

1930

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
1931

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, 1923.

DEPUTY LOCAL JUDGES:

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

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE ERNEST LAPOINTE, K.C.
and
THE HONOURABLE HUGH GUTHRIE, K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE LUCIEN CANNON, K.C.
and
THE HONOURABLE MAURICE DUPRÉ, K.C.

ERRATUM

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MEMORANDA RESPECTING APPEALS FROM JUDGMENTS OF
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A—To the Judicial Committee of the Privy Council:—

1. *Canada Steamship Lines Ltd. and James Richardson & Sons v. SS. Paisley* (1930) Ex. C.R. 105; (1929) S.C.R. 359. Appeal from Supreme Court allowed and Judgment of this Court affirmed.
2. *Christiani v. Rice* (1929) Ex. C.R. 111. Appeal to Supreme Court allowed (1930) S.C.R. 443. Appeal to Privy Council pending.
3. *Eurana, The SS., and Burrard Inlet Tunnel and Bridge Co.* (1930) Ex. C.R. 38. Judgment of Local Judge affirmed by this Court. Appeal to Privy Council pending.
4. *Grissinger v. The Victor Talking Machine Co. of Canada* (1929) Ex. C.R. 24. Appeal to Supreme Court dismissed. Application for leave to appeal to Privy Council refused.
5. *King, The, v. The Canadian Pacific Ry. Co.* (1930) Ex. C.R. 26. Appeal of C.P.R. to Supreme Court dismissed and cross-appeal allowed (1930) S.C.R. 574. Appeal to Privy Council pending.
6. *King, The, v. Carling Export Brewing & Malting Co.* (1929) Ex. C.R. 130. Appeal to Supreme Court allowed; (1930) S.C.R. 361. Appeal to Privy Council pending.

B—To the Supreme Court of Canada:—

1. *Canada Steamship Lines, Ltd., The, v. The Kingdoc and Paterson SS. Ltd. v. The Oxford* (1930) Ex. C.R. 1. Appeal allowed.
2. *Dobbs & Co. v. Robert Crean & Co.* (1929) Ex. C.R. 164. Appeal allowed as to part only. (1930) S.C.R. 307.
3. *Electrolytic Zinc Process Co. v. French's Complex Ore Reduction Co.* (1927) Ex. C.R. 94. Appeal dismissed. (1930) S.C.R. 462.
4. *King, The, v. Canadian Surety Co.* (1929) Ex. C.R. 216. Appeal dismissed, subject to variation as to interest.
5. *King, The, v. Consolidated Distilleries Ltd. and Third Party* (1929) Ex. C.R. 101. Appeal dismissed, (1930) S.C.R. 531.
6. *King, The, v. Easterbrooke* (1929) Ex. C.R. 28. Appeal dismissed.
7. *King, The, v. Frowde* (1929) Ex. C.R. 119. Appeal dismissed, (1930) S.C.R. 375.
8. *King, The, v. Miln-Bingham Printing Co.* (1929) Ex. C.R. 133. Appeal allowed and action dismissed, (1930) S.C.R. 282.
9. *Olsen, Fred, & Co. v. Princess Adelaide and The Canadian Pacific Ry. Co. v. The Hampholm* (1929) Ex. C.R. 199; and (1930) Ex. C.R. 10. Appeal dismissed.
10. *Roger Miller & Sons Co. v. The King* (1929) Ex. C.R. 136. Appeal allowed in part, (1930) S.C.R. 293.
11. *Saskatchewan Co-operative Wheat Producers Ltd. v. The Minister of National Revenue* (1929) Ex. C.R. 120. Appeal dismissed, (1930) S.C.R. 402.

12. *Secretary of State of Canada, as Custodian of Enemy Property v. The Alien Property Custodian for the United States and The Canadian Pacific Ry. Co. et al* (1930) Ex. C.R. 75. Appeal dismissed.
13. *Sun Life Assurance Co. v. Superintendent of Insurance* (1930) Ex. C.R. 21. Appeal dismissed, (1930) S.C.R. 612.
14. *Western Electric Co. v. Bell* (1929) Ex. C.R. 213. Appeal dismissed for want of prosecution.

C—The following are pending:—

1. *Fares et al v. The King* (1929) Ex. C.R. 144.
2. *Spooner v. The Minister of National Revenue* (1930) Ex. C.R. 229.

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CASES
 DETERMINED BY THE
EXCHEQUER COURT OF CANADA
 AT FIRST INSTANCE

AND
 IN THE EXERCISE OF ITS APPELLATE
 JURISDICTION

APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

CANADA STEAMSHIP LINES, LIM- } APPELLANT;
 ITED (PLAINTIFF) }

1929
 Oct. 15.
 Nov. 21.

v.

THE SS. *KINGDOC* (DEFENDANT) RESPONDENT.

AND

PATERSON STEAMSHIPS LIMITED } RESPONDENT;
 (PLAINTIFF) }

v.

THE SS. *OXFORD* (DEFENDANT) APPELLANT.

*Shipping and seamen—Collision—Canal navigation—Right of way—
 Creating a situation of danger.*

A collision occurred between the *K.* and the *O.* about 3.30 a.m., June 5, 1927, at the upper end of the Lachine Canal. The night was dark. The *K.*, upbound and light, had moored to the south revetment wall of the Canal near the place of collision on account of wind and rain. Her harbour lights were on and her red and green lights extinguished. She was drawing 3 feet 6 inches forward and 12 feet 8 inches aft, and a fresh southwest breeze was blowing across her beam. When the weather cleared, the *K.* cast off her four lines, beginning from the stern and casting the breast line last, on account of the wind. Before casting off, the *K.* had seen the starboard lights of the *O.* and knew that she was making with the current for the entrance of the Canal. After casting off, her stern, pushed by the wind, left the wall first and the ship moved towards the north side in a slanting position in the Canal, at this point about 275 feet wide. The *K.* then blew two blasts indicating she would pass starboard to starboard, forcing the *O.* to pass between her and the north side, towards which the *K.* was drifting. The *O.* answered by two blasts, but within a very few seconds perceiving the *K.* across the Canal and realizing there was not enough room to pass, the *O.* gave the danger signal and reversed full steam astern, which act, having a right hand propeller, forced her bow to the south, and the *K.* drifting across, the collision occurred,

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the stem of the *O.* striking the starboard side of the *K.* The ships were 250 feet long, with a 42 foot beam. Up to almost the time the *K.* gave the two blasts signal, the *O.* had reason to believe from the lights on the *K.* that she was still moored.

Held, on the facts, (reversing the judgment appealed from) that, the *K.*, without justification, created a situation of perplexity and danger, and that the *O.* did all, in the circumstances, that good seamanship required of her; and as she was coming down with the current she had the right of way, and the *K.*, on the evidence, failed to satisfy the burden resting upon her to excuse the collision.

Furthermore, moored at the revetment wall of the Canal, the *K.*, a light ship of 250 feet in length, with a fresh breeze blowing strong enough to affect her, on a dark night, casting off and getting unnecessarily under way, in a Canal of 275 feet in width, with the knowledge of a downbound vessel coming in at the time with the current, having thereby the right of way (Rule 25), will be held at fault for a collision which would not have happened had she lain fast at her berth and delayed casting off but a few minutes.

Casting off under such circumstances and spreading, in a slanting way, her 250 feet in length in a Canal of 275 feet in width was bad seamanship amounting to negligence.

APPEAL from decision of the Local Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Audette at Montreal, on the 15th day of October, 1929.

A. R. Holden, K.C., for appellants.

Errol Languedoc, K.C., for respondents.

The facts are stated in the reasons for judgment.

AUDETTE J., now (November 21, 1929), delivered judgment.

This is an appeal, by the Canada Steamship Lines, Limited, and the SS. *Oxford*, from the judgment of the Local Judge in Admiralty, bearing date 21st May, 1929, in a collision case—both actions having been consolidated—wherein he pronounced in favour of the claim of the plaintiff Paterson Steamships Limited and condemned the ship *Oxford* and her bail in the amount to be found due to the plaintiff between Paterson Steamships Limited and in costs. And he ordered that an account should be taken and referred the same to the registrar, assisted by merchants, to report the amount due, with costs of said reference against the ship *Oxford*, and dismissed the action of the Canada Steamship Lines against the ship *Kingdoc* with costs and condemned the plaintiff Canada Steamship Lines Limited in costs.

On the hearing of this appeal, I was ably assisted by Commodore W. Hose, C.B.C., R.C.N., as nautical assessor, whose experience and opinion were of great help and advantage to me in arriving at a decision, in which I have pleasure to say, he absolutely concurs.

The collision between the *Kingdoc* and the *Oxford* occurred around 3.30 a.m., daylight saving, on the 5th June, 1927, at the upper entrance of the Lachine Canal. The night was dark. The length of these two ships is respectively a few feet over 250 feet and their respective beam around 42 feet.

About an hour before the collision, the *Kingdoc* an up-bound vessel, light, moored at the revetment wall near the upper entrance of the Lachine Canal, at Lachine, on account, as stated by her Master, of hard rain and wind.

The *Kingdoc*, while laying so moored with four lines, had her harbour lights, having extinguished her red and green lights.

An hour or so after her arrival there, the weather having cleared, she began preparing to start when she knew a ship, the *Oxford*, was making with the current for the entrance of the Lachine Canal, her lights having already been seen on the lake. When coming on the Lachine range, she was plainly showing her starboard light.

Yet, knowing of this incoming ship, the *Kingdoc*, a light ship, drawing 3 feet 6 inches forward, 12 feet 8 inches aft, a fresh wind, southwest breeze, blowing across her beam, cast off her four lines, beginning by the stern line and following up, casting the breast line last, on account of the wind (p. 38). The second mate of the *Kingdoc* testified that the least little wind will blow a light ship off. Witness Scott shares that view (pp. 7, 14).

Her stern, pushed by the wind, left the revetment wall first and she thus became at once in a slanting position in the narrow Canal and when all her lines had been cast off the whole ship moved, by the wind, towards the north—the cribs—in this slanting position.

After casting off, she blew two blasts which were asking the other ship to pass starboard to starboard, i.e., between the *Kingdoc* and the cribs towards which she was drifting. The two blasts were answered by two blasts from the incoming vessel, the *Oxford*; but within a very few seconds

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($\frac{1}{4}$ of a minute says the Pilot of the *Kingdoc*) the *Oxford* perceiving the *Kingdoc* across the Canal, which is at that place something like 275 feet in width, and realizing she had not enough space to pass between the cribs and the stern of the *Kingdoc*, blew 5 or 6 short blasts as a danger signal and reversed full steam astern. Witness Brais, who was at the wheel of the *Oxford*, relatively close to the bow and at the best place for observation, testified that at that time the *Kingdoc* was slanting across the Canal, the wind having pushed her towards the cribs, and that they had not 20 or 25 feet to pass between the cribs and the stern of the *Kingdoc*. She was drifting across the path of the *Oxford*. According to him (p. 20), it was the wind which pushed her against the *Oxford* and which occasioned the collision. That must have occurred when the *Oxford* having reversed full speed astern, thereby causing her bow to go towards the south—towards the starboard with a right hand propeller, this reversing sent her astern towards the north and her bow to the south. Within that time the *Kingdoc* had moved ahead about two lengths and the two vessels collided, the *Oxford's* stem striking the *Kingdoc* on the starboard side 68 feet from her stem. The collision happened opposite and between the fourth and fifth cribs.

Up to almost the time the *Kingdoc* sounded her two blasts, the *Oxford* had reason to believe, from the display of her harbour white lights, that she was still moored at the revetment wall. In fact the *Kingdoc* only lighted her red and green lights a few seconds before sounding the two blasts and at that time, according to witness Brais, she still had her bow line tied (witness Redfearn swears to the contrary) and her stern slanting across the Canal, swinging with the wind. Within the space of time between the exchange of the two blasts and the danger signals given by the *Oxford*, the *Kingdoc* had drifted across the Canal obstructing the path of the *Oxford* (pp. 17, 18, 19), a ship of 250 feet in length slanting across a Canal or 275 feet in width.

Now, as is usual in Admiralty cases, the evidence is very conflicting and in this case especially so in respect of the question of the velocity of the wind at the time of the accident, which indeed was an important factor in occasioning the collision.

It is quite significant that all of the *Kingdoc* crew, *ne variatur*, swore that the velocity of the wind at the time of their casting off was between 8 and 10 miles an hour. Witness Pagington, second mate on the *Kingdoc*, swore however, there was a good fresh breeze, adding the least wind will blow a *light* boat off and the *Kingdoc* was a light boat travelling on ballast. The crew of the *Oxford* swears "qu'il y avait beaucoup *de vent*—il ventait fort," and Brais, the Pilot of the *Oxford*, estimates its velocity at 20 miles an hour. Scott, the Master of the *Oxford*, estimated the velocity of the wind at 20 to 25 miles an hour and Austen, first mate of the *Oxford*, testified the wind was "strong" (p. 15). Then witness Kelly, the Superintendent of the McGill Observatory, testified that at 3 o'clock in the morning, daylight saving, on the 5th June, the velocity of the wind was, in Montreal, 9 miles an hour. That would be about half an hour before the collision; but this statement must be approached with this qualification that wind is a very capricious and variable element, it travels in zones and is affected by the peculiarities of topographical relief and elevation and would obviously be affected by the Mount Royal, at Montreal, where the McGill University is located. The wind obeys to purely local causes, and it is therefore difficult to say that because it is blowing at a certain place at a given velocity that the same velocity may obtain at a relatively close distance. The record of the Observatory does not present any reliability to ascertain the velocity of the wind at the upper entrance of the Lachine Canal.

The question of the *wind* is not without great importance under the circumstances, especially when one has to seek and determine the truth, in case of conflicting evidence, by the probabilities of the respective cases which are set up.

Finally on this question of the wind, we have the testimony of the Master of the *Kingdoc*, who says that after casting off (p. 13) he let her drop from the pier and the reason for his two blasts asking the *Oxford* to pass starboard to starboard is quite explained in his language as follows:—

Well, in a case of blowing, when it is blowing *fresh* they generally give the *light* boat the high side. We were a light boat. Naturally the wind

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would have a great impression on the *Kingdoc* and make her drift. If I had gone on top of those cribs with the wind blowing fresh southwest, I could not get away.

(pp. 24, 25). He wanted to keep to the south on account of the wind.

All of this goes to show conclusively that there was a substantial wind which had quite an *impression* on the *Kingdoc* just as soon as she cast off, without any momentum, and being light. She must necessarily have drifted materially to the north and the probabilities are that when the crew of the *Oxford* swear she came across this Canal, right in their path, such contention is quite reasonable and quite acceptable and not the result of hectic alarm. A light ship clearing and casting off from a pier is not under normal navigable control for some time until sufficient steering way has been obtained to ensure prompt answering to the helm.

Witness Daignault, the Pilot of the *Kingdoc*, testified that her steering wheel was hard (était dure); more force than usual had to be used to move it. She obeyed less readily and took more time to take a direction (pp. 12, 13, 14).

Therefore it would take her more time to fight the wind which made her drift to the north, if that could be done, and to extricate herself from her slanting position obtained at the time of the casting off.

We are in this case governed by the Rules of the Road for the Great Lakes and Rule 25 thereof provides that in narrow channels, as under the present circumstances, when there is a current, when two steamers are meeting, the descending vessel *has the right of way*. See also *Madden v. The SS. Vinmount* (1).

There can be no doubt that, under the circumstances of the case, the *Oxford* had the right of way as she was coming down with the current, while the *Kingdoc*, up to a few minutes before the collision, was moored to the Canal wall showing only her harbour lights, and with a fresh breeze blowing across her beam which would obviously blow and drift her across the fairway. See Rule 25. In the case of *George Hall Corporation v. The Ship Fifetown* (2), under circumstances almost similar to the present case, it was

(1) (1927) Ex. C.R. 212.

(2) (1924) Ex. C.R. 12.

held that the upbound ship should not attempt to pass the downbound ship, but should moor to the bank until the downbound ship had passed her; and to continue her course was not good seamanship. Moreover, that the downbound ship, coming down the Canal with the current had the right of way and that the burden of proof was on the upbound vessel to establish that the collision was caused by the improper navigation of the downbound vessel—which she failed to do.

And I find that in this case the *Oxford* had the right of way and did, under the circumstances, all that good seamanship required of her to avoid the accident—*The Llanelly* (1).

Neglect to wait and hold back when practical and prudent to do so,—as in this case to remain moored at the bank,—the result of which will create a position of danger will amount to negligence in navigation. *The Eastern Steamship Co. v. The SS. Alice* (2); *The SS. Wenchita* (3); Marsden's Collisions at Sea, 8th Ed., p. 464.

It was bad seamanship, bad manoeuvring on behalf of the *Kingdoc* to leave her mooring under such circumstances. It was ignoring entirely elementary prudence and precaution which are required by the ordinary good practice of seamanship. See Rules 37 and 38.

The following excerpt from the testimony of witness Redfearn, Master of the *Kingdoc*, is not without significance (pp. 26, 27).

Q. In view of your hesitation, let me ask you this: at p. 66 you were asked:

Q. Before you let go your lines from the bow you knew the *Oxford* was coming up?

A. Coming down, yes.

Q. Yes, coming down, rather.

A. Yes.

Q. You knew that.

A. Yes, sir.

Q. In view of the condition of the weather at the time, a strong breeze blowing, could you have waited till that vessel had passed before casting off the lines.

A. Could I have waited?

The COURT: Yes.

A. Yes. I could have.

Q. Would it have been wisdom on your part to remain there?

A. I can't see how it would be. I am entitled to part of the Canal.

(1) (1914) P. 40.

(2) (1927) Ex. C.R. 228.

(3) (1928) Ex. C.R. 178.

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True as the witness says, the *Kingdoc* was entitled to part of the Canal, but she was not entitled to start across—in face of an incoming vessel with the current—from that bank of the Canal (the wrong side) which is around 275 feet in width and to spread over—a ship of over 250 feet—diagonally across such Canal and obstruct the path of such downbound vessel. Rule 25.

In the case of *Canadian Sand and Gravel Co. v. The Key-west* (1), it was held that when a ship with ordinary care, doing the thing which under any circumstances she was bound to do, could have avoided the collision, she should be alone to blame and it was in that case also contended that the accident would have been averted had the up-bound ship not cast off and remained tied to the bank.

Then at page 29:—

Q. And in that case there, with a strong breeze blowing—a *fresh wind* blowing—and a light ship, it takes some time before you leave, and you cannot help getting an angle obliquely from this wharf, because your stern went away in the first place and all the movements of the helm and engines would only accentuate the position because you cannot fight against the wind?

A. Yes, sir.

Q. Would it have been better for you to wait long enough for the *Oxford* to pass?

A. Yes, sir.

Q. You realize that now?

A. Yes, sir. If I had known what was going to happen I would not have left the pier.

When the *Kingdoc* did cast off, the *Oxford* was in the entrance of the Canal, and witness Brais (p. 5) contends that if the *Kingdoc* had waited until the *Oxford* had completely gone by, the *Kingdoc* would have lost in time: “Deux minutes et demi ou une minute et demi à peu près.”

There were a number of sketches prepared by the witnesses. Filed as Exhibits K4 K5 K6 and K7 are the sketches prepared by the crew of the *Kingdoc* as to the probable position of their ship just prior to the collision; but considering the place where these witnesses stood I find that these estimates by eye, at some distance from the stern of their ship, on a dark night, must be very problematic in their accuracy, and I rather agree with sketches K1 and K2 and more especially with K1, which was prepared by “Brais” who was in a much better position to

appreciate the true position of the two vessels, and which absolutely coincides with the reasonable probabilities of the case. The *Mary Stewart* (1); *The Ailsa* (2). And in view of the direction and force of the wind at the time the *Kingdoc* cast off and of the fact that starboard helm was predominantly used to bring the ship more and more towards the southern edge of the channel, the undoubted tendency would be for the ship to take a very pronounced angle across the Canal more in accordance with Exhibit K1.

The *Kingdoc* was guilty of want of good seamanship and elementary prudence (Rules 37 and 38) *ab initio* in casting off under such circumstances, with a stiff breeze blowing, and in transgressing Rule 25. The *Oxford* coming down with the current had the right of way, and on the evidence, the *Kingdoc* failed to satisfy the burden resting upon her to excuse the collision. She from the first to last, without justification, created a position of perplexity and danger and the *Oxford*, under the circumstances, did all that could be expected of her,—did everything reasonably possible to avoid the accident, by blowing the danger signals and reversing full speed astern, and her manoeuvring was entirely without blame. See *Madden v. The SS. Vinmount* (3); *The SS. Wenchita v. The SS. Beechbay* (4); *George Hall Corporation v. The Ship Fifetown* (5).

Moored at the revetment wall of the Canal, the *Kingdoc*, a light ship of 250 feet in length, with a fresh breeze blowing strong enough to affect her, on a dark night, casting off and getting unnecessarily under way, in a Canal of 275 feet in width, with the knowledge of a downbound vessel coming in at the time with the current, having thereby the right of way (Rule 25), will be held at fault for a collision which would not have happened had she lain fast at her berth and delayed casting off but a few minutes.

Casting off under such circumstances and spreading, in a slanting way, her 250 feet in length in a Canal of 275 feet in width was bad seamanship amounting to negligence. See Rules 37 and 38 and above cited cases.

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(1) (1844) 2 Wm. Rob. 244. (3) (1927) Ex. C.R. 212.
 (2) (1860) 2 Stuart's Adm. R. 38. (4) (1928) Ex. C.R. 179.
 (5) (1924) Ex. C.R. 12.

There will be judgment allowing the appeal in favour of the SS. *Oxford* and maintaining the action of the appellant The Canada Steamships Lines, Limited. The whole with costs in their favour.

Judgment accordingly.

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

1929
Oct. 4.
Nov. 18.

FRED OLSEN & COMPANY (OWNERS OF THE STEAMSHIP "HAMPHOLM"), (PLAINTIFF) } APPELLANT;

v.

THE SS. PRINCESS ADELAIDE (DEFENDANT) } RESPONDENT;

AND

THE SS. HAMPHOLM (DEFENDANT)..... APPELLANT;

v.

THE CANADIAN PACIFIC RAILWAY COMPANY (OWNERS OF THE STEAMSHIP "PRINCESS ADELAIDE") (PLAINTIFF) } RESPONDENT.

Shipping—Collision—Rule 16 of the Regulations for preventing Collisions at Sea—Speed—Fog

The *P. A.*, a passenger steamer, left Vancouver, bound for Victoria in a dense fog. After passing the first narrows, she was running at a rate of twelve knots, on a course of S.W. $\frac{1}{4}$ S., which course she kept till the collision was imminent. She stopped her engines about a minute before the collision. upon hearing a signal from a tug to port, and one from a ship to starboard, the *H.*, and which she first saw emerging from the fog at a distance of about 300 feet, and between two and three points on her starboard. The *P. A.* then attempted to clear the *H.* by putting her helm hard a starboard with full speed ahead, but without success, the stem of the *H.* cutting into the *P. A.* on her starboard side, a little ahead of amidships, she was swinging with a speed of about eleven knots.

The *H.* inward bound, passed Point Atkinson at 10.05 a.m. on a course of E. by N. and at a speed of four knots, but seeing the density of the fog decided not to enter the narrows, but to proceed cautiously, by "slow ahead" and "stop" alternatively, to a southerly part of English Bay, and altered her course at 10.25 to E.N.E. Later, at

10.50, hearing signals of other vessels, she changed her course E.S.E. giving proper signals. From 10 o'clock to 11.12 she was proceeding by "slow ahead" and "stop" at close arrivals. At 11.12 the *H.* heard the signal from the *P. A.* about 5 or 6 points on her port bow. She stopped her engine, blew the whistle, to which the *P. A.* replied. There followed another exchange of whistles, and while the *P. A.* was whistling for the third time, she emerged from the fog, heading for the *H.* The *H.* then reversed her engine full speed and put her helm hard a port, but too late to avert collision. When they first saw each other the *P. A.* was running at ten knots, and the *H.* at one and a half knots and the collision occurred about half a minute after.

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Held, on the facts (varying the judgment appealed from) that the *H.* by proceeding at a very moderate speed and otherwise acting as aforesaid was obeying rule 16 of the Regulations for Preventing Collisions at Sea, but that the speed of the *P. A.* (10 knots), in fog, was in the circumstances excessive, and that the *P. A.* was alone to blame.

