jurisdiction over the subject matter, he should appear under protest whether the action be *in rem* or *in personam* (1).

Counsel for the ship, however, relies on other grounds for the ship's release and the setting aside of the warrant and the arrest and for having the action dismissed than for want of jurisdiction. These are:

1st. There are no wages due to the crew as seamen;

(1) *The Vivar*, 2 P.D. 29.

The Vera Cruz, 9 P.D. 96; 10 App. Cas. 59.

The Seaward, 3 Ex. C.R. 268.

The Heligoland, Swaby, 496.

The Blakeney, 5 Jur. N.S. 418.

The Louisa, 9 Jur. N.S. 676 (Pt. 1).

The Cargo, ex Sultan, Swaby, 509.

2nd. Captain Burke is not captain of the ship, and the work he did was not done as captain of the ship.

1929
 BURKE ET AL
 v.
 THE SHIP
 Amla.
 Stewart
 L.J.A.

I have gone carefully over all the evidence given at the trial and the telegrams and letters placed in evidence and find that the manager of the company employed Captain Burke to get the ship fitted out and ready for a voyage at least to Pictou and to engage a crew for that purpose; that he also employed the engineer, Winchester, for the same purpose so far as the engine room was concerned, and that the latter obtained authority to select firemen.

There was certainly delay on the part of the captain in setting out for Pictou. This is explained by his erroneous idea that the material men had it in their power to prevent the ship sailing until their bills had been paid. He also advanced the excuse of the failure of the president of the company to supply him with funds to pay for the slip charges at Pictou. Taking into consideration that the president and manager of the company was in Charlotte-town on May 29 and had on that day authorized the captain to procure supplies from Moore & McLeod, Limited, for the ship I feel that this delay of itself would not justify depriving the captain of his wages. Besides, it came out in evidence that the company owning the ship had intended to use her in the fish trading business throughout the Maritime Provinces and that she was being fitted out for that purpose. In the absence of express instructions by the president it was not unreasonable for the captain to select his crew with a view for such a purpose.

In *Mills v. Gregory* (1), the seamen maintained a suit for wages though the ship had not sailed out of the river; and in *Wells v. Osmond* (2), a suit for wages succeeded which became due on a contract to go on a voyage although the voyage was put off.

The master suing for wages and disbursements is bound to furnish accounts before bringing his action, otherwise he will not be entitled to his costs. The *Fleur de Lis* (3).

The master in this case should have procured accounts from the material men and furnished them to the owner a reasonable time before taking action. He, however, furnished them on June 7, and on June 8 had the defendant

(1) (1754) Sayer 127.

(2) (1794) Mod. 238.

(3) (1866) L.R. 1 A. & E. 49.

1929
 BURKE ET AL
 v.
 THE SHIP
 Amla.
 Stewart
 L.J.A.

ship arrested for his wages. This bears on its face rather sharp practice and for that reason, so far as Captain Burke is concerned, there will be no costs allowed him.

The plaintiffs' counsel at one time during the course of the trial advanced an opinion that the captain and seamen could only recover the amount of their several wages sworn to in their affidavit to lead to warrant and cited in support *The Carolina* (1). At another time in closing his case he abandoned this view and claimed wages for the captain and crew at the monthly rates specified down to the making of the decree, and cited in support of his contention *The Great Eastern* (2). Neither of these two cases runs counter to any established legal principle and they are easily distinguishable. The former establishes the principle that when a master or seaman institutes an action for wages he is taken to have thereby indicated that he considers his connection with the ship determined. In that case as in the present, there was no wrongful dismissal of seamen. Sir R. Phillimore in giving the judgment of the court said:

The practice is founded upon the principle that where a seaman institutes a suit for wages, he ceases to have any claim for subsequent wages upon the ship. It is said there is a great hardship in the mariner being left without any claim for support after he has left the ship in the interval between the institution of the suit and the hearing of the cause. But substantially he would receive a sum of money for his maintenance and detention when the question of costs came to be decided. It is said these men stayed on board after the institution of the suit and at the request of the master. These are circumstances to be given due weight.

The *Great Eastern* case is wholly unlike the present one. It was a claim for damages for wrongful dismissal of the crew, which was held to be within the cognizance of the Court of Admiralty. The engineer and seamen were engaged for a voyage on a foreign going ship, which voyage was never entered upon. The seamen, after serving on board the ship for a time, were discharged. It was held in that case that a lien exists for damages after a wrongful dismissal, but that case has no possible bearing on this case.

I allow each of the plaintiffs one month's wages, and I fix the allowance for maintenance for all the crew, except the captain, at \$60 each. The crew seems to have been kept connected with the ship until the trial at the request of the captain, although it is not easy to understand why

(1) (1875) 34 L.T.R. 399.

(2) (1885) 53 L.T.R. 594.

they were so kept. I fix the claim of the captain at \$117.75; that of the mate at \$125; that of the cook at \$125; that of the engineer at \$210; those of the two firemen at \$140 each and those of the two seamen at \$120 each; and I give judgment in favour of the plaintiffs for the several amounts stated with costs.

1929
BURKE ET AL
v.
THE SHIP
Amla.
Stewart
L.J.A.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

FRED OLSON AND COMPANY.....PLAINTIFF;

1929
April 15-17.
May 22.

v.

THE PRINCESS ADELAIDE.....DEFENDANT;

AND

THE CANADIAN PACIFIC RAILWAY }
COMPANY } PLAINTIFF;

v.

THE HAMPHOLMDEFENDANT.

Shipping—Collision—Article 18 of Regulations—Fog—Canada Shipping Act—Maritime Convention Act (R.S.C., Ch. 126)

A collision occurred at 11.14 a.m. on December 19, 1928, in Burrard Inlet, Vancouver Harbour, B.C., between the *H.* inward bound and the *P. A.* outward bound. The weather was calm but with a dense fog and the tide at last of flood. The *P. A.* was running at 12 knots an hour on a course of S.W. ¼ S., which she held till the collision was imminent. She stopped her engine half a minute before collision upon hearing the fog whistles from a tug to port, and again from a ship to starboard, which turned out to be the *H.*, which was first seen emerging from the fog about 300 feet away, between 2 and 3 points on her starboard bow. She thereupon put her helm hard astarboard with full speed ahead, and the stem of the *H.* cut into her on the starboard side, a little forward of amidship. She was still swinging at moment of impact, with a speed of 11 knots. The *H.* passed Pt. Atkinson at 10.05 on a course of E. by N. at a speed of 4 knots, but shortly after decided not to try to enter the narrows, but to proceed cautiously by "slow ahead" and "stop" alternatively to usual anchorage in English Bay, altering her course at 10.25 to E.N.E. decreasing speed to 3, then 2 knots, and owing to signals of other vessels, again at 10.50 changed to E.S.E. giving proper signals. On this course, as early as 11.12 a.m. she heard the *P. A.*'s signals about 5 to 6 points on her port bow, upon which she stopped her engine and blew her whistle. This was answered by the *P. A.*, and after exchange of 3 or 4 whistles, the *P. A.* emerged about 3 or 500 feet

1929
 FRED OLSON
 & Co.
 v.
 THE
 Princess
 Adelaide.
 AND
 C.P.R. Co.
 v.
 THE
 Hampholm.

away heading for the *H.*, or at least, across her bow. The *H.* reversed full speed, put her helm hard a-port, but too late to avert the impact. The *H.* knew she was crossing the main stream of traffic.

Held,—That, on the facts, both vessels were to blame, but that as there was a great distinction between the conduct of the two vessels, the *P. A.* having deliberately violated the Regulations in a gross degree, and the *H.* having erred in the manner of endeavouring to carry them out, they were not equally to blame, and the “degree of fault” was fixed at $\frac{2}{3}$ and $\frac{1}{3}$ respectively.

2. That as to the costs in these cases of unequal apportionment, the Court has an “unfettered discretion” over them, and the Court condemned the *P. A.* to pay $\frac{2}{3}$ of the cost in both actions and the *H.* $\frac{1}{3}$ thereof. [*The Young Sid* (1929) 45 T.L.R. 389 (C.A.) referred to.]
3. That in fog, article 16 not only requires a ship’s engines to be stopped when the “circumstances admit” of it, but also to “then navigate with caution until danger of collision is over,” and that such navigation includes the prompt reversal of her engines to take her way off to a standstill or get her way on astern as may be necessary, and such manoeuvres come with the “precautions” prescribed in general for the “ordinary practice of seamen,” etc., in Article 29.

ACTIONS by the owners of the ships in question to recover damages occasioned by collision between the said vessels.

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

Martin Griffin, K.C., and *Sydney Smith* for the ship *Hampholm*.

J. E. McMullen and *M. M. Greaves* for the *Princess Adelaide*.

The facts are stated in the reasons for judgment.

MARTIN L.J.A., now (May 22, 1929), delivered judgment.

This is an action by the owners of the Norwegian freighter SS. *Hampholm* (length 395, beam 52, gross tonnage 4,480, registered 2615, Anton Markussen, Master), against the high-powered passenger SS. *Princes Adelaide* (Hunter, Master) for damages caused by a collision between those vessels in Burrard Inlet (English Bay) about three miles S.W. of the entrance to the First Narrows (Prospect Bluff) on the 19th December, 1928, at about 11.14 a.m. There is also a cross-action by the *Princess Adelaide* against the *Hampholm* for damages arising out of the said collision and by consent both actions are tried together.

At the time of collision the weather was calm but with a dense fog and the tide at the last of the flood. According to the admission of the *Princess Adelaide's* master she was running through the fog after she left the Narrows at a speed of twelve knots on a course which her Master says was S.W. $\frac{3}{4}$ and he marked it on the Admiralty Chart, Ex. 1, and he also says, and there is no sound reason to doubt that statement, that he did not change that course till the collision became imminent. He had stopped his engine about half a minute before the collision upon hearing the fog whistles from a tug to port and then, again, from a ship to starboard that turned out to be the *Hampholm*, which he first saw emerging from the fog at a distance of about 300 feet, between 2 and 3 points on his starboard bow, and tried to clear her by putting his helm hard-a-starboard with full speed ahead but it was too late to avoid the collision, the stem of the *Hampholm* cutting into the *Adelaide* on her starboard side, a little forward of amidships, as shown by the position of the models on Ex. 4, which is admitted by both parties to be substantially correct. At the moment of impact the *Adelaide* was still swinging with a speed of at about 11 knots at least to avoid the *Hampholm*, which still had, I am satisfied, upon the conflicting evidence on the point, a slight amount of way on her when she sighted the *Adelaide* but not exceeding $1\frac{1}{2}$ knots; her preliminary act admits she had "steerage way only."

At the conclusion of the evidence, but not before, counsel for the *Princess Adelaide* admitted that she had committed (as was obvious from the start) a breach of Article 16 of the Collision Regulations, which has frequently been considered and expounded in this Court, e.g., in *Pallen v. The Iroquois* (1), and *The Tartar v. The Charmer* (2), and *The Belridge v. Empress of Japan* (3); it was indeed, in all respects what is called a "gross breach" of said Article without any extenuating circumstances. *The Clackamas v. The Cape D'Or* (4).

It is submitted, however, that the *Hampholm* was also to a substantial degree in default in that she did not sooner reverse her engines so as to come to a standstill, and that under the circumstances of no wind there, sea current, or

1929
 FRED OLSON
 & Co.
 v.
 THE
 Princess
 Adelaide.
 AND
 C.P.R. Co.
 v.
 THE
Hampholm.
 —
 Martin
 L.J.A.
 —

(1) (1913) 18 B.C.R. 76.

(3) (1917) 3 W.W.R. 961.

(2) (1907) Mayer's Ad. Prac. 536.

(4) (1926) S.C.R. 331, at p. 336.

1929
 FRED OLSON
 & Co.
 v.
 THE
 Princess
 Adelaide.
 AND
 C.P.R. Co.
 v.
 THE
Hampholm.
 Martin
 L.J.A.

channel there was nothing to prevent her from so doing in safety, and that if she had done so the collision would have been avoided or its results minimized to an inappreciable degree. This submission is based on the assumption that the *Hampholm* became in ample time fully aware of the unascertained and dangerous position of the *Adelaide*, within Art. 16 but neglected "to navigate with caution until danger of collision (was) over."

By Art. 16, every vessel shall, in a fog, mist, falling snow or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over.

The *Hampholm*, inward bound, to the Narrows, at 10.05 had passed and seen Point Atkinson, half a mile off, on a course E. by N. at a speed of about 4 knots but shortly afterwards in view of the density of the fog had decided not to attempt to enter the Narrows but to proceed cautiously, by "slow ahead" and "stop" alternatively, to the usual anchorage in the southerly part of English Bay, which was in general the proper action to take in the circumstances, and to do so she altered her course at 10.25 to E.N.E. and continued on it at a decreasing alternate speed down to about 3 and 2 knots and finally owing to the signals of other vessels, again changed her course, at 10.50 to E.S.E. giving the proper signals and taking soundings.

While on that course, and at least as early as 11.12, she heard the signal of another vessel (which turned out to be the *Adelaide*) about 5-6 points on the port bow, upon which she stopped her engines and blew her whistle to which the *Adelaide* replied, and after another exchange of whistles, and when the *Adelaide* was whistling for the third time (if not the fourth, as the *Hampholm's* Master gives it), she almost immediately emerged from the fog, at a distance of about 3-500 feet, and apparently heading almost directly for the *Hampholm*, or at least across her bow, upon which the *Hampholm* reversed her engines full speed and put her helm hard-aport but too late to avert the impact, as already noted. The Master of the *Hampholm* says he was struck by the *Adelaide* less than "half a minute" after sighting her.

The real point pressed is that on the *Hampholm's* own statement of facts she knew at least two minutes before

the collision that she was in a position of danger from an "unascertained" out-going ship continuing to approach on the same S.W. course (5-6 points on her port bow) without broadening, and such being the case it is submitted that the requirements of "navigating with caution" under said Art. 16, and taking "any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case" under Art. 29, were not observed by merely stopping her engines but that she should have promptly taken her way off entirely, as aforesaid.

According to the Master of the *Hampholm* when his ship was on her final course, immediately preceding the collision, she was going so slowly that he could have brought her to a standstill within 30 feet, but he gives no satisfactory, if any, explanation why he did not, after hearing the *Adelaide's* second whistle at least, which indicated her continued approach in the same direction of "risk", then reverse his engine and take her way off as he had done shortly before in safely working past another vessel to port, also coming out from the Narrows, which he could not see. Both the pilot and the Master admit they knew they were crossing the main stream of traffic through the Narrows in going to the said southerly anchorage and expected to meet vessels, and hence the situation was obviously one requiring the exercise of much caution as is always the case when a ship is on the final approach to the narrow entrance of a great sea port such as the one in question.

Art. 16 not only requires a ship's engines to be stopped when the "circumstances admit" of it (as they did unquestionably here) but after that is done the Article goes on to require her to "then navigate with caution until danger of collision is over," and that such navigation includes the prompt reversal of her engines to take her way off to a standstill, or get her way on astern, as may be necessary, is beyond question, and such manoeuvres come with the "precautions" prescribed in general for the "ordinary practice of seamen, etc.," in said Art. 29, which expression is defined by Sec. 894 of the Canada Shipping Act, Cap. 186, R.S.C., 195, and:—

means and includes the ordinary practice of skilful and careful persons engaged in navigating the waters of Canada.

1929

FRED OLSON
& Co.

v.

THE
Princess
Adelaide.AND
C.P.R. Co.

v.

THE
Hampholm.

Martin

L.J.A.

1929
 FRED OLSON
 & Co.
 v.
 THE
 Princess
 Adelaide.
 AND
 C.P.R. Co.
 v.
 THE
 Hampholm.
 —
 Martin
 L.J.A.
 —

And it was decided by our National Supreme Court that "all these regulations must be read together as one Code" —*The Arranmore v. Rudolph* (1).

The cases are two numerous to cite, both under the present Articles and the former ones, 13 and 18 (which contain no essential difference in their practical requirements of good seamanship) in which it has been held that the question of whether approaching vessels in a fog should not merely stop their engines but also their way, or reverse their engines, is something to be decided under the circumstances of each case, but without going back unnecessarily far the following decisions may, *e.g.*, be usefully referred to:—*Smith v. St. Lawrence Tow-Boat Co.* (2); *The Ceto* (3); *The Dordogne* (4); *The Heather Belle* (5); *The Knarwater* (6); *The Cathay* (7); *The Oceanic* (8); *The Britannia* (9); *The Aras* (10); ("practically stopped in the water," p. 33); *The King* (11); (excluding also the application of Art. 19 in fog); *United States Shipping Board v. Laird Line Ltd.* (12); *The Clara Camus* (13); *The Union* (14), in which last Bateson J., said:—

In my view the meaning of the rule is that the engines must be stopped and the way run off the ship. Perhaps then you may go on again if you have heard nothing else but the one whistle from the other ship, although, if nothing more has been heard at all, I doubt very much if you are justified in going on until you do, or can be reasonably sure that there is no risk. At any rate, the proper course is to bring the ship as nearly as possible to a standstill before going on.

The Clackamas case, supra, has also valuable observations on the point, and it was very recently considered in *Eastern S.S. Co. v. Canada Atlantic Transit Co.* (15), a case in this Court from its Toronto District.

It would not be profitable to discuss these decisions but it should be noted that the leading one of the House of Lords in *The Ceto, supra*, is usefully considered and explained by the Court of Appeal in *The Knarwater, supra*, in applying the rule laid down by *The Ceto* and the importance of the "indication" as to the "broadening" of the

- | | |
|--------------------------------------|----------------------------|
| (1) (1906) 38 S.C.R. 176, at p. 185. | (8) (1903) 88 L.T.R. 303. |
| (2) (1873) L.R. 5 P.C. 308. | (9) (1905) P. 98. |
| (3) (1889) 14 A.C. 670 (H.L.) | (10) (1907) P. 28. |
| (4) (1884) 10 P. 6. | (11) (1911) 27 T.L.R. 524. |
| (5) (1892) 3 Ex. C.R. 40. | (12) (1924) A.C. 286. |
| (6) (1894) The Rep. 784. | (13) (1926) 17 Asp. 171. |
| (7) (1899) 9 Asp. 35. | (14) (1928) P. 175. |
| (15) (1928) Ex. C.R. 129 at p. 132. | |

whistles of the approaching vessel is unanimously emphasized; Lord Esher said, p. 788:—

If the second whistle was not broader on the bow, all that it indicated to him was that the vessels were coming nearer to each other, which made it more necessary that he should stop his vessel. It is only if he proves that the whistle was in fact broader that he will be enabled to erect his case at all. Did he prove that it broadened? . . . There is no evidence that it did broaden, that the course of the other vessel was such as to make it broaden. . . . He has failed to prove to any of us that the second whistle was broader than the first. If he has failed to prove that then the foundation of his justification or excuse is gone. That he "thought so" is not enough.

And Lord Justice Davey said, p. 790-1:—

The rule which we have to apply to such a case as the present has been laid down for us in the judgment in *The Ceto* in the House of Lords, Lord Herschell says that "when a steamship is approaching another vessel in a dense fog she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another."

After examining the evidence for the "indications" he proceeds:—

It appears to me that we cannot act on the captain's suggestion, even though it is confirmed by his mate, that he thought the second whistle was a little broader. I think there must be some foundation for that, because of the impression which it left in the captain's mind, and if the evidence shows that it did present that appearance to the captain's mind, and still there was no foundation in fact for thinking that the second whistle was a little broader, we can only come to the conclusion that the statement made by the captain is incredible or else that he was a negligent observer. There being, in fact no indications which would justify a man in the impression that there was no danger of collision between the two vessels, we must hold that it was the captain's duty to have stopped, and if necessary, to have reversed his engines. Indeed, on that point we are not left in much doubt, because the captain, in cross-examination, said that if he was mistaken in thinking that the second whistle was not broader he would have stopped his engines at that second whistle. I think, therefore, that the burden of proof, being on *The Knarwater*, she has not satisfied it, and we must hold that she, as well as the other vessel, was to blame for the collision.

And Lord Justice Lopes to the same effect.

Applying all the foregoing to the facts of this case I can only reach the conclusion, after giving much thought to the matter (because it "involves considerations of general importance," as Lord Watson said in *The Ceto*) that the *Hampholm* did not "navigate with caution" after, at least, she heard the second whistle of the *Adelaide* and thereupon should have realized that as it showed no indication of broadening the danger was imminently increasing. The person in charge of the *Hampholm* was not placed in the

1929
 FRED OLSON
 & Co.
 v.
 THE
*Princess
 Adelaide.*
 AND
 C.P.R. Co.
 v.
 THE
Hampholm.
 —
 Martin
 L.J.A.
 —

1929
 FRED OLSON
 & Co.
 v.
 THE
 Princess
 Adelaide.
 AND
 C.P.R. Co.
 v.
 THE
 Hampholm.
 ———
 Martin
 L.J.A.
 ———

“agony of collision” so that he had not even that inevitably short interval for “his mind to grasp the situation and to express itself in an order” (as was said in the *U.S. Shipping Board case, supra*, 290 in a space of three seconds) but he had at least one half a minute to give that proper order to reverse the engines which his mind should have been on the alert for, if necessary, after hearing the first whistle, and had that order been given there is no doubt that either the *Adelaide* would have swung clear or at the worst a scraping only would have resulted with little if not trifling damage. Such being the case it becomes necessary to apportion the liability for the damage “in proportion to the degree in which each vessel was in fault,” as the Maritime Conventions Act declares, cap. 126, R.S.C., Sec. 2.

This is usually far from an easy matter to do satisfactorily, and Lord Shaw in the *Clara Camus, supra*, recently referred to it thus (p. 173):—

There may be a danger in these cases of error in refinement and ultra analyses in what is at best a highly difficult exercise, viz., the quantification of cause by the quantification of blame. It is clear, to my mind, that a mere enumeration of errors or faults goes no distance to satisfy the case, and forms no safe prescription of any rule of quantification. For many errors or mistakes on minor incidents or in minor particulars (although none of them could have been ruled out of the category of causes contributory to the result) may be completely outweighed in causal significance by a single broad and grave delinquency. One error of the latter kind may have done more to bring about the result than ten of the former.

And I refer also to the cases on the point cited and applied by me in this Court in *The Belridge v. The Empress of Japan, supra*, particularly the observations of Lord Sumner in *The Peter Benoit* (1), and dealing with the present case in their light and “having regard to all (its) circumstances” as the Act directs, I apportion the liability for “degrees of the fault” as two-thirds on the part of the *Princess Adelaide* and one-third on that of the *Hampholm*; there is a great distinction between the conduct of the two vessels, the former deliberately violated the Regulations in a gross degree and the latter erred in her manner of endeavouring to carry them out.