2. That a vessel in fog should run at such a speed that upon sighting an approaching vessel, she can pull up in the distance she can see.
3. That Article 16 aforesaid does not require a vessel running in fog to reverse her engine upon hearing of a fog signal apparently forward of her beam, but only to stop her engines and then navigate with caution, and that as the *H.* could come to a stop in thirty feet and could see a vessel at three hundred feet, she was navigating with caution within the meaning of Article 16, and was not called upon to reverse before she did.

APPEAL and cross-appeal from the decision of the Honourable Mr. Justice Martin, Local Judge in Admiralty for the British Columbia Admiralty District.

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

Martin Griffin, K.C., for appellants.

J. E. McMullen, K.C., for respondents.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (November 18, 1929), delivered judgment.

This is an appeal from the judgment of Hon. Mr. Justice Martin, Local Judge in Admiralty for the British Columbia Admiralty District, in an action, brought by the owners of the steamship *Hampholm* against the owners of the steamship *Princess Adelaide*, for damage sustained by the plaintiffs by reason of a collision in a dense fog between the two ships. The defendants counter-claimed for damages against the plaintiffs. The learned trial judge found both ships to blame, and he apportioned the liabil-

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ity for damage in the proportions of two-thirds on the part of the *Princess Adelaide*, and one-third on the part of the *Humpholm*. Against this decision both parties appealed, the owners of the *Humpholm* contending that the *Princess Adelaide* was alone to blame, the owners of the *Princess Adelaide* contending that both ships were equally to blame and that the damages should be apportioned equally. The facts relating to the matters in issue are not seriously in dispute, and they are so fully and clearly stated by the learned judge in his reasons for judgment, to be found reported in (1929) Ex. C.R. p. 199, that I am relieved of the necessity of any lengthy or detailed reference to the facts disclosed at the trial.

The passenger steamer *Princess Adelaide*, of 1910 registered tonnage, departed from Vancouver on the 19th of December, 1928, bound for Victoria, in a dense fog. After passing the First Narrows or Prospect Bluff, the *Princess Adelaide* was running through the fog at the rate of twelve knots on a S.W. $\frac{1}{8}$ S. course, and she continued that course till the collision was imminent. The master of the *Princess Adelaide*, the learned trial judge stated, stopped his engines about half a minute before the collision upon hearing a signal from a tug to port, and also a signal from a ship to starboard which afterwards proved to be the *Humpholm*, and which he first saw emerging from the fog at a distance of about 300 feet, and between two and three points on his starboard bow. The *Princess Adelaide* attempted to clear the *Humpholm* by putting her helm hard-a-starboard with full speed ahead, but it was too late to avert the collision, the stem of the *Humpholm* cutting into the *Princess Adelaide* on her starboard side, a little ahead of amidships. At the moment of impact, the learned trial judge states, the *Princess Adelaide* was still swinging with a speed of about 11 knots at least, to avoid the *Humpholm*.

The *Humpholm*, a Norwegian freighter of 2,615 registered tonnage and 395 feet length, inward bound to Vancouver on the morning of the collision, had passed and seen Point Atkinson half a mile off, at 10.05 a.m., on a course E. by N. at a speed of about four knots, but in view of the density of the fog decided not to enter the Narrows but to proceed cautiously by "slow ahead" and "stop" alternately, to anchorage in the southerly part of English Bay.

The course of the *Hampholm* was accordingly altered at 10.25 to E.N.E., and she continued on this course at a decreased speed. Owing to the signals of other vessels, she again changed her course at 10.50 to E.S.E., giving proper signals and taking soundings. According to the engine room scrap log of the *Hampholm*, her movements from 10.00 to 11.12 were "slow ahead" and "stop" in closely following intervals of time. At 11.12 the *Hampholm* while on her last course, heard the signal of another vessel, which turned out to be the *Princess Adelaide*, about 5 or 6 points on her port bow. Thereupon the *Hampholm* stopped her engines and blew her whistle to which the *Princess Adelaide* replied; there soon followed another exchange of whistles, and while the *Princess Adelaide* was whistling for the third time, she emerged from the fog and became visible to the *Hampholm* at about 300 feet distant, heading directly for the *Hampholm* or at least across her bow, whereupon the *Hampholm* reversed her engine full speed and put her helm hard aport, but too late to avert the impact. It is admitted that the *Princess Adelaide* was running at a speed of 10 knots when the *Hampholm* was first seen right ahead. The master of the *Hampholm* states his ship was struck by the *Princess Adelaide* less than half a minute after sighting her; the former had on a slight amount of way when she first sighted the *Princess Adelaide*, according to the learned trial judge, but not exceeding $1\frac{1}{2}$ knots. In her preliminary act the *Hampholm* alleged that she had "steerage way only," which is pretty much the same thing. Just prior to hearing the first signal of the *Princess Adelaide*, the engines of the *Hampholm* had been stopped, then given ten or twelve revolutions ahead, and the master of the *Hampholm* testified that he was barely making headway when her engines were stopped upon hearing the first signal of the *Princess Adelaide*, and that he could have brought her to a standstill in 30 feet.

The learned trial judge found that the *Princess Adelaide* had committed a breach of art. 16 of the Collision Regulations; "that she deliberately violated the regulations in a gross degree," and "without any extenuating circumstances." It was alleged against the *Hampholm*, that at least two minutes before the collision, she was in a position of danger from an "unascertained" ship continuing to

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approach her on the same S.W. course, 5 to 6 points on her port bow without broadening; that the requirements of "navigating with caution," under 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 in that she did not earlier reverse her engines. The learned trial judge supported this view. He said:

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 her 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 port such as the one in question.

After a reference to art. 16 of the Collision Regulations, and a discussion of several authorities, the learned judge proceeded to say:

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 immediately increasing. The person in charge of the *Hampholm* was not placed in the "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 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.

* * * * *

I apportion the liability for "degrees of the fault" as two-thirds on that 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.

The real point in issue is therefore, whether or not the *Hampholm* should have not only stopped her engines upon hearing the first signal of the *Princess Adelaide*, but also have reversed them. The point is obviously one of very great importance to shipping and to navigators.

The important provision of the Regulations for Preventing Collisions at Sea, for consideration here, is art. 16, which reads:—

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 last paragraph of art. 16 first appeared in the Regulations of 1897. This part of the article seems to me to be quite plain as to its purpose and meaning. It appears to be a self contained code in itself, and I cannot agree that it is proper, in this case at least, to carry into that article, any other article of the Regulations for Preventing Collisions at Sea; art. 16 was the only one that applied in the circumstances. What is the meaning of this rule and why was it enacted? The reason for the adoption of art. 16, and its meaning, I think, was correctly expressed by Jeune J. in the case of the *Rondane* (1). In discussing that article he said:—

That article has to be considered with regard to both vessels. I have considered art. 16, and have had the advantage of reading the judgment of Barnes J. in the case to which I was referred (*The Pontos v. The Star of New Zealand*) not reported, which, as far as I know, is the only authority which bears upon the rule. So far as my judgment in the matter goes I feel no great difficulty in understanding substantially what the rule means. The words are "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." I think I understand what that rule means. It was an approach to what many persons had advocated at different times—namely, that in a fog vessels should absolutely stop. Of course a suggestion of that kind applies with far more force to river navigation than to the open sea, because of course, as has been said over and over again, in the Channel, if vessels had to stop dead, it might be that you would get the Channel crowded with ships, which would be unable to reach their destinations. In a river like the Thames it might be better for vessels to stop and anchor, though what injury it might cause to trade I do not say. This rule stops short of that. It does not say that a vessel is to stop and never move again

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in the fog. On the contrary all she has to do is to stop her engines and then navigate with caution, and she is to do that because she hears forward of her beam a fog-signal of a vessel, the position of which is not ascertained. She is to keep them stopped until she can by hearing further signals from the other vessel, ascertain the position of that other vessel. The rule does not say that in terms, but that appears to me to be the meaning. The object, of course, is clear—namely, to give the vessel which stops her engines an opportunity of hearing better than she otherwise would do, and also to specially call the attention of those on board to the matter. So that they may be more acute to hear a second whistle and to locate it if possible. Therefore the duty of a vessel in fog clearly appears to me to be to stop her engines when the first whistle is heard, for the purpose I have mentioned.

Another interpretation of art. 16 is to be found in a Scotch case, *The Warsaw v. Granite City Steamship Co.* (1). Art. 16 was there held imperative, as long as there was not certainty as to the position of the other vessel (*The Warsaw*) and what she was doing. Lord Stormonth-Darling said:—

Now, I do not doubt that all the articles are to be read together, so far as they can be so read, and accordingly that it may be quite right to read Article 16 along with any other article which will live with it. For example, the note to Article 21, by its reference to “thick weather or other causes,” shows that it may be read along with Article 16 when the emergency arises to which it refers. But it is equally clear that Article 21 itself cannot be so read, because that would involve the contradiction that, in certain circumstance, the same vessel was both to stop her engines and navigate with caution, and to keep her course and speed. The truth is that Article 16, in its two paragraphs, seems to contain all the obligatory directions with reference to speed in a fog. It deals (1) with the case of a vessel finding herself in a fog without knowing of any other vessel near her, in which case her duty is simply to go at a moderate speed, and then (2) with the case of her hearing the fog-signal of a vessel apparently forward of her beam, but in an otherwise unascertained position, in which case her duty is to stop her engines, and then to navigate with caution until the danger of collision is over. Plainly, I think, if a vessel obeys these directions she is not bound to act as if she saw the other vessel and knew all about her exact position. It is an acknowledged fact (which our skilled adviser corroborates) that sound in a dense fog may be very misleading and a shipmaster who governed his conduct by conclusions so drawn instead of following the safe and cautious directions of Article 16 might be very much to blame.

In the case of *The Challenge and Duc d'Aumale* (2), it will be found that the learned trial judge (Gorell Barnes J.) found that the charges of excessive speed and of improper helm action failed, for both the plaintiffs and the defendants' vessel were going at a moderate speed, and an alleged improper helm action had no material effect; but

(1) (1906) 8 Sc. Session Cases,
 (5th Ser.), 1013.

(2) (1905) P. 198.

the learned judge distinguished the case of the *Merthyr* (1), and gave judgment in favour of the plaintiffs, on the ground that the *Camrose* was not to blame as she had complied with art. 16 of the Regulations for Preventing Collisions at Sea by stopping, and was not bound to reverse before she did so; whilst the tug *Challenge*, and the sailing ship in tow, the *Duc d'Aumale*, were to blame, as distinguishing *The Lord Bangor* (2), it was practicable for the tug, in the circumstances of the case, to have at once stopped her engines, and let the way run off the tow. Upon appeal the judgment of the trial judge was sustained, and it was held unanimously that art. 16 did not prescribe reversing as well as stopping. Collins M.R. said:—

In this case the plaintiffs steamship *Camrose* was proceeding up the English Channel, and the defendants' sailing ship *Duc d'Aumale*, in tow of the defendants' tug *Challenge*, was proceeding down the channel on practically opposite courses. The weather was thick with fog, and the *Camrose*, hearing a fog signal upon her port bow, stopped, and, it is alleged against her, ported her helm. When the tug and her tow came into sight the *Camrose* reversed and starboarded. It is now further urged against her that she ought to have reversed before, and that the non-reversal led to the collision; but the second paragraph of article 16 of the Regulations for Preventing Collisions at Sea only requires that "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." So that there is clearly no obligation imposed by the rule to reverse. She did stop, and the learned judge has found—and he had the concurrence of the Elder Brethren—that as far as the circumstances of the case admitted she navigated with caution.

Numerous authorities were cited in support of the contention of the owners of the *Princess Adelaide*, and I must refer to some of them. One was *The Ceto* (3). It is to be observed that art. 18, of the Collision Regulations of 1884, was the one applicable to the case, and it was found that both vessels violated this regulation. That rule, required that every steamship, when approaching another ship, so as to involve risk of collision, should slacken her speed, or stop and reverse, if necessary. That article is not now to be found in the Collision Regulations, and therefore no assistance is, I think, to be gained from a consideration of that case. The same may be said of *The Knarwater* (4). Authorities subsequent to 1897, when the present art. 16 was first introduced, were also cited, such

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(1) (1898) 8 Asp. M.C. 475.

(3) (1889) 14 A.C. 670.

(2) (1896) P. 28.

(4) (1894) The Rep., Vol. 6, 784.

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as *The King* (1); *The Clara Camus* (2); and *The Union* (3). In the first mentioned of these cases, the *Queensdyke*, in a fog, stopped her engines on hearing the whistle of the *King*, the other ship involved in the collision, and they had been stopped for ten minutes before the collision. *The King* did not stop on hearing the *Queensdyke's* signals forward of her beam and was proceeding according to Bargrave Deane J., at too great a speed in the fog, and therefore she had broken art. 16, and for this reason the *King* was held alone to blame. It seems to me that this case is rather in support of the contention of the *Hamp-holm*. It perhaps might be pointed out also, that the learned judge who heard that case was of the opinion that in cases of fog, only the fog rules applied, the other rules being only applicable when the vessels are in sight of each other. Then as to the case of the *Clara Camus*. In this case both vessels were found throughout to be guilty of excessive speed in foggy weather, and thus both had violated the first part of art. 16 as to moderate speed in fog. There is nothing in the judgment delivered in the court of first instance or in the judgments rendered in the Court of Appeal, that in a fog, the regulations required a vessel hearing a fog signal apparently forward of her beam, not only to stop her engines, but also to reverse, unless of course unusual circumstances made it an obvious and prudent step to take. Everything would indicate the contrary. The learned trial judge found both vessels to blame and he apportioned the blame equally. The Court of Appeal held however, that the proper degrees of fault should be two-thirds and one-third, because of the fact that one of the vessels, the *Metagami*, was more to blame than the other vessel in that she not only broke that part of the regulation requiring moderate speed in a fog, but also that she broke the second part of art. 16 in that she did not stop her engines when she heard the signal of a ship forward of her starboard beam; the other vessel was held to blame only in respect of her speed. I do not think the decision in this case is applicable to the one being considered. Then there is the recent case of *The Union*. Here both ships were held equally to blame because both were held to be

(1) (1911) 27 T.L.R. 524. (2) (1926) 17 Asp. M.C. 171.
 (3) (1929) 17 Asp. M.C. 483; (1928) P. 175.

going too fast in a dense fog. *The Vulcano*, one of the ships involved in this collision which took place in the River St. Lawrence, was proceeding at the rate of eight or nine knots, when she first heard the whistle of the other ship, the *Union*. The latter ship was also found to blame for excessive speed and for not stopping—her engines I assume—shortly after she got into the fog when she heard the whistle of the *Vulcano*. This case was really decided upon the ground that both ships were to blame for excessive speed, and upon a state of facts which do not obtain here. At any rate, I do not think the case purports to decide that either ship was to blame, merely because she did not reverse her engines, as contended here. Other authorities cited do not, I think, support the contention made on behalf of the *Princess Adelaide*.

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It is clear, I think, that the *Hampholm* conformed to the Regulations for Preventing Collisions at Sea. She obeyed the first and second parts of art. 16, that is to say, she was proceeding at a moderate speed in the fog, she stopped her engines when she first heard the signal of the *Princess Adelaide* and thereafter she navigated with caution. In the case of *The Cathay* (1), that ship was found to blame for not having done just what the *Hampholm* did do. If, with the stopping of her engines, it also became necessary for the *Hampholm* for one reason or another, as an act of precaution or of good seamanship to reverse her engines as well, that would be another question. In my opinion, the actual facts of the situation as known to the *Hampholm* had not disclosed a necessity for such action on her part. I do not think that art. 29, which contains no express rule or regulation and is only a declaration concerning the effect of negligence, is applicable to the facts of this case. Both in letter and spirit the *Hampholm* was observing the exact regulation designed for the situation in which she found herself, and she was, I think, under such control as to meet successfully any situation that might fairly be expected to arise. One of the objects of art. 16, is, that a ship shall go at such speed in a fog as will give as much time as possible for avoiding a collision, when another ship suddenly comes into view at a short distance. In a fog it is well known that the sound of a

(1) (1899) 81 L.T.R. 391; 9 Asp. M.C. 35.

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whistle from a steamer is not a reliable means of ascertaining the position of that steamer, and by "position" I mean that both direction and distance are implied. In the circumstances here, the master of the *Hampholm* was justified in assuming that the *Princess Adelaide* was proceeding at a moderate speed and not at the rate of one thousand feet or thereabouts a minute, and that she was also being navigated with caution; he was justified in assuming also that when their respective positions were fairly ascertained by each, or when they came within sight of each other, there would be ample time for each to manoeuvre safely. I can hardly believe it open to controversy, that had the *Princess Adelaide* been going at a moderate speed and conforming fully with art. 16, there would have been ample time and space for each to manoeuvre past the other with perfect safety, after their respective positions had been definitely ascertained, or after they came in sight of one another. The collision occurred, in my opinion, because of the unwarranted speed of the *Princess Adelaide*, and for her failure to navigate with caution after hearing the signal of the *Hampholm* as required by art. 16; she was unable to meet the situation that developed on account of her excessive speed. The *Princess Adelaide* should have been going at such speed, after hearing the first signal of the *Hampholm*, or after sighting the *Hampholm*, that she could have pulled up in the distance she could see. See Deane J. in *The Counselor* (1). I do not think there was any negligence whatever on the part of the *Hampholm*. It does not establish negligence on the part of the *Hampholm* to say that had she earlier reversed her engines, there would have been no collision or that the consequences would have been less serious. She is charged with neglecting the precaution of practised seamen in not earlier reversing her engines; and negligence is the essence of the offence, according to art. 29. If the *Hampholm* observed art. 16, and I think she fully did, then the only interval of time when she could have been guilty of any negligence would be after sighting the *Princess Adelaide*, but then she did reverse her engines; the collision was then unavoidable as was declared by the *Princess Adelaide* in her preliminary act, and owing, I think, entirely

(1) (1913) P. 70, at p. 72.

to the speed of the *Princess Adelaide*. It therefore follows, I think, that the *Hampholm* was not negligent of the ordinary practise of seaman at that interval of time. Further, any fault on the part of the *Hampholm*, if any there was, did not in my opinion contribute to the collision, and sec. 2 (b) of the Maritime Conventions Act, Ch. 126, R.S.C. 1927, enacts that no vessel is liable for any loss or damage to which her fault has not contributed.

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I am of the opinion therefore, with respect, that the *Princess Adelaide* was alone to blame for the collision; that the appeal of the owners of the *Hampholm* should be allowed with costs; and that the cross-appeal of the owners of the *Princess Adelaide* should be dismissed with costs. The case will be remitted to the Court of first instance to be there dealt with as rights of the parties under this judgment may appear to the said Court.

Judgment accordingly.

THE SUN LIFE ASSURANCE COM- } APPELLANT;
PANY OF CANADA..... }

AND

THE SUPERINTENDENT OF IN- } RESPONDENT.
SURANCE }

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May 21.
June 18.

Insurance—Capital—Superintendent of Insurance—Powers of—Appeal

In 1865, the appellant company was incorporated by an Act of the late province of Canada, with power to carry on the business of insurance generally, and its capital was stated to be two million dollars, with power to increase the same to four million dollars. By an Act of Parliament of 1870, the capital was reduced to one million dollars with power to increase the same to four million dollars in sums of not less than one million dollars. The business of the company was to be carried on in two distinct branches Life and Accident Insurance business and to be known as the Life Branch, and other forms of insurance to be known as the General Branch business. The capital stock of one million dollars was to apply to the Life Branch only, with power to increase the same to two million dollars; authority was given to raise one million dollars for the purposes of the General Branch business with power to increase the same to two million dollars. In 1871, the powers of the company were by statute restricted to Life and Accident Insurance, and it was further provided that "All provisions of the Act of Incorporation of the said company, and the Act amending the same, which are inconsistent with the provisions of this Act, are hereby repealed."

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In its report to the Department of Insurance the company stated its capital to be four million dollars, and the Superintendent of Insurance ruled that it could only be two million dollars and amended the report accordingly. Hence the present appeal.

Held, that the capital of the company for Life and Accident insurance business was fixed at two million dollars by the Act of 1870 and was not altered by subsequent legislation. The ruling of the Superintendent of Insurance was upheld, and the appeal dismissed.

APPEAL by the appellant, from the ruling of the Superintendent of Insurance, amending the annual report of the company made to the Department of Insurance under the provisions of the Insurance Act.

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

Eugene Lafleur, K.C., and *J. A. Ewing, K.C.*, for appellants.

Lucien Cannon, K.C., and *F. P. Varcoe* for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (June 18, 1929), delivered judgment.

In 1865, the Sun Insurance Company of Montreal, now the Sun Life Assurance Company of Canada, was incorporated by statute enacted by the late province of Canada. By its charter the company was empowered to carry on the business of insurance generally, including fire, marine, accident, sickness, indemnity and life insurance. The capital of the company was therein stated to be two million dollars, with power to increase the same to four million dollars.

In 1870 the company's charter was amended in quite important particulars. The capital stock of the company was reduced to one million of dollars, with power to the company to increase the same, under the provisions of its charter, in sums of not less than one million dollars, to a sum not exceeding four millions of dollars. The business of Life and Accident Assurance, which was defined, was to be conducted as a distinct branch of the company's business under the corporate name of the company, with the addition thereto of the words "Life Branch." The capital stock of the company, one million dollars, was to be applied solely to the Life Branch of the company, but this amount might be increased under the terms of the charter of the

company, to two million dollars. The company was authorized to commence business of Life and Accident insurance when five thousand shares had been subscribed, and fifty thousand dollars paid in on account of the same to the Life Branch. The company was also authorized to transact fire, marine and guarantee insurance, and this class of insurance business was also to be conducted as a distinct branch of the business of the company, under the corporate name of the company, but with the addition thereto of the words General Branch. Authority was given by the Act to raise one million dollars for the capital purposes of the General Branch, which amount might be increased to two million dollars; when a certain amount of the capital stock of the company had been subscribed and allotted to the General Branch, the company was empowered to commence the insurance business included in this branch. The company was required to maintain separate accounts of the stock subscribed and allotted, and of the business transacted by it, under the Life Branch and General Branch, and of the expenses, profits, losses, etc., under each of the said branches respectively. The capital stock of the company subscribed and allotted to the Life Branch and the General Branch respectively, was to be liable only for the expenses, losses and liabilities incurred by the branch to which the same had been allotted, and entitled only to the profits and claims arising from such branch. The failure of one branch of the company's business to meet its obligations, did not require the suspension of the business of the other branch, nor was the latter to be subject to the statutory law relating to insolvent companies.

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In 1871, the Act incorporating the Sun Insurance Company of Montreal was further amended by an Act of the Parliament of Canada. The name of the company was changed to the Sun Mutual Life Insurance Company of Montreal. Nothing I think turns upon the introduction of the word Mutual into the corporate name. The important sections of this amending statute are two, and are as follows:—

3. The powers of the said company are hereby restricted to life and accident insurance.

4. All provisions of the Act of Incorporation of the said company, and of the Act amending the same, which are inconsistent with the provisions of this Act, are hereby repealed.

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The company up to this time had not yet begun to do insurance business of any kind, and I understand it was subsequent to the passing of this amending Act that it did commence business.

In accordance with the requirements of the Insurance Act, the company deposited with the Department of Insurance, in February, 1928, its annual statement for the preceding year, in which the amount of its capital stock authorized as of the 31st day of December, 1927, was stated to be an amount in excess of two million dollars, namely four million dollars. The Superintendent of Insurance, in his Annual Report for the year 1927, made an alteration in the said annual statement of the company, by stating the authorized capital stock of the company as being two million dollars, and the Superintendent of Insurance made a ruling to the effect that the authorized capital stock of the company was limited to two million dollars for the reason that by the charter of the company its capital stock was limited to two million dollars, without power in the company to increase the same beyond that amount. Under the provisions of the Insurance Act, the Sun Life Assurance Company appeals to this court from the ruling and action of the Superintendent of Insurance, and it claims an order of the court declaring that its authorized capital stock on the 31st day of December, 1927, amounted to more than two million dollars, and that under the provisions of its Act of incorporation and amending Acts, it had an authorized capital of four million dollars; it also asks for a declaration that on the 31st day of December, 1927, the amount of its capital stock was three million dollars, by virtue of a by-law enacted by the Board of Directors of the company, and approved of by the shareholders of the company as required by its charter, increasing the capital to three million dollars.

I have very carefully considered the argument of counsel for the company, and every relevant provision of the various statutes which relate to the matter in dispute, and I have reached the conclusion that the ruling of the Superintendent of Insurance was correct, and that the capital stock of the company is two million dollars. It is quite true that the company, under its charter as originally enacted, was empowered to commence business with a capital

of two million dollars, which amount of capital might have been increased to four million dollars with the sanction of the company's shareholders; and it is equally true that the company might have restricted itself to life and accident insurance only. The capital structure of the company was however entirely changed by the Act of 1870. The purpose of the change is I think quite plain. It was proposed to conduct the business of the company in one or two separate branches, and to make available to each branch a maximum of capital of two million dollars, as and when required. Section 1 of this Act clearly was drafted having this in mind, as is readily to be observed upon a reading of the succeeding sections dealing with the capital to be employed by the two different branches. The capital of the Life Branch was definitely limited to two million dollars whether or not the General Branch ever came into existence. The scheme was to set up what was virtually two separate and independent insurance organizations with an authorized capital stock of one million dollars for each, with power to raise such capital to two million dollars in each case, there being a common reservoir, from which each branch might draw the amount of one million dollars each, and again another million each, if and when desired. If one branch did not go to the reservoir for its capital, that would not make authority for the other branch to absorb what the other did not elect to take. To do this, the authority would need to be very clearly expressed. The Act of 1871 restricted the business of the company to life and accident insurance, but there is no intimation whatever therein, of any intention to grant a greater capital than two million dollars for the conduct of such classes of insurance business. I do not think it was intended by sec. 4 of the Act of 1871 to repeal sec. 4 of the Act of 1870, which latter provision fixed the capital of the Life Branch at two million dollars, and I think it still stands. It is not inconsistent to say that though the proposed General Branch has been eliminated, that the other branch remains exactly as it was constituted under the Act of 1870. The Act of 1870 made provision for such an event. It was not imperative in the proposed scheme that the General Branch be ever established.

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Upon a consideration of the statutory provisions which I have mentioned, I think it is quite plain that the ruling of the Superintendent of Insurance was a proper one, and that the provisions of the statutes relevant here permit only of the interpretation which he has given to them. It may well be that at the time of the enactment of the legislation of 1871, the company rested under the belief that its capital as authorized by the Act of 1865 incorporating the company, was being automatically restored; that may have been the intention of the legislature and it is probable it would then have expressly so enacted if requested so to do by the company, but when, as I think, the words of the statute admit of but one meaning, a court is not permitted to speculate on the intention of the legislature and to construe such words according to its notion as to what ought to have been enacted. That would be to make the law and not to interpret what the language of the legislature means. The question is not what the legislature meant, but what its language means. It is for the legislature alone to alter the statute. Accordingly I dismiss the appeal. Each party will bear its own costs of the appeal.

Judgment accordingly.

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 Mar. 21.

BETWEEN:—
 HIS MAJESTY THE KING..... PLAINTIFF;
 AND
 THE CANADIAN PACIFIC RAILWAY }
 COMPANY } DEFENDANT.

*Crown—Information of intrusion—Estoppel—Revocable licence to occupy
 —Title—Alienation by the Crown*

Held, that the old doctrine that the Crown is not bound by estoppels is so far modified by modern decisions that in a proper case the Crown may be held liable for acts or conduct of its responsible officers, which, if occurring between subject and subject, would amount to an estoppel *per pais*.

2. Where a railway company was permitted by responsible officers of the Crown to enter upon the right of way of a government railway and erect telegraph poles thereon and to maintain the same without hindrance or objection by the Crown for a period of some forty years, the railway company were held to be lawfully on the said right of way under a revocable licence from the Crown dating from the time of the erection of the telegraph poles.

3. That upon the facts the license in question was not an irrevocable one, which would be tantamount to an alienation of the Crown property (1).

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INFORMATION of intrusion exhibited by the Attorney General of Canada to recover possession of certain parts of the right of way of the Canadian National Railway System now occupied by the defendant with its telegraph poles or, in the alternative, for a declaration as to the rights of the defendant, in said lands, if any.

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

I. C. Rand, K.C., and W. P. Jones, K.C., for plaintiff.

W. N. Tilley, K.C., W. L. Scott, K.C., and E. P. Flintoft, K.C., for the defendant.

The facts and contentions of the parties are stated in the reasons for judgment.

AUDETTE J., now (March 21, 1929) delivered judgment.

This is an information of intrusion exhibited by the Attorney General of Canada, whereby it appears, *inter alia*, that the plaintiff seeks to remove a line of telegraph poles and wire erected by the defendant upon the right of way of the Canadian National Railway System—the plaintiff's property—under the circumstances hereinafter mentioned.

Besides claiming the possession of land upon which these poles are erected, the Crown further asks

(b) \$713,408 for the issues and profits of the said lands and premises from the 1st January, 1890, till possession shall be given.

The conclusion of an action of intrusion. And by way of amendment, at trial:

or in the alternative damages for trespass to said lands in the sum of \$100,000.

The conclusion of a common law action for damages.

(b1) In the alternative a declaration as to the right, if any, of the defendant in said lands, in respect of the said line of poles and wires.

This amendment, it will be seen, is in the nature of a material departure from what is usually understood would

(1) The information was one for intrusion, but by amendment at the trial the Crown asked for a declaration of the rights of the parties. The Court, after hearing the case, considered that the prime and controlling issue to be determined was as to the rights of the parties, but gave leave to the parties to apply for further direction in respect of other undetermined matters.

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be covered in an information of intrusion; but it has the great advantage of placing before the Court the whole controversy between the parties, in respect of this telegraph line built by the defendant on the right of way of the Government railway over an area of, in round figures, 500 miles.

The defendant company, by their amended statement in defense, avers, among other material things, that their entry upon the plaintiff's lands, was by leave of the proper officers of the Government railway, while the Crown, with that knowledge, stood by and acquiesced in this state of things for a great number of years, whereby an irrevocable license of occupation was impliedly granted. That the terms upon which the defendants were allowed on the right of way had been settled and that they are still ready and willing to carry out the same, as agreed upon.

It is thought unnecessary to develop into greater details the ground set out in the defense, which are fully spread on the record.

This controversy, complex in its legal aspects, extends, in the history of the facts controlling it, with all its ramifications, as far back as 1887, when negotiations originally started, the building by the defendant commencing in 1889.

At that time, in respect of the territory where the railway was then in operation, there were in existence agreements with telegraph lines, between the Crown and The Western Union Telegraph Company, The Great North Western Telegraph Company, and The Montreal Telegraph Company. See exhibits 6 and 290.

In this respect, it is thought unnecessary to say more than that the agreement (exhibit No. 6) with Montreal Telegraph Company gave them exclusive right over the territory covered by the agreement,—a matter upon which the Law Officers of the Crown have given considered opinion. An exclusive right was also given the Western Union Company from New Glasgow to Canso, but that agreement of 1880, it is contended by defendant, has been superseded by a later agreement (16th October, 1889, exhibit No. 290) without that exclusive right.

The history of this case involves so many facts and such a mass of evidence both oral and documentary, that it is thought unadvisable to recite them all in detail. Sufficient

is it to mention only those that have a specific controlling effect. And with regard to the above mentioned agreement with these three companies, and the exclusive right over certain area, reference will be hereafter made in the final adjudication.

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The right of way of a railway, it may be said *en passant*, has always been regarded as the proper place to build a telegraph line; the line is thereby unobstructed and can be easily inspected from a train. And in both the Government Railway Act and the General Railways Act provisions are made to meet such eventuality. See secs. 45 and 46, ch. 38, R.S.C., 1886, The Government Railways Act; The Railway Act, 51 Vic., ch. 29, secs. 265 and 266.

The first negotiations between the parties started in 1887 when the C.P.R. asked that no exclusive right be given any company to erect a line between Canso and Sydney (exhibits 8, 9, A, 14, 15, 39-29) when Mr. Schreiber, the Chief Engineer and General Manager of the Canadian Government Railways at the time, advised that

we are quite prepared to negotiate an arrangement by which your company would be permitted to build and operate a line along this railway; and under such conditions (exhibit No. 15) as the Government may see fit to impose.

Must it not be deemed that his power was properly exercised in allowing the defendant to proceed with building in the meantime? *Omnia praesumuntur rite et solemniter esse acta.*

At that time the defendants were approaching the completion of their "Short Line," there was the Cable at Canso and the agitation in the public for an *All Red Route*, i.e., a domestic telegraph company on exclusive Canadian soil.

According to witness Richardson, who was in charge of the C.P.R. Telegraph lines at the time, the defendant company began building their line, between St. John and Halifax, outside the right of way in 1889 and completed the work in 1890. This witness adds that it was all built outside the right of way, excepting in a few cases. He thinks only in one case, probably less than half a mile, just a small detour. He consulted Mr. Archibald, with this question of boundary, who granted him leave. Here the I.C.R. supplied an experienced man, familiar with the running of trains, to control and handle the hand-cars used in building the line.

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This part between St. John and Halifax was built outside the right of way, after the C.P.R. had tried to get leave to build inside, and had been met with the exclusive right of the Montreal Telegraph, set up by the Justice Department, but no objection was set up as far as the Government was concerned. Finally as the company could not wait any longer, they built outside. Witness Grant, an employee of the Western Union, further testified that when the C.P.R. were building on the right of way between New Glasgow and Mulgrave, he called it to the attention of Gray, the Roadmaster, who told him that he had instructions from headquarters to allow them to build on the right of way.

Richardson also built the line between Truro and New Glasgow, outside the right of way, in 1889; before reaching Halifax.

In 1893 he built the line between New Glasgow to Sydney on the right of way. Before commencing work on that area, under instructions of Mr. Hosmer, he first went to see Mr. Pottinger, the officer in charge of the whole I.C.R. as Chief Superintendent (p. 116) and consulted him about the construction of the line. Mr. Pottinger brought in the engineer of the railway, Mr. Archibald, and Mr. Wallace, the freight agent, and they all discussed the whole question. What the witness wanted to know was if they had any special instruction in regard to the construction of this line on their right of way, so that he could meet their wishes. Finally Mr. Pottinger turned him over to the department that handled that work and the engineer, Mr. Archibald, who told witness to build it the same as he would build the C.P.R. line, placing no restriction upon the manner he would build (pp. 243, 244).

The work was done openly. The poles were distributed from the cars and the transportation paid for.

This witness had nothing to do with the building from Westville to Pictou.

Now with respect to this section between New Glasgow and Sydney, it appears, from exhibits Nos. 116, 117, 118, 302, 125, 127 and 129, that permission or leave to build was given by Mr. Schreiber, subject to agreement similar to the one with the Western Union Telegraph; that the Crown drew up such an agreement, submitted it to the

General Manager of the Government Railways and transmitted it to the defendant for execution, and that, after being duly executed by the C.P.R., it was returned to the Crown with request to also execute the same and return one copy.

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This document was lost while in the possession of the Crown. In view of all this, it cannot be said that the C.P.R. was a trespasser on that section anyhow. The defendant is bound by that document and through its counsel at trial it declared its readiness to do everything they thereby agreed to; they built from New Glasgow to Sydney upon the terms asked for by the Crown.

With respect to the line from Westville to Pictou, the Board which had, at the time, the full control and management of the Government Railways, by a resolution of the 10th March, 1911, as shown by exhibit No. 185, granted the request of the C.P.R. for permission to string their wires on that area on the right of way, and to give the Crown the use of the line and to put the same into their stations at Westville and Pictou. See exhibits 188, 189, 193 and 195.

In a letter from Mr. Pottinger to Mr. McNicoll, Vice-President C.P.R., exhibit No. 194, Mr. Pottinger says:—

As I told you verbally when in Montreal, it will be all right for you to go on and build that line and we will arrange at a later period.

There is further what was called the Mersereau incident in 1904. The latter, at that date, was in charge of the building, maintenance and repair between St. John and Moncton, and arrived at a given place, for better convenience, some poles were placed on the right of way and objected to by the section man. The matter was referred to the Manager, Mr. Pottinger, who allowed them to maintain and place their poles on the right of way, on a distance of between 5 to 10 miles on that division.

From that date the work of repairing and maintenance was converted into rebuilding. It is perhaps well to say here that it was mentioned at trial that the life of those telegraph poles was between 15, 20 and 25 years, according to the nature of the soil. This rebuilding, by the defendant, resulted in transferring all their poles on the right of way. According to witness McNeil, the poles were brought on the right of way to conform with the other lines,

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concluding that the C.P.R. should be in the same and in no better position.

At one time an action of intrusion was taken before this Court, against the C.P.R., and instruction was also given to issue a similar action in Halifax; but the whole matter was stopped by Sir John A. Macdonald, then Premier of Canada and Minister of Railways and Canals at the time, who then defined the Crown's policy in respect of this matter.

As will appear by exhibit 75, on the 24th September, 1890, Sir John A. Macdonald wrote to Sir John Thompson, the Minister of Justice, as follows:—

Please stay proceedings. It won't do to have any further difficulties with the C.P.R. just now. This is an unimportant matter. And the suit in the Exchequer Court was abandoned and the costs paid by the Crown.

Furthermore, on the 9th October, 1890, Sir John A. Macdonald, wrote to W. C. Van Horne, the President of the C.P.R. as follows:—

Dear VAN HORNE:—

I have yours of the 22nd ult. and return you the papers therein enclosed, as you desire. The Government have not the slightest objection, so far as they are concerned, to the C.P.R. planting telegraph poles along the line of the I.C.R. The trouble is that long ago, by an absurd agreement, the Montreal Telegraph Company was given the exclusive right to plant poles and wires along the line of the I.C.R. Such being the case, the Government Officials gave notice to your people not to plant poles but the warning was utterly disregarded. The proceedings were taken lest the Government might be held responsible by the Montreal Telegraph Co. for breach of agreement and consequent damage. Dwight's letter to Hosmer is satisfactory enough, but it is not, I take it, binding on the Company, especially if under the control of Wiman. However, if the C.P.R. will stand between the Government and all harm in the event of proceedings being taken, we will not interfere with your telegraph poles.

Yours faithfully,

JOHN A. MACDONALD.

W. C. Van Horne, Esq.,
 Montreal.

See in this respect sect. 5, 6 ch. 38, R.S.C., 1886, defining the Minister's power, without Order in Council.

Then later on, in 1915, when the poles were all on the right of way, Mr. McMillan, the General Manager of the C.P.R. Telegraph, and Mr. Gutelius, then in charge of the Government Railways, as manager, met and discussed the whole matter seeking the solution of the problem in an agreement whereby the C.P.R. could give certain services

or render certain services to the I.C. Ry. in exchange for an arrangement whereby they could maintain their telegraph lines on the right of way.

A draft of such agreement was prepared by Mr. Gutelius, exhibit No. 239a. It was brought to a mutual conference at Montreal; changes were made and finally resulted in the agreement filed as Exhibit 245a—which was again duly executed by the C.P.R. and transmitted to the Crown. It was marked O.K. by Mr. Gutelius, under his own signature, and every page was initialed by him—the draft had also been marked O.K. and corrected by Mr. Gutelius.

This document, Mr. McMillan testified, never came back into his possession and the document turns up at trial as coming from the hands of the Crown.

Then Mr. Hayes, who succeeded Mr. Gutelius, proposed a new agreement. That was followed in 1924 with a letter of the Department of Justice advising that proceedings would be taken, but not assigning any special delay within which to remove the poles.

Hence the present action.

Having so set forth out of the mass of the evidence such of the important facts that were thought necessary, I shall now approach the consideration of the controversy on its merits.

It would seem that the poles were placed on the right of way with the consent and co-operation of the high officers of the railway and the Prime Minister and Minister of Railways at the time, and conjectured that these agreements that were placed in the hands of the Crown, after being duly signed by the C.P.R. would be executed. As a matter of fact they were not executed by the Crown, but on the other hand, the Crown retained the documents in its possession after they were marked with the approval of its responsible officers, and the right of the defendant to regard them as satisfactory to the Crown thus becomes apparent. Surely the equitable right of the defendant to remain upon the property under the terms of the proposed agreement cannot be disputed.

The land upon which the poles are erected belongs to and is vested in the Crown. There is here no question of parting with land or entering into a lease for which the authority of Parliament or an Order in Council would be required.

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The Crown is not divested of its fee. The defendant is found in occupation only of such portions of the surface of the lands as was necessary to erect their poles upon, with the consent, permission and authority of the railway officials. The permission is given by the Prime Minister and the Minister of Railways, and by the officer, who under the Order in Council appointing him (exhibit No. 293) is given

the duties and powers of General Manager, such powers as are usually vested in the executive of a railway Corporation.

Executive is

l'ensemble des personnes qui exercent l'autorité politique.

The poles are erected openly with here and there a confirmation of the leave or permission to do so.

The operation of the railway is confided onto this manager, and a telegraph system or telegraph systems would seem to be a necessary part for the operation of a railway. He could not give perpetual rights which would amount to alienation of property, but could it be said he could not grant a licence of occupation? Indeed, a revocable licence is nothing but a personal privilege to do certain acts upon the land of another, but creates no estate therein, and is revocable at will and may rest in parol. See also *Plimmer et al v. Mayor, etc., Wellington* (1). A licence could be implied as resulting from both the negotiations and the conduct of the minister and the managers of the I.C.R. And while this licence was being enjoyed by the defendant, the plaintiff, so to speak, stood by with full knowledge.

The leave given by the manager and others, was an act of interim nature, subject to arrangement. How can we find fault with such a sane act of administration? A foreign telegraph company was already on the right of way. Why any discrimination against a Canadian, a domestic company, which has a system of telegraphs extending from the Pacific to the Atlantic and a cable at Canso? Should not state messages, which might be conflicting with American interest, be in preference placed in the hands of a Canadian company, than in that of a foreign company? Should not this be doubly true if some trouble were arising with respect to the fisheries rights, in the Maritime Provinces, as between the Canadian and American Governments?

This is not a case where it is sought to protect the Crown's prerogatives, and it would seem that no claim of right could be made good against the defendant, under the circumstances. The case should not be approached in a narrow view of the prerogative rights, but it should be dealt with broadly as the issues demand. It is of utmost importance in the administration of justice that even the appearance or what might appear unjust and unfair should be avoided, if possible.

Under the circumstances of this case, were the Civil Law resorted to—although it is not the law under which the issues are to be determined here—there would be assumed a contract *sui generis*, whereby it would be presumed proper authorization was given. There would be presumed in favour of the occupant a sort of right to a certain superficies. *Tremblay v. Guay* (1); *Beaudry Lacantinerie et Chauveau* (2); Fuzier-Herman Rep. vo. Superficie. The Common Law closely approaches in spirit the above doctrine of the Civil Law where it restrains the actual owner of land, who has stood by and allowed another under mistake of title to improve it, from ejecting the latter from the land without compensation for his improvements. The equity inherent in that doctrine is of much the same spirit as that arising upon the facts of the case before me. Furthermore, it is a rule of the Common Law that a licence enables the person to do a thing which without such licence would be a trespass. And while a licence without consideration is revocable, if granted for a valuable consideration it is irrevocable. *Taylor v. Caldwell* (3). In *Hurst v. Picture Theatres Limited* (4), it was held that a man may become a licensee without a formal grant in writing.

Kay J., in *McManus v. Cooke* (5), cites many authorities which support the equitable right of the defendant in the case before me. It is useful to quote his remarks at p. 695:

In the well known case of *Dann v. Spurrier* (6), the doctrine is thus stated: "This Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement; a lessor knowing and permitting those

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(1) (1929) S.C.R. 29, at p. 34.

(2) Biens. No. 372.

(3) (1863) 3 B. & S. 826.

(4) (1915) 1 K.B. 1.

(5) (1887) 35 Ch. D. 681.

(6) (1802) 7 Ves. 230, at p. 231.

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acts, which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment."

In *Powell v. Thomas* (1), this doctrine was applied to a case in which the plaintiff had made a railway over the defendant's land without objection from the defendant, the only dispute being on the question of price, and the Court of Equity restrained the defendant from prosecuting an action of ejectment. So, in the case of *Duke of Devonshire v. Eghin* (2), the defendant allowed the plaintiff to make a watercourse under his land to convey water to a town. The watercourse was made at the plaintiff's expense, and this easement was enjoyed for about nine years, and although there was no grant the defendant was decreed to execute a proper deed, and a perpetual injunction was granted to restrain his interference with the watercourse. *Hewlins v. Shippam* (3); *Wood v. Leadbitter* (4), and other authorities at Common Law, were cited, and it was argued that the right claimed could only be granted by deed, and that therefore the licence was revocable; but this common law doctrine was not allowed to prevail in equity.

There has been a licence or permission given in fact and upon apparent authority, and why should it not be binding? This seems inherently justified by the acts of the managers of the Railway and the Minister of the Crown. The defendant's rights are only questioned after years of its overt acts of occupation and enjoyment. In other words, the conduct of the parties carries against the granting of the remedy asked by the information of intrusion. Upon no fair consideration, under the circumstances of the case, could an order of ejectment be made against the defendant company who were not trespassers.

The plaintiff has acquiesced, by its conduct, during a long period of time, to the occupation of this land. *McGreevy v. The Queen* (5); *The Queen v. McCurdy* (6); *The Queen v. Yule* (7). This acquiescence has led the defendant to believe that the occupation was assented to; it would otherwise work out an injustice. *Rochdale Canal Co. v. King* (8). See also exhibit No. 51 in respect of the construction by the Justice Department upon the facts that if the poles are suffered upon the right of way it would support evidence that poles had been placed there by permission of the plaintiff.

(1) (1848) 6 Hare, 300.

(2) (1851) 14 Beav. 530.

(3) (1826) 5 B. & C. 221.

(4) (1845) 13 M. & W. 838.

(5) (1888) 1 Ex. C.R. 321, at p. 322.

(6) (1891) 2 Ex. C.R. 311, at p. 320.

(7) (1899) 30 S.C.R. 24 at pp. 34, 35.

(8) (1853) 16 Beav. 630, at p. 636 (c).

Upon the facts of the case, it is clear that the plaintiff has no right to treat the defendant as a trespasser. The defendant from the beginning was upon the property of the plaintiff as a licensee with the consent and acquiescence of the plaintiff, and has ever since been continuously in that capacity upon the property. See also *Peterson v. The Queen* (1); *Davenport v. The Queen* (2); *Attorney-General v. Ettershank* (3).

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Now, there is a difference between estoppel by deed, and estoppel in pais or equitable estoppel, arising from acts and conduct. And while it may be readily conceded that the Crown is not bound by estoppel by deed, by recital in his patent (Robertson, On Civil Procedure), yet it is held in the case of *Attorney-General v. Collom* (4), that the Crown is bound by estoppel in pais. See also *Queen Victoria Niagara Falls Park Comm'rs. v. International Railway Co.* (5); *City of Montreal v. Harbour of Montreal* (6); *Attorney-General v. Holt & Co. Ltd. et al* (7). Under the circumstances of the case, as above mentioned, it must be found the defendant had a right to believe they were along the right of way by leave and permission open or implied.

Estoppels in pais are called equitable estoppels because they arise upon facts which render their application in the protection of rights equitable and just. Words and Phrases, vol. 2, pp. 340 et seq. Estoppel is the shield of justice interposed for the protection of those who have acted improvidently. It is the special grace of the Court, authorized and permitted to preserve equities that would otherwise be sacrificed. *Idem* 345.

The trial was proceeded with only upon the question of law, or, at any rate, leaving the question of damages to be dealt with after the rights of the parties had been determined, and hope was then expressed by counsel that once the rights were determined the terms and conditions could be agreed upon by the parties.

In the result, the prime controlling issue to be determined by these proceedings is what right, if any, has the defend-

(1) (1889) 2 Ex. C.R. 67.

(5) 63 Ont. L.R. 49, 66, 67.

(2) (1877) L.R. 3 A.C. 115.

(6) (1926) A.C. 299 at p. 313.

(3) (1875) L.R. 6 P.C.A. 354.

(4) (1916) L.R. 2 K.B. 193, at

(7) (1915) A.C. 599.

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ant on the right of way? Answering the same I find that the defendants are and have been on the right of way from the beginning by the licence of the plaintiff—but not an irrevocable licence, which would be tantamount to an alienation of the property of the Crown.