As to the costs in these cases of unequal apportionment, it has just been held in *The Young Sid* (1), that I have an "unfettered discretion" over them, and in the exercise of it I award two-thirds of them in both actions to the *Hampholm* and one-third to the *Princess Adelaide*. There will be the usual reference to the Registrar with merchants to assess the damage.

1929
FRED OLSON
& Co.
v.
THE
Princess
Adelaide.
AND
C.P.R. Co.
v.
THE
Hampholm.
Martin
L.J.A.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

HIS MAJESTY THE KING.....PLAINTIFF;
v.
THE *MARY C. FISCHER*.....DEFENDANT.

1929
July 15-16-17
July 18.

Shipping—Seizure—Customs Act, c. 42, R.S.C. (1927), Sec. 183—"Unavoidable cause"—"Probable cause for seizure"—R.S.C. (1927), c. 43, Sec. 27

The defendant ship was seized by the Customs Authorities under sec. 183, ch. 42 of R.S.C. (1927), as being in Canadian waters contrary to its provision. The defence alleged that the entry into Canadian waters was due to the fact that the sole man in command, during the illness of the Master believed himself without the three mile limit. The anchorage was made in the dark and this man had been battling with the elements for two days alone, had only had three hours sleep in 72 and was exhausted.

Held:—That, in the circumstances, he could not be regarded as a mariner in ordinary conditions, and could not be called upon to take such precautions as would in other circumstances be required by this Court, and that the entry was due to "unavoidable causes."

- 2. That the phrase "unavoidable cause" as found in sec. 183 aforesaid, is a very wide one, and depends upon the circumstances of each particular case, and no definition should be attempted, or could, in ever varying circumstances, be given of it.
- 3. That the word "probable" in the 4th line of sec. 27 of c. 43, R.S.C. (1927), means the same as "reasonable."

ACTION to have the seizure of the *Mary F. Fischer* declared good and valid.

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

C. H. O'Halloran for plaintiff.

Wm. Savage for defendant ship.

1929
 THE KING
 v.
 THE
 Mary C.
 Fischer.

At the conclusion of the trial and argument on the 17th of July, 1929, his Lordship took the case on advise-ment and on the next day (July 18), delivered the follow-
 ing oral judgment in which the material facts are stated.

Martin
 L.J.A.

PER CURIAM. This case presents some features which are quite different from those in the other cases in which judgment has been given, in that there is no question here about the intention of the vessel to come within Canadian waters because of stress of weather, or for any cause at all. The position taken by the defence is that the entry into Canadian waters was occasioned by the fact that in anchoring where the vessel did, the crew, or the one man who was in temporary command during the illness of the master, thought that he was without the three-mile limit and anchored at a place which in the dark he believed was without the territorial waters of Canada. In this I think that he was genuinely mistaken. The evidence leads me to believe that as a matter of fact the place of anchorage that was chosen was really within the waters of Canada, and that he had by misadventure "entered" wrongfully and contrary to the Statute—sec. 183, cap. 42, R.S.C. But the question is, was such entry in the circumstances an "unavoidable cause" within sec. 183 of the Customs Act? And that is the turning point of the case.

As I have before pointed out in the cases that have been decided at the present sitting of this Court, that phrase is a very wide one, and depends upon the circumstances of each particular case, and no definition should be attempted, or could, in ever varying circumstances, be given of it.

It is apparent that what the vessel (registered at Ketchikan, Alaska) was endeavouring to do was to return to Alaskan waters and refit at the Hutchison Station at Noyes Island, where there were special opportunities for so doing, and at a very small expense, and where it would be most convenient for her to do so. Having that object in view, which was a proper object, that explains the reason why she did not go to Prince Rupert. And there is also this other very substantial reason, viz., that the owners who were on board did not have the money to refit at Prince Rupert, or to obtain medical advice or assistance there.

The disturbing point of the case is as to whether or not a certain anchor was on deck, the larger anchor, as Captain Sheppard deposed, at the time the arrest was made by him. It is a difficult situation when these extraordinary conflicts of evidence arise in the testimony of witnesses who seem to be respectable and truthful men. And it is the more unfortunate that a conflict should have arisen on this point, because it has turned out to be a question of very considerable importance. I must find, without the slightest reflection upon Captain Sheppard, that he was mistaken in regard to that anchor. What finally induces me to come to that decision is the uncontradicted fact that before the two men, the owners, left Prince Rupert to come here, they went on board the ship, by permission, they say, of the Customs authorities, and removed or shifted two anchors from below the remaining tons of ice on board the vessel. Now I pause here to say that it seems to me a very odd thing, and to me an inexplicable thing that these two men were allowed by the authorities who were in the custody of the vessel—not the Marshal of this Court at that time, but the local Customs authority at Prince Rupert—they say they got the permit from—to go on board without anybody accompanying them to see what they were doing. I do not wish to say for one moment that what they were endeavouring to do was not perfectly proper, i.e., to put the vessel in order before coming down to attend the trial. But at the same time I feel impelled to say that common precaution should have suggested to those in charge, the local Customs authority, that when those two men were allowed to go on that vessel that was then under seizure, some officer should have gone with them so as to have seen exactly what happened, and then this whole question as to the anchors would have been cleared up. But the fact remains that the uncontradicted testimony of these two men is that they did go aboard the day before they started to come here, and removed those two anchors from beneath the ice, bringing one up on deck and leaving the larger below. Now if the authorities in charge of a seized vessel permit people to go on board of it without any one accompanying them to keep the Crown advised, so to speak, as to what is being done upon the vessel under seizure, this court is really left in a very awkward position, an unsatisfactory position, I

1929
 THE KING
 v.
 THE
 Mary C.
 Fischer.
 —
 Martin
 L.J.A.
 —

1929
 THE KING
 v.
 THE
 Mary C.
 Fischer.
 —
 Martin
 L.J.A.
 —

may say; the result being that I must find that there was no anchor practically available for the vessel other than the small one, the 25-pound one, then on deck and which was put out that night.

Such being the case, the only question remains as to whether or no the putting out of that anchor in that position, that mistaken position, can be deemed to be under the circumstances an "unavoidable cause"? I have come to the conclusion that in the special circumstances of this case it must be held to be so. For this reason, that the sole man in charge had after two days battling with the elements, with a very sick comrade below, in a very courageous and pertinacious manner, for which I must praise him, become exhausted, having had only a few hours sleep—two or three hours sleep in seventy-two hours. And I must say that both common sense and humanity suggest that in the circumstances, such dire circumstances, it would be a harsh, and to my mind an unconscionable stand to take that he must then be regarded as a mariner in ordinary conditions and be called upon to take such precautions as would in other circumstances be required by this court. In other words, he was prevented from doing what he otherwise would have done, or should otherwise have done, by the exhaustion of his natural forces, and it was not possible for him to remove the ice that was necessary to move in order to get one of the larger anchors below it; it was, in short, not physically possible for him to do more in the circumstances than he did. Just to illustrate—suppose, for instance, in attempting to put out the anchor, he had after that long period of stress and trial fallen into a faint, succumbed, and the ship had drifted ashore, under such circumstances it would be perfectly apparent to everybody that such inshore drift would be an "unavoidable cause." It then comes to the question of degree; and the degree in the circumstances here is such that he has, in my opinion, established what is really within the true meaning of section 183 of the Customs Act, an "unavoidable cause" for being where he was upon that night and the next morning in question.

The ship, then, must be released, as it comes within the "permission" given by sec. 10 (b) of cap. 43, R.S.C. The circumstances of the whole case are such, as I said fifteen

years ago in the case of the *Valiant* (1), that this Court will look upon them with (as the historical expression is) "a lenient eye" as being the misfortunes of innocent and much distressed mariners.

1929
THE KING
v.
THE
Mary C.
Fischer.
Martin
L.J.A.

The ship, then, as I have said, will be released. But that does not dispose of the other question, as to whether or no in the circumstances the seizure was made in pursuance of section 27 of cap. 43—that is to say, was there a "probable cause" for it? That point I must decide—the authority being given by that section to this Court to certify to "probable cause" with regard to costs; it is a special direction outside the ordinary jurisdiction of this court; and by that direction of Parliament I must be governed. Have you anything to say, then, Mr. O'Halloran, upon section 27, which says if I certify there was "probable cause for seizure the claimant shall not be entitled to costs?"

* * * * *

The COURT: You see, the difficulty is there, Mr. Savage, and this is a very difficult case upon that point, it is the most difficult of all of them that I have had at these sittings, to determine that question, because the circumstances of the case are such as to preclude, really, the seizing officer having an opportunity to go into all these facts. At the time that officer saw those men that morning, one of them had by then practically recovered, and the other man seemed to him to be in good health. Of course the physical effects of a sound sleep of that length are very marked. And then he found them in that position and was told something that was really untrue, that is that the vessel had anchored five miles out, his nautical knowledge convinced him, and properly convinced him, that that was a mistake, and with the set of the tides, and the local conditions, it could not be so. So therefore he was faced with a knowledge of something that he knew from his own nautical experience could not be the fact, and I have found that he was right in that.

Mr. SAVAGE: Yes, I have to regard that finding, My Lord.

The COURT: You see, it is the turning point; because if I were to find, for example, that there was not "probable," that is to say "reasonable" cause (Salmond on Torts, 1928,

(1) (1914) 19 B.C.R. 521, at p. 525.

1929
 THE KING
 v.
 THE
 Mary C.
 Fischer.
 —
 Martin
 L.J.A.
 —

p. 619*n*) for this seizure, I would have to hold in the circumstances, in effect, that Captain Sheppard did something which was really not part of his duty, or exceeded his duty.

Mr. SAVAGE: I can only urge, my Lord, that he had sufficient knowledge; he had knowledge of the previous days' distresses, and should have had knowledge of the anchor, according to the finding of the court this morning—the insufficiency of the anchor. He did have knowledge of the engine trouble to such an extent that before he reached Prince Rupert he had to put his own engineer aboard to remedy that.

The COURT: But it was so quickly repaired, you see, that he would infer from that that perhaps it was not a genuine claim.

Mr. SAVAGE: Well, I cannot submit more, My Lord.

The COURT: No. I realize it is a hard position, Mr. Savage, and all I can say is that if it was within the ordinary jurisdiction of this Court it would give me no trouble whatever, but I am compelled to make a decision which is special in its nature.

Mr. SAVAGE: I think a further inquiry, under the statute, which is provided under section 6, would have brought out all the facts which have been brought out to-day. I cannot urge further than that.

The COURT: I think, in the complicated circumstances of this case, the unusual elements that it presents, that it would be impossible for me to say that the seizing officer here, Captain Sheppard, did not have as the statute says, "probable cause" for seizure, and it therefore becomes my duty to certify to that effect. The consequence will be that the claimant will be deprived of the costs which he otherwise would have had in the ordinary practice of this Court.

THE WESTERN ELECTRIC COM- }
PANY, LIMITED } PLAINTIFF;

1929
Mar. 5.
Sept. 10.

v.

ELIZABETH M. A. K. BELL.....DEFENDANT.

Patents—Infringement—Injunction—Improvement—Equivalent

Plaintiff, owner of a patent of invention, known as the Hartley patent, for a radio receiving circuit, alleged that the circuit used in the set manufactured and sold by the defendant was an infringement of the said Hartley patent and asked that it be so declared and that the defendant be restrained from further manufacturing and using the said circuit.

Held, that even assuming that the defendant's circuit contained component parts and arrangements distinguishing it from the specific circuit disclosed by Hartley, and were patentable improvements, nevertheless, the Hartley invention being new and useful, the fact that it was more useful with the subsequent improvement, afforded no ground for infringing the original invention by using it with the subsequent improvement.

ACTION for the infringement of Patent 174,690, Hartley.

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

O. M. Biggar, K.C., and *R. S. Smart, K.C.*, for plaintiff.
Lorne F. Lambier for defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (September 10, 1929), delivered judgment.

In this action the plaintiff alleges infringement by the defendant of Canadian Patent No. 174,690, issued to one Hartley. While it is pleaded that Hartley was invalid, yet, upon the trial no serious effort was made to establish its invalidity, and I therefore sustain the patent granted to Hartley.

The defendant, Robert Bell, is the patentee of Canadian Patent No. 282,210, and it is claimed that the receiving sets which are alleged to infringe Hartley, were constructed in accordance with the specification and drawings of Bell. In his specification Bell states that self-sustained oscillations in tuned radio frequency amplifiers are brought about by the effect of capacitative coupling between the primary and secondary windings of the transformer, used between two

1929
THE
WESTERN
ELECTRIC
Co., LTD.
v.
BELL.
Maclean J.

successive stages of the amplifier, and his claims are based upon that theory. This conception of the phenomena as stated in Bell's specification and claims, is, I think, entirely erroneous. It was stated by Mr. Waterman, a witness on behalf of the plaintiff, that the cause of self-sustained oscillations in this type of amplifier, is the regenerative effect of energy transferred back from the output or plate circuit to the input or grid circuit of the audion, by way of the internal capacity between the plate and the grid. This, I believe to be a correct explanation as to why such a circuit breaks into oscillation. The infringing circuits are constructed according to some of the drawings. I need not give further consideration to Bell's patent as the matter in issue resolves itself down to the question, as to whether the actual circuits in the receivers made and sold by the defendants, infringe Hartley.

It was shown in evidence that in order to neutralize the regenerative action due to the plate-grid capacity of the audion, it is necessary to impress upon the input circuit a voltage of the proper amplitude and in a direction opposing the voltage which causes oscillation. This may be done by coupling the output circuit to the input circuit, through means external to the audion. Hartley, as explained in his patent, accomplishes this by electromagnetic coupling between the output and input circuits. Claims 3 and 4 of the Hartley patent are specific in this respect.

The defendants' circuit accomplishes neutralization by coupling the output circuit to the input circuit by electrostatic means. A small disc, which forms part of the defendant's device, is placed in electrostatic relation with the wires of a coil electromagnetically coupled to the output circuit, thereby deriving energy from that circuit; this energy is conveyed back to the grid through a small variable neutralizing condenser. In another form of the defendant's circuit, a small coil, placed in electrostatic and also in electromagnetic relation to the output circuit, is used in place of the disc for the purpose of procuring the necessary energy or voltage from the output circuit. In all cases shown in the drawings referred to at the trial, a small variable condenser is used for the purpose of transferring this energy or voltage back to the input circuit. The principle involved in all the forms of Bell's receiver is the same, that

is to say, Bell secures a transfer of energy or voltage from the output circuit to the input circuit by means of an electrostatic coupling and thereby impresses upon the input circuit a voltage of the proper amplitude and phase to nullify the undesired voltage.

The defendants' receiver employs the principle set forth by Hartley inasmuch as it feeds back energy from the input to the output circuit of the proper amplitude and phase relation, to secure the desired effect. This is the vital principle in the method of neutralization. The means employed in the defendant's circuit to secure this end are in some respects different from Hartley, in that the energy is obtained by electrostatic means from a coil electromagnetically coupled to the output circuit, and transferred to the input circuit by means of a variable neutralizing condenser. The reason for doing this is, in the first place, to secure the necessary reversal of phase, and in the second place to provide means for controlling the amplitude. This gives the identical effect of Hartley. The defendant's receiver, wherein it differs from Hartley, may represent an improvement on the specific arrangement of Hartley, and conceivably it might afford subject matter for letters patent, if it has not already been anticipated. Nevertheless, the general principle of Hartley, which has not been attacked by the defendants, is I think embodied in the defendant's circuit. Assuming for the moment that the defendant's circuit contains component parts and arrangements distinguishing it from the specific circuit disclosed by Hartley, and that they are not the mere substitution of equivalents, and further assuming that they are improvements, yet I conceive it to be the law that where an invention is shown to be new and useful, as was Hartley, the fact that it is much more useful with a subsequent improvement affords no ground for infringing the original invention by using it with the subsequent improvement. For that reason, I think, the plaintiff must succeed, and is entitled to the relief claimed. Costs will follow the event.

Judgment accordingly.

1929

THE
WESTERN
ELECTRIC
Co., LTD.

v.
BELL.

Maclean J.

1929

May 30 & 31
June 29.

HIS MAJESTY THE KING.....PLAINTIFF;

v.

THE CANADIAN SURETY COMPANY...DEFENDANT.

Revenue—Customs—Bond—Cancellation—Fraud—Effect upon surety

The facts in this case are similar to that in the *The King v. The Fidelity Insurance Company of Canada*, (1929) Ex. C.R. 1, except that in this case the bond given for the due exportation of the liquor according to its terms, and which was sued on, had been cancelled by the Customs authorities and had been surrendered to the surety. This cancellation was procured by fraud; the same having been obtained upon production of a forged document which the Collector believed to be genuine.

Held,—That when the release of the principal debtor by the creditor is accomplished by means of fraud, on the part of the former, the surety is not discharged, even if he is not a party to the fraud by which the release was secured.

ACTION upon a bond executed by the defendant for the payment to His Majesty of the sum of \$41,500 for the due exportation of certain whiskey out of Canada.

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

N. W. Rowell, K.C., and *Gordon Lindsay* for plaintiff.

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

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (June 29, 1929), delivered judgment.

This is an action upon a bond executed by the defendant for the payment to His Majesty of the sum of \$41,500. On the 31st day of January, 1925, the defendant executed a bond for the payment to His Majesty of the sum just stated. The conditions of the bond were to the effect that, if certain goods, namely twelve bags of whisky and six hundred and forty-two kegs of whisky, entered at the port of Halifax, N.S., by the Scotia Import and Export Co., Ltd., for exportation to Georgetown, Grand Cayman, B.W.I., by the steamer *Gemma*, were actually exported to the place provided for in the said export entry, unless the said goods were after leaving Canada lost and destroyed; and that if such proof or certificate, as was required by regulations of the Minister of Customs and Excise, that such goods had

been so exported or lost and destroyed, as the case might be, were produced to the Collector or other proper officer of Customs and Excise at the port of Halifax, N.S., within thirty days of the date of the said bond, then the bond should be void, but otherwise to remain in full force and virtue.

1929
 THE KING
 v.
 THE
 CANADIAN
 SURETY
 Co.

Maclean J.
 —

Such a bond was required by a proviso to section 101 of the Customs Act, which proviso specifically relates to the exportation of wines and spirituous liquors. The regulation of the Minister of Customs and Excise relating to the entry outward of wines and spirituous liquors to be exported from a Customs warehouse provided, that if within the period appointed in such bond, there was produced to the Collector or other proper officer of Customs, the written certificate of some principal officer of Customs, or some other designated person, at the place to which the goods were exported, showing that the goods named in the said bond were actually landed and left at the place named in the bond, or if within the said period appointed, it was proved to the satisfaction of the Collector or other proper officer that the said goods were, after leaving Canada lost and destroyed, the bond might be cancelled.

The steamer *Gemma* reported outwards from Halifax, N.S., on February 3, 1925, for Georgetown, Grand Cayman, B.W.I., via St. John, N.B., which latter port she reached on February 5 where a further quantity of liquor in transit to Havana, Cuba, was taken on board. There she remained until February 25 when she cleared for Georgetown. On March 3, she reported inwards at Shelburne, N.S., in ballast, and cleared therefrom for Halifax on March 10. When the Master of the *Gemma* reported inwards at Shelburne he made a sworn statement before a Customs officer there, that since he had cleared from St. John, the "merchandise" then laden in the *Gemma* had been disposed of on the high seas, thirty miles off the United States coast on board lighters, and that no part of the cargo was disposed of in Canada. I shall refer to this matter later. It is not contended that the liquor entered outwards at Halifax was ever forwarded to Georgetown.

On the 27th of February, a written certificate was deposited with the Collector of Customs at Halifax, purporting to certify under the signature of the Collector of Cus-

1929
 THE KING
 v.
 THE
 CANADIAN
 SURETY
 Co.
 Maclean J.

toms at Georgetown, and having impressed thereon what purported to be the Customs Stamp of that port bearing the date February 16, 1925, that the goods referred to in the bond in suit and laden on the *Gemma* at Halifax, had been landed at Georgetown. This certificate turns out to be a forgery. The Collector of Customs at Halifax, however, acted on this certificate, believing it to be genuine, and thereupon cancelled the bond and surrendered the same to the Halifax agents of the defendant, for delivery to it. These facts, it is claimed, became known to the Department of Customs in consequence of a public inquiry directed by a Royal Commission, into the administration of the Department of Customs. After retaining the cancelled bond for two years, the same was destroyed in accordance with the company's usual practice; there is no question of bad faith on the part of the defendant company in this connection. The plaintiff commenced action upon the bond in September, 1928, more than three years subsequent to the cancellation of the bond.

The plaintiff contends that the cancellation of the bond was procured by fraud; that the goods were never shipped to the place mentioned in the bond as already explained, and that no certificate or proof was ever produced by the defendant, or any other person, that the goods mentioned in the bond had been exported to the place there mentioned, or that they had been lost or destroyed; and that the conditions of the bond not having been performed it is still in full force and effect.

Several defences are pleaded in the defendant's answer to the Information, some of which I think are not substantial and do not call for any discussion. One of the defences is, that the true intention of the bond and the provisions of the Customs Act under which it was given, was to ensure the export out of Canada of the goods referred to in the bond, and that they would not be brought back to Canada without payment of duty; that the goods were not brought back to Canada and accordingly the public revenues of Canada did not suffer any loss or damage, even if actual export was not made of the goods to the place mentioned in the bond; that the Collector of Customs at Halifax was the judge of the sufficiency of the compliance with the conditions of the bond,

and having acted on the evidence before him and having cancelled the bond, that concludes the matter; and that the defendant did "otherwise account for the said goods", this accounting it is claimed, was made to the Collector of Customs at Shelburne, when as explained, the master of the *Gemma* made the sworn declaration that the goods were landed into lighters thirty miles off the coast of the United States and were not landed in Canada. It is also claimed that the officers of His Majesty's Customs service knew, or should have known, that the certificate produced was not genuine, and that its falsity should have been discovered earlier. One of the principal defences is, that as the bond was cancelled by the Collector of Customs at Halifax, and as no action was commenced for more than three years subsequent to the date of such cancellation, the position of the defendant has been materially changed, because it had an indemnity agreement from one McDonnell, and also reinsurance with the American Insurance Company of the United States against its liability in part on the bond, and therefore the plaintiff is in equity estopped from suing on the bond at this time.