I do not think that I should be called upon in my judgment to determine more than that; but if I can assist the parties to a full and complete settlement of their difficulties I shall be glad to have them, or either of them, apply, upon notice, for further directions.

There will be judgment accordingly. The question of costs is reserved.

Judgment accordingly.

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT

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Dec. 7.

THE S.S. *EURANA* (DEFENDANT) APPELLANT;

VS.

BURRARD INLET TUNNEL AND }
BRIDGE COMPANY (PLAINTIFF) . . } RESPONDENT.

Shipping—Crown—Navigable Waters Protection Act—Order in Council—Board of Railway Commissioners—Collision with bridge—Negligence—Public nuisance—Works done under legislative authority.

Plaintiff, under its Charter (9-10 Edward VII, Chapter 74) erected a railway bridge over the second Narrows of Burrard Inlet, B.C. By its Charter, the Railway Act was made applicable to the undertaking. The site and plans of the bridge, as originally projected, were first approved by the Governor in Council on June 10, 1913, on recommendation of the Minister of Public Works. No steps were taken for ten years, then in April, 1923, amended plans were approved by the Governor in Council. These amended plans were, in July, 1923, sanctioned by the Board of Railway Commissioners and the company was authorized to begin construction, plans of sub-structure and super-structure to be filed for approval of the Engineer of the Board. A Board of Consulting Engineers made certain recommendations in regard to the elevation of the piers, the number of spans, etc. Plans embodying these changes were submitted to the Governor in Council for approval by the Minister of Marine and Fisheries and the plans of the bridge, as finally completed, were approved by Order in Council in August, 1925. In March, 1925, the Railway Board had approved of the said plans. The Charter provided that the bridge be built "so as not to interfere with navigation." It was contended by defendant that the plaintiff had no title to the land on which the bridge was built and that it was a trespasser thereon; that approval should have been obtained as required under the Navigable Waters Protection

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Act, and this not having been done the bridge was a public nuisance; that the approval of the amended plans having been approved by the Railway Board before approval by the Governor in Council, such latter approval was a nullity; that the plaintiff without justification had begun construction before final plans were approved; and that the plaintiff's Charter having enacted the limitation that the bridge should not be built so as to interfere with navigation, neither the Governor in Council nor the Board of Railway Commissioners had power to authorize a bridge which interfered with navigation, and that as it in fact so interfered, it was contrary to its Charter and constituted a public nuisance.

Held (affirming the judgment appealed from), That plaintiff being in possession of the land in question, at least by licence of the owner, the defendant had no status to attack such occupancy.

2. That the Navigable Waters Protection Act not having been made applicable to the undertaking, and it having been enacted that the Railway Act should apply, and the undertaking being authorized by an Act of Parliament of Canada, the Navigable Waters Protection Act did not apply to the undertaking.
3. That even if there had been laxity on the part of those interested in the matter, in observing from time to time the precise directions of the statute, all such procedural defaults were waived in the final sanction of the plans of the bridge as completed. That the fact that the order of the Railway Board preceded the approval of the same plans by the Governor in Council was not of importance; their combined effect being a sanction, as required by Statute, of a bridge proposed to be built over a navigable water.
4. That the words, in the Company's Charter, "so as not to interfere with navigation," mean not reasonably calculated to interfere with navigation, and the Governor in Council and the Board of Railway Commissioners having approved the plans of the bridge under the authorization of Parliament, and having exercised the discretion resting in them, the bridge in question could not be said to be a public nuisance even though it might contribute some difficulties to navigation at the point in question.
5. That the consent of the Governor in Council, required under Sec. 248 (2) of the Railway Act, to deviations in the plans, need not be obtained upon the recommendation of any particular Minister.
6. That when a vessel passing through a bridge collides with it causing damage to the bridge, the owners of the bridge can only recover such damage upon proof that the vessel was negligently navigated.

APPEAL from judgment of the Honourable Mr. Justice Martin, L.J.A. (1)

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

Martin Griffin, K.C., and *S. A. Smith* for appellant.

Dugald Donaghy, K.C., and *W. E. Burns* for respondent.

(1) The reasons for judgment of Martin L.J.A. are printed at page 52 following this report.

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The facts and the questions of law as well as the contentions of the parties are stated in the reasons for judgment.

THE PRESIDENT, now (December 7, 1929), delivered judgment.

This is an appeal from a judgment of Mr. Justice Martin, L.J.A., for the Admiralty District of British Columbia, in an action brought by the respondent against the appellant, for damages arising from a collision of the steamship *Eurana* with a railway and traffic bridge owned by the respondent company and crossing the Second Narrows of Burrard Inlet, a navigable water, in the province of British Columbia. The appellant counterclaimed for damages occurring to the *Eurana* in consequence of the same collision. The learned trial judge dismissed the respondent's action against the *Eurana*, holding that there was no negligence on the part of that ship, and that the collision was one of "inevitable accident"; he dismissed the counterclaim upon the ground that the bridge was lawfully authorized and erected and did not constitute a public nuisance as alleged. The shareholders of the respondent company, as I understand it, are, The District and City of North Vancouver, The District of West Vancouver, and The City of Vancouver. Money subventions in aid of the undertaking were granted by the Government of Canada, by the Government of British Columbia, and by the Corporation of the Vancouver Harbour Commissioners.

As stated by the learned Judge, the case is one of exceptional importance and difficulty. Inasmuch as I have reached the conclusion that the judgment appealed from should be maintained, it is not necessary that I should discuss at length all of the grounds upon which the learned trial Judge based his conclusions, all of which are, I think, very comprehensively and forcibly set forth in the judgment appealed from.

Broadly speaking, the appellant's case is, that the respondent company without lawful authority erected and now operates the railway bridge in question; that this bridge interferes with the public right of navigation over a navigable water and thus constitutes a public nuisance. If this contention is established, then I apprehend that the appellant should, in the absence of negligence, succeed generally. The appellant's position is sought to be main-

tained *inter alia*, upon the following grounds: that the respondent has not title to the lands upon which the bridge is built; that the plans of the bridge were not approved under the provisions of the Navigable Waters Protection Act which is claimed to be here applicable; that the bridge was constructed in violation of the respondent company's charter which required that the bridge should be so constructed as "not to interfere with navigation"; and that in any event the respondent company did not secure the necessary approval required by statute, of the plans of the bridge as constructed, by the Governor in Council and the Board of Railway Commissioners. I shall usually refer to the latter body as the Railroad Board. Alternatively, the appellant says the collision was not attributable to its negligence, but that the same was due to "inevitable accident," and it is not therefore liable in damages to the respondent upon the assumption that the bridge was lawfully erected and operated. From this, the substance of the respondent's case may be inferred; chiefly it is, that at the time material here, the ship *Eurana* collided with and damaged the bridge by reason of negligent navigation.

Alluding now, briefly, to the contention that the respondent does not possess a valid title to the lands upon which the bridge was erected, because though a grant therefor issued from the Crown in the right of the Dominion, yet, as required, no Order in Council authorizing the issuance of such grant was ever passed by the Governor-in-Council, and that in consequence thereof the grant is void and the respondent is a mere trespasser. In respect of this point, it seems to me that the conclusion reached by the learned trial Judge is the correct one, and I agree with the reasons advanced by the learned Judge in reaching such a conclusion; there is very little, if anything, I can usefully add. Presumably, the respondent company is in possession of the land in question, at least by licence of the owner, and the appellant has not, in my opinion, any status to attack such occupancy. Further, if the bridge constitutes a public nuisance, it is because it interferes with navigation, and not because the validity of the respondent company's title is perhaps open to question as alleged.

Then it is urged that the plans of the bridge required approval under the provisions of the Navigable Waters

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Protection Act, cap. 115, R.S.C. 1906, which was not done, and that therefore the bridge was unlawfully erected and is in law a public nuisance. Upon the argument, I was impressed by this contention of appellant's counsel, but upon a more careful consideration of the matter I have reached the same conclusion as the learned trial Judge, but, as he dealt very briefly with the point, and as it was strongly urged upon the hearing of the appeal by Mr. Griffin on behalf of the appellant, it might be appropriate to make a more extended reference to this phase of the case. The question is whether a company authorized by statute to construct a bridge over a navigable water, should, prior to construction, have its plans approved under the provisions of the Navigable Waters Protection Act. Upon a careful perusal of sec. 3 of that Act, it would seem clear, that its provisions do not apply "to any work constructed under the authority of any Act of the Parliament of Canada". If a special Act of the Parliament of Canada, authorized the erection of a public work over a navigable water, such as in this case, and that Act stipulated that the work was to be subject to the terms of the Navigable Waters Protection Act, then the latter Act would of course apply; but that is not this case. Here the respondent company's charter authorizing the work, cap. 74, Statutes of Canada, 1910, expressly provided by sec. 16 thereof, that the Railway Act should apply to the company and its undertaking. Therefore, the Navigable Waters Protection Act not having been made applicable to the undertaking, and it having been enacted that the Railway Act should apply to the undertaking which itself was authorized by an Act of the Parliament of Canada, there can, I think, be only one conclusion, and that is, that the Navigable Waters Protection Act does not apply and was not so intended. The fact that the undertaking was primarily to be a railway bridge, at once suggests the appropriateness of subjecting the undertaking to the provisions of the Railway Act, so far as approval of plans was concerned; further, the work when completed was to be subject to the jurisdiction of the Railway Board. It would therefore seem clear that Parliament intended that the Railway Act, and nothing else should apply to the undertaking. To obtain approval of the plans of a work under the Navigable Waters Pro-

tection Act, involves practically the same procedure as is necessary under the Railway Act, that is, there must be secured the approval of the Governor-in-Council upon the recommendation of the Minister of Public Works; there is just this distinction, that under the Navigable Waters Protection Act, public advertisement of the proposed work is required, whereas when the Railway Act is applicable to the work, as here, no public advertisement is necessary; a formal order of approval of the detail plans and profiles by the Board of Railway Commissioners is required, following approval by the Governor-in-Council of a plan and description of the proposed site and a general plan of the work to be constructed. It therefore appears manifest to me, that it was not the intention of Parliament that the Navigable Waters Protection Act was to be applicable to the work in question.

Before entering upon a discussion of another important point in the appellant's case, it might first be convenient and useful to state chronologically, the steps taken by the respondent company, in securing from time to time the approval of the plans of the work by the Governor-in-Council, and by the Board of Railway Commissioners. The appellant claims that the bridge as actually constructed, was unauthorized and not approved of by the authorities designated by the Railway Act, and was therefore erected contrary to the terms of the statute made and provided for in such cases; I shall indicate, as I proceed, the several grounds upon which this contention is based. The site and plans of the bridge, as originally projected, were first approved by the Governor-in-Council on June 10, 1913, upon the recommendation of the Minister of Public Works. No further step was apparently taken in respect of the undertaking for nearly ten years; the reasons for this prolonged delay need not be enquired into. On April 25, 1923, amended plans (exhibit 2) were approved of by the Governor-in-Council upon the submission and recommendation of the Minister of Public Works; the principal departure from the original plans was that the amended plans contemplated a bascule lift span with 150 feet horizontal clearance and 15 feet clearance above high tide, instead of another type of opening span shown in the first plans of 1913. The recommendation of the Minister was made with

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the concurrence of the Vancouver Harbour Commissioners and the Acting Chief Engineer and Deputy Minister of the Department of Public Works. On the 31st of July, 1923, the Railway Board by Order sanctioned, under section 248 of the Railway Act, the amended plans of the bridge (exhibit 34), and on the same day authorized the company to proceed to construction of the bridge according to such amended plans, but directed that detail plans of the sub-structure and super-structure be filed for the approval of the engineer of the Board. It is to be mentioned here that the appellant contends that the plans just mentioned as being approved of by the Railway Board, differed from the plans (exhibit 2) approved previously by the Governor-in-Council, in the following respects: the latter provided for two spans and four piers, the former for three spans and five piers; the piers in each case were to be composed of a different number of cylinders; the length of the bridge varied in the two plans; and that the grade at the south end of the bridge was different in the two plans. By reason of the variations, in the plans approved by the Railway Board from those approved by the Governor-in-Council, the appellant urges that the Order of the Railway Board was made without jurisdiction and is a nullity. Subsequently it appears, fears were expressed by the interested public, that if the bridge was constructed as contemplated, it would increase the rapidity of the current of water passing under the bridge, and a Board of Consulting Engineers was set up, I think, at the instance of the Government of Canada, to consider, *inter alia*, the best means of altering the structural plan of the bridge so as to diminish the rapidity of the current of the waters of the harbour passing under the bridge. The Board of Consulting Engineers eventually recommended that the spans of the bridge be raised five feet and also the Lynn Creek approach; that two additional spans be constructed and that certain changes be made in the piers; that certain of the framed trestle super-structure be dismantled and reconstructed. These changes were apparently suggested with a view to reducing the structural impediments to the free flow of the current at this point. Plans embodying these several changes were submitted to the Governor-in-Council for approval, on the recommendation of the Minister of

Marine and Fisheries. It is probable, as suggested by counsel for the appellant, that this recommendation emanated from the Minister of Marine and Fisheries, because the Board of Harbour Commissioners for the Port of Vancouver were proposing to assist the company financially in carrying out certain of the proposed alterations in the structural plans of the bridge, and this board was under the administration of the Department of Marine and Fisheries. At any rate, the plans of the bridge as finally completed were approved by this Order in Council. No explanation was given as to why the recommendation to the Governor-in-Council for the approval of the last amended plans was not made by the Minister of Public Works, but I shall later refer to this. The amended plans were approved by the Governor-in-Council on August 20, 1925. The Board of Railway Commissioners had apparently given its approval to the amended plans on March 6, 1925, prior to the approval by the Governor-in-Council. The appellant contends that the changes made by the amended plans were "deviations", which under the Railway Act, required the approval of the Governor-in-Council, and before any Order of approval of the same was made by the Railway Board, and that therefore, the Order of the Railway Board was a nullity because it preceded the approval of the "deviations" by the Governor-in-Council. The changes involved in the amended plans were doubtless of a very substantial character. The appellant also contends that the Order in Council of August 20, 1925, was not one such as contemplated by the Railway Act, but rather an approval of the advance of public funds to the Vancouver Board of Harbour Commissioners, to assist financially the respondent company in elevating the spans of the bridge and one of the approaches. It is also alleged that the respondent company, without justification proceeded with the construction of the bridge prior to the approval of the last amended plans, by either the Governor-in-Council or the Board of Railway Commissioners. The bridge was completed under the plans approved of in 1925 as just stated. An Order of the Railway Board permitting the use and operation of the bridge was passed on October 21, 1925; the bridge was formally opened for traffic on

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November 7, 1925, and has been continuously in operation since that date.

It is appropriate next to refer to the provisions of the Railway Act which are applicable to the work in question. First, it should be stated that the respondent company was incorporated in 1910, cap. 74, Statutes of Canada, 1910, and, *inter alia*, was authorized to construct and operate a bridge over the Second Narrows of Burrard Inlet, for railway and other purposes, but "so as not to interfere with navigation". Sec. 16 enacted that "The Railway Act shall apply to the company and its undertaking". The company was also empowered by sec. 14 of the Act, to construct one or more lines of railway to connect the bridge with the lines of other railway companies, operating in that locality. The undertaking was also declared to be a work for the general advantage of Canada. The provisions of the Railway Act, cap. 68, Statutes of Canada, 1919, which are relevant here, might be quoted at length; they are as follows:—

245. No company shall cause any obstruction, in or impede the free navigation of any river, water, stream or canal, to, upon, along, over, under, through or across, which its railway is carried.

* * * * *

247 (1). Whenever the railway is, or is proposed to be carried over any navigable water or canal by means of a bridge the Board may by order in any case, or by regulations, direct that such bridge shall be constructed with such span or spans of such headway and waterway, and with such opening span or spans, if any, as to the Board may seem expedient for the proper protection of navigation.

* * * * *

248. When the company is desirous of constructing any wharf, bridge, tunnel, pier or other structure or work, in, upon, over, under, through or across any navigable water or canal, or upon the beach, bed or lands covered with the waters thereof, the company shall, before the commencement of any such work,

- (a) in the case of navigable water, . . . submit to the Minister of Public Works . . . for approval by the Governor-in-Council, a plan and description of the proposed site for such work, and a general plan of the work to be constructed, to the satisfaction of such Minister; and
- (b) Upon approval by the Governor-in-Council of such site and plans, apply to the Board for an order authorizing the construction of the work and with such application, transmit to the Board a certified copy of the Order in Council and of the plans and description approved thereby, and also detail plans and profiles of the proposed work, and such other plans, drawings and specifications as the Board may, in any such case, or by regulation, require.

- (2) No deviation from the site or plans approved by the Governor-in-Council shall be made without the consent of the Governor-in-Council.
- (3) Upon any such application, the Board may,—
 - (a) Make such order in regard to the construction of such work upon such terms and conditions as it may deem expedient;
 - (b) make alterations in the detail plans, profiles, drawings and specifications so submitted.
- (4) Upon such order being granted, the company shall be authorized to construct such work in accordance therewith.
- (5) Upon the completion of any such work the company shall, before using or operating the same, apply to the Board for an order authorizing such use or operation, and if the Board is satisfied that its orders and directions have been carried out, and that such work may be used or operated without danger to the public, and that the provisions of this section have been complied with, the Board may grant such order.

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The alleged defaults of the respondent, in complying with the provisions of the Railway Act in respect of the securing of approval of the bridge plans have already been stated. Now, starting with the plans approved of by the Governor-in-Council in 1923, and assuming even that the plans approved of by the Railway Board in July of the same year, deviated, as alleged, in substantial particulars from the plans approved of by the Governor-in-Council. Sec. 248 (2) of the Railway Act enacts that “no deviation from the site or plans approved by the Governor-in-Council shall be made without the consent of the Governor-in-Council”. Any deviation from the plans approved of by the Governor-in-Council in 1923, was however sanctioned by the Order in Council made in August, 1925, approving of the final plans. The fact is, that the plans of the bridge as completed and put into use and operation were approved of by the Governor-in-Council and by the Railway Board; when all is said and done, the fact remains, that the bridge as constructed had such approval. If the respondent company proceeded, as alleged, with construction, according to the deviations to be recommended by the Board of Consulting Engineers,—and it is not unreasonable to assume that it had knowledge in advance of what such recommendations were to be—and chose to take the risk of securing subsequently the formal approval of such deviation by the Governor-in-Council; if the plans approved by the Railway Board in 1923 in fact constituted “a deviation” from the general plan approved of by the Governor

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in-Council in the same year, or, if such approval was prematurely obtained, that is, prior to the approval by the Governor-in-Council; still, I do not agree with the contention, that therefore the approval made by the Governor-in-Council and the Railway Board in 1925 of the ultimate plans of the bridge as actually constructed is a nullity, and not a compliance with the spirit of the statutory conditions. It seems to me that all the requirements and conditions which the Legislature sought to impose for the purpose of protecting public rights in navigable waters, was in the end observed. There may have been laxity on the part of all having to do with the matter, in observing from time to time the precise directions of the statute, but all such procedural defaults, if any, were, in my opinion, waived in the final sanction of the plans of the bridge as completed. The fact that the Order of the Railway Board made in 1925, preceded the approval of the same plans by the Governor-in-Council, is not, I think, of importance; their combined effect was a sanction, as required by statute, of a bridge proposed to be carried over a navigable water. Neither does sec. 248 (2) of the Railway Act make it imperative that consent to such deviations by the Governor-in-Council should be made upon the recommendation of one particular Minister; the consent of the Governor-in-Council is all that is required, and the statute does not say that this consent must be obtained upon the recommendation of any one Minister. The changes effected by the plans approved of in 1925 were evidently designed for the further assurance of the protection of navigation; it is to be assumed that the protests made against the plans approved in 1923, were, that the bridge had not sufficient height above high tide, and that the sub-structure of the bridge offered too many obstructions to the normal flow of the water at the Second Narrows. Probably, it was with the Department of Marine that public protests were registered against the plans approved in 1923, and which brought about the enquiry made by the Board of Consulting Engineers. Particularly would it be the function of the Department of Marine to safeguard the public rights in navigable waters, in Canada. That possibly was one reason why the recommendation to the Governor-in-Council was, in this instance, made by the Minister of that Depart-

ment of Government, in addition to the other reason I have already assigned. I do not therefore think there is substance in the contention, that the approval of or consent to the deviations of August, 1925, made by the Governor-in-Council, was a nullity because it was not made on the recommendation of the Minister of Public Works; in fact, I think, it matters little by what Minister that recommendation was made so long as the approval was made by the Governor-in-Council. Further, I think, it is to be presumed that the recommendation in question to the Governor-in-Council carried the approval of the Minister of Public Works. I therefore reach the same conclusion as the learned trial Judge, that the statutory conditions relating to the approval of the site, the general plans and the detail plans, of the bridge, were complied with, within the spirit and intent of the Railway Act.

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There remains to consider, upon this aspect of the appeal, the effect of the words "so as not to interfere with navigation", as found in the Act of Incorporation of the respondent company. It is contended, that Parliament having enacted this limitation in respect of the power of the company to construct and operate the undertaking in question, that neither the Governor-in-Council nor the Railway Board, had power to authorize the construction of a bridge which interfered with navigation; that the Act falls short of authorizing a nuisance; and that if the bridge as constructed does in fact interfere with navigation, it is a work erected contrary to the statute and constitutes a public nuisance. Upon this point, I agree with the reasoning and conclusion of the learned trial Judge, and there is little further that I need say. The Legislature committed to the Governor-in-Council and to the Board of Railway Commissioners, the power to determine the plan of bridge that might be constructed. Having exercised the discretion resting in them, and having approved of the site, and the general and detail plans of the work, as one not reasonably calculated to interfere with navigation,—and they must have meant that,—I think it is now too late to say, that the bridge was one erected contrary to the provisions of the respondent company's Act of Incorporation. Possibly, an error in judgment was made in approving the

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structural plans of the bridge; it may be that the bridge has left navigation at the Second Narrows more difficult and dangerous than theretofore; yet, the site, and the general and detail plans of the bridge having been approved by those to whom such power was specially delegated by Act of Parliament, the work having been in good faith completed according to such plans, and the completed work having been put into operation by leave of the Railway Board, I do not think the same can now be declared to be an unlawful work and a public nuisance, even if it does, in fact, in some degree, render navigation at this point more hazardous than prior to its construction. Fundamental errors in constructed public works, inimical to public interests, are frequently discovered after completion, but if the statutory authority and conditions applicable to the work were complied with, I hardly think it practical to say, that if damages result from the construction of the work, the party using it is responsible for any such damages, if occurring without negligence. In this case, I think, as the learned trial Judge held, that the words "so as not to interfere with navigation", mean not more interference than is reasonably necessary to carry out the undertaking as authorized, and as approved by the Governor-in-Council and the Board of Railway Commissioners. What the Governor-in-Council and the Board of Railway Commissioners did, was the equivalent of a positive legislative act authorizing the erection of the bridge, according to the plans under which it was in fact erected. If I am correct in this view, then the appellant fails because the work as constructed was one authorized by the Legislature. Thus, Blackburn J., in the course of his judgment in *Hammer-smith Railway Co. v. Brand* (1) says:—

I think it is agreed on all hands that if the Legislature authorizes the doing of an Act (which if unauthorized, would be a wrong and a cause of action), no action can be maintained for that act, on the plain ground that no Court can treat that as a wrong which the Legislature has authorized, and consequently the person who has sustained a loss by the doing of that act is without remedy unless in so far as the Legislature has thought it proper to provide for compensation to him.

The learned trial Judge has discussed this point in his reasons for judgment, at great length and with clearness,

(1) (1869) L.R. 4 H.L. 171, at p. 196 (E. & I. App.)

and his finding which I adopt, should not in my opinion be disturbed.

It was also contended that a rock fill, on the south shore, was greater in extent than authorized and was responsible for definite difficulties in navigating the bascule span. I do not propose discussing this point as I fully concur in the disposition of the same made by the learned trial Judge, and his reasons therefor.