This case is similar to that of *The King v. Fidelity Insurance Company of Canada*, reported in 1929 Exchequer Court Reports, part 1, page 1, to which I would refer, except that in this case there was a cancellation of the bond by the customs authorities and its surrender to the surety. In that case, as here, the goods were not landed at the place mentioned in the bond, nor was it shown in either case that they were landed at all; it was only shown that in each case the goods were delivered to other carriers on the high seas. It is not necessary to repeat here much that I said in the case just mentioned, and I am thus relieved of a discussion of several points raised here, which I dealt with in that case. The first question arising for decision is, what is the legal effect of the cancellation of the bond. The cancellation was procured by fraud; that cannot be denied. No landing certificate was ever produced as required by the Customs regulations, already referred to. A forged document only was produced, which the Collector of Customs acted upon, believing it to be genuine. It is well settled law that when the release of the principal debtor by the creditor is accomplished by means of fraud, on the part of

1929
 THE KING
 v.
 THE
 CANADIAN
 SURETY
 Co.
 Maclean J.

1929
 THE KING
 v.
 THE
 CANADIAN
 SURETY
 Co.
 Maclean J.

the former, the surety is not discharged, even if he is not a party to the fraud, by which the release was secured. *Scholefield v. Templer* (1), and *County of Frontenac v. Breden* (2).

According to the doctrine of the law of suretyship, a surety is not released by something which happens in consequence of that which amounts to a fraudulent breach of contract, against which the surety has guaranteed the party with whom he has contracted. The defendant contracted that the goods in question, if not lost or destroyed, would be landed at Georgetown. They were not so landed, they were not lost or destroyed, and the cancellation and surrender of the contract was procured by fraud. Can the defendant be heard to say, that it is to benefit by the fraud of those whom it guaranteed would land the goods at Georgetown. The fraud was in representing that a certain undertaking had been carried out, which was not in fact carried out, and which if not carried out the defendant agreed to pay a stated sum as liquidated damages. That, I think, is the meaning of the contract. In *Mayor, etc., v. Kingston-upon-Hull v. Harding* (3) to which I would refer, Bowen L.J. said:—

The broad principle of law, which is the root of our decision is that a surety cannot claim to be discharged on the ground that his position has been altered by the conduct of the person with whom he is contracting, where that conduct has been caused by a fraudulent act or omission against which the surety by the contract of surety has guaranteed the employer. This seems to be good sense and I think it is good law.

I am of the opinion that the cancellation and delivery up of the bond, procured as it was, does not of itself void the obligation, but that it remains in full force and effect, unless upon other grounds it is in law unenforceable.

It is specifically contended that the position of the surety was altered by reason of the cancellation of the bond, and the long period intervening between the cancellation of the bond, and the commencement of this action. Upon the evidence submitted, I am bound to conclude that on discovery of the fraud, in 1927 I think, following the revelation of the facts before a Royal Commission, the plaintiff, within a reasonable period elected to avoid the cancellation and delivery up of the bond by the commencement of this

(1) (1859) 4 De G. & J. 429, at p. 434. (2) (1870) 17 Gr. Chan. Rep., 645.

(3) (1892) 2 Q.B.D. 494.

action. Had the plaintiff taken no steps, for a long period after gaining such knowledge, to repudiate the cancellation, it might have stood; but the plaintiff has impugned it by this action, and he says it is not binding upon him.

Unless something has happened to alter the position of the defendant since the delivery up of the bond, and before the plaintiff elected to treat the cancellation as void, the cancellation will not avail the defendant. The defendant had an indemnity agreement with one McDonnell, who has been brought in by the defendant as a third party in this action, as also has the Scotia Import and Export Co. From the evidence, I assume that McDonnell and the Scotia Import and Export Co., the exporters mentioned in the bond, are one and the same. The defendant claims it has been unable to obtain any admission or assumption of liability from McDonnell for the amount here sued upon, which is about what one would expect. The defendant also re-insured with the American Insurance Company against a portion of its liability upon the bond, but it is not suggested that the position of the company giving the counter-bond has been altered by the cancellation of the bond. There is no proof that within the period intervening between the cancellation of the bond and the bringing of this action, the position of the defendant had been altered in such a way as to make it inequitable as against it, that the cancellation should be treated as avoided. Whether the position of defendant as surety has been altered is a question of fact and not of law; in this case it is not to be presumed from the mere cancellation of the bond. The defendant has not released the third party, McDonnell, from his indemnity agreement, nor the American Insurance Company upon its counter-bond. That being so how can it be said that the position of the defendant has been altered? The defendant here seeks judgment against McDonnell and the Scotia Import and Export Co., if judgment in this action is against it; and it is admitted that to the extent of the reinsurance with the American Insurance Company, it was not expected that this company would not honour its obligation, in the event of judgment being against the defendant in this action. Even if it were established, that neither McDonnell or the American Insurance Company were not, in fact, able to answer for their several obligations to the defendant if called upon so to do, by reason of

1929
 THE KING
 v.
 THE
 CANADIAN
 SURETY
 Co.
 ———
 Maclean J.
 ———

1929
 THE KING
 v.
 THE
 CANADIAN
 SURETY
 Co.
 Maclean J.

financial losses occurring to them since the cancellation of the bond, that would not, I think, be an answer to the plaintiff's claim. That could not be attributable to the plaintiff. The continuing solvency of the defendant's guarantors was a risk assumed by it when selecting insurers against its liability upon the bond. If the cancellation of the bond has in any way altered the position of the defendant, the fact remains that this was brought about by the fraud of a principal, against which act the defendant had contracted with the plaintiff. The contract of suretyship provides by implication, that the defendant is not to be discharged in consequence of an act, which the defendant had guaranteed to the plaintiff would not occur. In the facts of this case, I am unable to see how the defendant can successfully contend, that its position has been so changed by any act of commission or omission on the part of the plaintiff, as to afford a defence in equity to the claim here sought to be enforced against it.

It was suggested that Customs officers should have in some way superintended the movements of the *Gemma*, and should have known before the cancellation of the bond that her master had not landed the goods at the place mentioned in the bond. The obvious remark upon this point is, that there was no contract between the plaintiff and the defendant that the officers of Customs should follow the movements of the *Gemma*. Where the omission of one who contracts to do something deprives a surety of a right under the contract, such an omission might so affect or alter his position as to avoid the obligation of the surety. That is not this case. It would appear rather absurd to say that officers of Customs were obliged to follow the movements of the *Gemma*, and to see that she actually went to the port mentioned in the bond. It was no part of the duty of Customs Officers to do this. The defendant guaranteed to the plaintiff that this would be done, and it is because it was not done, that the plaintiff claims the surety is liable. Then it is said that the goods were accounted for at Shelburne, and that the Collector of Customs at Halifax accepted this accounting as sufficient, and certain words of the first paragraph of sec. 101 of the Customs Act are relied upon. These words are: "to otherwise account for the said goods, etc." It is to be pointed out that this action is not founded

upon that part of that section of the Customs Act, but upon the proviso to that paragraph and these words are not there to be found. The proviso was expressly enacted to cover the exports of wines and spirituous liquors from a Customs warehouse, and its terms are most exacting and rigid, and I assume that was intended to mean just what it says. A distinction seems to be made between "wines and spirituous liquors" and other goods. With the purpose of the enactment I am not concerned. The contentions that the goods were not brought back to Canada, assuming the fact to be proven; that the revenues of Canada had not suffered; and that to exact the performance of the bond is unjust because the goods went out of Canada, do not seem to be of substance in view of the terms of the statute, the Customs regulations and the bond itself. To suggest that there is ground for suspicion, that it was the practice at many Canadian ports of Customs to turn a blind eye upon landing certificates required by the Customs Act, in connection with the export of wines and spirituous liquors, as in this case, may have some justification, but there is no satisfactory evidence of that before me. What its effect would be upon this case, if established, I need not pass upon.

1929
 THE KING
 v.
 THE
 CANADIAN
 SURETY
 Co.
 Maclean J.

A number of authorities in support of the doctrine that the Crown is bound by estoppel in pais, or equitable estoppel, were cited by counsel for the defendant, and to that doctrine I agree, because, I think, it is now well settled law. I do not think, however, that the line of decisions referred to by counsel, are applicable in this case. The principle laid down in these cases is expressed by Lord Cranworth in *Ramsden v. Dyson* (1), as follows:—

If a stranger begins to build on my land supposing it to be his own, and I perceiving his mistake abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he expended money, on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active and to state my title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. But it will be observed that to raise such an equity two things are required, first that the person expending the money supposes himself to be building on his own land; and secondly that the

(1) (1865) L.R. 1 H.L.R. 129 (E. & I. App.)

1929
 THE KING
 v.
 THE
 CANADIAN
 SURETY
 Co.
 Maclean J.

real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner.

That principle is hardly applicable to the facts here. It has not been shown that the plaintiff knowingly did anything to justify the defendant in believing or continuing to believe, that the plaintiff was aware that the goods had been delivered at a place other than that mentioned in the bond. Anything that might lead the defendant to believe that the plaintiff was satisfied that there had been a fulfilment of the obligation of the defendant under the bond, was brought about by the defendant's principal fraudulently representing something as done which was not done, but which the defendant had contracted would be done. I must go by the evidence before me, and there is nothing here to show that the plaintiff stood by for three years and more, knowing or suspecting that the obligations of the bond had not been actually fulfilled according to its precise terms. But this contention is answered, I think, by the fact that whatever Customs officers or others did, was brought about by the fraud of those to whom the defendant stood in the position of surety to the plaintiff. No bona fide landing certificate was ever presented in fact to Customs, and the bond was in the same position as if it had been stolen by the defendant's principal. I have referred to the affidavit made by the master of *Gemma* at Shelburne. It is true this was done in virtue of departmental directions, in the cases where a ship enters a port without cargo, as in this case, after leaving her last port of departure with a cargo, in this case, St. John. This may show knowledge or suspicion on the part of a Customs officer at Shelburne that the goods in question had not been landed at the declared port of destination, but of that I am not sure, as I do not think it was made clear to me that the Customs officer at Shelburne was made aware of the nature of the "merchandise" aboard the *Gemma*, when she cleared from St. John. In any event this suspicion or knowledge was not communicated to the Collector of Customs or other proper Customs officer at Halifax, who alone could cancel the bond, or to the chief executive officers of Customs at Ottawa, either before or after the act of cancellation was made, and there was nothing requiring it to be done.

The plaintiff is in my opinion entitled to judgment for the amount sued upon together with his costs of action.

1929
THE KING
v.
THE
CANADIAN
SURETY
Co.
Maclean J.

As already stated Mr. P. A. McDonnell was by leave of the Court served with a third party notice, as also was the Scotia Import and Export Company Ltd., to which neither have entered appearance. I am not satisfied that the Court has jurisdiction in these third party proceedings and I reserve leave to counsel for the defendant to argue the question of the jurisdiction of the Court, as arising upon such third party proceedings.

Judgment accordingly.

HIS MAJESTY THE KING..... PLAINTIFF;

v.

L. J. CYR ET AL..... DEFENDANTS.

1929
Aug. 20-
21-22.
Sept. 30.

Expropriation—Valuation—Sales in vicinity—Market price

Held,—That where the evidence of value relied upon had reference to a number of sales in the vicinity, only a few of which were for cash, others were never perfected, and others again had been completely abandoned; and further where it is established that there are large areas of land available for building purposes in the vicinity at reasonable prices; such sales must be considered in such a case as made under special circumstances and at prices that cannot establish a market value and cannot be taken as a criterion of the value of property.

- 2. That the price paid for a small lot cannot be said to establish the market price of large areas, to wit: 200,000 sq. ft.
- 3. Where the only witness heard for the defence on the question of value was the owner himself, the weight to be given such testimony—as a jury would consider it—is to be measured by the consideration that, as an interested owner, his mind would lean or incline from a state of indifference to a particular object, due to the unhappy upbuild of human nature, and will amount to little more than a definite statement of the maximum figure of his contention.

INFORMATION by the Attorney General of Canada to have certain lands expropriated for purposes of a public work of Canada valued by the Court.

The action was tried before the Honourable Mr. Justice Audette at Edmundston, N.B.

I. C. Rand, K.C., and M. A. Kelly for plaintiff.

P. J. Hughes, K.C., and Pius Michaud for defendants.

The facts are stated in the reasons for judgment.

1929
 THE KING
 v.
 CYR ET AL.

AUDETTE J., now (September 30, 1929), delivered judgment.

This is an information exhibited by the Attorney General of Canada, whereby it appears, among other things, that certain lands, therein described, belonging to the defendants, were expropriated by the plaintiff, for the "purpose of a public work of Canada, to wit"; a right of way of a spur of the Canadian National "Railways", at Edmundston, N.B., by depositing on the 9th November, 1920, and on the 21st January, 1921, in the Registry Office, plans and descriptions of the said parcels of land.

The area taken, as set forth, both in the Information and on the plan is, more or less (5·364) five and three hundred and sixty-four thousands acres.

The plaintiff, by the Information, offers the sum of \$9,504.79, after tendering the same; and the defendants, by their statement in defence, claim the sum of \$35,678.10.

At the opening of the trial, the defendant Eva L. Cyr, the wife of the other defendant, was added party defendant being duly represented by counsel. The mortgage mentioned in the Information has merged with the interest of both defendants, and in the result it has disappeared and the compensation moneys become payable to both defendants.

Accompanied by counsel for the respective parties, I had, on the first day of the trial the advantage of viewing and visiting the *locus in quo*.

The land expropriated is situate east and back of Victoria street, in the town of Edmundston, and lies practically in a ravine or coulée, running from north to south, wherein runs an old watercourse, with water now appearing stagnant but which formerly was running from the Madawaska river to the St. John river. The waters of the Madawaska formerly ran under a bridge, on Victoria street to this watercourse; but this bridge has disappeared and its location has been filled. Since the erection of the dam, on the Madawaska river, which was completed in June, 1918, before the expropriation, the water seeps or percolates from the river through the street, into the cellars of the houses on Victoria street and thence to the watercourse. There is also a sewer which runs into this watercourse, and it was there at the time of the expropriation and necessitated the

construction of a culvert in the course of the filling of the land after expropriation to an average height of eight feet.

1929
THE KING
v.
CYR ET AL.
Audette J.

This seepage and this sewer now form stagnant water, polluted by the sewer, creating a stench which as some witnesses testified, renders part of the defendants' land very objectionable and unfit for residential purpose.

The watercourse formerly ran freely from the Madawaska river into the St. John river; but it is now so encumbered that it stops and loses its flow. Witness Rhinelanders says there is nothing to prevent the water discharging in the River St. John. Undoubtedly, when all litigations have come to an end, this will be remedied.

The land taken rises at the north adjoining the C.P.R. fence and slopes down south towards the watercourse, forming a swamp, until it rises again on the south to a plateau.

On behalf of the defendants, the defendant Levite J. Cyr, was the only witness heard on the question of the value of land taken which he values of 15 cents a square foot.

However, the weight of this testimony as it is generally appreciated—and as a jury would consider it—is to be measured by the consideration that as an interested owner, his mind will lean or incline from a state of indifference to a particular object, all due perhaps to the unhappy up-build of our human nature. And in the result his testimony will amount to little more than a definite statement of the maximum figure of his contention. No witness but himself ventured such a high valuation.

The remainder of the defendants' witnesses were persons who had apparently purchased lots from him at prices ranging from 15 cents, 12 cents and 10 cents a foot, according to their location. Three of these lots adjoining the C.P.R. fence were sold at 15 cents. Some of these sales were abandoned, because they could not think of building in the vicinity of the offensive smell emanating from the watercourse.

Mention was also made of what has been called the Thibaudeau option; but the evidence in this respect is uncertain and uncorroborated, therefore, obviously of no value.

The award upon the expropriation for the C.P.R. cannot be of any help in this case, as it rests wholly upon the evidence adduced in that case.

1929
 THE KING
 v.
 CYR ET AL.
 Audette J.

The defendant purchased this land in 1909, subdivided it on paper at that date and sold but a few lots up to the time of the expropriation in 1920,—most of the sales were made in 1920. Were most of these sales, apparent or real, made, as suggested at trial, with the design to establish a market price? The vendor did not provide actual roads to his purchasers; they would have to be made at their expense.

Considering that only a few of these sales were cash and that the balance is not to this day perfected, and some of them have been completely abandoned, and furthermore that there are in Edmundston, large areas of land available for building purposes at reasonable prices, it results that such sales were made under special circumstances and at prices that are not established as market prices and that, therefore, such sales cannot be taken as a criterion of the value of the property. *Belanger v. The King* (1); *The King v. Coleman* (2).

Moreover, the price paid for a small lot cannot be said to establish the market price of large areas of over 200,000 square feet. A larger price is paid proportionately for smaller lot than for such large area, that is commercially well known.

On behalf of the Crown, the following witnesses testified respecting the value of the land taken as follows: Edmond Giroux (a stranger to the locality), $\frac{2}{3}$ of the property at 5 cents a square foot and the balance at \$100 an acre. Martin Denis, $\frac{2}{3}$ at 5 cents and $\frac{1}{3}$ at 3 cents; Willie E. Albert, at \$8,000; C. Rhineland, at \$5,000; and Edmund Evans at \$2,000 to \$2,500.

This parcel of land so expropriated forms part of a much larger area, the whole of which was bought by the defendant on the 22nd February, 1909, for the sum of \$10,000, with a proviso that if the sum of \$16,000 or any other amount above \$10,000 be offered for the therein mentioned property, the vendors and the purchaser would decide upon a sale of the same,—a majority of two to decide and the amount above \$10,000 was to be divided equally.

It is true that Edmundston has grown and developed since 1909, but not to the extent dreamt of by the defend-

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

(2) (1926) Ex. C.R. 121.

ants, and the prospective potentialities of the land taken must be measured at the time of the expropriation—*The King v. Trudel* (1).

1929
 THE KING
 v.
 CYR ET AL.
 Audette J.

Moreover, where, as in this case, an inflated value is placed upon the property as related to a prospective use to which it might be applied, but only upon the expenditure of large sums of money which would make it, without it, unprofitable and impracticable as a commercial or industrial proposition, such valuation is not a proper basis of the market value of the property. *Belanger v. The King* (2).

Now, the land taken is obviously not farming land, it is not fit for desirable residential purposes and its value must be approached as if in the class of industrials, reckoning however that it could only be utilized upon the expenditure of large sums of moneys which necessarily goes to the depreciation of the price thereof.

The placing of the property in the industrial class seems accepted by the Crown's counsel and moreover acquiesced in by the offer of \$9,504.79, a value it could not have if approached as farm land.

For the consideration to which I have just adverted, I have come to the conclusion to fix the compensation by placing a value, per acreage, working from north—from the C.P.R. fence—towards south—towards the watercourse, and to allow as follows:—

For the 1st acre, more or less, from north to south.....	\$4,000
“ 2nd “ “ “ “ “ “	3,000
“ 3rd “ “ “ “ “ “	1,500
“ 4th “ “ “ “ “ “	1,000
“ 5th “ “ “ “ “ “	1,000
To which must be added the 364/1000 at the same rate as the fifth acre making in all.....	364
	\$10,864

Therefore there will be judgment as follows:—

1st. The lands expropriated herein are declared vested in the Crown as of the 9th November, 1920.

2nd. The compensation for the lands so taken and for all damages whatsoever resulting from the expropriation is hereby fixed at the sum of \$10,864 with interest thereon at the rate of five per cent per annum from the 9th November, 1920, to the date hereof.

(1) (1913) 49 S.C.R. 501.

(2) (1920) 19 Ex. C.R. 423.

1929
THE KING
v.
CYR ET AL.
Audette J.

3rd. The defendants, upon giving to the Crown a good and satisfactory title free from all mortgages, charges and encumbrances whatsoever are entitled to be paid the said sum of \$10,864 with interest thereon, as above mentioned.
4th. The defendants are further entitled to their costs against the Crown.

Judgment accordingly.

1929
June 26.
Sept. 30.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

STANDARD OIL COMPANY OF NEW JERSEY } PLAINTIFF;

v.

THE SS. IKALA.....DEFENDANT;

AND

INDUSTRY STEAMSHIP COMPANY, LIMITED } PLAINTIFF;

v.

THE SS. JAMES McGEE.....DEFENDANT.

Shipping—Collision—Narrow channel—Article 25—Rule 8 of Regulations for St. Lawrence River

A collision occurred between the *I.*, and the *McG.*, soon after midnight, on May 12, 1927, in a narrow channel of the St. Lawrence River between buoys 23 and 24, south of the fairway, and close to buoy 23. The weather was fine and clear, somewhat overcast, but without haze, and visibility was good. Both ships were going at full speed. The *McG.* outbound, going with the stream and a tide of 3 knots an hour and the *I.* inbound. When the *McG.* was abreast of the buoy 24 she gave a one-blast signal which was answered by the *I.* when abreast of buoy 23, indicating that they would pass port to port. The *I.* always going at full speed, then directed her course to port instead of keeping to starboard, contrary to the signal given, and to Article 25, shoving the *McG.* to the south; and the collision occurred, the *I.* striking the *McG.* on the port side just amidships, with her port bow.

Held: (Varying the judgment appealed from), that as the two vessels were travelling port to port after exchanging signals indicating they would keep their course, the speed of the *McG.* in no way contributed to the collision, but that the collision was entirely due to the fault of the *I.* in not keeping to starboard of the channel and neglecting to slow up or stop as good seamanship required.

- 2. That the ship primarily at fault can only discharge her liability in that respect by very clear and plain evidence of the other's fault.
- 3. That the descending vessel coming with the current is entitled to consideration, and an up-coming vessel, in a narrow channel, where navi-

gation is intricate, seeing another vessel coming down stream, must stop, and if necessary come to a position of safety below the point of danger and there remain until the channel is clear.

4. That where in such channel a ship fails to keep to starboard she must, at her own risk, right herself back to her proper position.
5. That where the court is assisted by a Nautical Assessor, his opinion on questions submitted to him as such may be filed of record with the judgment of the Court [SS. *Melanie* (1919) 36 T.L.R. 507 referred to and followed].

Judicial observation, that the practice, in some districts, of filing the evidence taken before the Wreck Commissioner as evidence before the trial judge is irregular and should be discouraged.

1929
 STANDARD
 OIL
 COMPANY
 OF NEW
 JERSEY
 v.
 THE SS.
Ikala
 —
 INDUSTRY
 STEAMSHIP
 Co., LTD.
 v.
 THE SS.
*James
 McGee*.
 —
 Audette J.

APPEAL and cross-appeal by the parties herein from the decision of the Local Judge in Admiralty for the Quebec Admiralty District.

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

A. R. Holden, K.C., for Industry Steamship Co. and the *Ikala*.

L. Beauregard, K.C., for Standard Oil Co. and the *James McGee*.

The facts are stated in the reasons for judgment.

AUDETTE J., now (September 30, 1929), delivered judgment.

This is an appeal by the SS. *James McGee* and a cross-appeal by the SS. *Ikala*, from the judgment of the Local Judge of the Quebec Admiralty District, bearing date 19th April, 1929, in a collision case, wherein he found both vessels to blame in unequal proportions and gave judgment and

pronounced in favour of the plaintiff's claim, Standard Oil Company of New Jersey, in the action bearing No. 682, and condemned the ship *Ikala* and her bail in four-fifths of the amount to be found due to the plaintiff, Standard Oil of New Jersey,—and pronounced in favour of the plaintiff's claim, Industry Steamship Company, Limited, in the action bearing No. 442 and condemned the ship *James McGee* and her bail in one-fifth of the amount to be found due to the plaintiff, Industry Steamship Company, Limited, each party to pay its costs, etc.

The collision between the *Ikala* and the *McGee* occurred soon after midnight on the morning of the 12th of May,

1929
 STANDARD
 OIL
 COMPANY
 OF NEW
 JERSEY
 v.
 THE SS.
Ikala
 —
 INDUSTRY
 STEAMSHIP
 Co., LTD.
 v.
 THE SS.
*James
 McGee*
 —
 Audette J.
 —

1927. The weather was fine and clear, somewhat overcast; but without haze, everything being quite visible.

With the exception of the evidence of Pilot de Villers, amounting to about 14 pages, who was recalled at trial, the whole of the evidence, of about 600 pages, submitted to the trial judge, was the evidence taken on the inquiry or investigation before the Wreck Commissioner. Therefore, as regards pure questions of fact and the probative value of the statements of witnesses, the trial judge was in no better position than the judge sitting here on appeal. It is highly important in cases where the evidence is conflicting, unfortunately a very common occurrence in Admiralty cases, that the trial judge should have the witnesses before him so that he may equate the credibility of their testimony to the measure of impartiality and reasonableness manifested by them while under examination.

On the hearing of this appeal I had the advantage of the assistance, as nautical assessor, of Commodore W. Hose, C.B.C., R.C.N., whose experience greatly assisted me and I am pleased to say, his opinion coincides absolutely with mine. I have, following the observation made in the case of the *SS. Melanie* (1), filed in the record the opinion of the Commodore upon the case.

The evidence adduced on behalf of both parties is absolutely conflicting in all respects. Indeed, as Wellman, on the "Art" of cross-examination, so truly says that one sees, perhaps the most marked instances of partisanship in Admiralty cases which arise out of a collision between two ships. Almost invariably all the crew of one ship will testify in unison against the opposing crew.

I fear, as I have had occasion to say so before, that this is a weakness in the make-up of human nature, and while such a witness is not deliberately committing perjury, he is unconsciously prone to dilute or colour the evidence to suit a particular purpose by adding a bit here and suppressing one there; but these bits will make all the difference in the meaning.

Let us, therefore, endeavour to reconcile this conflict with the object of discerning the truth, bearing in mind that where the evidence on both sides is conflicting and nicely balanced, the court will be guided by the probabilities of the respective cases which are set up.

The Mary Stewart (1); *The Ailsa* (2).

The evidence on behalf of the *Ikala* is inconsistent, unrelated and it is impossible to draw from it a consistent and controlled conclusion. That evidence creates a curious puzzle of inconsistency when it establishes that the first blast of the *McGee* was given when she was abreast of buoy No. 24, and that the *Ikala* answered the same by one blast when abreast of buoy No. 23. This fact is quite illuminating, as it establishes beyond peradventure that it is impossible,—both ships going full speed and the tide running down against the *Ikala* at about three knots an hour—for the collision to have taken place quite close to buoy 24, as contended by the *Ikala*. The probabilities of the case, consistent with common sense and surrounding circumstances, is that the collision took place, as contended by the *McGee*, southwest and close to buoy No. 23.

I wish further to add that I absolutely concur with the trial judge with respect to the conduct of the crew of the respective vessels and, with him, accept without equivocation the version of the *McGee*,—the only point, however, upon which, I feel I must differ, is upon his decision with respect to the division of responsibility; I find that the *Ikala* was solely and entirely at fault and to blame for the accident.

Indeed, the *Ikala* through some undisclosed reasons (her port steering, however, not being normal), in a narrow channel, in violation of Art. 25, unduly and through lubberly manoeuvring, directed her course to port, gradually shoving the *McGee* south. After announcing a different course by the exchange of their respective blasts, she further kept going full speed in a meeting of this kind when both vessels were to pass inside or within the channel indicated by these respective buoys,—notwithstanding that the *Ikala* was proceeding against the tide.

As found by the trial judge, and I agree with him, the river between buoys 24 and 23 must be taken to be a narrow channel (Art. 25)—with also comparatively shallow water south of buoy 23.

An up-coming vessel, like the *Ikala*, in a narrow channel and when the navigation is intricate, must stop and, if necessary, come to a position of safety below the point of

1929
 STANDARD
 OIL
 COMPANY
 OF NEW
 JERSEY
 v.
 THE SS.
Ikala
 —
 INDUSTRY
 STEAMSHIP
 Co., LTD.
 v.
 THE SS.
*James
 McGee.*
 —
 Audette J.

(1) (1844) 2 Wm. Rob. 244.

(2) (1860) 2 Stuart's Adm. 38.

1929

STANDARD
OIL
COMPANY
OF NEW
JERSEY

v.
THE SS.
Ikala

INDUSTRY
STEAMSHIP
CO., LTD.

v.
THE SS.
*James
McGee.*

Audette J.

danger and there remain until the channel is clear. This, the *Ikala* has absolutely failed to do, and had she complied with this requirement, it is obvious the accident would not have happened.

The descending vessel, coming with the current, is entitled to consideration. Had the *Ikala* below buoy 23—or north of it—had she slackened to slow, as good seamanship required under the circumstances, the accident would have been avoided. The *SS. Coniston* (1); the *Ezardian* (2); the *Talabot* (3). The accident happened shortly after the *Ikala* had resumed her course, after anchoring to make some repairs.

The *Ikala*, through lubberly manoeuvring, placed herself, at full speed, in a false position, thus displaying a glaring want of good seamanship care and prudence.

In a narrow channel, it is the duty of the steamer navigating against the tide, to wait until the downward bound vessel has passed clear. *Bonham v. Honoreva* (4).

Moreover, among the "Regulations for the River St. Lawrence from Father Point to Victoria Bridge," at Montreal, which are, among other places, to be found in the 1927 Tide Tables, etc., issued by the Department of Marine and Fisheries of Canada, the following rule appears, viz:—

(8) All up-coming vessels, on each occasion, before meeting down-bound vessels at sharp turns, *narrow passages*, or where the navigation is intricate, shall stop, and, if necessary, come to a position of safety below the point of danger, and there remain until the channel is clear.

This general rule is complete by itself; but below the same we find the further enactment.

These directions apply to the following points:—

Cap Charles

Cap à la Roche

Grandmont Poulter, etc., etc.

And I find that these latter directions do not, in any way, detract from the generality of rule 8, which is applicable at large to all such cases therein provided; and I find the *Ikala* failed to observe the same and I further find that had she complied with it, the accident would have been avoided.

The *Ikala* did not keep to the proper side of the narrow channel (Art. 25) and it is hardly in her mouth to say, when she was going full speed, that the collision would not

(1) (1918) 19 Ex. C.R. 239, at p. 249.

(2) (1911) 11 Asp. 602.

(3) (1890) 6 Asp. (N.S.) 602.

(4) (1916) 54 S.C.R. 51.

have occurred had the *McGee* not gone full speed, especially when the collision resulted exclusively from her own bad seamanship. The ship primarily at fault, the *Ikala*, could only discharge her liability in that respect by very clear and plain evidence which does not exist here, *Bryde v. SS. Montcalm* (1).

Moreover, the fact that the collision took place south of the fairway, between the two buoys and near buoy 23, confirms the finding that the *Ikala* did not, in compliance with Art. 25, keep to starboard, and that she had, at *her own risk*; to right herself back to her proper place in the channel. *The Glengariff* (2); *The Union SS. Company v. The Wakena* (3), reversed on appeal.

Was the *Ikala* carried to the south, at the place where I find the accident occurred only through lubberly manoeuvring or was it the result of some defect in her rudder—perhaps matters very little. Indeed, it is not without some significance that the pilot of the *Ikala* admits the peculiarity of her wheel which was carrying port helm; to carry her steady on her course one had to give her port helm *two turns*; she carried 1½ turns to port all the time and the pilot declares he had never seen any ship requiring 16 turns from port to starboard helm in his experience (p. 208). Witness Hay, the classification surveyor, found the chains of the steering gear of the *Ikala* a little bit slack. The wheelsman, Brown (341), testified also that crossing the Atlantic she would carry a port helm. Be all this as it may, it is not without some reason to suspect that with that defect the *Ikala* could not obey her helm on a port order as readily and effectively as if in perfect and normal order and condition.

I am unable to acquiesce in the finding below, following the *Europa* and I disagree with it, when approving of the assessor's view, it is said:

Had she reduced her speed (the *McGee*) at the red buoy, it is probable that she would have avoided the collision at all events it would have minimized the damages.

There was no apparent reason for the *McGee* to slacken speed; the two vessels were travelling port to port after exchanging one blast indicating they would keep their course.

(1) (1913) Can. Rep. (A.C.) 472; (2) (1905) 10 Asp. 103; (1905) P. 14 D.L.R. 46. 106.
 (3) (1917) 16 Ex. C.R. 397; 35 D.L.R. 644; 37 D.L.R. 579.

1929
 STANDARD
 OIL
 COMPANY
 OF NEW
 JERSEY
 v.
 THE SS.
Ikala
 —
 INDUSTRY
 STEAMSHIP
 CO., LTD.
 v.
 THE SS.
*James
 McGee.*
 Audette J.

1929
 STANDARD
 OIL
 COMPANY
 OF NEW
 JERSEY
 v.
 THE SS.
Ikala
 —
 INDUSTRY
 STEAMSHIP
 Co., LTD.
 v.
 THE SS.
*James
 McGee.*
 Audette J.

Had the *Ikala* kept her course, there would have been no collision. The *McGee* was led or chased out of her course to the south by the pursuit of the *Ikala*.

I am unable to share that view suggested by the assessor. One must not overlook the fact that the *McGee* was coming down with a three knot tide and that a certain speed was therefore, absolutely necessary for her to keep good command of her steering,—the duty of stopping or reducing speed, under the circumstances, was clearly upon the *Ikala* and not upon the *McGee*. Moreover, although it is hard to surmise, yet had the *McGee* reduced speed instead of the *Ikala* striking the *McGee* with her port bow, on the port side just amidship at a very slight angle, her anchor going through the side amidship,—the collision might have been either end on or bow to bow at right angle and the results would have been ever so much more disastrous. *The Bywell Castle* (1); *the Benares* (2); Marsden's Collisions at Sea, 8 Ed., p. 465.

The *Ikala* failed to keep her course to starboard, Art. 25; the *Ikala* failed to slacken or stop below buoy 23 as good seamanship required under the circumstances of the case.

The speed of the *McGee* did not in any way contribute to the collision. In re *Canadian Pacific Railway v. SS. Storsstad* (3), the learned judge observes:—

We find that a manoeuvre is wrong if it creates a risk of collision. The test, therefore, is whether this manoeuvre created a risk of collision. A further test is again if it did create a risk of collision did it contribute to the disaster in question? If a given manoeuvre creates a risk of collision, it would be a breach of the rule, and if it creates a risk of collision which contributed to the collision or caused it, then it would be a fault. As is well known, there is a difference between the English law and our law that used to exist and which has been but recently abolished. All the English jurisprudence is under the old law. In England, formerly, a breach of the rules was presumed to have contributed to the collision or caused it, unless the contrary was proved. Whilst, in our law, the plaintiff has to prove the breach of the rule, and also that it caused or contributed to the collision.

As I have said before the speed of the *McGee* did not contribute to the accident, and, under the circumstances of the case, considering the false manoeuvring of the *Ikala* it contributed greatly to decrease the result of the collision. Under the general trend of the evidence, taking all the circumstances into consideration, I allow the appeal of the

(1) (1879) 4 Asp. N.S. 207.

(2) (1883) 5 Asp. N.S. 171.

(3) (1915) 17 Ex. C.R. 160, at p. 170; 40 D.L.R. 600, at p. 607.

McGee and dismiss the cross-appeal of the *Ikala* and order and adjudge that the judgment appealed from be varied accordingly, the whole with costs in favour of the *McGee* against the *Ikala*.

I cannot close without calling attention to the mischievous and most irregular practice which has of late crept into the practice before some of the local Courts of the Admiralty Districts and that is to accept as evidence in the case the evidence of the witnesses heard on the investigation before the Wreck Commissioner. It is most unsuitable; it involves an unnecessary mass of evidence respecting the conduct of the officers of the respective vessels (R.S.C., 1906, Ch. 113, sec. 782). Therefore, the object of proceedings before the Wreck Commissioner is quite dissimilar from that of proceeding in this court for damages arising out of a collision. This evidence is not adduced in a judicial proceeding. It is not a trial in its true sense and meaning. The evidence is not authentic, it being but testimony before an investigating commissioner. *Menard v. The King* (1).

The evidence before the court in the present case, taken upon such investigation, is adduced in a most unscientific manner and contrary to the well known rules in that respect. It is chaotic. The witnesses are questioned without the observance required at trial. Hearsay is allowed. The questions submitted both by the Commissioner and counsel are made at random and repeated in an unconceivable number of times, which tend to make the analysis of the same very difficult and cumbersome.

The trial judge should have, if possible, the advantage of seeing the witnesses, observe their demeanour in the box and be enabled to put such question as his legal training and experience may suggest. If the trial judge is once thus deprived of these advantages and that he has to decide upon evidence so adduced in an extra-judicial inquiry—not a court of record—he is taken out of his ordinary function and position as contemplated in the true administration of justice.

The stock argument for using such evidence is that it will make the trial less expensive, is without merit and not deserving consideration. The question of expense, in any

1929
 STANDARD
 OIL
 COMPANY
 OF NEW
 JERSEY
 v.
 THE SS.
Ikala
 —
 INDUSTRY
 STEAMSHIP
 Co., LTD.
 v.
 THE SS.
*James
 McGee.*
 Audette J.

1929
 STANDARD OIL COMPANY OF NEW JERSEY v. THE SS. *Ikala*
 —
 INDUSTRY STEAMSHIP Co., LTD. v. THE SS. *James McGee*
 —
 Audette J.

case, should not trammel a tribunal in the administration of justice between the parties.

Now does the acceptance of such evidence really constitute a saving? I readily answer in the negative. Indeed, in the present case where the evidence taken before a judicial tribunal, instead of being spread upon about 600 pages, 250 to 300 would have been amply sufficient, and a saving of a good half been made. And were the parties going to appeal before a tribunal exacting the printing of the evidence, the saving of the printing expense is also self-evident.

The further argument that the witnesses are difficult to assign does not either avail. What was being done before there was a Wreck Commissioner can also be done to-day.

It is a most unsatisfactory practice and contrary to the well established procedure. It is quite irregular to accept such evidence in a Court of Justice, even if tendered by the consent of the respective counsel. It is unfair both to the judge and to the litigants to attempt to make it trial evidence. The practice of accepting such evidence should be discouraged as there is a tendency at the present day of resorting to it.

Judgment accordingly.

1929
 Mar. 12-21.
 Sept. 10.

CANADIAN RADIO PATENTS LIMITED, ET AL } PLAINTIFFS;

v.

THE HOBBS HARDWARE COMPANY, LIMITED } DEFENDANT.

Patents—Infringement—Specification—Equivalents—New result—New Method of applying a new principle and a well known principle

Held, that in respect of subject matter inventions may be divided into two classes, first that kind of invention which consists of the discovery of a new method of application of a new principle, and second, that kind which is to be found in some particular new method of applying a well known principle. As to the first, upon the ground that the patentee is not bound to describe every method by which his invention could be put into effect; the Court will regard jealously any other method embodying the same principle. As to the second, the use of other methods is not contemplated by the patentee, and should not be included within the ambit of his claims.

2. That it is important to ascertain what is the exact invention that is protected, and which is said to be infringed and if the invention belongs to the former class, then the doctrine of infringement by the substitution of equivalents applies. On the other hand if the invention belongs to the second class, and is only for an improved method of attaining an old object, the monopoly would be for that particular improved method only, and only by using that particular method would a person be held to have infringed.
3. Held further that when an invention consists in the production of a new result, the patentee is not tied down to the particular means, or the identical parts mentioned in his specification. In other words one cannot make use of the novel principle of an invention, the carrying of which into effect is the real substance of the patentee's invention, by substituting obvious equivalents for some of the parts mentioned in the patentee's specifications, and thus escape infringement.