Now as to the cross-appeal, in respect of the respondent's claim against the ship *Eurana* for damages caused to the bridge in consequence of the collision. In his reasons for judgment, the learned trial Judge discussed with great care the effect of the construction of the bridge upon navigation at the Second Narrows, the natural difficulties of navigation at this point, the peculiar sub-surface tidal currents obtaining at the time material here, the effect of dredging operations at the First Narrows upon the Second Narrows tidal currents, the navigation of the *Eurana*, and other alleged facts relevant to the respondent's claim that the damages caused to the bridge was by reason of the negligent navigation of the *Eurana*. He concluded, that upon the evidence, he could not find that the allegations of negligence against the *Eurana*, as to the time of making the attempt to pass through the bridge or the manner in which the attempt was carried out, had been sustained, and that it was a case of inevitable accident. After a careful perusal of the evidence, and upon a consideration of the reasons given by the learned Judge, I cannot see any grounds for disturbing the conclusion which he reached, and I think the same was justified by the evidence. I do not think that negligence has been established against the *Eurana*. At the time and place in question, conditions prevailed that undoubtedly made navigation through the bascule span extremely difficult, and I think with the learned Judge, that the *Eurana* attempted to navigate the open span with reasonable care, caution and maritime skill, and left undone nothing that could have been done to avoid the accident.

Accordingly I am of the opinion that the appeal and cross-appeal should both be dismissed, and with costs in each case.

Judgment accordingly.

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Judgment of the Honourable Mr. Justice Martin L.J.A.
delivered the 20th of April, 1929.

This is an action by the plaintiff company (incorporated by Can. Stat. 1910, Cap. 74 against the SS. *Eurana*, length 339.7 feet, beam 56.21, gross tonnage 5,688, regtd. 3,516, draught as then loaded 25 ft. aft 23.5 for'd. single screw. h.p. 2,500, Nels Svane, master), to recover \$7,887 damages done to its bridge across the Second Narrows of Burrard Inlet on the 10th March, 1927, shortly after 6 p.m. by said ship, owing to the alleged negligent navigation thereof, in colliding with the E. side of the bridge while attempting to go through its 150 feet bascule span with a full cargo of 4,200,000 feet of lumber when the tide, a fairly big one, was apparently at the last of low water slack, outward bound from Barnet. Several charges of faulty navigation are set up but those substantially relied upon are that the ship did not set and keep a course true for the centre of the span opening, and that she made the attempt to go through it at a wrong stage of the tide, i.e., on the ebb, instead of at slack or slight flood, and failed to observe the unfavourable set of the same, and delayed in taking proper manoeuvres.

The defendant ship disputes the title of the plaintiff to the bridge and the land it is built upon and its right to construct and maintain the same, and alternatively alleges that the plaintiff has not obtained the approval of the Governor General in Council, under the Navigable Waters Protection Act for its undertaking, and that in consequence the bridge is an unlawful obstruction to navigation; and also that even if the statutory power to build a bridge which impedes navigation has been duly conferred yet the plaintiff—

“negligently and wrongfully constructed a badly designed bridge which impedes and interferes with the navigation of said Second Narrows to a greater extent than is necessary for the proper exercise of the plaintiff's said statutory powers and the defendant says that the col-

lision between the SS. *Eurana* and the said bridge was occasioned by the fact that the said bridge was badly designed and constructed and impedes and interferes with the navigation of said Second Narrows to a greater extent than is necessary to enable the plaintiff to exercise its said statutory powers and that therefore the plaintiff is not entitled to recover damages in respect of said collision.”

The defendant ship also, on the facts of the collision, denies any bad navigation and alleges alternatively, par. 14, that it was caused by “circumstances of wind and current over which those in control of the *Eurana* had no control and which they could not anticipate or guard against and the collision was an inevitable accident for which the defendant is not responsible.”

And it further alleges that at the time in question the tide turned and began to flood earlier than the hour fixed by the tide table, and the northerly set of the tide was of abnormal force, and that the span opening is not in the middle of the channel, and is too narrow, and that the unnecessary number of short spans and a rock fill on the South shore create strong and varying currents which make navigation unusually difficult even at the most favourable times.

The defendant ship further sets up a counterclaim against the company for \$77,064 as and for damages to her caused by the said collision based upon the allegation that the plaintiff wrongfully and illegally erected the said bridge and maintains it as a public nuisance as being an “obstruction” which “impedes the free and convenient navigation of the said Second Narrows by ships having lawful occasion to navigate said waters,” and which “obstruction” was the cause of the damage to the ship while she was endeavouring to proceed past or through (it) without colliding with it.”

To this the plaintiff replies that the bridge has been duly constructed in accordance with powers con-

ferred by the said Statute and the Railway Act and certain recited orders of the Governor in Council and the Board of Railway Commissioners, and, in general, joins issue with the other said allegations of undue interference with navigation and nuisance by obstructions and wrongful or negligent construction in any respect, and denies that the same were the cause of the collision, and that it was due to abnormal conditions which could not have been anticipated and guarded against.

Upon these issues forty-two witnesses were called and a vast amount of evidence taken upon all aspects of the claim and counter-claim, much of which evidence is applicable to both distinct causes of action though not all of it, and it would be easy to confuse the issues were not their distinct nature kept in mind because the relevant facts are largely interwoven.

Taking up then the Plaintiff's claim first, and assuming in its favour all questions of title and that the bridge has been only constructed in accordance with statutory powers and plans authorized by the proper authority, it is nevertheless necessary to consider the effect of this authorized obstruction upon the navigation of the channel when an action is brought against a vessel for damaging the bridge in passing through it. In other words, if the effect of its construction is to make navigation even at proper times more difficult than theretofore it would not be reasonable to expect that mariners so using the channel could avoid injury to themselves or to the bridge as easily as they could if the channel had been left in a state of nature, even though they use all the skill and caution that should be required of a prudent and skilful navigator. It must follow that the more difficult the passage is made the more must accidents be expected, just as the easier it is the fewer should there be. Obviously it would not be reasonable to expect the same results in such very different circumstances, because though the standard of the mariner's navigation is always the same, yet as his task is rendered more difficult the more must it be expected that

reasonable human effort and precaution cannot always guard against accident when the margin of safety is substantially reduced in what at the best of times is, now at least, a channel which presents increased difficulties in navigation for larger deep sea vessels, over 300 feet in length, to navigate.

It is not necessary, on this branch of the case, to consider to the fullest extent what the effect of the construction of the bridge has been upon such navigation by ships of the class now in question, but it is sufficient to say that in three respects the natural difficulty has been substantially increased thereby, viz., in contracting the space in which it is necessary for such ships to line up in passing through the bascule span outwards, and in manoeuvring after passing through inwards; in addition to the naturally very uncertain conditions of tidal currents in the immediate vicinity of the bridge; and in increasing the force of the current through it at said span in particular. Though a great mass of evidence was given upon these main points it would be practically impossible to review it adequately in these reasons, and the subject is further complicated by the important unquestioned fact that the extensive operations which for a long time have been carried on (and still are in progress) in deepening, widening and straightening the outlet channel at the First Narrows have had an appreciable effect upon the currents at the Second Narrows, which indeed is obvious from the mere inspection of the charts of Burrard Inlet, because the contracted run-in of a great volume of water to the lower basin (between the bridge and Brockton Point) through the Second Narrows must inevitably be affected by the facilities of run-off to sea through the First Narrows, and *vice versa* with incoming tides which bring the water back through the First and Second Narrows to the much larger upper basin above the bridge. But upon the extent of the undoubted substantial effect of these First Narrows operations upon conditions at the Second there is no evidence of any weight, which is

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not indeed to be wondered at, because to obtain any reliable information upon the point a series of long and doubtless very expensive observations, and also researches into prior conditions, would have to be undertaken, which the parties hereto have not attempted and could not reasonably be expected to do so. Nevertheless the absence of exact information upon substantial changes in navigation which are not due to the bridge at all (and yet which will continue to increase as the First Narrows channel continues to be widened) renders it impossible to determine satisfactorily the extent of the degree to which the bridge alone has added to the natural difficulty of navigation, and it is not necessary on the present point to say more than that the bridge has, apart from the said First Narrows operations, increased in the said three ways the said natural difficulty to a substantial extent, though undefinable upon the insufficient evidence before me. At the same time, however, the increase is not as great as many witnesses deposed to and it is very probable that one of the reasons why there was so much conflict between apparently credible witnesses (as I am pleased to say most of them appeared to be) as to the difference between former and present conditions at the Second Narrows is that they failed to appreciate the far-reaching effect of the First Narrows operations upon present conditions of the tide and current at the Second and merely regarded the latter in the light of what they see now at that spot.

It is further alleged that the difficulty of navigating larger vessels through the bridge has been increased by the fact that the bascule span is not placed at right angles to the centre of the main current, and that it is appreciably to the South thereof. That such is the case to some, and an appreciable extent, there is little if any doubt because the presence of a shoal on the South shore of the channel extending Eastward from the bridge for about 700 feet to a protuber-

ance called The Knuckle tends to cramp such vessels in their passage inwards and outwards. It is not, in strictness, for this Court to suggest a remedy for this condition but in a case of this exceptionally wide public importance I cannot shut my eyes to the fact that the evidence suggests that it would be well for the proper authority to cause careful observation and investigation of the shoal to be made to ascertain if it would not be possible to reduce, materially at least, the obstruction it causes, by dredging operations, as in the First Narrows.

These questions of the proper construction of bridges and their proper position as regards the current are always difficult and there have been several of them before this Court, the last being *The Attorney General of British Columbia v. The Pacific Foam* (1), but they all depend upon the particular and always varying circumstances of each case. The present one, in view of its exceptional importance and difficulty has caused me long and anxious reflection, with the result, that bearing in mind the conditions the defendant ship was confronted with in attempting to pass through the span at the time in question, I can only reach the conclusion that the said allegations of negligence against her are not sustained by evidence, either with respect to the time of making the attempt or of the manner in which that attempt was carried out, despite the able manner in which Mr. Burns presented his argument to the contrary. The accident, was, I can only conclude from the evidence, caused by a very strong incoming sub-surface current setting northeasterly across the bridge and not visible on the surface, which continued to indicate slack water, and which under-current at a distance of 500-600 feet from the bridge suddenly and unexpectedly greatly increased in strength and took control of the ship causing her to sheer suddenly from the proper course she had been on and was still holding at a proper speed, and which in ordinary circumstances would have taken

her safely through the bascule span. No fault is to be found in the measures taken by the ship to extricate herself, though ineffectually, from the imminent danger in which she suddenly found herself and which she had no reason to anticipate. It is true that those in charge of her expected, and were in fact prepared to meet ordinary changes in the undercurrent there (caused largely by the fact that the change of the tide as the bascule span is very quick, almost instantaneous at times, and slack water usually is only for a few minutes) but not one at all approaching the abnormal strength encountered on this occasion, which her pilot, Wingate, describes as "tremendously stronger" than he had ever experienced there, and his evidence is confirmed in essentials by that of the Master, Svane, and also largely by Captain Harrison of the *Pacific Foam* and Captain Payne of the *Farquhar*, and W. Tambourino, independent eyewitnesses.

Being then of opinion that this collision "could not possibly have been prevented by the exercise of ordinary care, caution and maritime skill" on the part of the ship, the case becomes one of "inevitable accident" as so defined by the Privy Council in *The Marpesia* (1), wherein it is also said:—

"Here we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be."

This definition was also adopted by the English Court of Appeal in *The Schwan* (2), and lately applied by this Court in its New Brunswick District in the similar case of *The King v. The Woldingham* (3), to include a sudden "yaw" in passing through a narrow bridge; cf., also *Marsden's Collisions at Sea* (1922) 18, and *Bevan on Negligence* (1928) 1291.

It is to be noted that in certain aspects there is also a similarity between this case and the very recent one of *The Vectis* (4), wherein a collision "bumping" took place between two barges in a narrow creek owing to "a sudden swell of the incoming tide," as Lord Merivale describes it. A new trial was ordered in the circumstances, but speaking of the expectation of "bumps" in narrow places Mr. Justice Hill said, p. 387:

"Apart from knowledge of the dangerous position of the anchor, I can see no reason for saying that there is negligence in not preventing a harmless bump between barges, such bumps are frequent in the ordinary working of barges, and in this narrow creek were probably incidental to the ordinary use of the creek. They involve neither *damnum* or *injuria*."

Seeing that the case is one of inevitable accident the Plaintiff's claim must be dismissed, and formerly it was the practice to make no order as to costs in such circumstances, but the present practice as laid down by this Court in *The Jessie Mack* v. *The "Sea Lion"* (5), is that costs should follow the event in the absence of special circumstances requiring a departure from that rule; to the cases there cited I add *The Cardiff Hall* (6), and as the defence of inevitable accident was pleaded herein and there are no special circumstances which would justify a departure from said general rule the disposition of the costs will be in accordance therewith.

Then as to the counterclaim of the ship against the bridge. This depends largely on different considerations because if the bridge has been duly built in accordance with the permission given by the proper authority, the fact that it does actually obstruct navigation more or less imposes no liability upon it for damage to vessels caused by the increased difficulty in navigating the natural narrow channel, which it

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(1) (1872) L.R. 4 P.C. 212.

(2) (1892) P. 419.

(3) (1925) Ex. C.R. 85.

(4) (1929) 45, T.L.R. 384.

(5) (1919) 27 B.C.R. 444.

(6) (1918) P. 56.

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has restricted and impeded substantially as already indicated; it is beyond reasonable doubt that if the bridge had not been there on the day in question the ship would not have suffered any damage. The right, therefore, of the Plaintiff company to build and maintain the bridge in its present state and position is what is really in question on this branch of the case.

It is first objected that the Plaintiff has no title to the lands upon which the bridge is built and therefore cannot maintain this action and that its National Crown Grant (dated May 9, 1924) of the lands "as part of a public harbour" is invalid in that no Order in Council authorizing it has been put in evidence though the Grant recites "that it is made under and by virtue of the statutes in that behalf and pursuant to authority duly granted by our Governor in Council." This objection, in my opinion, is not one of weight in the case of a Grant made under the great seal of Canada, even assuming that an order in council is necessary, because, in brief, a recital in such an instrument of the greatest solemnity and duly recorded, i.e., enrolled (on 31st May, 1924) is sufficient to establish a *prima facie* case of the existence of such an order if necessary, or at least to bring into operation the maxim *omnia praesumuntur rite esse acta*, nor on long-established and well-known principles has a stranger any status to rely upon the effect of the non-performance of any conditions which might, e.g., result in a forfeiture to the Crown—*Canadian Co. v. Grouse Creek Flume Co. Ltd.* (1), and cases noted at p. 8.

Then as to the application of the Navigable Waters Protection Act, cap 115, R.S.C. 1906, and amendment, cap. 33 of 118, now cap. 140 R.S.C. 1927; it is in my opinion excluded by the 3rd section thereof in and for the present circumstances and purposes, not being "rebuilding or repairing," as will later appear.

The Plaintiff company by its said act of incorporation (cap. 74 of 1910) is authorized by secs. 8 and 9

thereof not only to build a bridge but also to operate (and does in fact operate) "one or more lines of railway" across said bridge and into adjacent territory as part of its undertaking as a connecting line with certain of the other railways specified in sec. 14, and by sec. 2 that whole undertaking is "declared to be a work for the general advantage of Canada" and sec. 16 declares that "the Railway Act shall apply to the company and its undertaking." The effect of these provisions is to read into the Act of Incorporation, which is a public Act (Interpretation Act, R.S.C., cap. 1, s. 13), all apt provisions of the Railway Act and the two acts must be read as one so as to carry out the intention of Parliament to legislate for the "public good" (advantage of Canada) and, as the said Interpretation Act, sec. 15, declares it—"shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act. . . . according to its true intent, meaning and spirit."

Approached in this light no real difficulty is to be experienced from the words much relied upon by the ship in sec. 8, that said undertaking may be constructed, operated and maintained "from some convenient points on the South shore in or near the City of Vancouver to points on the opposite shore of Burrard Inlet so as not to interfere with navigation. That the general location of the bridge is at the most "convenient points" of the Second Narrows is not disputed; in fact it is unquestionably at the best points, and except in its immediate neighbourhood the construction of a bridge across them (the Narrows) would not in reason be contemplated, and even where it is located the evidence is clear that for many reasons its construction presented several problems of exceptional difficulty to overcome. It would be impossible in the present stage of human effort to build a bridge there which would not in some substantial degree interfere with navigation within the decisions which are con-

veniently collected in a leading case in this Court. *Kennedy v. The Surrey* (1), to which may be added *Attorney-General v. Terry* (2), and *The King v. The Woldingham*, *supra*.

To escape the literal consequences of those decisions and to allow unimpeded navigation for the whole of the space at all stages of this tide it would, as one example only, be necessary to have a span of at least one thousand feet without supporting piers and that fact alone shows that Parliament, which must be assumed to be informed upon the subject of the public harbour with which it was dealing, could never have contemplated anything of the kind, and to hold that Parliament intended to grant a charter which ostensibly conferred powers to be exercised to the "general advantage of Canada" and yet at the same time rendered them incapable of execution is a conclusion which a Court of Justice should be intractably driven to before accepting because it would "lead to a manifest absurdity." The Privy Council in *City of Victoria v. Bishop of Vancouver Island* (3), thus laid down the principles which should govern the construction of the act in question:

"There is another principle in the construction of statutes especially applicable to this section. It is thus stated by Lord Esher in *Reg. v. Judge of the City of London Court* (4), 'If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity.

In my opinion, the rule has always been this:—if the words of an Act admit of two interpretations, then they are not clear; and if the one interpretation leads to an absurdity, and the other case does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation.' *And Lord Halsbury*

in Cooke v. Charles A. Vogeler Co. (5), said: 'But a court of law has nothing to do with the reasonableness or unreasonableness of a provision, except so far as it may help them in interpreting what the legislature has said.' Which necessarily means that for this latter purpose it is legitimate to take into consideration the reasonableness or unreasonableness of any provision of a statute. Again, a section of a statute should, if possible, be construed so that there may be no repugnancy or inconsistency between its different portions or members?"

Applying both these most appropriate principles to the present case, Parliament, in my opinion, intended that the said two acts must be read together and practically applied in such a way as to arrive at the only possible reasonable result in the circumstances, viz., that the words "not to interfere with navigation" mean not more than is necessary to carry out the undertaking in the manner authorized by the special tribunal created by Parliament in the incorporated Railway Act to determine that very question, i.e., the Board of Railway Commissioners for Canada. And it must not be overlooked that, since the granting of the charter and the construction of the bridge thereunder, the National Government itself has materially increased the difficulty of navigation at this bridge by its large operations at the First Narrows already noted.

In the Railway Act (cap. 68 of 1919) itself there is a much more pronounced "repugnancy or inconsistency" than in the Plaintiff's Act (sec. 8) because the group of sections, 245-8, entitled "Respecting Navigable Waters," begins by a general prohibition s. 244 against "any obstruction in. . . the free navigation" of such waters, but nevertheless proceeds immediately and necessarily to provide for inevitable obstruction by bridges and "other structures" to be constructed (under secs. 247-8) as to the said "Board may seem expedient for the proper

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(1) (1905) 11 B.C.R. 499.

(2) (1874) 9 Ch. App. 423.

(3) (1921) 2 A.C. 384.

(4) (1892) 1 Q.B. 273, 290.

(5) (1901) A.C. 102, 107.

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protection of navigation" by proper openings in spans and due provision for draws and swings where necessary. What is the "proper protection of navigation" in the particular circumstances is for the Board to decide before granting an order in accordance with the specified procedure, for construction, and subsec. (5) of 243 finally provides that: "Upon the completion of any such work, the company shall, before using or operating the same, apply to the Board for an order authorizing such use or operation, and if the Board is satisfied that its orders and directions have been carried out, and that such work may be used or operated without danger to the public and that the provisions of this section have been complied with, the Board may grant such order."

This brings the case to a question of fact as to whether the Plaintiff has procured the necessary orders from the Board under said sections, as to which a long contest arose but no useful purpose would be served by here considering it in detail. It is sufficient to say, therefore, that in my opinion all statutory conditions were fulfilled which are necessary to support the validity of the various orders of the Board that the Plaintiff relies upon, and that it has in fact and without negligence constructed the bridge at the site and in accordance with the plans and specifications duly authorized originally and later by alterations in certain particulars validly approved. Such being the case no liability attaches to the Plaintiff for the consequences of the proper "construction, operation and maintenance" of its undertaking under its act of Parliament. *Can. Pac. Ry. v. Roy* (1); and *Quebec Railway, etc. Co. v. Vandry* (2).

The final point requiring particular consideration is that the bridge is in fact not constructed in accordance with the said statutory authorization but has substantially departed therefrom in a way that has materially increased the difficulty of navigation even beyond the degree

of obstruction that the said authorization permitted, and on this question a large amount of evidence was given but with the result that such allegation has not been established in proof. The only feature of it that created any doubt in my mind was in regard to the rock fill on the S. shore, the extent of which was not as clearly defined as I should wish by either party, doubtless owing to its nature and the unavoidable obliteration of the original contour of the land and tidal marks at that point. But I have no doubt that even if it could be clearly proved that the said fill is greater in extent that authorized nevertheless that excess in size is "an encroachment of so trifling a nature that this Court would not interfere" as was said by Lord Chancellor Cairns in *Attorney-General v. Terry*, *supra*, p. 431. That case has been unanimously adopted by our National Supreme Court in *The Queen v. Moss* (3), as "settling the law," and it approves the judgment below of Jessel M. R. The Court said, per Chief Justice Strong:—

"Even if the bridge now in question was of very great public benefit, whilst the prejudice it caused to the public as an obstruction to navigation was of the slightest possible degree, it nevertheless would have been an illegal structure amounting to a public nuisance, which, as such, the Crown might cause to be removed unless for other reasons it was not to be treated as a nuisance." In the case at bar there is no evidence to justify a finding that any "prejudice" has been occasioned to the navigation of the bridge by the excess in size (if such there be) of the rock fill beyond what was lawfully authorized as aforesaid.

In conclusion the following illustration given by the Master of the Rolls (in the course of his valuable remarks upon the way obstructions in public harbours should be regarded in the light of changing conditions) in Terry's case may appropriately be cited as some indication of how the difficult situation at the Narrows was doubtless viewed by

(1) (1902) A.C. 220.

(2) (1920) A.C. 662, at 681.

(3) (1896) 26 S.C.R. 322 at p. 332.

the Board of Railway Commissioners in their attempt to deal with conflicting public interests in a practical way which would best secure the greatest benefit to the public as a whole:

"Suppose you have a navigable river, and it is necessary to cross it by a bridge, and the river is too wide to allow of a bridge of a single span, you must then put one or more piers into the middle of the river. and, of course, according to the extent you introduce bridge piers or bridge arches into a navigable river, you to some extent diminish the waterway, and to some extent, perhaps to a more or less material extent, obstruct the navigation. But it is for the public benefit at that spot that a public road should be carried over the river by the bridge, and that benefit may so far exceed the trifling in-

jury, if injury it be, to the navigation, that on the whole a Court of Justice may fairly come to the conclusion that a public benefit of a much greater amount has been conferred on the public than the trifling injury occasioned by the insertion of the piers into the bed of the river. In that case also it would be a public benefit that would counterbalance the public injury."

It follows that upon the whole of this branch of the case the counterclaim must be dismissed and with costs in accordance with the general rule.

I feel that I should not leave this case of exceptional importance and difficulty without adding a few words in appreciation of the highly creditable manner in which it was handled by the counsel concerned therein; their able work has been of great assistance to the Court.

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THE B.C. FIR AND CEDAR LUMBER COMPANY, LTD. } APPELLANT;

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v.

THE MINISTER OF NATIONAL REVENUE } RESPONDENT.

Revenue—Use and Occupancy Insurance—Insurance on Net Profits and Fixed Charges—Income Tax—Profit and Gain.

The appellant carried on the business of manufacturer and dealer of lumber. Besides fire insurance it was insured against loss or damage which it might sustain in the event of its plant, in whole or in part, being shut down or suspended in consequence of fire or damage, which insurance is known as Use and Occupancy Insurance. These policies insured plaintiff for \$60,000 in respect of loss "On Net Profits" and \$84,000 "On Fixed Charges," the former being defined to mean net profits that would have accrued had there been no interruption of business caused by the fire, and the latter, all standing charges and expenses which must necessarily continue to be paid or incurred by the assured during the time the plant is inoperative.

A fire having occurred in the appellant's premises destroying part of the property, they received from the Insurance Company \$43,000 for loss of net profits and \$52,427 for fixed charges. This amount, or part thereof, was assessed for income tax. Hence the appeal.