1929
 ~~~~~  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL  
 v.  
 HOBBS  
 HARDWARE  
 CO., LTD.  
 ———

ACTION for the infringement of Patent 174,690 Hartley, and 241,138 Rice.

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

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

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

The facts are stated in the reasons for judgment

THE PRESIDENT, now (September 10, 1929), delivered judgment.

In this case, the plaintiffs claim infringement of two patents having to do with certain improvements in that type of radio receiving circuit in which the desired signal is progressively selected and amplified, in a succession of tuned circuits, coupled by means of vacuum tubes or audions. In this type of circuit, the input as well as the output circuit of each successive audion, is tuned to the frequency of the signal to be selected. It is this tuning which gives to the circuits the property of selectivity, or discrimination, in favour of a signal whose frequency corresponds to the frequency to which the circuit is tuned.

The audion acts as a relay, to generate in its output a signal identical in all respects to the signal impressed on its input terminals. Under favourable conditions of operation, the amplitude or strength of the signal so relayed may be considerably increased and the audion caused to act as an amplifier as well as a relay. The audion consists of an evacuated glass enclosure containing a cathode, an anode and a grid. The cathode usually takes the form of a metal-

1929

CANADIAN  
RADIO  
PATENTS  
LTD. ET AL  
v.  
HOBBS  
HARDWARE  
CO., LTD.

Maclean J.

lic filament which may be heated by an electric current. The anode is generally in the form of a metal plate surrounding the filament, and the grid in the form of a spiral of wire placed between the anode and the cathode or filament. The input circuit is connected between the grid and the filament, and the output circuit which includes a battery is connected between the anode plate and the filament. The combination of tuned circuits and audion, which constitute the selective amplifier involved in this case, is represented diagrammatically in fig. 1 of the Alexanderson patent, referred to in the reported case of *Canadian General Electric Company Ltd. v. Fada* (1).

It is conceded that an amplifier of this type, designed to operate at broadcast frequencies, is essentially unstable, that is to say, there is an inherent tendency in the amplifier to act as an oscillator or generator of oscillations. This tendency is due to the fact that the anode and the grid act as the two plates of a condenser. By reason of this condenser effect, or internal capacity of the vacuum tube, some of the high frequency energy in the output circuit is fed back into the input circuit. If this feedback or regenerative action is sufficient to compensate for the energy losses of the system, the oscillations are sustained even though no oscillations are impressed upon the system from outside, and the audion functions as an oscillator. When functioning as an oscillator, the audion or vacuum tube is incapable of functioning efficiently as an amplifier of the signals impressed upon the receiver, and reception becomes unsatisfactory. The oscillating condition of the tube gives rise to a whistling noise in the telephones or loud speaker which seriously impairs the quality of the received signals.

The object of the improvements described in the two patents in suit, owned by the plaintiffs, and which are said to be infringed, Hartley, Canadian patent no. 174,690, and Rice, Canadian patent no. 241,138, is to prevent the tube from functioning as an oscillator while at the same time taking full advantage of its amplifying properties. Hartley's method of attaining this result is described in his specifications. He says:—

This invention relates in general to electrical circuits containing amplifiers, in particular to such circuits in which an electrical coupling exists

1929  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL  
 v.  
 HOBBS  
 HARDWARE  
 Co., LTD.  
 Maclean J

which is capable of transferring power from the output terminals of an amplifier to its input terminals. \* \* \* \* \*

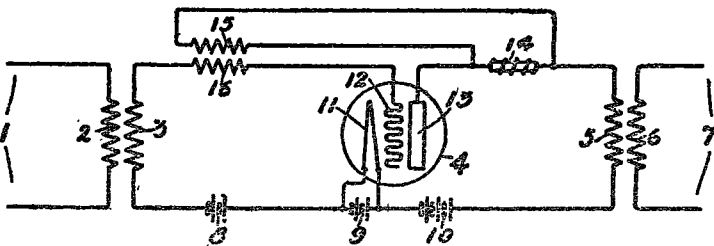
Now in the thermionic repeater it is impossible to eliminate this coupling, and the present invention contemplates introducing still another electromotive force into the input circuit and so adjusting it, as to amplitude and phase, that it shall annul the effect of electromotive force introduced by the first-mentioned unavoidable coupling inside of the repeater itself.

Then he proceeds to describe an arrangement by which this may be accomplished.

The application of this idea to amplifying networks containing some such unavoidable coupling is illustrated in the drawings, in which Fig. 1 shows a typical amplifying arrangement in which an inductive coupling of input and output circuits is secured by breaking the output circuit and closing this break through one winding of a transformer, whose other winding is included in the input circuit.

Below is Fig. 1 of Hartley, referred to in his specification.

Fig. 1



Hartley further proceeds to say:—

In the operation of this network, an electromotive force impressed upon the input circuit produces a current in the output circuit, which current, through the agency of the coupling inside the repeater, induces a further electromotive force in the input circuit. As has been stated the present invention consists in opposing to the last named electromotive force, another which is obtained in the typical cases illustrated, by the transformer coupling 15, 16.

Hartley's arrangement is briefly stated in claim 1

1. An electrical network containing a thermionic amplifier having an input and output circuit, said output circuit being adjustably coupled to said input circuit to oppose the effect upon said input circuit of currents in said output circuit.

The fundamental principle involved in Hartley is, that it seeks to counteract the effect of the parasitic or objectionable feedback which takes place through the internal capacity of the vacuum tube, by creating an external feedback, the direction or phase of which is such as to oppose and neutralize at every instant the internal feedback. And this is the basic principle of the so called "neutralization cir-

1929  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL  
 HOBBS  
 HARDWARE  
 Co., LTD.  
 Maclean J.

cuits." To secure neutralization, it is necessary to feed back a certain electromotive force by external means from the output circuit to the input circuit, equal and opposite in direction to that impressed on the input circuit by reason of the internal feedback. Hartley has disclosed one way of doing this. He does it entirely by electro-magnetic means, that is, by coupling two coils together and he suggests that it could be done in other ways.

Rice describes in his specifications, the object of his invention and how it is carried out. He says:—

The object of our invention is to avoid the undesired production of oscillatory currents when such a device is used either as an amplifier or detector, or to serve both functions. It has been ascertained that the production of oscillatory currents by such a device is due to the coupling which is always present between the grid and plate circuits.

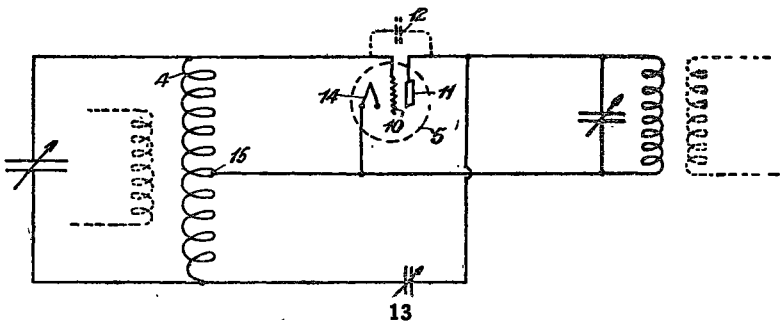
This coupling is of two kinds, electromagnetic and electrostatic. . . .

In carrying our invention into effect we overcome the electromagnetic coupling between the circuits which is present when air core inductances are used by inclosing the inductances in separate metal boxes. We also overcome the effect of the electrostatic coupling by impressing upon the circuits electromotive forces equal to and opposite in direction to those impressed thereon by reason of the natural capacity coupling and thereby neutralize the effect of this coupling. When this compensation is once adjusted it is effective for all frequencies to which the circuits may be tuned.

\* \* \* \* \*

The coupling between the inductances may also be avoided by employing closed iron cores for the inductances. In order to compensate for the coupling due to the natural capacity between the grid 10 and anode 11, which is represented by the dotted condenser 12, we apply to the grid circuit through the condenser 13 an electromotive force equal and opposite to that impressed upon the grid from the anode 11 across the capacity 12. In order to do this the cathode 14 is connected to the central point 15 of inductance 4, the grid is connected to one end of this inductance and condenser 13 is connected to the other end.

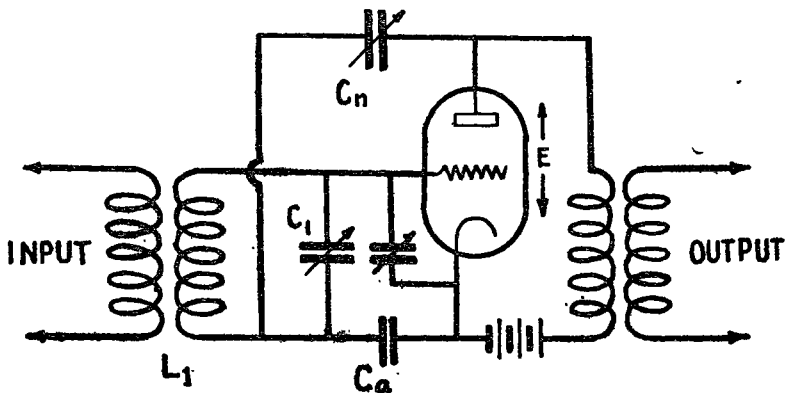
A drawing of Rice, shown in Exhibit No. 11, is as follows:—



In the case of Rice, the plaintiffs point out that a reversal of phase is obtained by connecting the cathode to the mid-point of the inductance 4. This mid-point 15 was described by the plaintiffs' expert witness, Waterman, as an "electrical pivot," and its action was explained by him. The reversal of phase in Rice, is obtained electro-magnetically by means of a coil tapped at some point, preferably the centre point, which is connected to the cathode. So far, Rice is essentially the same as Hartley in that the reversal of phase is obtained electro-magnetically. In Rice however, the energy is fed back from the plate or anode circuit by way of the condenser 13, that is, the feedback is obtained electrostatically. Therein lies the improvement of Rice over Hartley, for, whereas in Hartley the adjustment of magnetic coupling covers a very narrow band of frequencies, in Rice the condenser 13 once adjusted is correct over a wide band of frequencies.

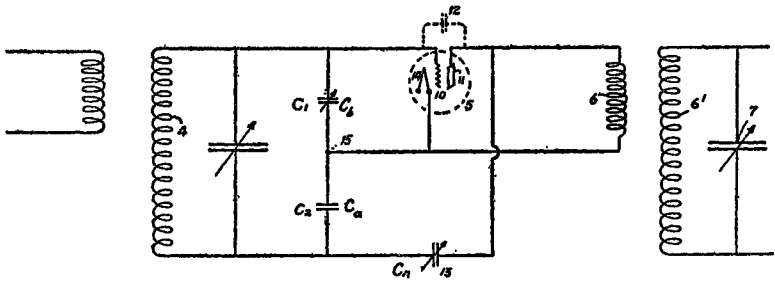
1929  
CANADIAN  
RADIO  
PATENTS  
LTD. ET AL  
v.  
HOBBS  
HARDWARE  
Co., LTD.  
Maclean J.

Turning now to the defendant's receiver. One stage of the tuned radio frequency amplifier of this receiver is represented in fig. 1 of defendant's Exhibit B, which is identical with plaintiffs' Exhibit 9, except that the latter diagram omits the anode battery, and this battery is not essential to the point under discussion. Fig. 1 of the defendant's Exhibit B is as follows:--



The various elements of this circuit may be redrawn as in the plaintiffs' Exhibit no. 12, to show the relation between Rice and the defendant's receiver, and which drawing here follows:--

1929  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL.  
 v.  
 HOBBS  
 HARDWARE  
 CO., LTD.  
 Maclean J.



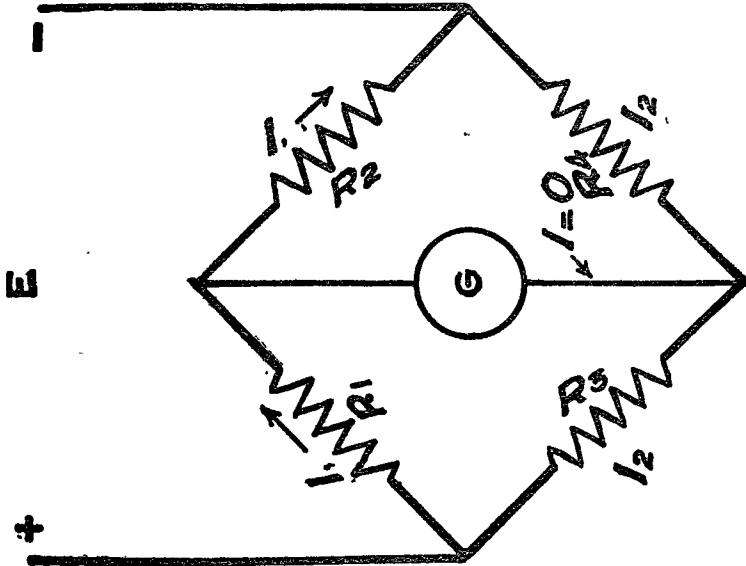
In the above figure, the various elements are designated by the symbols used by the plaintiffs and defendant respectively to identify the different elements.

It is the plaintiffs' contention, that in the defendant's receiver known as Sparton, energy is fed back from the output to the input circuit by the agency of the small variable condenser, designated by the symbol  $C_n$  in the defendant's diagram, and by fig. 13 in that of the plaintiffs', in a manner identical to that described in Rice, and for the same purpose. It is the plaintiffs' further contention that in Sparton an "electrical pivot" is to be found, and that this pivot which produces reversal of phase, is obtained by connecting the cathode to the mid-point of two small condensers  $C_b$  and  $C_a$  connected in series across the tuned input circuit. In other words, these two condensers connected in series with their mid-point connected to the cathode, constitute, when taken in conjunction with the tuned circuit, an exact electrical equivalent of a tapped coil as suggested by Rice. The defendant has not questioned directly the contention that such an arrangement is capable of producing phase reversal in the manner indicated by the plaintiffs, nor did it offer evidence upon this point. The defence is based chiefly on the contention that Sparton does not depend for its action on the principle of feedback in phase opposition, or, as it is sometimes called, feedback in counter-phase, but on an entirely different principle, namely, that of isolating the output from the input circuit by means of a balanced network of the Wheatstone bridge type.

It might be observed that a balanced network or bridge was originally used as a measuring device for measuring resistance and was later used to measure capacity and inductance. To measure these electrical values a balance is

obtained in the circuit, and it is this balancing effect that the defendant claims to use to secure isolation of the input from the output circuits and thus obtain stability of the audion. The defendant's Exhibit A illustrates the principle of the Wheatstone bridge. It is as follows:—

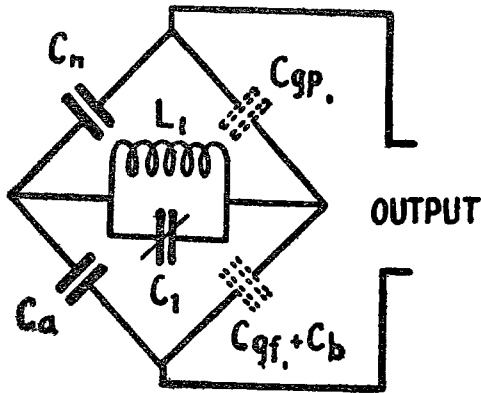
1929  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL  
 v.  
 HOBBS  
 HARDWARE  
 Co., LTD.  
 Maclean J.



As explained by the defendant's expert witness, Prof. Glasgow, there are in a Wheatstone bridge, four arms arranged in the form of a square and marked in the above drawing  $R_1$ ,  $R_2$ ,  $R_3$ , and  $R_4$  respectively. Across one diagonal of the square is connected a source of electromotive force  $E$ , and across the other diagonal a measuring instrument which may be a sensitive galvanometer. The arms may be composed of four resistances, and the source of electromotive force may be a battery. Or again, they may be made up of resistances, inductances or condensers, and the source of electromotive force may be a generator of alternating current, but so long as a certain relation obtains between the numerical values of the elements of the network, the bridge is said to be balanced, and no current will pass through the galvanometer, or to use the words of Glasgow, the galvanometer may be said to be isolated from the source of electromotive force. The circuit diagram of one stage of radio frequency amplification in Sparton, as represented in the defendant's Exhibit B, fig. 1, may be redrawn as in fig. 3 of the defendant's Exhibit B, and

1929  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL  
 v.  
 HOBBS  
 HARDWARE  
 CO., LTD.  
 Maclean J.

when so drawn it forms a network of the type just described, in which two of the arms of the bridge are formed by the condensers  $C_n$  and  $C_a$ , and the other two arms by the internal tube capacities between grid and plate, and between filament and grid respectively, the latter being also paralleled by the condenser  $C_b$ . Defendant's Exhibit B, fig. 3 is as follows:—



The input circuit  $L_1$ ,  $C_1$ , is across one diagonal of the bridge and the output circuit across the other. When the network is balanced by adjusting the small variable condenser  $C_b$ , it is claimed by the defendant that the output circuit is then isolated from the input circuit, and no transfer of energy can take place between the tuned circuits by way of the internal grid-plate capacity of the vacuum tube. In such a condition the defendant claims that the grid-plate capacity is prevented from acting as an internal coupling so as to cause the tube to function as an oscillator. This constituted the main argument of the defences.

It will probably be as convenient here as elsewhere, to discuss any legal principles applicable to this case. In respect of subject matter, inventions may be divided roughly into two classes. First there is that kind of invention which consists of the discovery of a method of application of a new principle, and generally speaking the Court will regard jealously any other method embodying that principle, upon the ground that the patentee is not bound to describe every method by which his invention could be put into effect. In the next place, there is that kind of invention which is to be found in some particular new method of applying a well known principle; in this case the use of other methods



is not contemplated by the patentee, and of course should not be included within the ambit of his claims. It is therefore always important to ascertain what is the exact invention that is protected, and which is said to be infringed. If the invention belongs to the former class, then the doctrine of infringement by the substitution of equivalents applies, and the plaintiffs may say to the defendant "you cannot effect the same result by electrical equivalents." On the other hand if the invention belongs to the second class, and is only for an improved method of attaining an old object, the monopoly would be for that particular improved method only, and only by using that particular method would a person be held to have infringed. Further when an invention consists in the production of a new result the patentee is not tied down to the particular means, or the identical parts mentioned in his specification. In other words one cannot make use of the novel principle of an invention, the carrying of which into effect is the real substance of the patentee's invention, by substituting obvious equivalents for some of the parts mentioned in the patentee's specifications, and thus escape infringement. In *Automatic Weighing Machine Co. v. Knight* (1), Cotton L.J. said:—

Where there is a principle first applied in a machine capable of carrying it into effect, the Court looks more narrowly at those who carry out the same principle, and say they do it by a different mode, and looks to see whether, in effect, although the mode is not exactly the same, it is only a colourable difference—a mechanical equivalent for a substantial part of the patentee's invention being looked upon as a mere colourable difference, and, therefore, he being entitled to an injunction against that mode of carrying out his principle, which is only the same in substance as that which he patented, though there are colourable differences.

I am of the opinion that Hartley and Rice possess subject matter for letters patent and belong to the first class mentioned. The real essence or substance of the invention claimed by Hartley and Rice, was a neutralizing circuit employing feedback in counterphase, to avoid the undesired production of oscillatory currents. These inventions were intended, or expected, to produce new results, I think,—at least upon the evidence presented in this case—that Hartley and Rice together showed how to attain new and useful results, or the method of application of new principles which they discovered, and the novelty of the result itself is part of the merit of the invention; at that

1929  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL.  
 v.  
 HOBBS  
 HARDWARE  
 CO., LTD.  
 Maclean J.

1929  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL  
 v.  
 HOBBS  
 HARDWARE  
 Co., LTD.  
 Maclean J.

time, I think, the step was a long one, and they appear to be the first to disclose how some principle which underlay the actual circuit described by them, might be utilized. By "principle" I do not mean any of those first principles or laws of nature which cannot be subject of a patent, but merely a practical application of those first principles by some device or other. Hartley and Rice are not, I think, to be construed as claims to monopoly for the precise mechanisms described, but for the attainment of the same results by any means equivalent to the precise mechanism described. The circuits which they disclosed were not in my opinion merely improved methods of attaining old objects or applying well known principles; if that were so the monopoly could only be for the particular or improved methods described by them.

Many prior patents were cited by the defendant to show that the principle of a balanced electrical network was old in the art. Of these, all the references to the telephone art may be dismissed as having no bearing upon this case. The telephone art deals with voice frequencies, and at these frequencies the effect of the internal grid-plate capacity of the audion is negligible and requires no balancing or neutralization. The defendant referred to a well known United States patent granted to Armstrong. This is not an anticipation of Hartley or Rice. Armstrong deals with a circuit which is essentially stable and discloses means of producing regenerative or positive feedback, and not feedback in counterphase. Armstrong did not address himself to the problem of neutralizing the effect of the internal capacity. The same remarks apply to the De Forest patents which were also cited. Another prior patent, Wright, was also cited. This patent had for its object the provision of a wireless telegraph receiver in which the noises due to atmospherics would be so reduced that they would not overpower the sounds due to the signals it was desired to read; obviously this could not be an anticipation of Rice. I am of the opinion that no anticipation of Hartley and Rice had been established.

There remains for consideration therefore the question whether Sparton is only colourably different from Hartley and Rice, and that any distinction is obtained by the substitution of equivalents.

Counsel for the defendant stressed the contention that Sparton was of the bridge type of circuit, and that it secured neutralization by isolating the input and output circuits and not by feedback and counterphase as claimed by the plaintiffs. If any importance is to be attached to the fact that a circuit is of the bridge type, then there is reason for saying that Rice is also of the same type. For instance, Prof. Glasgow described Rice as of the bridge type of circuits in a paper presented by him, before the American Institute of Electrical Engineers in March, 1928. In this paper he was discussing the question of stability, in the operation of tuned radio-frequency amplifiers, and the various methods practised to secure this stability; his reference to Rice is as follow:—

These objections have lead to the development of a number of bridge types of circuits, so called because of their similarity to the a-c wheatstone bridge. The first of these, for which credit is due C. W. Rice, is shown in Fig. 14,—A being the actual circuit and B, the electrical equivalent omitting the tube electrodes. The filament terminal of the tube instead of being connected to the lower end of the input circuit is connected to an intermediate point which provides the inductance into two parts,  $L_a$  and  $L_b$ . The lower terminal  $n$  of the input circuit is connected to the plate through a small balancing condenser  $C_n$ . The terminals  $g$  and  $n$  of the input circuit and  $r$  and  $p$  of the output circuit constitute two pairs of opposite points of a bridge, as shown in B. An inspection of the latter figure indicates that no voltage can exist across the input terminals  $g$   $n$ , due to a voltage between  $r$   $p$  if the arms are balanced. Hence the energy which is fed back through  $C_{gp}$  is opposed in phase by that which flows through  $C_n$ . The conditions for a balance are

$$\frac{L_a}{L_b} = \frac{C_n}{C_{gp}} \tag{17}$$

I think there is no doubt Rice may be drawn in the form of a bridge as in fig. 14 of defendant's Exhibit K, the Glasgow paper just referred to. The two halves of the input inductance form two of the four arms of the bridge, the internal grid plate capacity of the tube forms a third arm, and the neutralizing condenser forms the fourth. On the other hand some standard text books describe circuits similar to Rice, as circuits in which stability is attained by feedback in counterphase, or to use the exact words of Rice, by impressing on the circuits electromotive forces equal to and opposite in direction to those impressed thereon by reason of the natural capacity coupling. Further it is to be re-

1929  
CANADIAN  
RADIO  
PATENTS  
LTD. ET AL  
v.  
HOBBS  
HARDWARE  
Co., LTD.  
Maclean J.

1929  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL.  
 v.  
 HOBBS  
 HARDWARE  
 CO., LTD.  
 Maclean J.

membered that Glasgow stated, that while Rice's circuit resembled a Wheatstone bridge yet if looked upon as a bridge it is out of balance with all except one frequency, whereas it is claimed that Sparton balanced for all frequencies, but in the Glasgow paper, it is stated that if the coupling between the coils  $L_a$  and  $L_b$  of Rice, be made substantially unity, then a balance for all frequencies would be secured; so far as I can see there is no reason why this condition could not be fulfilled, thus making Rice as satisfactory a bridge as Sparton.

I do not think it is of importance what names are given to the circuits in question, nor do I think that deductions one way or the other can be usefully made from the fact that Rice and Sparton, as neutralizing circuits, are variously named as of the bridge type or as feedback in counter phase. The important question is, what in fact is the precise nature of the circuits. Rice and Sparton may be drawn in the same way. The conventional manner of graphically representing the electrical connections between the component parts making up an electrical device, is by means of a diagram of connections. These components, which, in the case of a radio set, consist of vacuum tubes, condensers, inductances, resistances, etc., are graphically represented by standardized symbols, and the diagram is completed by means of lines indicating the wires whereby the components are connected together. A diagram need not be an exact plan or photograph of the wired device, it being the privilege of the draughtsman to locate the symbols representing the different component parts on the diagram wherever his fancy pleases; so long as the component parts are shown connected together, exactly as they are connected physically in the receiver itself, the diagram would be correct and perfectly intelligible to one skilled in the art. Thus in the case under discussion, if the draughtsman desires to show Rice or Sparton as a bridge, he arranges the component parts so as to appear in the conventional square shaped bridge arrangement, whereas if he elects to draw the diagram in the conventional manner adopted for receiving sets, he would present an entirely different picture; nevertheless, there would be present in each picture every one of the component parts of the device, and these component parts would be interconnected in precisely the same manner.

Repeating what I have already stated; in an ordinary vacuum tube circuit, such as the Alexanderson type which I have earlier mentioned, the output circuit impresses a voltage on the input circuit by virtue of the internal capacity of the tube, and by reason of this voltage energy is transferred from the output to the input circuit, and the tube will tend to oscillate. To neutralize this flow of energy it is necessary to impress upon the input circuit an equal voltage acting in the opposite direction, when a static, balanced, or neutralized condition is obtained, and the undesired transfer of energy ceases. That is a result or condition which both Rice and Sparton produce, and they each secure this result or condition by impressing upon the input circuit by external means an equal voltage acting in the opposite direction. The term "isolation" as used by Glasgow, in describing Sparton, is purely relative, and has reference to the absence of electrical reaction between the input and output circuits when balanced. Equally there is an absence of electrical reaction in Rice when the circuit is balanced, and in such a condition the term "isolation" can as appropriately be applied to Rice as to Sparton. It must be borne in mind that the component parts of these circuits are physically connected together by condensers and wires, and, I think, that in both Rice and Sparton these connections are identical in that the grid end of the input circuit is connected to the plate through the internal tube capacity, and the other end of the input circuit to the same plate by means of a neutralizing condenser; the only difference in the arrangement of the two circuits being that in the case of Rice, the filament is connected to the centre of the coil of the input circuit, whereas in the case of Sparton it is connected to the centre point of two small condensers connected in series across the same coil. When a circuit is balanced or neutralized a condition is obtained whereby no voltage can exist across the terminals of the input circuit due to a voltage across the terminals of the output circuit; in the electrical sense these two circuits may then, if one wishes, be described as being isolated from one another inasmuch as a voltage in one cannot create a voltage in the other, but that is as true of Rice as of Sparton. In both cases there is impressed upon the grid terminal of the input circuit a voltage to the filament through the internal tube capacity, which in turn is bal-

1929  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL  
 v.  
 HOBBS  
 HARDWARE  
 CO., LTD.  
 Maclean J.

1929  
 CANADIAN  
 RADIO  
 PATENTS  
 LTD. ET AL.  
 v.  
 HOBBS  
 HARDWARE  
 CO., LTD.  
 Maclean J.

anced or neutralized by an equal voltage impressed on the other end of the input circuit by virtue of a neutralizing condenser. The terms, "feedback in counterphase," "isolation," "balancing," or "neutralization," so far as this case is concerned, describe the same condition, namely, that no voltage exists across the input terminals by reason of a voltage across the output terminal.

Hartley and Rice disclosed a method of overcoming the tendency of the tuned radio-frequency amplifier to generate oscillations caused by the feeding of energy from the plate circuit to the grid circuit; that method I have fully described. Sparton I think obtains the same result by using the substance and principle of Hartley and Rice, and by practically the same means. I think in this case the doctrine of equivalents applies, and Rice and Hartley cannot be destroyed by the use of slightly different means for obtaining the same result. The only distinction I can observe between Rice and Sparton relates to the means employed in securing what has been called reversal in phase. Reversal of phase, in the circuits under discussion, can always be obtained by tapping the centre of the coil with a wire and connecting it to the cathode; that is what Hartley and Rice did. Waterman stated in his evidence that if one uses two condensers connected in series across this coil, and connect the mid-point to the cathode, you obtain the same pivoting action or reversal of phase just as if the mid-point of the coil was connected with the cathode. This statement of Waterman's was not I think contested by the defendant, and I do not see how it can be. That being so, then it is my conclusion that Sparton's means of securing reversal of phase is the equivalent of the means employed by Hartley and Rice.

I have not thought it necessary to distinguish between Hartley and Rice in my discussion of this case, but I have generally referred to them as one. These two patents being controlled by the plaintiffs, they were not here in any way in conflict. In one respect at least, I think Sparton infringes Rice alone; and that is in the use of the neutralizing condenser  $C_n$  in such a circuit. This I think was really the substance of Rice's invention, and without this condenser the Sparton circuit could not be balanced or neutralized. I therefore think that upon this ground alone, Spar-

ton must be held to infringe Rice, but I do not propose to discuss this point at greater length.

From what I have said, it follows that in my opinion infringement has been established, and the plaintiffs are entitled to the relief claimed; costs will follow the event.

*Judgment accordingly.*

1929  
CANADIAN  
RADIO  
PATENTS  
LTD. ET AL  
v.  
HOBBS  
HARDWARE  
CO., LTD.  
Maclean J.

APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT

WALTER W. HODDER COMPANY, } APPELLANT;  
INCORPORATED (PLAINTIFF) . . . . . }

AND

THE SHIP *STRANDHILL* AND HER } RESPONDENT.  
OWNERS (DEFENDANT) . . . . . }

1929  
June 18.  
Oct. 2.

*Shipping—Lien for necessaries—Vendee without notice—Interest—Costs—Judicial discretion*

*Held.*—(Affirming the judgment appealed from) that the vendee of a ship without notice of a claim for necessaries against her, who offers to suffer judgment for the amount of such claim is not liable for interest upon the same.

- The Court following the decision in the case of *The Young Sid* (1920) P. 190 refused to interfere with the exercise of the trial judge's judicial discretion in disallowing costs.

APPEAL from the decision of the Local Judge in Admiralty for the Nova Scotia Admiralty District rendered herein on the 7th May, 1929.

The appeal was heard before the Honourable Mr. Justice Audette at Halifax.

*Alfred Whitman, K.C.*, for appellant.

*C. B. Smith, K.C.*, for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now (October 2, 1929), delivered judgment.

This is an appeal from the judgment of the Local Judge of the Nova Scotia Admiralty District pronounced on the 7th May, 1929, in an action for necessaries. The appeal is

1929

WALTER W.  
HODDER Co.,  
INC.

v.  
THE SHIP  
*Strandhill*  
AND HER  
OWNERS.

Audette J.

limited to the question of interest and costs upon the motion for judgment.

The appellant—pursuant to a notice to admit—admitted the following, as shown by the record, viz:—

I. That at the date of the commencement of this action, namely the 9th August, A.D. 1923, and at the date of the arrest of the said steamship *Strandhill*, William P. Cant was the owner of the said steamship *Strandhill* and that the said ship was then of British registry having on the 21st March A.D. 1923, been registered under Official Number 146328, at Glasgow, Scotland, in the name of William P. Cant.

Later on the respondent filed the following consent, viz:—

Take notice that William P. Cant, the owner of the ship *Strandhill*, the above mentioned defendant hereby consents that the formal judgment to be entered following the decision of His Lordship Mr. Justice Mellish herein shall be against the said William P. Cant, personally as well as against the said ship and her bail.

It therefore follows that the action *in rem* becomes also an action *in personam* against Cant, and he becomes liable for the full amount on this admission. Roscoe, 4th Ed., 35. By such admission, he introduces his own personal liability.

In the result, the facts of the case are really admitted.

The necessaries in question were supplied by the appellant to the ship on or about the 24th and 26th October, 1922. On the 27th October, 1922, the then owner, Fertitta, gave a note for \$1,000, for part of the price of these goods, and the note was endorsed by the Master. On the 11th December, 1922, this note was dishonoured.

The appellant now asks for interest from the date of presentation for payment, and as no payment was made, contends that interest should run from the date of dishonour.

The question of interest, a question of law, is one not free from difficulty in view of the numerous conflicting decisions.

But the question to be determined in this case, is not the broad question as to whether or not interest should, as a question of law, be allowed on necessaries, as was argued at bar on appeal. The question is whether the vendee of a ship without notice of such claim should be held liable for the interest upon the same. The question of the existence of the foreign lien for such necessaries and its recognition by our Courts has already been determined by the Supreme



Court of Canada, confirming the judgment of the trial judge. The ship *Strandhill* v. *Walter W. Hodder Company* (1).

1929  
 WALTER W.  
 HODDER Co.,  
 INC.  
 v.  
 THE SHIP  
*Strandhill*  
 AND HER  
 OWNERS.  
 ———  
 Audette J.  
 ———

Now, the foundation upon which rests this case is thus well and clearly expressed in Maclachlan's Law of Merchant Shipping, 6 Ed., p. 86, viz:—

If the owner, after ordering necessaries, sell and transfer the ship, the vendee is not liable, not even for such of the necessaries as were supplied after the transfer on the previous order. *Trewhella* v. *Rowe* (2). Nor would he be if the necessaries were ordered by the master, to whom at the time he had let the vessel. *Fraser* v. *Marsh* (3).

The law of the United States upon the question of interest in the case of a vendee without notice, if there is any, has not been proven.

The liability of the respondent, under the circumstances of the case, must be limited to the scope of his above recited admission and for the reasons mentioned by the trial judge, I am bound to confirm the conclusion he arrived at, and disallow the appeal for interest.

There remains the question of costs. On the consideration of this question in the light of the decision in *The Young Sid* (4), I am forced to the conclusion that the trial judge has exercised a judicial discretion in withholding costs upon which there is no appeal and I feel that I can do nothing else but confirm his judgment in that respect.

Therefore, there will be judgment dismissing the appeal with costs.

*Judgment accordingly.*

(1) (1926) S.C.R. 680.

(2) (1809) 11 East. 434.

(3) (1811) 13 East. 238.

(4) (1929) P. 190.



# INDEX

## ABANDONMENT

See PATENTS FOR INVENTION No. 2.

## ACTION

For Military pay:—See CROWN No. 1.  
To expunge.—See TRADE-MARKS No. 5.

## ADMIRALTY

See SHIPPING AND SEAMEN.

## ADMISSIONS

See REVENUE No. 2.

## AGENCY

See REVENUE No. 10.

## ANTICIPATION

See PATENTS FOR INVENTION No. 4.

## ARREST OF SHIP

See SHIPPING AND SEAMEN No. 5.

## BILL OF LADING

See SHIPPING AND SEAMEN No. 3.

## BOND

See REVENUE, NOS. 1, 2, 12.

## BURDEN OF PROOF

See REVENUE, NOS. 3, 4, 5.

## CANADA SHIPPING ACT

See SHIPPING AND SEAMEN, NOS. 2, 6.

## CANCELLATION OF BOND

See REVENUE No. 12.

## CIVIL RIGHTS

See EXPROPRIATION No. 2.

## COLLISION

See SHIPPING AND SEAMEN NOS. 1, 6, 7.

## COMPENSATION

See EXPROPRIATION NOS. 1, 2.

## CONCEPTION OF IDEA

See PATENTS FOR INVENTION No. 4.

## CONFLICT

See PATENTS FOR INVENTION No. 2.

## CONSUMPTION TAX

See REVENUE No. 7.

## CONTRACT

See CROWN NOS. 1, 3, 4.

## CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY

See TRADE MARKS No. 5.

## COSTS

See SHIPPING AND SEAMEN No. 8.

## COST PLUS

See CROWN No. 4.

## CROWN

1 — *Militia Act — Enlistment — Military Pay—Right of Action—Jurisdiction.*—*Held*, that enlistment by a subject under the Militia Act, is in the nature of a formal transmutation of a citizen into a soldier for the time being, and as required by the defence of the realm, and does not constitute a contract between the subject and the Crown creating mutual rights and obligations.—(2) That Military officers and soldiers, while in the service of the Crown hold their positions at and during the pleasure of the Crown and no action at law lies for their pay. COOKE v. THE KING..... 20

2 — *Intrusion — Indian Title—Right to Compensation for improvements made by Tenant.*—*Held*, that at common law a tenant is not entitled on quitting to any compensation for permanent improvements made by him during his tenancy on the premises leased.—2. That under the statute law of Ontario, in order that the occupant of any land may be entitled to compensation for “lasting” improvements on the land he must show that the improvements were made “under the belief that the land was his own,” and a tenant recognizing another as the owner by the payment of rent to him is not entitled upon the lease being terminated to any compensation for any improvements made by him.—3. The question of Indian title discussed. THE KING v. EASTERBROOKE..... 28

3 — *Contract [— Interpretation of Contract—Order in Council—Power of Minister.]—Held*, that an Order in Council authorizing the Minister to enter into a contract for the removal of clay, sand and gravel, tendered for at a given price, does not carry with it any authority to add anything to or to vary the scope of the contract beyond the ambit of the Order in Council. The introduction of a clause purporting to be part of the authorized contract, throwing upon the contractor the obligation to remove, at the same price, material of another class than that mentioned in the Order in Council, is beyond the authority conferred by said Order in Council.—2. However general the terms of a contract may be expressed, they extend only to the things concerning which it appears that the parties intended to contract, which, in the present case, was clay, sand and gravel.—3. Where under an executory contract, the Crown accepted the works done by the contractor, beyond its executed contract in writing, it must be taken to have ratified it, and such work and labour having accrued to its benefit, it becomes liable

**CROWN—Continued**

therefor, on a *quantum meruit* basis, as upon an implied contract. **NATIONAL DOCK AND DREDGING CORPORATION LTD. v. THE KING**..... 40

4—*Contract—Cost plus—Rent of plant—Interest on money borrowed—Interest on drawback and on deposit by contractor.*] Claimant contracted to construct certain public works in the harbour of Toronto, on a cost plus basis. It was, *inter alia*, agreed that the claimant would furnish the plant, for which he was to receive as rental thereof a certain percentage of its value per annum for a working season of 150 days; this to be payable when each piece commenced operation, and to cease when determined by the respondent's engineer. A portion of this rented plant became locked in behind a coffer-dam constructed in connection with the works in question. It was properly there engaged on the works, but it could not be removed when its work was completed on account of the coffer-dam, and while so retained was not available for use, which condition of affairs was not due to any fault of the contractor.—*Held*, that said portion of the plant never ceased to be part of the rented plant under the terms of the contract and was still retained for use on the works by the respondent's engineer, and the claimant was entitled to recover rent therefor.—On some occasions, payments due by respondent to the claimant under the contract were delayed, compelling him to borrow from banks and pay interest on such loans.—*Held*, that the claimant was entitled to recover such interest from respondent under the contract as part of the cost of the work.—Under a clause of the contract the Crown was permitted to abandon the works and terminate the contract. The Crown suspended operations for a time, but retained contractors' drawback during this period, which consisted of a stated percentage of the total monthly costs retained as security for performance of the contract.—*Held*, that the contractor was not entitled to claim interest on this amount for the period of suspension, such drawback being in the nature of capital employed, upon which no interest was allowed by the contract.—*Held*, further that the contractor could not claim interest on the security deposit made by him with the Crown, for the time the same was held by it, it being in the nature of a guarantee for carrying out of the contract and a condition which it had to fulfil. **ROGER MILLER & SONS LTD. v. THE KING**.. 136

5—*Grant by the Crown—English Common Law—Dominion Lands Act—Title to land of inland lake—Riparian rights—North West Territories.*]—*Held*, that the English Common Law, as it was estab-

**CROWN—Concluded**

lished on the 15th July, 1870, was introduced into the North West Territories by Statute of Canada, 1886, ch. 25, sec. 3, and that the same was neither expressly nor by implication altered or amended, in its application to riparian rights, by any subsequent Canadian legislation.—2. That a grant from the Crown of land bounded on one side by the waters of an inland non-tidal and non-navigable lake carries with it the ownership of the land covered by water to the centre of the lake. **WILLIAM H. FARES ET AL v. THE KING**... 144

**CUSTOMS ACT**

*See* REVENUE NOS. 1, 11, 12.

**CUSTOMS BOND**

*See* EXPORTATION. *See* REVENUE NOS. 1 AND 12.

**CUSTOMS SEIZURE**

*Of Ships.*—*See* REVENUE No. 11.

**DAMAGES**

*Elements of.*—*See* EXPROPRIATION No. 2.

**DATE OF INVENTION**

*See* PATENTS FOR INVENTION No. 4.

**DIVIDENDS**

*See* REVENUE No. 9.

**DOMINION LANDS**

*See* CROWN No. 5.

**DRAWBACK**

*Interest on, in cost-plus contract.* *See* CROWN No. 4.

**ENGLISH COMMON LAW**

*See* CROWN No. 5.

**ENLISTMENT**

*See* CROWN No. 1.

**EQUIVALENTS**

*See* PATENTS FOR INVENTION NOS. 5 AND 6.

**ESTOPPEL**

*See* PATENTS FOR INVENTION No. 2.

**EVIDENCE**

*See* REVENUE NOS. 4 AND 5.  
*See* SHIPPING AND SEAMEN No. 7.

**EXEMPTION**

*See* REVENUE NOS. 4, 5 AND 6.

**EXCISE ACT**

*See* REVENUE NOS. 1, 2.

**EXPORTATION**

*See* REVENUE NOS. 1, 4.

**EXPROPRIATION** — *Compensation — "Value in use" — Market value.*—*Held*, that the productive value of land, or the value of the land to its owner based on the income he is able to derive from its use, is not the measure of compensation, for land expropriated, and is not material,

**EXPROPRIATION—Concluded**

except in so far as it throws light upon the market value. "Value in use" is to be repudiated as a test. *DUSSAULT v. THE KING*..... 8

2—*Leasehold—Civil rights—Elements of damage to lessee—Market value as test—Compensation.*—*Held*, that the rights conferred by a lease being a matter of property and civil rights, within the exclusive powers of the Provincial Legislature, the Court in ascertaining the estate or interest of persons claiming compensation thereunder in an expropriation by the Dominion Crown, will have regard to the laws affecting such estate or interest in the province where the property is situated, notwithstanding sections 25 and 26 of the Expropriation Act.—2. Where a leasehold has been expropriated, the compensation to be made to the lessee for the unexpired term of his lease should cover all reasonable cost of moving, refitting and settling the new premises; loss of time in seeking new location; depreciation of valuable business fixtures and fittings and damage thereto due to moving, etc., and a certain amount for dislocation or disturbance of business, which however cannot be fixed with mathematical certainty. — 3. That the customary test of market value is no test of value in arriving at the compensation to be allowed for a leasehold interest expropriated. That leaseholds rarely have any market value. *THE KING v. ELITE CAFE LIMITED*..... 56

3—*Valuation—Sales in vicinity—Market price.*—*Held*, that where the evidence of value relied upon had reference to a number of sales in the vicinity, only a few of which were for cash, others were never perfected, and others again had been completely abandoned; and further where it is established that there are large areas of land available for building purposes in the vicinity at reasonable prices; such sales must be considered in such a case as made under special circumstances and at prices that cannot establish a market value and cannot be taken as a criterion of the value of property.—2. That the price paid for a small lot cannot be said to establish the market price of large areas, to wit: 200,000 sq. ft.—3. Where the only witness heard for the defence on the question of value was the owner himself, the weight to be given such testimony—as a jury would consider it—is to be measured by the consideration that, as an interested owner, his mind would lean or incline from a state of indifference to a particular object, due to the unhappy upbuild of human nature, and will amount to little more than a definite statement of the maximum figure of his contention. *THE KING v. CYR ET AL.*..... 225

**EXPUNGING**

*See TRADE MARKS No. 3.*

**FISHERIES PROTECTION ACT**

*See REVENUE, No. 11.*

**FOG**

*See SHIPPING AND SEAMEN No. 6.*

**FRAUD**

*See REVENUE No. 12.*

**GAIN AND PROFIT**

*Meaning of.—See REVENUE No. 10.*

**GOVERNMENT ANNUITIES**

*See REVENUE No. 3.*

**GRANT OF LAND**

*See CROWN No. 5.*

**HARBOUR**

*See SHIPPING AND SEAMEN No. 1.*

**IMPEACHMENT**

*See PATENTS FOR INVENTION No. 4.*

**IMPROVEMENTS**

*Right to Compensation for.—See CROWN No. 2.*

*See also PATENTS FOR INVENTION No. 5.*

**INCOME**

*See REVENUE Nos. 3, 8, 10*

**INCOME WAR TAX ACT**

*See REVENUE Nos. 3, 8, 10.*

**INDIAN TITLE**

*See CROWN No. 2.*

**INFRINGEMENT**

*See PATENTS FOR INVENTION.*

*See TRADE MARKS.*

**INGENUITY OF INVENTION**

*See PATENTS FOR INVENTION No. 3.*

**INJUNCTION**

*See PATENTS FOR INVENTION No. 5.*

**INTERNATIONAL CONVENTION**

*See PATENTS FOR INVENTION No. 2.*

**INTERNATIONAL LAW**

*See SHIPPING AND SEAMEN No. 3.*

**INTEREST**

*See CROWN No. 4.*

*See SHIPPING AND SEAMEN No. 8.*

**INVENTION**

*See PATENTS FOR INVENTION Nos. 2, 3.*

**INTERPRETATION**

*See REVENUE No. 2.*

*Of Contract.—See CROWN No. 3.*

**INTRUSION**

*See CROWN No. 2.*

**JUDICIAL DISCRETION**

*As to Costs.—See SHIPPING AND SEAMEN No. 8.*

**JUDICIAL OBSERVATION**

*Re use of evidence before Wreck Commissioner.—See SHIPPING AND SEAMEN No. 7.*

**JURISDICTION**

*See CROWN No. 1.  
See PRACTICE No. 1.  
See SHIPPING AND SEAMEN Nos. 4, 5.*

**LANDLORD & TENANT**

*See CROWN No. 2.*

**LANDS**

*Grant of.—See CROWN No. 5.*

**LAW OF THE UNITED STATES**

*See SHIPPING AND SEAMEN No. 3.*

**LEASEHOLD**

*See EXPROPRIATION No. 2.*

**LIEN**

*For Necessaries.—See SHIPPING AND SEAMEN No. 8.*

**LIMITATION OF ACTION**

*See REVENUE No. 2.*

**LIMITATION OF LIABILITY**

*See SHIPPING AND SEAMEN No. 2.*

**LOCUS STANDI**

*See TRADE MARKS No. 5.*

**MAGAZINE**

*Meaning of.—See REVENUE No. 6.*

**“MANUFACTURED”**

*Meaning of.—See REVENUE No. 9.  
See WORDS AND PHRASES.*

**MARITIME CONVENTION ACT**

*See SHIPPING AND SEAMEN No. 6.*

**MARKET VALUE**

*See EXPROPRIATION Nos. 1, 2 AND 3.*

**MATERIAL MEN**

*See SHIPPING AND SEAMEN No. 4.*

**MEANS**

*See PATENTS FOR INVENTION No. 1.*

**MILITIA ACT**

*See CROWN No. 1.*

**MILITARY PAY**

*Right of Action for.—See CROWN No. 1.*

**MINISTER OF THE CROWN**

*Powers of.—See CROWN No. 3.*

**NAME OF NEWSPAPER**

*See TRADE MARKS No. 4.*

**NARROW CHANNEL**

*See SHIPPING AND SEAMEN No. 7.*

**NAUTICAL ASSESSOR**

*Opinion of.—See SHIPPING AND SEAMEN No. 7.*

**NECESSARIES**

*See SHIPPING AND SEAMEN No. 8.*

**NORTH WEST TERRITORIES**

*Grant of land in.—See CROWN No. 5.*

**NOTICE**

*Vendee without.—See SHIPPING AND SEAMEN No. 8.*

**ORDER IN COUNCIL**

*As Controlling Contract.—See CROWN No. 3.*

**PARTICULARS**

*See PRACTICE No. 2.*

*See PATENTS.*

**PARTY AGGRIEVED**

*See TRADE MARKS No. 5.*

**PATENTS FOR INVENTION**

Abandonment. No. 2.

Amendment.

To Sealed Statement. No. 2.

Anticipation. No. 4.

Claims:

Vague and Indefinite No. 3.

Conception. No. 4.

Conflict. No. 2.

Different Means. No. 1.

Equivalents. Nos. 5 and 6.

Improvement. No. 5.

Impeachment. No. 4.

Infringement. Nos. 1, 5 and 6.

Ingenuity of Invention. No. 3.

Injunction. No. 5.

International Convention No. 2.

Invention:

What Constitutes. Nos. 2 and 3.

Date of. No. 4.

Principle, No Patent for. No. 1.

Rule 343. No. 2.

Specification. No. 6.

1 — *Infringement — Principle — Different Means of Operating.*—Held, that a principle cannot be the subject of a patent, and a claim to every mode or means of carrying a principle into effect amounts to a claim for the principle itself.—Held, further, that a patent may be granted for a principle coupled with a mode of carrying the principle into effect, but such principle may be carried into effect under several patents operating in different ways and by different means. **GRISSINGER v. VICTOR TALKING MACHINE COY. OF CANADA LTD. .... 24**

2 — *Conflict — Rule 343—Undesirability of moving to amend sealed statement—International convention—Abandonment and estoppel—Invention.*—Held, That rule 343 of the General Rules and Orders of this Court requiring the parties, in a conflict action, within ten days after issues joined, to file, in a sealed envelope, a statement giving the date on which they claim to have invented the matter described in their application, was made to avoid placing a person between his duty and his interest, and whilst an application at trial to amend