Held, as the amounts constituting Fixed Charges were incurred and paid by the appellant in carrying on its business, and had been allowed as a deduction in determining its net income, that the amounts received

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by it from the Insurance Policies covering Fixed Charges are applicable to such deduction and should be applied in reduction of the deduction claimed.

2. That the amount received for "Net Profits" aforesaid falls within Section 3 of the Income War Tax Act, and is taxable as income. That the said amounts were gain or profit connected with and arising from the business of the appellant. That it was not a receipt or revenue on account of loss or replacement of capital.

APPEAL from decision of The Minister of National Revenue, under the Income War Tax Act, 1917.

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

C. H. Locke, K.C., for Appellant.

C. Fraser Elliott, K.C., for Respondent.

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

THE PRESIDENT, now (December 11, 1929), delivered judgment.

The appellant company, during the year 1921 and thereafter, carried on its business as a manufacturer and dealer in lumber products in the city of Vancouver, B.C. In the month of March, 1923, the appellant was insured for the period of one year from the said month by some seventeen fire insurance companies against loss and damage to its plant and property by fire, and also by the same companies against loss or damage which might be sustained in the event of its plant, either in whole or in part, being shut down or suspended in consequence of fire and damage, which the latter insurance policies are usually known as Use and Occupancy Insurance. The contracts of Use and Occupancy Insurance insured the plaintiff in the total amount of \$60,000 in respect of loss "On Net Profits", and \$84,000 "On the Fixed Charges". In these contracts of insurance, "Fixed Charges" is defined to include all standing charges and expenses which must necessarily continue to be paid or incurred by the Assured during the time its plant shall be inoperative; and "Net Profits" is defined to mean net profits that would have accrued had there been no interruption of business caused by the fire.

On August 21, 1923, the plant and premises of the appellant were destroyed by fire; the appellant and the adjuster for the insuring companies agreed upon the period of the interruption of the former's business as being two hundred and fifteen (215) business days, this being the length of time agreed upon as being required for the rebuilding of the plant, and the loss was adjusted upon the following basis:—

Loss of net profits estimated at \$317·3263 per day. Insured for and allowed at \$200. per day for 215 days.....	\$43,000 00
Fixed charges estimated at \$243·85 per day. Insured for \$280 per day.	
Allowed at the actual estimated loss of \$243.85 for 215 days...	\$52,427 90

The insuring companies paid to the plaintiff the said sum of \$95,427.90.

During a portion of the period of the interruption of the appellant's business, it was able to carry on certain business, namely, the sale of part of its lumber stock and wood which had not been destroyed by fire; and in order to maintain its business connections it purchased certain manufactured lumber in the market and resold it. These operations, it is agreed, constituted but a small fraction of the business which the appellant would ordinarily have carried on but for the destruction of its manufacturing plant and premises.

The appellant in making its return under the Income War Tax Act, charged the premium of \$3,828.29 paid for such insurance, under the heading of General Expenses. The respondent, in assessing the income of the appellant for the year 1924, treated part of the moneys received by the appellant from the insurance companies as income for the said year; the appellant treated such moneys as income in its accounts and reported a profit to the Department of Government administering the Act, but it is agreed, that in so doing the company acted without legal advice. Later, upon obtaining legal advice, the appellant informed the Department of National Revenue that these insurance moneys were wrongly included as income. The appellant, in due course, appealed from the assessment made against it, but the Minister of National Revenue dismissed the appeal; the appellant now appeals to this Court and it is agreed that such appeal is properly here. The appellant's contention is that the money received by it from the insur-

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ing companies is not income within the meaning of the Income War Tax Act; the respondent contends that such money is income and was properly assessed as such under the Act.

It was agreed by counsel, upon the hearing of the appeal, that all I need determine was whether or not the moneys received by the appellant company from the insuring companies were income within the meaning of the Income War Tax Act. That question being disposed of, I was informed that in the event of my finding that the moneys in question were properly taxable, the amounts due for the different taxation periods would be amicably reached between the parties.

I think the amounts derived by the appellant, from the Use and Occupancy Insurance policies, constitute income within the meaning of the Income War Tax Act. So far as the amounts received on account of Fixed Charges are concerned, there is little room, I think, for substantial controversy. If the amounts constituting Fixed Charges, were incurred and paid by the appellant in carrying on its business, and have been allowed as a deduction in determining its net income, then the amounts received by it from the insurance policies in respect of Fixed Charges are applicable to such deduction and should be applied in reduction of the deduction claimed. The appellant was, in that amount, recouped for any disbursements made on this account during the period its plant was not in operation. As expressed by Mr. Elliott for the respondent, had the insurance companies themselves paid directly the Fixed Charges as maturing, and the appellant might conceivably have so directed, in that case, the appellant's business accounts would not disclose any receipts or disbursements on account of Fixed Charges, and consequently there would be no income subject to taxation. The result is the same if the appellant received the amounts from the insurance companies on account of Fixed Charges, and disbursed the same on the same account; a deduction must be made for such disbursements, but the appellant's accounts must show the receipt of any amounts derived from the insurance companies on account of Fixed Charges. The appellant having received the benefit of a deduction for Fixed

Charges, an expense for income tax purposes, all receipts coming into its hands on account of Fixed Charges must appear on the other side of the ledger; the difference would be the taxable net income, although in this case the debits and receipts would no doubt be treated as balancing one another. Nothing further need, I think, be said upon this aspect of the case.

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Now, as to the remaining point in issue. It seems to me that the amounts derived from the insurance policies, on account of Net Profits, fall within sec. 3 of the Income War Tax Act. The premium paid on account of insurance against loss of Net Profits was claimed as an operating expense and so allowed by the Minister, and this expense was incurred for the purpose of ensuring the earning of net business profits; the contracts of insurance or indemnity make this quite clear, and also that Net Profits mean net profits that would have been earned had there been no interruption of business. Here, a definite portion of the appellant's business was for a fixed period interrupted, and consequently a portion of its usual revenues accruing from the production and sale of its products was temporarily interrupted; but on account of that interruption, and under contracts of indemnity against business interruption, the cost of which was borne by the business interrupted, the appellant received sums of money in substitution of the net profits that otherwise would presumably have been earned. I think such income must enter into the revenue accounts of the business like any other income ordinarily earned, or any other receipt incident to the business, and thus enter into the calculations determining what is the net income of the business, for taxation purposes. The moneys in question were, I think, a gain or profit connected with and arising from the business of the appellant. I cannot conceive of it being anything else. If the same were transferred to a reserve or contingent account no deduction could be allowed upon the ground that it was there so placed. It was not a receipt or revenue on account of loss or replacement of capital. The Act does not seem to have contemplated any exemption or deduction on account of income of this nature.

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Many cases were cited by counsel, but I found little or no assistance from any of them, with one exception, *The International Boiler Works Co. v. Commissioner of Internal Revenue* (1). In this case, the income in question was derived from so-called Use and Occupancy Insurance against loss of net profits, and the same was held to be taxable under the provisions of the United States Revenue Act, by the United States Board of Tax Appeals. There is nothing in the United States Revenue Act, so far as I can see, that differentiates that case from the present proceeding under the Income War Tax Act.

I therefore disallow the appeal with costs to the respondent.

Judgment Accordingly.

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MICO PRODUCTS, LIMITED.....PLAINTIFF;

vs.

ACETOL PRODUCTS, INC.....DEFENDANT.

Patents—Specification—Claims—Subject-matter—Validity—Infringement

The patent in suit herein related to a window glass substitute. The patentee states that he employed a "reticular metallic base, the width of the meshes and size of the wire strands thereof being so designed as to insure maximum transparency and strength of the final product. The composition of the lacquer or filler used to produce, when dried, a thin, tough transparent coating or film between the wire meshes and firmly adhering to the strands of the base material, must be so selected as to not only withstand weather conditions but to possess the property of being a poor conductor of heat which makes the ultimate article specially suitable for specific uses such as green-houses, poultry houses and the like. We have found that cellulose acetate or cellulose nitrate mixed with a suitable plasticizer and the mixture dissolved in a suitable solvent, has given excellent results from the standpoint of producing a coating substance endowed with the above characteristics." The Specification ends as follows: "While our invention has been set forth in several modifications, it will be understood that others may be made by those skilled in the art without departing from the spirit and scope thereof. For example other compositions or lacquer may be found for coating the fabric or material other than those suggested and because of their inherent properties, will be especially valuable for such use,—but all such modifications are desired to be regarded as contemplated by the invention as defined in the appended claims." And he then claims: "An

(1) (1926) 3 U.S. Board of Tax Appeals, 233.

article of manufacture comprising a reticular metallic base covered with a flexible transparent film adapted to wet the strands of said base and follow the expansion and contraction thereof, the thickness of said film being such that the outlines of the meshes of the base are substantially preserved in the surfaces of the film, whereby said surfaces are substantially divided into sections corresponding in number and general design to the meshes of the bases."

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Held: That inasmuch as the quantities of the ingredients to be used to successfully produce the object covered by the patent was nowhere given, the patent failed in this respect to comply with the provision of Section 14 of the Patent Act.

2. That as the final clause of the specification took in all the prior art and was a blanket claim, it was too wide and vague in view of the prior art, and failed in that respect to comply with the Statute. That a claim to every mode of carrying a principle into effect amounted to a claim to the principle itself and is bad.
3. That the questions of anticipation and subject-matter are so much bound up together that it would seem impossible to deal with one without touching the other.
4. That upon the enquiry as to whether or not the patent is good or bad, as to whether the subject-matter can be sustained by letters patent, regard must be had exclusively to the patent itself and not to the product the patentee might see fit to produce under a secret process outside and foreign to the patent.

ACTION to impeach and annul the Canadian letters patent for invention No. 270,927.

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

O. M. Biggar, K.C., for plaintiff.

C. C. Robinson, K.C., for defendant.

The facts are stated in the Reasons for Judgment.

AUDETTE J., now (January 14, 1930), delivered judgment.

This is an action to impeach or annul the Canadian patent, No. 270,927, issued on the 24th day of May, 1927, to Cello Products, Incorporated, whose name has been changed to *Acetol Products, Inc.*, assignee of Jules Colle and Achilles Colle, for "Glass Substitutes." The application for the Patent was filed on the 25th August, 1925.

In the language of the Specification (p. 2) the invention relates to a window *glass substitute* and more particularly to a novel and improved article of manufacture which can be utilized in various arts to take place of window panes and the like, being particularly applicable in the construction of enclosures when light diffusing and

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heat insulating properties are important factors such as greenhouses, hot-beds, cold-frames, poultry houses, chicken coops and the like . . .

Further on (at p. 5), the Patentees state:

In practicing our invention, we prefer to employ a *reticular metallic* base, the *width of the meshes and size* of the wire strands thereof being so designed as to insure maximum transparency and strength of the final product. The composition of the lacquer or filler used to produce, when dried, a thin, tough transparent coating or film between the wire meshes and firmly *adhering* to the strands of the base material, must be so selected as to not only withstand weather conditions but to possess the property of being a poor conductor of heat which makes the ultimate article specially suitable for specific uses such as greenhouses, poultry houses and the like. We have found that *cellulose acetate* or cellulose nitrate *mixed with a suitable* plasticizer and the mixture *dissolved in a suitable solvent*, has given excellent results from the standpoint of producing a coating substance endowed with the above characteristics.

Then further on, at p. 7, the Specifications set forth:

The lacquer or coating which we use to incase or enroll the strands of the base 1 may comprise a composition consisting of cellulose acetate and a plasticizer, the admixture being dissolved in a suitable solvent.

Cellulose acetates and cellulose nitrates belong to the general class of cellulose esters. The plasticizer is a material which, when added to the solution of cellulose esters, is a suitable solvent which confers upon that solution ability to produce when dry a film which will wet and adhere to the metallic base to which it is applied. It is non solvable in water and will prevent entrance of water in these films.

Plastifying agents and plasticizers mean the same thing.

Then claim 1, which covers everything, as there is no substantial difference in the five other claims, reads as follows:—

What is claimed is:

1. An article of manufacture comprising a reticular metallic base covered with a flexible transparent film adapted to wet the strands of said base and follow the expansion and contraction thereof, the thickness of said film being such that the outlines of the meshes of the base are substantially preserved in the surfaces of the film, whereby said surfaces are substantially divided into sections corresponding in number and general design to the meshes of the bases.

These extracts from the Specifications and claim, as above set forth, are made with the view to facilitate the comparison or *rapprochement* of the same to the prior art, as the case turns principally upon the question of anticipation.

The issues are narrowed down to the only question as to whether or not the defendant's patent is valid or invalid. The defendant's patent is far from being a pioneer patent. It is very narrow and therefore calls for a narrow construction.

Proceeding to the consideration of the merits of the case submitted, the outstanding question which presents itself for determination is as to whether the process or product in question covered by the patent is *per se*, in view of the prior art, proper subject-matter.

This process or product is one of great simplicity involving a subject-matter well defined in the prior art for a similar and analogous purpose.

The history of the prior art discloses the two products called respectively *Spondite* and *Vitrex*, together with prior patents describing a similar process and product for an analogous purpose.

The commodity claimed to be produced under the patent would seem to be and comprise a reticular metallic base,—the well known wire screening—not in any way earmarked—to be covered with a flexible transparent film adhering to the strands. The film is confined to a composition or solution of cellulose acetate or cellulose nitrate; with a plasticizer, generally speaking, the kind, nature or composition of which is not claimed by the patent.

Exhibit D was produced at trial as a sample of the defendant's product; but the evidence does not establish that it was manufactured by them and, what is more important, that it was manufactured according and under the patent and not under a secret process as distinguished from the patent, a matter to which reference will be hereinafter made.

The product *Vitrex*, samples of which, among others, are filed as exhibits 7 and 8, was sold on the Canadian markets, in February, 1923, in British Columbia, Alberta, Saskatchewan and Manitoba and was likewise advertised in the "Farm and Home" publication circulated in these provinces.

It seems in all respects similar and analogous to Exhibit D,—with perhaps a weaker wire—and used for similar and analogous purposes. It is also called "wire glass"—"substitute for glass." Its use and durability for interior purposes is not questioned; exhibit 8 is a portion of the material used on cold-frames for two years and which was recently cut off from the same.

Exhibit 7 was cut off a chicken-house, but was never exposed to the weather.

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Spondite is another similar "glass substitute,"—a wire mesh covered with cellulose and plasticizer. It was also sold and advertised in British Columbia, between 1920 and 1921, in 1922 and 1923. It was advertised as a general "glass substitute" for the analogous purposes mentioned in the defendant's patent. Exhibits 11 and 12 are filed as samples of the same. Witness Smillie, who went to Scotland in 1920, brought out with him a sample of "Spondite" in 1920.

The frame work in "Spondite" is copper wire and this commodity, it appears, was removed from the market because of the price of wire going up during the war.

Witness Glenn testified he can produce "Spondite," (exhibits 11 and 12), under the instructions found in the defendant's patent as coming within the scope of the patent in question,—and the converse is also true. A very important and controlling statement.

Then, besides these two glass substitutes, "Vitrex" and "Spondite," come a number of patents of the prior art in connection with the same subject-matter, which were filed by the plaintiff at trial, viz:—

Exhibit 14—British Patent—No. 1765—Johnson, 1855.

- " 15—British Patent—No. 128,274—Henry Dreyfus, Convention date—Aug. 3, 1916—U.K. 10 July, 1917.
- " 16—U.S. Patent—No. 314,483—Scarles—24 March, 1885.
- " 17—U. S. Patent—No. 342,345—Ford—25 May, 1886.
- " 18—British Patent—No. 16,656—de Chazelles—29 July, 1904.
- " 19—U.S. Patent—No. 1,308,426—Keil—1 July, 1919.
- " 20—U.S. Patent—No. 1,309,858—Jones—15 July, 1919.
- " 21—U.S. Patent—No. 1,354,551—Hansen—5 October, 1920.
- " 22—British Patent—No. 25,984—Henry Dreyfus—9 December, 1921.
- " 25—U.S. Patent—No. 1,497,989—Russel—17 June, 1924.

Witness Glenn has filed as exhibits 14a, 14b, 14c, 14d 14e the results of his experiments showing the products made under patent exhibit 14. They are made with similar wire screening upon which a film was wet or adhered to; they show what the patent covered.

The same witness, dealing with exhibit 15, filed also as exhibits 15a, 15b, 15c products of the results of his experiments under that patent.

This witness Glenn, who made these experiments, is a patent solicitor and an amateur chemist, having some laboratory facilities at his home. He states, among other things, that exhibit 15b was made with cellulose acetate, as in the defendant's patent, and dissolved in tetrachlorethane reinforced by metallic fabric. These exhibits although quite crude and made without the proper appliances, under these patents of the prior art, show clearly even from mere ocular observation that they come within the scope of the subject-matter of the defendant's patent.

Then exhibit 16 (Scarles) discloses a wire cloth to which a thin translucent film is applied. The formulae mentioned in this patent have been criticized by the defendant's witness Hawthorn as not adhering to the metallic base; but not from observation of an article produced thereunder, but merely from the suggestion of the solution therein described.

Ford's patent, exhibit 17, is another one of the same class as the previous exhibit and has reference to a waterproof and translucent covering for roofs and for other like purposes, consisting of wire gauze coated with an oxidized compound of linseed oil and litharge or other siccativ which covers up the wire and fills the meshes. It is light, flexible and transparent.

The British Patent of de Chazelles (exhibit 18) is a product of "armoured celluloid." It is an armature or core formed either of perforated or other plates, *wire*, and is enveloped in a bed or layer, or between two thin sheets of a *plastic material having nitrocellulose as its base*, such as is designated under the generic name of celluloid, and it has flexibility, rigidity and strength,—its uses being the same as the product of the defendant's patent.

The Kiel British patent (exhibit 19) is another one that has to do with an open-work material, such as wire screen-

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ing, producing a semi-transparent material by dipping the wire in a solution of sodium silicate or applying a heavy coating of the same upon it and turning out a product resembling stained glass.

The Jones patent (exhibit 20) is an invention having to do with the coating of a wire fabric with *cellulose acetate*, *cellulose nitrate* or any similar composition. This patent uses the same composition as that used by the defendant and expressly anticipates the defendant's patent.

The Hansen patent (exhibit 21) is also for a substitute for glass by closing the meshes of a wire fabric, producing a translucent sheet by dipping the screen into solutions described in the patent and having acetic acid among its ingredients.

The second Dreyfus British patent (exhibit 22) provides various proposals for the manufacture of sheets, webs, plates or the like of *nitrocellulose*, *acetyl cellulose* and other *cellulose esters* or compositions containing the same, reinforced by open-meshed metallic base, being employed as *glass substitute*, and makes use of plastifying agents,—just as in the defendant's patent.

The adherence of the film is, in the defendant's patent, done through the use of plasticizers with cellulose acetate; but the nature of the plasticizers is not defined or claimed in his patent, nor are the quantities, the quality or the kind anywhere therein described. And as disclosed by one witness at trial, one can manufacture under the prior patents the very article claimed by the defendant's patent.

Then the Russell patent (exhibit 23) provides a wire screen carrying a binder supporting a *plastic* composition producing a flexible or glass composition, using for his solution a silicate of sodium.

The products of these different patents as compared with the product of the defendant's patent and with exhibit D, have been conjecturally (i.e., without having ever seen the product, but from the mere reading of the patent), criticized, by the defendant's expert witness for their want of durability and adherence; but, he testified that the products (p. 116) suggested by these earlier patents would be perfectly satisfactory for interior purposes. However, whether the product is made under the prior art and

whether the defendant's patent is good or bad, so long as it is the same, there is anticipation.

Is not a peremptory answer and explanation to this criticism to be found in the testimony of Dr. Max Mueller, president of the defendant company since its incorporation in March, 1923, when it abandoned the name of Cello Products, Inc. This examination was taken, upon commission, at New York City.

It results, among other things, from this evidence, that the defendant's product was first sold in 1923 and that they used *cellulose acetate since then*.

In the course of his examination, we find the following questions and answers, viz:—

Q. 22. What plasticizer was used? This question is objected to.

Q. 23. Am I correct in understanding from time to time you have used a variety of plasticizers in making this product?—A. I do not doubt that in some cases plasticizers were used, but these belong to one particular class that is adaptable to *cellulose acetate*.

Q. 24. What *class of cellulose do you use now?* The question was objected to, the witness answered thus.—A. I decline to answer.

Q. 25. Do you use tri-phenyl-phosphate at the *present time?*—A. I decline to answer.

Q. 26. Do you use an ingredient to make the product non-inflammable at the present time?—A. I decline to answer.

Q. 27. What salt do you use?—A. I decline to answer.

* * * * *

Q. 40. And I suppose the formula you *finally adopted* was the result of collaboration?—A. Yes.

Q. 41. That formula is a secret formula?—A. No, I do not think so.

Q. 42. Well, if it is not, I would like to have it.—A. Well, it might be secret from the point of view of quantities and of applications, etc.

Q. 43. Well, then we might say it is secret. *If by formula I mean exact names of ingredients, it is a secret formula.*—A. Yes.

* * * * *

Q. 54. Have you any knowledge of any difficulties being overcome by research work in order to make the product *weather proof* and capable of withstanding climatic conditions?—A. Well, all I can say is that we have made *our product more weather proof* and more durable than it was in the very beginning when we started. . . .

Q. 55. But what were the innumerable difficulties that you had to overcome?—A. We found that heat alternating with heavy rains deteriorated the product in a given time which, in our opinion, was too short to make the product really commercially successful, and we have made all sorts of attempts to correct this.

Adverting to all that has been said, I have come to the conclusion that the defendant's patent has been clearly anticipated by both the Spondite and Vitrex products and by the prior patents above referred to.

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The evidence of Dr. Mueller confirms and corroborates this necessary conclusion. Indeed, when the defendant's first manufactured their product according to their patent, they found, in the language used at trial, that the product was unfit for exterior use to make it commercially successful,—just the criticism offered on behalf of the defendant to the patents of the prior art and to Spondite and Vitrex.

What did then happen? The defendants realizing that their product—alike the product of the prior art—had a very limited length of life for exterior use, devised a new *preparation*, a new formula, and ceased to manufacture according to their patent which is and was absolutely anticipated by the prior art. This is further confirmed by Dr. Mueller's evidence when he affirms that they use now a secret process, being a formula "*respecting the exact names of the ingredients.*"

The defendants' patent has on its very face, compared with the prior art, been clearly anticipated. There is no evidence establishing that exhibit D is the product manufactured by the defendants under their patent or under their secret process. Under their patent they would produce nothing else but what was produced under the prior art. The specifications (at p. 7) called for the width of the meshes of ten to the inch; but exhibit D has 14 meshes to the inch, making the fabric stronger and the meshes to fill smaller and more numerous, thereby making the fabric or reticular metallic base stronger; but this degree of strength resulting from this departure does not *per se* amount to invention as compared to meshes of a smaller or larger width. Spondite is weaker because of a weaker reticular metallic base and with larger meshes.

Apart from the issue of invalidity based upon anticipation, as raised by the pleadings, the patent should also be impeached upon the question of subject-matter. Indeed the questions of anticipation and subject-matter are so much bound up together that it seems impossible to deal with one without touching the other. (*Pope Appliances Corporation v. Spanish River Pulp and Paper Mills* (1)).

Under the provisions of section 14 of The Patent Act (13-14 Geo. V, Ch. 23) the patentee must correctly and fully describe his invention and its operation. It shall set

(1) (1929) A.C. 269, at p. 275.

forth clearly the various steps in a process, or the method of construction, making or *compounding* . . . or *composition of matter*.

Under section 7 of the same Act, a patent may be granted to a person who has invented something new, not known or used by any other person before his invention, etc., etc.

The application of old devices to a similar and analogous subject, with no change 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 contemplated. *Blake v. San Francisco* (1); *The Northern Shirt Co. v. Clark* (2), and confirmed on appeal to Supreme Court of Canada (2).

The device exhibit D consists, at its best, in nothing else than using a stiffer fabric under its secret process with closer warp and woof stand of 14 meshes to the inch instead of 10 meshes to the inch as mentioned in the defendant's specifications. Even if the article placed upon the market were better than a previous article, it would not amount to invention and would, in this case, be the result of their undisclosed secret process not mentioned in the patent and which perhaps is the result of using a stiffer material with closer meshes.