PATENTS FOR INVENTION

—Continued

such statement by giving a later date, was granted, the Court observed that such an application created an undesirable atmosphere.—2. That in a case of conflicting applications the Court has to decide who is the first inventor and not who first filed an application for a patent, and where the first inventor filed his application after a later inventor, a plea of abandonment or estoppel cannot be set up upon the ground of delay in making his application.—3. The words “not known or used by others before his invention” must be read alone, as they are without any qualification attached to them (*Wright v. Brake Service*, (1926) S.C.R. 434, referred to).—4. Under the International Convention, where inventors have filed applications for patents for invention in the United States and subsequently apply for patents in Canada for the same thing, they are entitled to have the priority of invention determined by the date of the filing of their applications in the United States.—5. That the true inventor is not he who first may say to himself that such and such a thing might be done, but he who works out the idea to completion and success and shows how it is done. **THE GOODYEAR TIRE AND RUBBER COMPANY v. THE RUBBER SERVICE LABORATORIES Co. . . . . 63**

3 — *Patents — Invention — Vague and indefinite claim—Ingenuity of invention.*] Plaintiff in his specification states that “the invention provides a collar of multiple-ply interwoven fabric which is sufficiently stiff to maintain its shape without the employment of starch, and is nevertheless sufficiently pliable to assume the necessary curvature to fit the neck of the wearer without undue rigidity. Accordingly the collar may be washed and if desired, ironed without the supplemental use of starch, which therefore, becomes unnecessary in the laundry operation,” and claim No. 1—the only claim alleged to be infringed—reads as follows: “A shirt collar, made up of fabric having a reinforce interwoven therein and inherently capable in an unstarched condition of receiving and maintaining a curvilinear set.” No claim is made for the fabric or material, nor for the weave or the shape or form of the collar.—*Held*, that, as reinforce interwoven, as a means of stiffening a fabric was part of the prior art, it did not require ingenuity of invention to make a collar as claimed, it being only a matter of the degree of stiffness to be used.—2. That there is no invention in a mere adaptation of an idea in a well known manner for a well known or clear purpose in a well known art, without ingenuity, though the adaptation may effect an improvement which may sup-

PATENTS FOR INVENTION

—Continued

plant an article already on the market.—3. *Held*, further, that the description formulated in claim No. 1 above was too wide and vague in view of the prior art, and fails in that respect to comply with the statute, and is void. **VAN HEUSEN PRODUCTS, INC. v. TOOKE BROS. LIMITED . . . . . 89**

4 — *Date of invention — Anticipation — Impeachment—Conception of idea.*] The invention in question herein was for a process of making cellular cement products suitable for building material and containing insulating properties.—*Held*, That the conception of an idea in some cases may be the merit of an invention, and may not require to be followed by any effort or experimental work of skill; but here the conceiving of the bare idea that voids or cellular spaces would be useful in concrete building materials, would be futile, unless the method or process for doing this successfully in a commercial way was made known. The invention must include and disclose the means of making commercially practical the idea.—2. That an antecedent publication ought not to be held to be an anticipation of a subsequent patent, unless it is clear that the antecedent publication discloses a practical mode of producing a result which is of the same effect as that disclosed in the subsequent patent. The mere publication of an idea that a practical article might be made, without sufficient information or means of knowledge communicated to the public, does not prevent a subsequent and independent inventor of those means, from taking out a patent. **CHRISTIANI v. RICE . . . . . 111**

5 — *Infringement — Injunction [—Improvement—Equivalent.]* Plaintiff, owner of a patent of invention, known as the Hartley patent, for a radio receiving circuit, alleged that the circuit used in the set manufactured and sold by the defendant was an infringement of the said Hartley patent and asked that it be so declared and that the defendant be restrained from further manufacturing and using the said circuit.—*Held*, that even assuming that the defendant's circuit contained component parts and arrangements distinguishing it from the specific circuit disclosed by Hartley, and were patentable improvements, nevertheless, the Hartley invention being new and useful, the fact that it was more useful with the subsequent improvement, afforded no ground for infringing the original invention by using it with the subsequent improvement. **WESTERN ELECTRIC COMPANY LTD. v. BELL . . . 213**

## PATENTS FOR INVENTION

—*Concluded*

6 — *Infringement — Specification — Equivalents—New result—New method of applying a new principle and a well known principle.*—*Held*, that in respect of subject matter inventions may be divided into two classes, first that kind of invention which consists of the discovery of a new method of application of a new principle, and second, that kind which is to be found in some particular new method of applying a well known principle. As to the first, upon the ground that the patentee is not bound to describe every method by which his invention could be put into effect; the Court will regard jealously any other method embodying the same principle. As to the second, the use of other methods is not contemplated by the patentee, and should not be included within the ambit of his claims.—2. That it is important to ascertain what is the exact invention that is protected, and which is said to be infringed and if the invention belongs to the former class, then the doctrine of infringement by the substitution of equivalents applies. On the other hand if the invention belongs to the second class, and is only for an improved method of attaining an old object, the monopoly would be for that particular improved method only, and only by using that particular method would a person be held to have infringed.—3. Held further that when an invention consists in the production of a new result, the patentee is not tied down to the particular means, or the identical parts mentioned in his specification. In other words one cannot make use of the novel principle of an invention, the carrying of which into effect is the real substance of the patentee's invention, by substituting obvious equivalents for some of the parts mentioned in the patentee's specifications, and thus escape infringement. **CANADIAN RADIO PATENTS, LIMITED ET AL V. THE HOBBS HARDWARE COY. LTD.** . . . . . 238

*See also* PRACTICE.

**PRACTICE — Jurisdiction — Third Party Notice—Subject and subject.**] The Crown brought action on certain bonds executed by the defendants in its favour. The defendants allege that by reason of an agreement between them and the third party, the third party agreed to indemnify them, and they now seek to bring the third party before this Court to have the issue between them determined here.—*Held*, that the matter in issue between the defendants and the third party is one over which the Exchequer Court of Canada has no jurisdiction, and that the third party notice filed and served herein should be set aside.—2. That rule 262 of the General Rules and Orders of this Court respecting third parties, was framed

PRACTICE—*Concluded*

to meet the case where the Crown being defendant might be interested in having other parties than itself as defendant before the Court.—3. That the Court also has jurisdiction to entertain an issue between a defendant and a third party in cases where it is given jurisdiction as between subject and subject. **THE KING V. CONSOLIDATED DISTILLERIES LIMITED AND CONSOLIDATED EXPORTERS CORPORATION LIMITED (THIRD PARTY)**.. 101

2 — *Patents — Further particulars — Rule 28—English Order LIII A.*—*Held*, that under Rule 28 of the General Rules and Orders of this Court, the Court or a judge thereof may order such further and better particulars as such Court or judge may see fit.—2. That the practice laid down in Order LIII A of the High Court of Justice in England has not so far been adopted in this Court. That, however, said Order was only declaratory of what the practice was previously.—3. That in an action for the alleged infringement of a radio receiving set the plaintiffs should give the following particulars, namely: showing what tuned radio frequency sets claimed to be infringements of plaintiffs' patent have been or are being sold and used by the defendant, so far as known to the plaintiffs; and also showing the claims of the said patent which are alleged to be infringed by the defendant. **CANADIAN RADIO PATENTS, LIMITED V. HIGEL RADIO, LIMITED**..... 107

*See also* PATENTS FOR INVENTION No. 2, *Re amending sealed statement.***SHIPPING AND SEAMEN No. 4 AND 5. Re Admiralty Rules, etc.**

**PRESCRIPTION — Commercial transaction—Article 2260 Civil Code—Law of the Province of Quebec.**] The *Sarnor*, owned by claimants and another, was requisitioned by the Crown during the war, and handed over to the C.S.S. Lines to be operated. The C.S.S. Lines advanced various sums to B. & J. amounting to \$25,000 in connection with the *Sarnor*, and the said B. & J. transferred their interest of 60 per cent in the *Sarnor* to the C.S.S. Lines as collateral security for the repayment of the said sum. On the 29th September, 1924, the *Sarnor* became a hulk and was destroyed. By judgments on the Petitions of Right by the co-owners of the *Sarnor*, B. & J. became entitled to recover 60 per cent of \$11,000, fixed as the compensation for the *Sarnor*, and the C.S.S. Lines applied to have this amount paid to them as assignee of B. & J. B. & J. denied any liability and contended that the transaction was of a commercial nature and was prescribed by five years.—*Held*, that it was not in the company's ordinary course of



**PRESCRIPTION—Concluded**

business to advance money for the repair of vessels belonging to others, and that the transaction in question was not one of a commercial nature within the meaning of sub-par. 4 of Article 2260 of the Civil Code, of the Province of Quebec, but was in the nature of a loan only prescribed by thirty years. *BONHAM ET AL V. THE KING AND CANADA STEAMSHIPS LINE LTD.*..... 32

**PRIORITY OF INVENTION**

*See PATENTS FOR INVENTION No. 2.*

**QUANTUM MERUIT**

*See CROWN No. 3.*

**RENTAL OF PLANT**

*See CROWN No. 4.*

**RESERVE FUND**

*See REVENUE No. 8*

**REVENUE**

Agency. No. 10.

Bond, for export. Nos. 1 and 2.

Cancellation of on false representation. No. 12.

Effect of, on Surety. No. 12.

Burden of Proof. Nos. 3 and 5.

Condition of Bond. No. 2.

Consumption or Sales Tax. No. 7.

Customs Act. Nos. 1 and 12.

Dividends. No. 8.

Excise Act. Nos. 1 & 2.

Exemptions. Nos. 3, 4 & 6.

Exportation. Nos. 4 and 5.

Gain and Profit. No. 10.

Government Annuities. No. 3.

Income. Nos. 3, 8 and 10.

Income War Tax Act Nos. 3, 8 and 10.

"Issued Exempt." No. 3.

"Leads." No. 9.

Limitation of Action. No. 1.

"Magazine." No. 6.

Manufacture for Own Use. No. 7.

"Manufactured."

Meaning of. No. 9.

"Probable Cause for Seizure." No. 11.

Profits Undistributed. No. 8.

Reserve Fund. No. 8.

Sales Tax. Nos. 4, 5, 6 and 9.

Special War Revenue Act. Nos. 4, 5, 6, 7 and 9.

"Unavoidable Cause." No. 11.

Voluntary Association. No. 10.

1—*Excise Act—Bond for exportation—Liability thereunder—Limitation of action—Section 279, Customs Act—Substantial compliance.*] The B.C.D. Co. imported certain liquor into Canada, and warehoused it without paying duty. Later it made entry outwards of this liquor for exportation to G. The defendant gave a bond in double the amount of the duty, that the said liquor would be exported, and to the place mentioned in the entry, and if so exported, and proof thereof

**REVENUE—Continued**

made, then the bond to be void; otherwise to remain in full force and virtue. This liquor never reached its declared destination, but was transhipped at sea; it was not re-landed in Canada.—*Held*, where the bond is one specifically required by a statute and the obligation of the bond is to secure the absolute exportation of specific goods to a fixed destination, which in this case admittedly was not done, and where the goods have not been lost or destroyed, the defendant is liable upon the bond.—2. The statutory provisions make it impossible for a Court to give effect to the defence that the goods not having been re-landed in Canada, there was an actual exportation and a substantial compliance with the statute. Relief upon this ground can come only from the Crown, and not from the courts.—3. That the limit of three years, mentioned in section 279 of the Customs Act, within which certain actions must be brought, does not apply to a specialty contract or to a suit upon a bond given under the Act. This limitation relates to penalties and forfeitures imposed by particular sections of the Act. *HIS MAJESTY THE KING V. THE FIDELITY INSURANCE COY. OF CANADA.*..... 1

2—*Excise Act—Bond for exportation—Liability thereunder—Power to extend conditions.*] Defendants furnished bonds under the Excise Act, the conditions of which read as follows: "Now the condition of the above written obligation is such that if the said goods and every part thereof shall be duly shipped, and shall be exported and entered for consumption or for warehouse at San Jose, Guatemala, aforesaid, and if proof of such exportation and entry shall, in accordance with the requirements of the Warehousing Regulations in that behalf, be adduced within ninety days from the date hereof, to the satisfaction of the said Collector of Inland Revenue for the division of Vancouver, B.C., or if the above bounden Vancouver Breweries shall account for the said goods to the satisfaction of the said Collector of Inland Revenue for the said Inland Revenue Division of Vancouver, this division, then this obligation to be void, otherwise to be and remain in full force and virtue." On an agreement of facts filed it was admitted that the goods in question were not re-landed in Canada. *Held*, that such admission cannot be construed as of greater consequence than if that fact had been established by oral evidence at trial, and that it cannot be inferred from such admission that the conditions of the bond had been complied with.—2. That the period of 90 days mentioned in the bond, is not only the time within which the exporter must furnish proof of exportation and entry of

## REVENUE—Continued

the goods for consumption at the nominated destination, but applies equally to the accounting for the said goods to the satisfaction of the said Collector of Inland Revenue, which accounting must also be within the said 90 days.—3. The bonds themselves fixing the time within which their conditions must be performed, the court has no power to extend said period, and whether or not there was a belated compliance with the spirit of the statute, the regulations, and the bond, is not material to this action. *THE KING v. THE VANCOUVER BREWERIES LTD. ET AL* ..... 14

3 — *Government Annuities — Income — 7-8 Ed. VII, c. 5—Income War Tax Act, 1917 — Exemptions — Burden of proof — “Issued exempt.”*] *Held*, that the annuity paid to a person by virtue of a Dominion Government annuity contract, issued under the provisions of 7-8 Ed. VII, c. 5, is “income” within the meaning of the Income War Tax Act, 1917, and is not issued free of taxation.—2. That any representation made to the contrary by any officer of the Crown, cannot alter the law nor bind the Crown in any way.—3. That the onus of proving that an income is exempt from taxation under the Taxing Act, is upon the one claiming such exemption.—4. That the annuity in question not having been “issued exempt” from taxation, and, in any event, not being in the nature of a “bond” or “security” mentioned in sec. 5, subsec. i of the Taxing Act (now sec. 4, subsec. j, R.S.C., 1927, ch. 97) is not exempt from taxation, and was properly taxed. *KENEDY v. MINISTER OF NATIONAL REVENUE* ..... 36

4—*Special War Revenue Act, 1915—Sales Tax—Proviso—Exemption from tax—Proof of export—Exportation to be by manufacturer.*] The Special War Revenue Act, 1915, imposed a consumption or sales tax on all goods manufactured and produced in Canada, and there sold by the manufacturer or producer, provided however, that when such goods were sold and exported the sales tax was not payable.—*Held*, that the words sale and export as used in the Act, mean a sale and export by the manufacturer or producer, the exportation being an act consummating a transaction to which the tax does not apply.—2. That the language of the proviso relates only to exportation by the manufacturer, and cannot be extended to a case where the manufacturer loses control of the goods by selling and disposing of the same to a purchaser in Canada. *THE KING v. FROWDE LIMITED* ..... 119

## REVENUE—Continued

5 — *Sales Tax — Exportation—Special War Revenue Act, 1915—Proof of Exportation.*] The Dominion Government sought by information filed by the Attorney-General to recover from the defendant certain moneys alleged to be due to the Crown for the sales tax and gallonage tax on beer manufactured and sold in Canada. The defendant pleaded that the beer in question was sold for export to a purchaser in the United States and was in fact actually exported to the United States in conformity with such sales.—*Held*, that the exportation of goods from Canada under the proviso to section 19 B.B.B. of the Special War Revenue Act, 1915 (now paragraph “A” of subsection 2 of section 86 of the R.S.C., 1927, chap. 179), is a question of fact to be determined on the evidence.—2. That where it is established that goods were sold to a person residing in the United States, and invoiced to him there via train to an outport in Canada, and there loaded on a vessel under the supervision of the Customs officer, who then stamps the B. 13, and clears the vessel for some United States port, such goods are duly exported within the meaning of the statute and regulations made thereunder. *THE KING v. CARLING EXPORT BREWING AND MALTING COY. LTD.* ..... 130

6—*Special War Revenue Act, 1915—Sales Tax — Magazine — Exemption — Advertisement.*] The defendant printed a pamphlet for the Canadian Kodak Company called “Kodakery” for which it was paid from \$1,100 to \$1,200 a month. It refused to pay sales tax on the ground that the pamphlet in question was a “magazine” and as such exempt therefrom. The pamphlet was nothing but one of the numerous means of advertising, and the articles and advertisement therein referred only to the goods sold by the C.K. Co., and such articles with their illustrations were all intended to draw the attention of the public to the superiority of their goods. This pamphlet was given away with each kodak sold, and only brought in a sum of between \$30 and \$40 a month by way of subscription.—*Held*, that such a pamphlet was a mere advertisement for the Kodak company’s goods which was meant to increase their sales and was not a “magazine” within the meaning of subsection 4 of section 19 B.B.B. of the Special War Revenue Act, 1915.—2. That as both the Customs Tariff Act and the Tax Act are revenue acts, a clear definition in one of these enactments of a term common to both may reasonably be referred to for the purpose of dispelling any ambiguity of meaning in the other. [*Bradshaw v. Minister of Customs and Excise* (1927) 2 D.L.R. 490; (1927) 4 D.L.R. 278; (1928)

## REVENUE—Continued

2 D.L.R. 352 referred to.] *THE KING v. MILN-BINGHAM PRINTING COMPANY LIMITED*..... 133

7—*Special War Revenue Act, 1915—Consumption or sales tax—Goods manufactured for person's own use—Sections 86 and 87.*] The plaintiff, by his Information, claims a consumption or sales tax on certain books, forms, etc., printed and made by the defendant for the use of its various offices or branches throughout Canada and elsewhere.]—*Held*, that sections 86 and 87 of the Special War Revenue Act (R.S.C., 1927, c. 179) must be read together. That under section 87, when goods are manufactured and produced in Canada, not for sale, but for the use of the manufacturer or producer, such transactions are for the purposes of the Act to be regarded as sales, and that in consequence, the books, forms, etc., referred to are subject to the sales or consumption tax. *THE KING v. BANK OF NOVA SCOTIA*..... 155

8—*Income War Tax Act, 1917—Undistributed profits—Dividends—Reserve fund—14-15 Geo. V, c. 46, sec. 5, sub-sec. 9.*] *The H. P. & L. Co. sold to H. & E. M. Co.* its entire assets which were composed of shares, plus a "reserve fund," representing an accumulation of undistributed profits and gains from 1917 to 1926, set aside for the exclusive benefit of holders of permanent shares, to be from time to time divided and paid to shareholders. For the purpose of this agreement, the value of a share was fixed at \$227, being \$100 for the share and \$127 being the proportion of the reserve coming to each shareholder per share held, the \$100 paid cash, and the reserve was only finally paid after all liabilities had been discharged. The assessment herein was made in respect of the payment of \$10,127.95 to the appellant, during the taxation period of 1926, coming to him as a shareholder of H. P. & L. Co., out of the distribution of the proceeds of the said sale of its property and assets, in the form of a dividend, to the extent that the company had on hand undistributed profits. Payment was refused on the ground that this amount was capital, and that even if it was not capital then only that part of the reserve accumulated since 1921 should be taxed.—*Held*, that by the mere setting of these figures of \$227 per share, the company could not change the fact of the existence of a fund which under its by-laws could and would have been distributed as dividends, and that a shareholder receiving this sum must pay income tax on that portion of the price which represents the distribution of the reserve or accumulated profits.—2. That under sec. 5, ss. 9 (14-15 Geo. V,

## REVENUE—Continued

ch. 46), dividends made up of undistributed profits and paid or payable after 1921, whether accrued before 1921 or not, as under the circumstances of this case, are liable to income tax.—3. That the reserve fund herein being made up of gains and profits, it would, even prior to the amendment (14-15 Geo. V, c. 46, sec. 5, ss. 9), under secs. 3 and 4 of the Act, be treated as a dividend made up of profits and gains and thereby become liable to the tax. That the said amendment of the Act in 1924 was enacted for the purpose of removing any possible doubt or contention—*ex majore cautela*. (Re Judges' Salaries (1924) Ex. C.R. 157, referred to.) *HOPE v. MINISTER OF NATIONAL REVENUE*..... 158

9—*Special War Revenue Act, 1915—Sec. 19 B.B.B., ss. 4—Sales Tax—"Manufactured"—"Leads."*] The defendant carried on both the business of a saw mill and the business of coal mining, and manufactured at its mills "Leads" for use in its mining operations. In some isolated cases it would purchase such "Leads" in the market for the same purpose. It now refuses to pay sales tax upon these "Leads" manufactured by it, claiming that they come within the exceptions contained in ss. 4 of sec. 19 B.B.B. of the Special War Revenue Act, 1915. These "Leads" are logs put through the mill, sawn in half longitudinally and again into the required lengths for the use aforesaid.—*Held*, that such "Leads" are manufactured at the defendant's mill and used by them not in the course of manufacturing the same, but are used in a different and distinct undertaking or operation quite apart from manufacturing of the same at their mill and that they are manufactured articles bought and sold on the market, and clearly come within the provisions of section 19 B.B.B. aforesaid, and do not fall within the ambit of ss. 4 of said section of said Act, and are subject to the sales tax. *THE KING v. MIRAMICHI LUMBER COY. LIMITED*..... 172

10—*Income Tax—Voluntary association—Gain and profit—Agency—Income War Tax Act, 1917, and amendments.*] The appellant is a voluntary association of people,—incorporated under the Saskatchewan Companies' Act, pursuant to a memorandum of association, confirmed by Act of the Legislature—who pool together their wheat or grain crops so as to dispose of them to best advantage, with the idea of obviating and reclaiming the waste experienced when each farmer personally disposed of his crop. The officers and employees are paid wages, as part of the operating expense, which are not gains or profits depending on the

**REVENUE—Continued**

state of the market. A farmer takes his grain to the elevator, obtains a certificate or receipt for the same together with a first instalment payment, previously adjusted, until he finally gets the last instalment, subject to three deductions: *First*, a deduction for operating expense. *Second*, one for elevator reserve, and *third*, one for commercial reserve. The Crown has assessed the last two for income tax as being income, gains or profits of the association. Hence the appeal. These deductions belong to the farmer and must be accounted for to him and the association retains nothing but the expense, including capital to acquire elevators for the farmers to handle the grain in question, the said deductions being made solely to earn income to the farmers and not to the association.—*Held*, that the deductions in question are but loans or advances under contract made by the farmers out of the price of their grain to the appellant for carrying on the business and acquiring elevators, which are all repayable to the grower, and are not gains or profits of the association within the meaning of the Income War Tax Act, 1917, and are not taxable under the said Act.—(2) That “profits and gains” must not be regarded loosely, the words as used in the taxing Act must be read in conjunction with the meaning of the words used in the context. *SASKATCHEWAN CO-OPERATIVE WHEAT PRODUCERS LTD. v. MINISTER OF NATIONAL REVENUE*..... 180