It may, however, be said that there is even no invention in a mere adaptation of an idea in a well known manner for a well known purpose, without ingenuity, though the adaptation effects an improvement which may supplant an article already on the market. Exhibit D would, however, seem to have been anticipated, whether produced under the Patent or not. *Carter v. Leyson* (3).

Upon the enquiry as to whether or not the patent is good or bad, as to whether the subject-matter can be sustained by letters patent, regard must be had exclusively to the patent itself and not to the product he might see fit to produce under a secret process outside and foreign to the patent.

A patent for the mere new use of a known contrivance, without any additional ingenuity is overcoming fresh difficulties, is bad, and cannot be supported. If the new use involves no in-

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(1) (1885) 113 U.S.R. 679, at p. 682. (2) (1917) 17 Ex. C.R. 273; (1917) 57 S.C.R. 607.
 (3) (1902) 19 R.P.C. 473.

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genuity, 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* (1).

The specification of the defendant's patent ends by this clause:—

While our invention has been set forth in several modifications, it will be understood that others may be made by those skilled in the art without departing from the spirit and scope thereof. For example other compositions or lacquer (and the kind of plasticizers in these products not being defined and is not claimed) may be found for coating the fabric or material other than those suggested and because of their inherent properties. will be especially valuable for such use.—but *all such modifications are desired to be regarded as contemplated by the invention as defined in the appended claims.*

This clause, as it will be readily realized, takes in all the prior art. It is a blanket claim. It is too wide and vague in view of the prior art and also fails in that respect to comply with the statute. A claim to every mode of carrying a principle into effect amounts to a claim to the principle itself and is thereby bad. *Neilson v. Harford* (2); *Automatic Weighing Machine Co. v. Knight* (3).

The patentee cannot and must not throw the net so wide; but he must limit his claims to what he contends he might have invented and no more. This clause contains the mere subject of his speculations in his endeavour to grasp more than that to which he is entitled: what he only dimly and not clearly conceived and all the prior art. The public must know what they can infringe. *Incandescent Lamp Patent* (4); *Tyler v. Boston* (5); *British Thompson-Houston Co. Ltd. v. Corona Lamp Works Ltd.* (6); *British Vacuum Case* (7). There is no new element entering into the production of this product as compared with the prior art. Terrell on Patents 5th Ed. 38; Nicolas on Patent Law, 23, and cases therein cited. *Yates v. Great Western Ry. Co.* (8). The patentee must define and limit with precision what he claims he has invented, as distinguished from the prior art.

Under our patent law a patent is granted as a reward for invention, whereby restraint upon commercial freedom in

(1) (1892) 9 R.P.C. 516, at p. 524.

(2) (1841) 1 Web. P.C. 328, at p. 355.

(3) (1889) 6 R.P.C. 297, at p. 308.

(4) (1895) 159 U.S. 465 at 475.

(5) (1868) 7 Wall 327,330 (74 U.S.).

(6) (1922) 39 R.P.C. 49.

(7) (1911) 29 R.P.C. 309.

(8) (1877) 2 A.R. (Ont.) 226.

respect of the use of the patented invention necessarily results; and a court cannot be too careful in insisting that the requirements of the law in respect of the same have been duly satisfied and guard against allowing any restraint of trade resulting from a patent without merit and clearly anticipated.

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Having regard to the prior art and looking to what was known and published at the date of the defendant's patent, I must find that the patent has been anticipated; that he has invented nothing and that there is no subject-matter where invention is wanting. All of the defendant's patent is to be found in the prior art. Its invalidity has been established beyond all question.

There will be judgment in favour of the plaintiff declaring the Canadian Patent No. 270,927, bearing date the 24th May, 1927, null and void. The whole with costs against the defendant.

Judgment accordingly.

THE HONOURABLE THE SECRETARY OF STATE
 OF CANADA AS CUSTODIAN OF ENEMY
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 Jan. 7, 8.

vs.

THE ALIEN PROPERTY CUSTODIAN FOR THE
 UNITED STATES,

1929
 Feb. 14.

AND

THE CANADIAN PACIFIC RAILWAY COMPANY,
 DEFENDANTS.

AND

THE HONOURABLE THE SECRETARY OF STATE
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 PROPERTY, PLAINTIFF;

vs.

THE ALIEN PROPERTY CUSTODIAN FOR THE
 UNITED STATES,

AND

IMPERIAL OIL LIMITED,
 DEFENDANTS.

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vs.

THE ALIEN PROPERTY CUSTODIAN FOR THE
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AND

THE TORONTO POWER COMPANY LIMITED,
DEFENDANTS.

AND

THE HONOURABLE THE SECRETARY OF STATE
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PROPERTY, PLAINTIFF;

vs.

THE ALIEN PROPERTY CUSTODIAN FOR THE
UNITED STATES,

AND

CITY OF MONTREAL,
DEFENDANTS.

Alien Property Custodian—Beneficial ownership in Securities—Canadian Consolidated Orders—Treaty of Peace—Classes of Property passing to Custodian—Canadian War Measures Act—Vesting Order.

Certain "securities" (shares, note certificates and stocks) in the above companies, listed and dealt in on recognized stock exchanges, and the certificates for which were held in the United States, being owned by enemy nationals, were, upon demand of the Alien Property Custodian of the United States, surrendered to him or to others for him, in 1918, under the War legislation of that country, and were subsequently transferred to him on the books of the said companies, or new certificates issued. In regard to one of the above companies no vesting order was ever obtained by the Canadian Custodian, but as to the others vesting orders were obtained subsequent to the action by the American Custodian, namely, in 1919, but none of the "securities" were ever transferred to him nor is it in evidence that such orders were served on the companies.

Held: That the beneficial ownership in or title to the securities herein was in him who held the paper, and that it is the law of the place where the paper was that determined who was the holder. The contention that certificates of securities are but evidence of ownership, is not inconsistent with the idea that an assignment and delivery of the certificates, carries the title and property in the securities.

2. That under The Canadian Consolidated Orders enemy property was not automatically confiscated, but the owners' enjoyment thereof was suspended until the restoration of peace, and, subject to any legisla-

tion to the contrary or anything to the contrary contained in the Treaty of Peace, such enemy was then entitled to his property, or if liquidated, to its proceeds. It was only the transfer of securities by or on behalf of an enemy that was prohibited by the publication of these Orders.

3. That under the Peace Order only two classes of enemy property passed to Canada: 1st. Property in Canada belonging to an enemy on January 10, 1920, and not in the possession or control of the Custodian, and, 2nd. Enemy property in the possession and control of the Custodian on that date.
4. That there was nothing to be found in the Canadian War Measures prohibiting or avoiding the transfers of the securities in issue as made by the American Custodian; that, on the 10th January, 1920, the property, right or interest in the securities mentioned and the title to the same did not belong to an enemy, and was not at that date in the control or possession of the Canadian Custodian; and that the property, right or interest in such securities and the title to the same belonged to the Alien Property Custodian of the United States.

ACTIONS by the Canadian Custodian of Enemy Property against the Alien Property Custodian of the United States of America, to determine the title, as between them, to certain securities issued by the four Companies and Corporations, the other defendants in said actions.

It was contended by the Canadian Custodian that The Canadian Consolidated Orders constituted an absolute bar against the transfer of enemy owned securities in Canadian companies, and that the possession of mere paper certificates of such securities, could not prevail against such measures. And by the American Custodian that it being agreed that the seizures of the certificates were made in conformity with the provisions of the American Trading with the Enemy Act, he became the holder of the title to the securities and was entitled by law and of right to the transfers made on the books of the defendant corporations; and that there is nothing in any Canadian war legislation invalidating the acquisition of the title to the securities, and later, the transfers of the same to the American Custodian on the books of the defendant corporations, the same not having been made by or on behalf of an enemy.

The actions were tried before the Honourable Mr. Justice Maclean, President of the Court, at Montreal.

Aimé Geoffrion, K.C., for plaintiff.

George Montgomery, K.C., and *W. Chipman, K.C.*, for Alien Property Custodian of the United States.

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W. H. Curle, K.C., for The Canadian Pacific Ry. Co.

W. G. Hanna for The Toronto Power Co.

H. W. Shipley for The Imperial Oil Co. Ltd.

No one appeared for The City of Montreal, but Mr. Geoffrion declared the city was ready to have some one appear if necessary, but it would only be to declare that it would abide by the judgment to be given. The contestation was solely between the two custodians.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (February 14, 1929), delivered judgment.

These several causes, which were tried before me largely upon agreed statements of fact, are to determine the title as between the Canadian Custodian of Enemy Property and the Alien Property Custodian of the United States, to certain shares, note certificates and stocks, hereafter to be designated as "securities," and issued by the several defendant corporations, all of which are domiciled in Canada. Each Custodian claims ownership of the property represented by the securities in question, under the provisions of legislation enacted during the Great War by their respective countries dealing with enemy property. These causes were heard together, and I think they may be conveniently disposed of together, without causing any confusion presently or in the event of an appeal.

It should at once be stated that these several proceedings are authorized by the terms of sec. 41 of the Treaty of Peace (Germany) Order, 1920, which in part is as follows:

41 (2) In case of dispute or question whether any property, right or interest belonged on the tenth day of January, 1920, or theretofore to an enemy, the Custodian or, with the consent of the Custodian, the claimant may proceed in the Exchequer Court of Canada for a declaration as to the ownership thereof, notwithstanding that the property, right or interest has been vested in the Custodian by an order heretofore made, or that the Custodian has disposed or agreed to dispose thereof. The consent of the Custodian to proceedings by a claimant shall be in writing and may be subject to such terms and conditions as the Custodian thinks proper.

(3) If the Exchequer Court declares that the property, right or interest did not belong to an enemy as in the last preceding subsection mentioned, the Custodian shall relinquish the same, or, if the Custodian has before such declaration disposed or agreed to dispose of the property, right or interest, he shall relinquish the proceeds of such disposition.

It is desirable at the outset to describe separately the nature of the securities in controversy, the circumstances attending the acquisition of the same as contended for by the respective Custodians in each case, and any other facts which may appear relevant to these matters in the light of the legal position taken by counsel on behalf of each Custodian.

First, as to the securities issued by the defendant corporation, the Canadian Pacific Railway Company. These consisted of shares of the capital stock of the company, and Special Investment Note Certificates. On December 19, 1917, paper certificates representing certain shares of the capital stock of the company, and Special Investment Note Certificates, were in the hands of Speyer & Co., bankers, in New York, who reported the same to the American Alien Property Custodian as property held by them for the account of an enemy, the Deutsche Bank. On the demand of the American Custodian, these certificates were in March, 1918, delivered to his nominee as enemy property, under and in conformity with laws enacted by the Congress of the United States. It is agreed that the owner of these shares and note certificates, at the time of the delivery of the certificates to the American Custodian, was also an enemy within the meaning of the laws of Canada. Upon every certificate there was endorsed a form of transfer and power of attorney in blank, and the certificates in question were at the time of the delivery to the American Custodian endorsed in blank by the registered holder who was not the enemy owner; there were two unimportant exceptions to this, in that two note certificates representing small amounts were not endorsed, although it is agreed they were held by the registered owners on behalf of the Deutsche Bank. There was nothing to indicate that the registered holders of the shares and note certificates were enemy nationals. Under the by-laws or regulations of the Canadian Pacific Railway Company there were, at all material times, registry or transfer offices at New York, London and Montreal. The securities here in question were all registered in New York, and the shares were transferable only upon the New York register.

The Special Investment Note Certificates, it perhaps should be said, contained the obligation of the company, to

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pay the principal amounts therein stated with interest, at the company's bankers, in Montreal, London or New York; they were transferable upon the books of the Trustee, at the transfer offices of the Canadian Pacific Railway in Montreal, New York, or London, in person or by attorney, and upon the surrender of the note certificate. For this purpose the Central Trust Company of New York was the registrar of transfers, and the Bank of Montreal, New York, the transfer agents at New York.

In due course, the certificates of securities so acquired by the American Custodian, were surrendered to the New York registry and transfer offices of the company, and new certificates were thereupon issued in the name of the Bank of Manhattan Company as depositary for the American Custodian. The new certificates so issued, have since been and now are, in the control and possession of the American Custodian. It is agreed that these securities were listed and dealt in on recognized stock exchanges by means of the certificates endorsed in blank, and transferable by delivery. On October 17, 1919, a Vesting Order was made by a Judge of the Superior Court of Quebec purporting to vest the securities in question in the Canadian Custodian.

In the case of the defendant company, Imperial Oil Limited, incorporated under the laws of the Dominion of Canada, and whose head office is at Toronto, the securities were surrendered in New York on September 14, 1918, to the American Custodian by the agents of the owner, then an enemy under the laws of Canada and the United States; such surrender was made upon the demand of the American Custodian and it is agreed, in conformity with the laws of the United States. The securities here were bearer share warrants. These were authorized by the company's by-laws, and each certificate, as usual, stated that the bearer was entitled to a stated number of shares of the capital stock of the company. The bearer share warrants passed into the possession of the Guaranty Trust Company of New York, as depositary for the American Custodian, and on November 3, 1919, were surrendered by it to the New York agents of Imperial Oil Limited, receiving in exchange therefor certain other bearer shares warrants issued by Imperial Oil Limited, and representing 960 shares of the capital stock of that company. In December, 1921, the then shareholders

of the defendant company were granted the right to subscribe for additional shares on terms and conditions which need not be stated. The Guaranty Trust Company, acting on behalf of the American Custodian, subscribed for and was allotted 96 additional shares and received bearer share warrants for such additional shares. In February, 1925, the Guaranty Trust Company, acting on behalf of the American Custodian, surrendered all the bearer share warrants just mentioned and received in exchange therefor bearer share warrants of Imperial Oil Limited representing 4,224 shares of its capital stock, of no par value. Such bearer share warrants have since been, and are now, in the possession of the American Custodian. On October 14, 1919, an Order was made by a Judge of the Supreme Court of Ontario vesting, it is claimed, in the Canadian Custodian these securities. The Vesting Order and schedule thereto represent one Heinrich Reidmann as the owner of 240 shares of Imperial Oil Co. Ltd. being of the par value of \$100 each; it was apparently from the agent of this person, in New York, that the American Custodian seized the bearer share warrants representing these shares. It is agreed that the securities in question in this case, were listed and dealt in on recognized stock exchanges.

A further observation should perhaps be made regarding this case. The defendant company is described as Imperial Oil Ltd. In the exhibits to the agreed statement of facts, there are many references to Imperial Oil Company Ltd. which is apparently another company. Certain by-laws appearing as an exhibit in the case, are described as those of Imperial Oil Company Ltd. The Canadian Vesting Order had reference to shares of the Imperial Oil Company Ltd.; the samples of bearer share warrants, filed as exhibits, purport to be issued some by one company, and some by the other. In fact, it appears from the record that it was shares of Imperial Oil Co. Ltd., that was seized by the American Custodian. I propose assuming that there is but one company involved here throughout; the case was put to me on that footing. I have no doubt this apparent confusion is capable of a ready explanation, and that the substantial issue to be determined stands unaffected by this seeming discrepancy.

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In respect of the case of the defendant company, The Toronto Power Co. Ltd., a company incorporated under the laws of the Province of Ontario, the securities in issue are Guaranteed Debenture Stocks. The certificates of this stock were held in New York, by a banking firm on behalf of one who it is agreed was, at all times material here, an enemy national under the laws of both Canada and the United States. The stock was registered in the books of the defendant company at Toronto, where the principal and interest was payable, in the name of one Wallach, who is not alleged to have been an enemy under the laws of Canada, or the United States, but it is agreed that Wallach held the stock on behalf of an enemy, a German Bank. In May, 1918, delivery of the certificates representing this debenture stock was demanded by the American Custodian, as in the other cases, and the same was thereupon delivered to the Central Union Trust Company of New York, as depository for that Custodian. The Trust Company surrendered the certificates to the Toronto Power Company in November, 1922, and later, in January, 1923, received on behalf of the American Custodian a new certificate representing the same amount of stock in a new issue. Later, in March, 1926, this stock was transferred into the name of the American Custodian, and is now so registered in the books of the defendant company at Toronto. The certificates did not themselves contain the usual blank form of transfer and power of attorney, but conditions printed on the certificates permitted a transfer by instrument in writing, in the usual common form. The debenture stock in question, it is agreed, was at all material times listed and dealt in on all recognized stock exchanges. On October 14, 1918, an Order was made by a Judge of the Supreme Court of Ontario, vesting the debenture stock in question in the Canadian Custodian.

In the case of the defendant, The City of Montreal, the securities in dispute are debenture stocks issued by that City, payable as to principal and interest only to the registered holder, at Montreal. The stock was transferable on the books of the City at Montreal, only by the registered holder, or by attorney duly constituted; the certificates themselves did not contain a printed blank form of transfer and power of attorney. In conformity with the laws

of the United States, possession of these debenture stock certificates was, on April 26, 1919, demanded by the American Custodian from The Hartford Trust Company at New York, it holding the same as Trustee on behalf of one who was, at all times material here, an enemy under the laws of Canada and the United States, and the same were thereupon surrendered to that Custodian. At this date it appears the stock was registered in the name of The Hartford Trust Company as Trustee for an enemy corporation. Since the surrender of the certificates of stock to the American Custodian, the same or other certificates have since been held by depositaries for such Custodian. The stock is presently registered in the name of The Empire Trust Company for the account of the American Custodian. On August 25, 1919, the stock was transferred from the Hartford Trust Co., to the New York Trust Company, and by the latter transferred to the Empire Trust Co. of New York, on behalf of the American Custodian. It is agreed that the stock in question had at all material times been listed and dealt in on all recognized stock exchanges. No Vesting Order was ever applied for in this case, by the Canadian Custodian.

It is convenient here to point out, that in the case in which the Canadian Pacific Railway is a defendant, it was a part of the agreed statement of facts, entered into by the solicitors of the plaintiff and defendant Custodians, that "the securities in question were listed and dealt with on recognized stock exchanges by means of scrip commonly in use, endorsed in blank and transferable by delivery." In the other three cases the stipulation was merely that the securities "were listed and dealt with on recognized stock exchanges." No explanation for this distinction was made. I am going to assume that the intended effect of these agreed statements of facts upon this point was to be the same throughout, and intended as evidence of custom and usage, otherwise my attention should have been directed to the point. Securities listed on stock exchanges are usually traded in by means of scrip or certificates commonly in use, endorsed in blank and transferable by delivery; this must be so of necessity otherwise they could only be traded in with great delays, between members of stock exchanges. Delivery of certificates of securities must be made if bought

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and sold; while there is no evidence upon the point I have no doubt the delivery is regulated as to time by the stock exchanges. However this point is not of much importance, as the legality of the steps taken by the American Custodian to obtain possession of the certificates, is not contested. In all cases here, except the bearer share warrants, the securities were transferable by written instrument in writing in the common form, either upon the certificate itself, or by another separate instrument and in all such cases the registered owner had executed the usual transfer and power of attorney, though perhaps in blank in most cases.

The several Vesting Orders that have been mentioned, and which were made under the provisions of Canadian Consolidated Orders respecting Trading with the Enemy, and which I shall hereafter refer to as Canadian Consolidated Orders, purported to vest in the Canadian Custodian, the securities mentioned and described in a schedule attached to each Vesting Order. The Custodian was in all cases authorized and empowered by the Vesting Orders to cause the securities and each of them, to be transferred into his own name as such Custodian, and to vote upon and manage such securities. None of the securities in question, mentioned in the several Vesting Orders, were in fact transferred into his name; there is no evidence that they were served upon the defendant corporations, or that any demand was ever made upon them to transfer these securities into the name of the Custodian; the many transfers and registrations made concerning some of the securities, by some of the defendant corporations, as already related, are difficult to understand, if either had been done. The Judges of the Court to which any jurisdiction was committed under Canadian Consolidated Orders, were empowered to make rules for the practice and procedure to be adopted for the purpose of the exercise of such jurisdiction; if any such rules were made my attention was not directed to the same. In England, rules were adopted under the Trading with the Enemy Act, and they contained the provision that proceedings on any application under the Act should, so far as not provided for in such rules, be conducted in accordance with the ordinary practice dealing with similar matters of the Court to which application was made.

Briefly stated, the case of the plaintiff Custodian is that Canadian war measures, such as Canadian Consolidated Orders, constituted an absolute bar against the transfer of enemy owned securities in Canadian companies, and that the possession of mere paper certificates of such securities, could not prevail against such measures. On the other hand, it is substantially the contention of the defendant Custodian, that, it being agreed that the seizures of the certificates were made in conformity with the provisions of the American Trading with the Enemy Act, he became the holder of the title to the securities and was entitled by law and of right to the transfers made on the books of the defendant corporations; and that there is nothing in any Canadian war legislation invalidating the acquisition of the title to the securities, and later, the transfers of the same to the American Custodian on the books of the defendant corporations, the same not having been made by or on behalf of an enemy.

The case of the plaintiff Custodian may now be considered. Ordinarily speaking no one can get the benefits of ownership in securities, except through and by means of the paper certificates. Certificates of corporate shares, stocks or bonds, particularly those listed on stock exchanges, are to-day regarded as some form of property; in some cases as negotiable instruments. They are bought and sold like chattels in the market, they pass from hand to hand without any action on the part of the issuing corporation, they are transferred and pledged as collateral security for loans without leave of the corporation and frequently beyond its domicile, they are taxed in the hands of the holder or in the estate of a decedent; all this is frequently done under the blank endorsement of the registered owner, and transfer is made by delivery, and for all practical purposes paper certificates are treated by the world to-day as property. Where they pass from hand to hand by delivery, the transfer being signed in blank by the registered owner, the plain legal effect of this practice is, that the transferor who executes the transfer in blank confers on the holder of the document for the time being, authority to fill in the name of the transferee and to register the same when he so desires. The beneficial ownership in or title to the security is in him who holds the paper, and it is the law of the place where the paper is that determines who is the holder

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The contention that certificates of securities are but evidence of ownership, is not inconsistent with the idea that an assignment and delivery of the certificates, carries the title and property in the securities. Particularly would this seem to be true of securities put into circulation in the market, through the medium of recognized stock exchanges, where such securities are listed. It may be true that some further act by the transferee is required to perfect his right and title, and that the original transferor who continues to be the registered owner, is the only shareholder entitled to vote, until the transferee obtains registration in his name. The delivery of the certificate however passes the title, which will enable the holder to have the shares vested in himself by registration in the books of the company, without risk of his right being defeated by any other person deriving title from the registered owner, and the company is, if in Canada, upon the request of the holder, bound to register the shares in the name of such holder or his nominee, and to issue a new certificate in such name in exchange for the old one. Apart from the exceptional war measures, which must be considered, that I apprehend is the law of Canada, as it is of England. That much would seem to be beyond controversy.

Many and conflicting principles and authorities were submitted by counsel, relating to such questions as, the situs of shares or certificates of shares, the degree of usage necessary in law to constitute a security a negotiable instrument, what securities are simple contract debts or choses in action, the capacity of corporations to have more than one domicile, the power to tax securities outside the domicile of the issuing corporation, the law of succession duties, and questions of a similar nature, but I have concluded that all these furnish little or no assistance in the matters under consideration. If it were not for particular war legislation there would not, I apprehend, be any issue here; the title to the securities would clearly be in the hands of the holder of the paper certificates, and the defendant corporations could not successfully resist the demand of the holder to register the same in his name. The ownership of and title to the securities here, are, in my opinion, in the holder of the certificates, unless there be something in the war legislation of Canada which dis-

possessed him of that title, or which prevented his ever acquiring the same. It appears therefore to me, that the real issue involved in all these proceedings is to be determined upon a consideration of Canadian Consolidated Orders, The Treaty of Peace, and the Treaty of Peace (Germany) Order (1920); if the Canadian Custodian is by law entitled to the securities, it is by virtue of some provision to be found in one or all of these exceptional war measures, that is, special legislation modifying temporarily the ordinary rules of law.