11 — *Seizure — Customs Act, c. 42, R.S.C. (1927), Sec. 183*—“Unavoidable cause”—“Probable cause for seizure”—*R.S.C. (1927), c. 43, Sec. 27*.] The defendant ship was seized by the Customs Authorities under sec. 183, ch. 42 of R.S.C. (1927), as being in Canadian waters contrary to its provision. The defence alleged that the entry into Canadian waters was due to the fact that the sole man in command, during the illness of the Master believed himself without the three mile limit. The anchorage was made in the dark and this man had been battling with the elements for two days alone, had only had three hours sleep in 72 and was exhausted.—*Held*:—That, in the circumstances, he could not be regarded as a mariner in ordinary conditions, and could not be called upon to take such precautions as would in other circumstances be required by this Court, and that the entry was due to “unavoidable causes.”—2. That the phrase “unavoidable cause” as found in sec. 183 aforesaid, is a very wide one, and depends upon the circumstances of each particular case, and no definition should be attempted, or could, in ever varying circumstances, be given of it.—3. That the

**REVENUE—Concluded**

word “probable” in the 4th line of sec. 27 of c. 43, R.S.C. (1927), means the same as “reasonable.” *THE KING v. the MARY C. FISCHER*..... 207

12 — *Customs — Bond — Cancellation — Fraud—Effect upon surety*.] The facts in this case are similar to that in *The King v. The Fidelity Insurance Company of Canada*, (1929) Ex. C.R. 1, except that in this case the bond given for the due exportation of the liquor according to its terms, and which was sued on, had been cancelled by the Customs authorities and had been surrendered to the surety. This cancellation was procured by fraud; the same having been obtained upon production of a forged document which the Collector believed to be genuine.—*Held*,—That when the release of the principal debtor by the creditor is accomplished by means of fraud, on the part of the former, the surety is not discharged, even if he is not a party to the fraud by which the release was secured. *THE KING v. THE CANADIAN SURETY CO.*..... 216

**RIGHT OF ACTION**

*See TRADE MARKS No. 5.*

**RIPARIAN RIGHTS**

*In inland lake.—See CROWN No. 5.*

**RULES**

*Re Particulars.—See PATENTS FOR INVENTION No. 2.*

**SALES TAX**

*See REVENUE Nos. 4, 5, 6, 7 AND 9.*

**SEIZURE**

*Of Ships in Canadian Waters.—See REVENUE No. 11.*

**SHIPPING AND SEAMEN**

- Bill of Lading. No. 3.
- Canada Shipping Act. Nos. 2 and 6.
- Collision. Nos. 1, 6 and 7.
- Costs: Judicial Discretion. No. 8.
- “Engine Space Deducted.” No. 2.
- Fog. No. 6.
- Good Seamanship. No. 1.
- Harbour. No. 1.
- Interest. No. 8.
- International Law. No. 3.
- Jurisdiction. No. 4.
- Limitation of Liability:
  - Action for. No. 2.
- Maritime Conventions Act. No. 6.
- Narrow Channel. No. 7.
- Necessaries. No. 4.
- Lien for. No. 8.
- Practice. Nos. 4 and 5.
- Tonnage. No. 2.
- Wages. No. 5.

1 — *Collision — Good seamanship — Harbour*.] On June 19, 1927, at 9.43 p.m., the night being fine and clear, the *D.*, a passenger boat, was moored in

## SHIPPING AND SEAMEN—Continued

Quebec Harbour heading down stream and had all required lights, and was otherwise lighted up as a passenger boat. There was a flood tide of three miles an hour and the *D.* being bound for Montreal had to turn to go up the river. The river at this point is about 3,000 feet in width. The *D.* when leaving dock gave three blasts to warn ships in dock. There was then no other ship in sight except one coming up from the Island of Orleans. After working the engines for 7 minutes to clear the shore, the *D.* went ahead and started to turn, the flood tide helping her. The collision took place 6½ minutes later about 600 feet from the south shore, the starboard bow of the *L.* striking the port-quarter of the *D.* Before porting her helm, the *D.* gave one blast indicating she was directing her course to starboard. The *L.*, a freighter, was then below Buoy 140 B., and showed her red light, but suddenly, as the *D.* was pointing to the south shore, the *L.*, which was over half a mile away, starboarded her helm, changed her course and began to show her two lights, then a green light only. As the *L.* changed her course, the *D.* gave a second short blast, to which the *L.* replied with two short blasts, indicating she was altering her course to port, which course she continued to follow until the collision. When 750 feet from the *D.*, the *L.* reversed her engines, but too late. It was impossible for the *D.* to go full speed for fear of grounding, but to ease the blow she starboarded her helm, put her port engine astern and the starboard engine ahead.—*Held*, on the facts, that by attempting to pass starboard to starboard instead of going between the north shore and the stern of the *D.*, and by starboarding her helm when she did the *L.* violated the rules of good seamanship and was wholly to blame for the collision.—2. That although a vessel emerging from a dock must be navigated with utmost care, yet other vessels should be manoeuvred with consideration to the difficulties of the vessel that is emerging. The manoeuvres and caution to be taken in such cases all depend on the distance at which the ships sight each other. OCEANIC SS. NAVIGATION v. THE SS. *Lingan* and THE LINGAN SS. Co. LTD. v. THE SS. *Doric*. . . . . 71

2 — *Limitation of liability proceedings*—“*Engine space deducted*”—*Canada Shipping Act (R.S.C. 1927, c. 186, sec. 904)*—*Tonnage*.]—*Held* (reversing the judgment appealed from), that the words “engine-room space deducted” as found in sec. 904, ch. 186, Canada Shipping Act, R.S.C. 1927, and in the corresponding provision of the Merchant Shipping Act, 1894, refers to the deduction allowed for propelling power as appearing in the certificate of registry.—2. That in calcu-

## SHIPPING AND SEAMEN—Continued

lating the tonnage of a ship in limitation of liability proceedings, the tonnage allowed for the power propelling space, must be added to the register tonnage. EASTERN STEAMSHIP CO. LIMITED v. CANADA ATLANTIC TRANSIT CO. . . . . 103

3 — *Bill of lading—Law of United States—International Law.*] The plaintiff contracted with the defendant ship for the carriage of a cargo of wheat from Buffalo to Montreal. The plaintiff was an American, the ship was an American ship, and the contract was made in the United States. The defendant alleged that the contract or bill of lading was issued subject to an Act of Congress of the United States known as the Harter Act, the terms and conditions of which applied to and formed part of such contract, while the plaintiff alleged that as this Act was not referred to or made part of the contract it did not apply.—*Held*,—That, under the circumstances, the obligations of the parties under this contract were governed by the laws of the United States.—2. That under the laws of the United States the Harter Act did not need to be referred to in the bill of lading to become binding on the parties and that the said Act is to be applied in this case.—3. The bulkhead of the *B.* was watertight up to the main deck, which was 17½ feet above the keel.—*Held*,—That, as the *B.*'s draught was 13 feet 11 inches and had a freeboard of 3 feet 7 inches above water line, she was seaworthy for the voyage in question. JAMES RICHARDSON & SONS LTD. v. THE SS. *Burlington*. . . 186

4 — *Practice — Jurisdiction — Material men.*] The *A.* was under arrest by process of the Court, in a joint action for master's and seaman's wages, when she was re-arrested by the plaintiffs, under three separate warrants, in actions for necessities and supplies furnished to the *A.* in the port of Charlottetown, to which she belonged and the owners of which were domiciled in Canada.—*Held*,—That the ship being under arrest of the Court, this Court had jurisdiction in the matter, but that the issuing of warrants and the re-arrest was unnecessary.—*Semble*:—That where a ship has been sold and its proceeds are in Court, material men can bring their claim before the Court by petition, and the fact that the *A.* had not yet been sold afforded no ground for a different course. BRUCE STEWART & Co. LTD. v. THE SHIP *Amla* . . . . . 192

5 — *Arrest for wages — Practice — R.S.C. (1927), c. 42, sec. 183.*] The captain, mate and certain seamen of the *A.* had the ship arrested in a joint action *in rem* for wages. The claim made was for

## SHIPPING AND SEAMEN—Continued

one month and some days, being not only the amount actually earned, but also for substantial sums not earned, which were more in the nature of damages.—*Held*,—That wages cannot be sued for until earned, and that where a hiring at so much a month is made, no wages are or can be earned until the whole month's service is performed.—The owner of the ship defendant appeared unconditionally and later raised a question of jurisdiction.—*Held*,—That in Admiralty where the defendant wishes to raise an objection to the jurisdiction of the Court, in a case where the Court has jurisdiction over the subject matter, he should appear under protest whether the action be *in rem* or *in personam*.—*Held*,—That a Master suing for wages and disbursements is bound to furnish accounts before bringing his action, otherwise he will not be entitled to his costs. [The *Fleur de Lis* (L.R. 1 A. & E. 49) referred to.] WILLIAM P. BURKE ET AL. v. THE SHIP *Amla*. . . . 194

6 — *Collision — Article 18 of Regulations — Fog — Canada Shipping Act—Maritime Convention Act (R.S.C., Ch. 126).*] A collision occurred at 11.14 a.m. on December 19, 1928, in Burrard Inlet, Vancouver Harbour, B.C., between the *H.* inward bound and the *P. A.* outward bound. The weather was calm but with a dense fog and the tide at last of flood. The *P. A.* was running at 12 knots an hour on a course of S.W.  $\frac{3}{4}$  S., which she held till the collision was imminent. She stopped her engine half a minute before collision upon hearing the fog whistles from a tug to port, and again from a ship to starboard, which turned out to be the *H.*, which was first seen emerging from the fog about 300 feet away, between 2 and 3 points on her starboard bow. She thereupon put her helm hard astarboard with full speed ahead, and the stem of the *H.* cut into her on the starboard side, a little forward of amidship. She was still swinging at moment of impact, with a speed of 11 knots. The *H.* passed Pt. Atkinson at 10.05 on a course of E. by N. at a speed of 4 knots, but shortly after decided not to try to enter the narrows, but to proceed cautiously by "slow ahead" and "stop" alternatively to usual anchorage in English Bay, altering her course at 10.25 to E.N.E. decreasing speed to 3, then 2 knots, and owing to signals of other vessels, again at 10.50 changed to E.S.E. giving proper signals. On this course, as early as 11.12 a.m. she heard the *P. A.*'s signals about 5 to 6 points on her port bow, upon which she stopped her engine and blew her whistle. This was answered by the *P. A.*, and after exchange of 3 or 4 whistles the *P. A.* emerged about 3 or 500 feet away heading for the *H.*, or at least, across her bow.

## SHIPPING AND SEAMEN—Continued

The *H.* reversed full speed, put her helm hard a-port, but too late to avert the impact. The *H.* knew she was crossing the main stream of traffic.—*Held*,—That, on the facts, both vessels were to blame, but that as there was a great distinction between the conduct of the two vessels, the *P. A.* having deliberately violated the Regulations in a gross degree, and the *H.* having erred in the manner of endeavouring to carry them out, they were not equally to blame, and the "degree of fault" was fixed at  $\frac{2}{3}$  and  $\frac{1}{3}$  respectively.—2. That as to the costs in these cases of unequal apportionment, the Court has an "unfettered discretion" over them, and the Court condemned the *P. A.* to pay  $\frac{2}{3}$  of the cost in both actions and the *H.*  $\frac{1}{3}$  thereof. [The *Young Sid* (1929) 45 T.L.R. 389 (C.A.) referred to.]—3. That in fog, article 16 not only requires a ship's engines to be stopped when the "circumstances admit" of it, but also to "then navigate with caution until danger of collision is over," and that such navigation includes the prompt reversal of her engines to take her way off to a standstill or get her way on astern as may be necessary, and such manoeuvres come with the "precautions" prescribed in general for the "ordinary practice of seamen," etc., in Article 29. FRED OLSEN & COY. v. THE *Princess Adelaide* and THE CANADIAN PACIFIC RY. Co. v. THE *Hampholm*. . . . . 199

7 — *Collision — Narrow channel — Article 25—Rule 8 of Regulations for St. Lawrence River.*] A collision occurred between the *I.*, and the *McG.*, soon after midnight, on May 12, 1927, in a narrow channel of the St. Lawrence River between buoys 23 and 24, south of the fairway, and close to buoy 23. The weather was fine and clear, somewhat overcast, but without haze, and visibility was good. Both ships were going at full speed. The *McG.* outbound, going with the stream and a tide of 3 knots an hour and the *I.* inbound. When the *McG.* was abreast of the buoy 24 she gave a one-blast signal which was answered by the *I.* when abreast of buoy 23, indicating that they would pass port to port. The *I.* always going at full speed, then directed her course to port instead of keeping to starboard, contrary to the signal given, and to Article 25, shoving the *McG.* to the south; and the collision occurred, the *I.* striking the *McG.* on the port side just amidships, with her port bow.—*Held*: (Varying the judgment appealed from), that as the two vessels were travelling port to port after exchanging signals indicating they would keep their course, the speed of the *McG.* in no way contributed to the collision, but that the collision was entirely due to the fault of the *I.* in not

**SHIPPING AND SEAMEN—Concluded**

keeping to starboard of the channel and neglecting to slow up or stop as good seamanship required.—2. That the ship primarily at fault can only discharge her liability in that respect by very clear and plain evidence of the other's fault. 3. That the descending vessel coming with the current is entitled to consideration, and an up-coming vessel, in a narrow channel, where navigation is intricate, seeing another vessel coming down stream, must stop, and if necessary come to a position of safety below the point of danger and there remain until the channel is clear.—4. That where in such channel a ship fails to keep to starboard she must, at her own risk, right herself back to her proper position.—5. That where the court is assisted by a Nautical Assessor, his opinion on questions submitted to him as such may be filed of record with the judgment of the Court [SS. *Melanie* (1919) 36 T.L.R. 507 referred to and followed.]—*Judicial observation*, that the practice, in some districts, of filing the evidence taken before the Wreck Commissioner as evidence before the trial judge is irregular and should be discouraged. **STANDARD OIL OF NEW JERSEY v. THE *Ikala* AND INDUSTRY SS. Co. v. THE *James M. McGee***..... 230

8—*Lien for necessaries—Vendee without notice—Interest—Costs—Judicial discretion.*]—*Held.*—(Affirming the judgment appealed from) that the vendee of a ship without notice of a claim for necessaries against her, who offers to suffer judgment for the amount of such claim is not liable for interest upon the same.—2. The Court following the decision in the case of *The Young Sid* (1920) P. 190 refused to interfere with the exercise of the trial judge's judicial discretion in disallowing costs. **WALTER W. HODDER Co. INC. v. THE SHIP *Strandhill***..... 253

**SPECIAL WAR REVENUE ACT, 1915**  
*See* REVENUE Nos. 4, 5, 6, 7, 9.

**SPECIALTY CONTRACT**  
*See* REVENUE No. 1.

**SPECIFICATION**  
*See* PATENTS FOR INVENTION No. 6.

**SURETY**  
*Effect on, of Cancellation of Bond in error.*  
*See* REVENUE No 12.

**TENANT**  
*Rights of, as to improvements.* *See* CROWN No. 2.

**THIRD PARTY NOTICE**  
*See* PRACTICE No. 1.

**TITLE TO LANDS**  
*By Indians.—See* CROWN No. 2.

**TONNAGE**

*See* SHIPPING AND SEAMEN No. 2.

**TRADE-MARKS—Infringement—Packings common to the trade—Form, size or colour—'Get-up.'**] For some years previous to the date of plaintiff's registration of its trade-marks in question herein, it had been common to the trade, including the defendant, to market cod liver oil in pink or red packings, similar to the plaintiffs. The defendant's package complained of however bore his name prominently at the top. This was so also of the label on the bottle itself inside. Plaintiff's outside package also bore the name "Wampole" in large letters at top. This being the essential characteristic of the two trade-marks.—*Held:* That when the goods of one manufacture are so packed or arranged externally as to resemble those of others engaged in the same trade (as in the case of starch and tea), the similarity common to all does not of itself expose the manufacturer to an action for infringement, but makes it incumbent upon him to take care that his distinguishing mark is really distinguishing. The imitation or similarity must be in respect to matters which are not common to the trade, but special to one trader. And in this case the manufacturer's name, printed in large letters at the top being really distinguishing, the public could not be deceived, and the action was dismissed.—2. A trade-mark does not lie in each particular part of the label, but in the combination of them all. It is the impression produced by the mark as a whole, *dans son ensemble*, in its "get-up" and which strikes the eye, that must be considered.—3. The user of a trade-mark does not result in what the person using it may have in mind; but what the public would obviously understand upon looking at the package.—4. There can be no trade-mark right in the mere form, size or colour of a package containing an article used commercially.—5. Where two traders are selling the same medicine, and the one prints on his bottle directions for its use, assuming such directions to be correct, it is no infringement of such label to copy or repeat such directions; otherwise his liberty as a manufacturer would be unduly interfered with. **HENRY K. WAMPOLE & Co. LIMITED v. HERVAY CHEMICAL Co. OF CANADA LIMITED.** 78

2 — *Trade-Mark and Design Act — "Calculated to deceive"—User different from registered trade-mark.*] Plaintiff was the owner of a registered trade-mark "Honey Dew" used in connection with the sale of a certain orange flavoured drink. The shops where it was sold had a characteristic interior arrangement and equipment and the mark had become well known to distinguish the beverage sold by plaintiff from that of others. The

TRADE-MARKS—*Continued*

defendant subsequently registered the words "Flora Dew" as its trade-mark for a similar drink, displaying said trade-mark in and about its shops much in the manner employed by the plaintiff, and in a pronounced manner following the interior arrangement and equipment of the plaintiff's shops.—*Held*, on the facts, that the defendant could not be said to have adopted his mark with a view of giving a distinctive description to his beverage, but rather to take advantage of the business connections and efforts of a rival trader, and such trade-mark being liable to mislead, should be expunged from the Register.—2. That in considering whether one mark is an infringement of another resemblance between the two marks must be considered with reference to the ear as well as to the eye.—3. That the words of the Trade-Mark and Design Act "calculated to deceive" may mean either "intended to deceive" or "likely to deceive," and that the prohibition applies where the case falls within either meaning.—4. Plaintiff's trade-mark, as registered, consisted of the words "Honey Dew" in scroll, the word "Dew" being almost immediately under "Honey," whereas he has used the words "Honey Dew" in plain letters, and following one another.—*Held*, that although the practice of departing from the precise form of a trade-mark as registered is objectionable and dangerous to the registrant, inasmuch as here, the mark as used was not substantially different from the mark as registered, such deviation should not deprive the plaintiff of his right to protection. HONEY DEW, LIMITED, v. RUDD ET AL. . . . . 83

3 — *Misleading — Expunging—Trade Mark and Designs Act.*] In 1923 the respondent registered, and began using in Canada, a trade mark consisting of a triangle bearing the words "Deer Skin Finish" above the words "Dan Dobbs," and a triangle below bearing the words "Character Hats," for use in the sale of felt and straw hats. Some years before, namely, 1913, the Petitioner, who was in similar business adopted its president's name "Dobbs" as a trade mark, to be used in the sale of its hats, and has since used the name to the present in Canada, and now by its petition asks that the respondent's trade-mark be expunged.—*Held*, that the words "Dan Dobbs" and "Dobbs" are obviously words as applied to a particular kind of goods that can be confused and would tend to deceive the ordinary purchaser. The name "Dobbs" having acquired a secondary meaning as distinguishing petitioner's goods from that of other merchants and having been used in Canada long before the use made by the respondent of his trade mark, the

TRADE-MARKS—*Continued*

respondent's trade mark should be expunged.—(2) That the applicant for registration of a trade-mark in Canada must be the first user thereof in Canada. DOBBS & COMPANY v. ROBERT CREAN & COY. LIMITED. . . . . 164

4—*Name of newspaper—Section 5 of Trade Mark and Designs Act—"Trade Marks"—"Trade"—"Manufacture product or Article."*—*Held*, that the name of a newspaper is not a proper subject of a trade mark susceptible of being registered under the provisions of the Trade Mark and Designs Act (R.S. 1927, chap. 201).—(2) That the words "trade mark" have reference to marks applied to goods that are the subject of trade, trade signifying the business of exchanging commodities by barter or by buying and selling for money, and not in the sense of the word as applied to the mechanical arts.—(3) That a newspaper is not a "manufacture, product or article" within the meaning of section 5 of the Trade Mark and Designs Act. JOURNAL OF COMMERCE PUBLISHING CO. LTD. v. THE RECORD PUBLISHING COY. LTD. . . . . 168

5—*Party aggrieved—Locus standi — Convention for the Protection of Industrial Property, 1925—18-19 Geo. V, c. 10.*] The petitioner asked that the trade mark of the objecting party, registered in Canada in 1902, consisting of three panels placed side by side, the maple leaf with the letter "E" thereon constituting the central panel, the left panel having the representation of an anchor and the right one that of a lion, be expunged as likely to be confused with the Birmingham Hall or Assay Office mark, consisting of an anchor to indicate that particular assay office, and a lion passant to indicate standard or quality, and as being calculated to deceive.—The petitioner is a mutual non-trading association of manufacturers of and wholesale dealers in silverware, etc. It is not itself a manufacturer or seller or user of Hall Marks and has no trade mark.—*Held*, that the petitioner is not a party aggrieved within the meaning of the Trade Mark and Designs Act.—2. That the amendment of the Trade Mark and Designs Act passed in 1928 (18-19 Geo. V, c. 10), adding paragraph (g) to sec. 11 of R.S. (1927), c. 201, was intended as a partial adoption of the terms of Article 6 (ter) of the Convention for the protection of Industrial Property, signed at The Hague in 1925, and to which Canada was a signatory.—3. That the effect of the addition of said paragraph (g) to sec. 11 of the Trade Mark Act was merely to add to the grounds upon which the Minister might refuse to register a mark. The fact that the Minister is now empowered, by said



**TRADE-MARKS—Concluded**

paragraph, to refuse to register trade marks which consist in whole or in part of "official control or guarantee signs or stamps" adopted by another country, is indicative of the fact that prior to 1928 it was not intended by the Trade Mark Act that a trade mark might be refused registration upon the ground that it consisted of "official control and guarantee signs or stamps." *BIRMINGHAM JEWELLERS AND SILVERSMITHS' ASSOCIATION v. STOCK* ..... 175

**TRADE MARKS AND DESIGNS ACT**

*See* TRADE MARKS.

**UNDISTRIBUTED PROFITS**

*See* REVENUE No. 8.

**USER**

*Re Trade Marks.*—*See* TRADE MARKS No. 2

**VAGUE AND INDEFINITE CLAIMS**

*See* PATENTS FOR INVENTION No. 3.

**VALUATION**

*See* EXPROPRIATION No. 3.

**VOLUNTARY ASSOCIATION**

*See* REVENUE No. 10.

**WORDS AND PHRASES**

"*Calculated to deceive.*" *HONEY DEW, LTD., v. RUDD*..... 83

"*Cost plus.*" *ROGER MILLER & SONS LTD. v. THE KING*..... 136

"*Engine space deducted.*" *EASTERN SS. CO. v. CANADA ATLANTIC TRANSIT CO.* ..... 103

"*Issued exempt.*"—*KENNEDY v. MINISTER OF NATIONAL REVENUE*..... 36

"*Manufactured.*"—"Leads." *THE KING v. MIRAMICHI LUMBER CO. LTD.*..... 172

"*Party aggrieved.*" *BIRMINGHAM JEWELLERS & SILVERSMITHS' ASS. v. STOCK*. 175

"*Trade Marks.*"—"Trade"—"*Manufacture, product or article.*" *JOURNAL OF COMMERCE PUBLISHING CO. v. RECORD PUBLISHING CO.*..... 168

"*Unavoidable Cause.*"—"Probable Cause for Seizure." *THE KING v. THE Mary C. Fischer*..... 207

"*Value in Use.*"—*DUSSAULT v. THE KING* ..... 8