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In an enquiry into what exceptional war measures enacted by Canada, if any, modified the ordinary rules of law obtaining in respect of the rights of a holder of certificates of securities, the first to consider is, Canadian Consolidated Orders. It will assist in an interpretation of these Orders if it is understood that it was not the purpose of the Orders to confiscate thereunder private enemy property. It was stated over and over again by the Courts in England during the war, that the private property of an enemy subject, was not during the war subject to confiscation, but his right of enjoyment therein was suspended until the restoration of peace, and subject to any legislation to the contrary, or anything to the contrary contained in The Treaty of Peace, when peace came, he was entitled to his property, or if liquidated its proceeds, with any fruits it may have borne in the meantime. Even if this statement of the law, prior to the war, be not concurred in by all recognized authorities upon international law, it is immaterial, because, by the British Trading with the Enemy Act, that for the time clearly became the law, if it was not already the law. *In re Ferdinand, Ex-Tsar of Bulgaria* (1). The corresponding legislation in Canada was almost in the precise language of the British Act. Canadian Consolidated Orders was then primarily designed to prevent the use of, or control by, enemy nationals, of their property within Canada, and thus to weaken the financial resources of the enemy. To ensure the effectual execution of this public policy, it was necessary to grant wide and arbitrary powers to some officer of government. Under this legislation, a Custodian of enemy property was appointed whose func-

(1) (1921) 1 Ch. D. 107.

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tions included receiving, holding, preserving and dealing with the property of enemy nationals. By section 1 (*d*) "securities" included shares, bonds, debentures or other obligations issued by or on behalf of any corporation, whether within or without Canada. By section 6, no transfer of any securities made after the publication of these Orders, unless under licence, by or on behalf of an enemy, conferred upon the transferee any right or remedy in respect thereof, and any company or other body by whom such securities were issued was prohibited from taking any cognizance of or otherwise acting upon any notice of any transfer; much reliance is placed on this section by the Canadian Custodian. Entry in any register or branch register kept within Canada, of any transfer of any securities therein registered in the name of an enemy was prohibited, except by leave of a court or the Secretary of State. Extensive powers were granted the Custodian; such as the right to inspect documents and books, company registers, to demand and receive payments of dividends arising from enemy property, and many other similar powers. Section 28 (1) provided, that any Superior Court of Record might by order vest in the Custodian any real or personal property, and any legal or equitable rights therein, belonging to or held or managed for or on behalf of an enemy, if such vesting was deemed expedient for the purposes of Canadian Consolidated Orders. Among the classes of persons or bodies which might apply for such an order was the Custodian, or any department of the Government of Canada. If the Custodian by any Vesting Order was empowered to transfer any securities, the company in whose books the securities were registered, was required on request of the Custodian to register such transfers in the name of the Custodian, or other transferee, notwithstanding any regulations of the company, and notwithstanding that the Custodian was not in possession of the scrip or certificates relating to the securities transferred. The Custodian was required to hold any money paid to, and any property vested in him, under authority of Canadian Consolidated Orders until the termination of the war, and thereafter to deal with the same as the Governor in Council might by Order in Council direct.

The next matter to consider is the Treaty of Peace. Articles 297 and 290, with the annex thereto, of the Treaty of Peace, made final and binding all acts done by the Allied or Associated Powers in pursuance of any exceptional war measures, and gave a general authorization to Allied and Associated Countries to retain and liquidate, according to its laws, all property, rights and interests controlled by them, or belonging to enemy Germans at the date when the Treaty came into force, and at that time within allied territory. The German owner lost all his interest in property in Canada by the Treaty of Peace, and could make no claim for the property, rights or interests so retained, or contest in any way the retention. Germany bound herself to deliver within six months from the coming into force of the Treaty of Peace, to each Allied or Associated Power all certificates, deeds or documents of the title held by its nationals and relating to property rights or interests situated in the territory of any Allied or Associated Power, including any shares, stock, debentures or other obligations, of any company incorporated in accordance with the laws of that Power.

Then followed The Treaties of Peace Act, Chap. 30 Statutes of Canada 1919, which authorized the Governor in Council to make such orders as were necessary to give effect in Canada, to the Treaty of Peace. In pursuance of this authority The Treaty of Peace (Germany) Order 1920 was enacted, and which I shall refer to as the Peace Order. The Peace Order contains provisions for giving effect to the Treaty of Peace and to the charges made therein against enemy owned property in Canada. Turning now to Part II of the Peace Order, section 33 enacts that:—

(1) All property, rights and interests in Canada belonging on the 10th day of January, 1920, to enemies, or theretofore belonging to enemies and in the possession or control of the Custodian at the date of this order shall belong to Canada and are hereby vested in the Custodian.

(2) Notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy such property, right or interest shall belong to Canada and the Custodian shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order.

By section 34 all Vesting Orders and all other orders made in pursuance of Canadian Consolidated Orders or in pursuance of any other Canadian war legislation, and all

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acts done or to be done in the execution of any exceptional war measures with regard to the property, rights and interests of enemies, were validated and confirmed, and declared final and binding upon all persons, subject however to the provisions of section 33 and section 41. It was further provided by section 34 (4) as follows:—

The provisions of this section shall not be held to prejudice any title to property hereto acquired in good faith, and for value and in accordance with Canadian law by . . . a national of any of the Powers allied or associated during the war with His Majesty.

It is quite plain that the mere publication of Canadian Consolidated Orders did not automatically operate as a forfeiture or a vesting of enemy property, in the Canadian Custodian. Enemy property passed to the Custodian when vested in or paid to him, in pursuance of these Orders. It was only the transfer of securities by or on behalf of an enemy, that was prohibited by the publication of these Orders. Securities held or suspected to be held by or on behalf of an enemy, might by order of the Court be vested in the Custodian and registered in his name for the time being; any such Vesting Order if acted upon by the Custodian would have been a bar to any registration by the American Custodian, or any other person, whatever his title or rights might be, until the end of the war when his claim of right to the same would be heard and determined. In no case, apparently, did the Canadian Custodian exercise his power of requiring securities mentioned in any Vesting Order, to be registered in his name. The possession of the certificates, and the title to the securities came into the hands of the American Custodian, before any Vesting Orders were made by the Courts. That could not well have been prevented by any Canadian war measure. The transfer of the registered title of the securities to the American Custodian, on the books of the defendant corporations, was in no way contrary to Canadian law, and was not, I think, a transfer contemplated by section 6 of Canadian Consolidated Orders; it was not a transfer made by or on behalf of an enemy. The seizures and transfers made by the American Custodian effectually accomplished the purpose of Canadian Consolidated Orders, that is, it removed from the enemy proprietors of the securities the power of control over their property. It is difficult to believe that the legislature intended that if an allied or associated power

lawfully acquired within its own territory, in furtherance of the purposes for which Canadian Consolidated Orders were enacted, the beneficial interest in or title to enemy owned securities of a Canadian company prior to any authorized act of the Canadian Custodian vesting the title to the securities in him, that its representative, here the American Custodian, was to be denied a transfer and registration of the securities in his name or that such a transfer was one prohibited by Canadian Consolidated Orders.

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Then there is the effect of the Peace Order to consider. As stated this Order enacted that all property, rights and interests in Canada belonging on the 10th day of January, 1920, to enemies, or therefore belonging to enemies but in the possession or control of the Custodian, became vested in and subject to the control of the Custodian, and became the property of Canada. For the reasons already stated, the securities in question were not in my opinion in the control or possession of the Custodian, and they were not the property of enemies, on the date mentioned; the property, right or interest in the same was not in an enemy but in another. If under the terms of the Peace Order, enemy property in Canada, or enemy property in the control of the Custodian, became vested in Canada, that cannot in my opinion have reference to any securities, the title to which had lawfully passed to one not an enemy before any Vesting Order in respect of the same was made in Canada, or which had been registered in the name of the American Custodian before any Vesting Order made was acted upon by the Canadian Custodian and before the enactment of the Peace Order. I wish to emphasize the fact that only two classes of enemy property passed to Canada under the provisions of the Peace Order; first, property in Canada belonging to an enemy on January 10, 1920, and not in the possession or control of the Custodian, and next, enemy property in the possession and control of the Custodian on that date. The property here in dispute does not belong to either class. The enemy ownership had entirely vanished, and it was not in the possession or control of the Custodian. If the securities were, on January 10, 1920, owned by a German enemy national, and if on that date the certificates of such securities were in Germany in the hands of that enemy owner, but later were found in the

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hands of a third party not an enemy who claimed the same, that of course would be a different case.

It is however to be pointed out that in one case, that of the defendant corporation Toronto Power Co., Ltd., the first registration of title made in the books of this company in Canada by the American Custodian, was after the enactment of the Peace Order. If the legal effect of the Vesting Order and the Peace Order, were to transfer the property in these particular securities to the Canadian Custodian, notwithstanding that he had not required the transfer of the securities into his name upon the company register, even all that would not and does not place the question of the rights of the American Custodian in such securities beyond consideration. Section 4 (2) of the Peace Order, as I have already pointed out, provides in effect, that if others claim any right in such securities, it is for the Court to decide whether or not any property, right or interest, in such securities belonged on the 10th day of January, 1920, to an enemy, or to another, notwithstanding that the property right, or interest has been vested in the Custodian by an order theretofore made, or by the Peace Order. If the property right or interest did not belong to an enemy, in the opinion of the Court, then the Custodian is to relinquish such property, right or interest. It was obvious that some machinery had to be provided to determine the rights of non-enemy claimants of property, officially held or claimed as enemy property, because bona fide disputes would arise inevitably as to whether certain property on January 10, 1920, was enemy property or not. Therefore we are again returned to the question of the effect in law of the seizures of the certificates made by the American Custodian, and upon which I have already expressed my conclusions. I should perhaps again refer to section 34 (4) of the Peace Order, which states that, notwithstanding the provisions of section 34, which validates everything done under Canadian Consolidated Orders or any other Canadian war legislation, the provisions of that section shall not be held to prejudice "any title to property heretofore acquired in good faith, and for value, and in accordance with Canadian law, by a national . . . of any of the Powers allied or associated with His Majesty during the war." I attach some importance to this provision; its purpose re-

quires no comment. I think it is clear that the American Custodian by obtaining possession of the certificates acquired title to the property in question in good faith, according to the laws of the United States, and not in violation of Canadian law, before any Canadian Vesting Orders were made, and before the enactment of the Peace Order. If a private citizen of the United States had in good faith and for value acquired title to securities belonging to an enemy, the Court would be bound I think to hold that the same was property not belonging to an enemy, and the title would be confirmed in the United States citizen. I know of no reason why the quality of the claim of the American Custodian should be held to be inferior to that of the private citizen.

Two American cases were discussed at considerable length by counsel of both Custodians, and they must be briefly considered. I shall first refer to *Miller v. Kaliwerke* and three other cases; usually referred to as the *Miller Case* (1). Here the property in issue consisted of certificates of stock and voting trust certificates, alleged to belong to certain alien enemies. The American Trading with the Enemy Act, authorized the Custodian to reduce enemy captured property into his possession, and in the case of securities to require new certificates to be issued to him in the place of the old certificates which had not been captured, but which were presumed to be in the possession of the registered owner. Primarily the question was, to whom should new certificates be issued, the American Custodian, or the enemy owner claimant. In two of the four cases before the Court, the British Public Trustee intervened, alleging his seizure in England of certain of the certificates of the securities in question, and the vesting of the same in him by Vesting Orders made by the Board of Trade prior to any demand made by the American Custodian, and claiming that he became vested with the ownership of the certificates and with the beneficial interest in the stock, or voting trust certificates, just as if the same had been then and there duly conveyed and transferred to him by the enemy owner. The court of first instance merely held that the old certificates were to be cancelled, and that new certificates were to be issued to the American Custodian, with-

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(1) (1922) 283 Fed. Rep. 746.

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out any decision as to the question of ownership of the securities, as between the American Custodian and the Public Trustee. On appeal, it was held by the appellate court, that under the terms of the American Trading with the Enemy Act, the Custodian was authorized to deal with such stock in the same manner as he would with any other enemy owned property and regardless of the situs of the certificates; that the Act authorized the Custodian to require the issuance to him of certificates for stock owned by an alien enemy and seized by him without the presentation of the old certificates for cancellation, and that no claim of right was good against it; that any claim of right must be made under section 9 of the Act, which made provision for the determination of the rights of the bona fide holder of the certificates who was not an enemy; and that the sole remedy of the Public Trustee for the determination of his claim was under section 9 of the American Trading with the Enemy Act and not under the procedure which was in fact taken. It will be seen therefore that this case is not authority upon the point to be determined here, as the decision did not proceed upon the merits of the claim of the Public Trustee, and did not purport to determine the claim of the Public Trustee. I might point out, that Canadian Consolidated Orders granted to the Canadian Custodian power to have vested in him securities registered in the name of an enemy, and to have new certificates issued to him, though he was not in possession of the old certificates, just as was authorized by the American Trading with the Enemy Act. If this was done in prejudice of the rights of any person not an enemy, provision was made, as I have already stated, by the Peace Order section 41, whereby those rights might be adjudicated by a Court. These very proceedings were taken and heard under that provision of the Peace Order.

The other American case is, *Disconto-Gesellschaft v. U.S. Steel Corp., The Public Trustee, et al* (1). This case is usually referred to as the Disconto case. Certificates of shares in the defendant company were seized in London by the Public Trustee from an enemy owner, and the plaintiff, the enemy owner of the certificates or the securities prior to the seizure, and the Public Trustee, were each seeking

a declaration of ownership in the shares, and the issuance of new certificates. The German holder contended that the domiciliary law was exclusive; and the only way in which the securities could be acquired was by some action at the domicile of the corporation. The Court of first instance granted a decree declaring that the Public Trustee be registered as a shareholder, and that appropriate certificates be issued to him. The case eventually went on appeal to the Supreme Court of the United States, and the judgment of that Court, delivered by Mr. Justice Holmes, sustained the claim of the Public Trustee to be registered as the shareholder of the shares. It was held that the Public Trustee got a title good as against the plaintiff by the seizure of the certificates; that the things done in England transferred the title to the Public Trustee by English law; and that it is the law of the place where the paper is, that determines who is the owner. The American Custodian made no claim to the certificates or securities and consequently was not a party to the action. It is not, as suggested, to be inferred from the decision of the Supreme Court of the United States in the Disconto case, that had the American Custodian exercised his right of seizure of the shares as in the Miller case, and had the Public Trustee proceeded under section 9 of the American Trading with the Enemy Act that the result would not have been the same. In any event, the Disconto case is not authority for the suggestion that had the American Custodian been a party to the action, the Court would have denied the claim of the Public Trustee to the shares, even assuming he were before the Court in the manner provided by statute.

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We therefore return to the question: Is there anything to be found in the Canadian exceptional war measures, which prevents the operation of the ordinary rules of law in the case where certificates of securities acquired in good faith and for value, by a person not an enemy, prior to any effective Vesting Order placing the possession and control of the securities in the Canadian Custodian, and before the enactment of the Peace Order? I do not think there is. I am of the opinion that there is nothing to be found in the Canadian war measures which prohibited or avoided the transfers of the securities in issue as made by the American

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Custodian on the books of the defendant corporations; that they now are in law properly registered in his name; and that on the 10th day of January, 1920, they were not in the possession or control of the Canadian Custodian, nor were they then enemy owned property. Might I further observe that these cases should not be looked upon from a narrow point of view in jurisprudence. They must be dealt with broadly as the nature of the issues demand. It is a case between administrative officers of two sovereignties, hence the undesirability of invoking rules of public law that perhaps may properly be regarded as outworn. I refer to such matters as the law pertaining to prerogative rights, the powers of sovereignties in time of war, etc. The principal parties to these proceedings came into court on an equal footing of legal right; and so far as any rules of equity might be invoked by them, they are also on an equal footing.

In view of what I have already said, I do not think it necessary to discuss at length any of the facts distinguishing some of the cases from others. The cases involving the Canadian Pacific Railway Company securities and Imperial Oil Limited bearer warrants might well be distinguished from the other cases; in the former instance it is agreed the shares passed from hand to hand by delivery, and nothing remained to be done in Canada to perfect the title of the American Custodian to the shares or note certificates, in the latter case, the securities were negotiable instruments. *Goodwin v. Roberts* (1); *Bechuanaland Exploration Co. v. London Trading Bank* (2), and *Edelstein v. Schuler Co.* (3). The case involving the securities issued by the City of Montreal is different from all others in that no Vesting Order was ever made.

Accordingly I am of the opinion that, on the 10th day of January, 1920, the property, right or interest in the securities mentioned in these several proceedings, and the title to the same, did not belong to an enemy, and was not at that date in the control or possession of the Canadian Custodian; that the property, right or interest in such

(1) (1875) L.R. 10 Exch. 337.

(2) (1898) 2 Q.B.D. 658.

(3) (1902) 2 K.B. 144.

securities, and the title to the same, belonged to the American Custodian; and there will be a declaration to that effect.

There will be no order as to costs, as between the plaintiff and defendant Custodians. The matter of the costs of the defendant corporations is reserved until the settlement of the minutes of judgment.

Judgment accordingly.

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BETWEEN:

GRANVILLE S. DECATUR.....PETITIONER;

AND

FLEXIBLE SHAFT COMPANY LIM- }
ITED } RESPONDENT.

1930
Jan. 14.
Jan. 28.

Trade-marks—Numerals—Expunging—Distinctiveness

Held, that the registered trade-marks "No. 360," "No. 361," "No. 90" and "No. 99," applied to the upper and lower blades of an animal clipping machine, and not in its original use intended as a trade-mark, and being without distinctiveness, are not properly trade-marks within the meaning of the Trade-Mark and Designs Act and should be expunged.

- 2. That there can be no distinctiveness, as a rule, in a numeral or numerals alone, although conceivably they might be so arranged, selected or used, that they would lose, partially at least, the characteristic of numerals, and acquire a distinctiveness qualifying them for registration as trade-marks.

PETITION by the Petitioner herein to have certain trade-marks referred to hereafter expunged.

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

Eugene Lafleur, K.C., and *R. S. Smart, K.C.*, for petitioner.

Peter White, K.C., and *E. Bristol, K.C.*, for respondent.

The facts are stated in the Reasons for Judgment.

THE PRESIDENT, now (January 28, 1930), delivered judgment.

The petitioner asks that the trade-marks "No. 360," "No. 361," "No. 90," and "No. 99," registered in 1927 by the respondent company, Flexible Shaft Company Ltd., be expunged.

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The marks in question were registered in connection with the sale of clipper plates (or blades) for use in animal clipping machines, manufactured or assembled by the respondent, in Canada, since 1920. The first two of the above mentioned marks are respectively applied to the upper and lower plates used in the most recent model of animal clipping machines produced by the respondent; the last two mentioned marks are respectively applied to the upper and lower plates of an earlier model of the same machines. These marks are stamped upon the plates as just stated, together with the full name of the respondent company in some instances, but with merely its initials in other instances. The plates bearing the first two mentioned marks, are sold to the public in small green and yellow tin boxes; plates bearing the other two marks are sold both in red and black tin boxes. The boxes all prominently designate their contents as either "Stewart Clipper Plate"; "Stewart Top Plate" or "Stewart Bottom Plate." The number of the plate also appears upon the box. Printed words upon the exterior of the boxes includes the following: "None genuine without our registered trade-mark Stewart on the box," "Always order this plate by its number"; and "Look for our name and number on every plate". It was not shown at the trial whether or not the word "Stewart" was a registered trade-mark. The name "Stewart", seems to be applied and used both in respect of the complete clipping machines, and the plates or blades separately. It does not appear that numeral marks of any kind are applied to the various parts of the complete clipping machine, other than the plates; but certain parts which are castings, have a pattern number, but that is not registered.

The respondent manufactures or assembles, and sells, several types of animal clipping and shearing machines. In a printed catalogue or price list, issued by the respondent for the season 1924 and 1925, and produced in evidence, the clipping and shearing machines are all referred to by the name of "Stewart," but with other descriptive matter, such as numbers, to designate the particular machine. In this catalogue the various parts of the clipping machines, and all other goods sold by the respondent, are designated by numbers; the exact marks here in question, and used

upon the several clipper plates as already explained. are also to be found in the catalogue indicating such clipper plates by the same numerals. The plates of the new model are referred to in the catalogue as "Stewart New Process Clipping Plates"; the catalogue also states: "Please specify our clipping plate numbers when ordering." The catalogue numbers are of course employed to facilitate or simplify the ordering of clipping machines or their parts, by customers, or users of the petitioners' clipping machines.

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The real point in controversy is, whether the registered marks which the petitioner seeks to expunge, were properly registered in 1927, as trade-marks. The Trade-Marks Act gives no definition of a trade-mark other than is to be found in sec. 5 which enacts:—

All marks, names, labels, brands, packages or other business devices which are adopted for use by any person in his trade . . . for the purpose of distinguishing any manufacture, product . . . manufactured, produced . . . or offered for sale by him, applied in any manner whatever either to such manufacture, product . . . shall, for the purposes of this Act be considered and known as trade-marks.

Sec. 11 (e) empowers the Minister to refuse to register a trade-mark "if the so called trade-mark does not contain the essentials necessary to constitute a trade-mark, properly speaking." A reference to further provisions of the Trade-Mark Act, would not be helpful.

In view of all the facts I have already stated, it seems to me, that the marks registered by the respondent are not properly speaking trade-marks; they were not originally adopted as trade-marks, nor were they so used at the time of registration, and I am not satisfied they are so being used to-day. The clipper plates are sold to the public generally as "Stewart Clipper Plates," and really that is the trade-name of the goods; in my opinion, that is the only way that the goods are distinguished as those of the respondent. Had the name or mark "Stewart" been registered in some form or other, in combination with a numeral or numerals, that might possibly have constituted proper subject matter for a registered trade-mark. There can be no distinctiveness, as a rule, in a numeral or numerals alone, although it is conceivable that numerals might be so arranged, selected or used, that they would lose, partially at least, the characteristic of numbers and acquire a distinctiveness qualifying them for registration as a trade-

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mark. Here, the numerals are used in the plain and ordinary way and without any suggestion of distinctiveness in any form; everything suggests and establishes that the marks were not adopted and used as trade-marks prior to the time of registration, nor do I believe they are so now looked upon by the public. They were used merely to number parts, as a trade convenience, a practice common to many manufacturers. Merely to number parts of a manufacture is not, in my opinion, the same as adopting a mark as a trade-mark to distinguish a manufacture or product. The prefix "No." to the numerals is in itself, I think, fatal to the respondent, because it indicates that they were adopted merely as a number and not as a trade-mark; the purpose is evident. The marks in issue were used by the respondent for seven years in Canada before the same were registered as trade-marks. It is a fair and safe deduction from the evidence that the marks were used during this period, not as trade-marks, but merely as numbers designating parts of complete clipper machines, so as to facilitate replacement orders of such parts. If that is so, then such marks were improperly registered as trade-marks, and this for the reason that when they were so registered they had not been adopted or used as trade-marks by the respondent.

I am impressed with the reasoning found in the American case, *Deering Harvester Co. v. Whitman & Barnes Mfg. Co.* (1), referred to by counsel for the petitioner. This was not an action for infringement of a statutory trade-mark. It was held in this case—the fact being much the same as here—that in machines such as reapers and mowers, which have many detachable parts, subject to be worn out or broken, the stamping or casting of letters and figures thereon, merely for the purpose of distinguishing them from each other, so that the user of the machine may more readily order them by letter or telegram for purposes of replacement or repair, creates no trade-mark rights in such letters or figures; nor is it sufficient to justify their appropriation as trade-marks that they are found only in association with the machines of the particular manufacturer.

From the reasons for judgment of the Court, delivered by Lurton J., the following might be usefully quoted:—

The claim that, inasmuch as these marks are found only in "association" with machines which do bear the trade name or mark or both,

of the Deering Harvester Company, they thereby serve to indicate that company as the common source of all articles having a like designation, is not sufficient to justify their appropriation as trade-marks. Any office which these marks perform as designations of origin is purely accidental. The fact that no two distinct parts in the same machine bear the same numerals is altogether persuasive of the fact that their purpose is not that of indicating the producer. Without explanation, such a multitude of different marks would convey no meaning. When explained, as they always have been and always must be, the explanation is that they are intended to designate size, shape, and place in the machine, and are to be used to distinguish one piece or part from another having a different function. This purpose does not tend, in any but the most remote way, to indicate the producer or maker. If each of such parts had some common symbol, in addition to the varying marks indicating place and size and shape, we would have marks capable of the double duty claimed for those actually used. The system of so defining the place, size, and shape of a part of a machine is not original with appellants. It is common to many other manufacturers. The purpose is to facilitate replacements. If they may also be appropriated as trade-marks, it will operate to practically monopolize all repairs and replacements by the original maker of the machines. The question is, therefore, one of wide general interest. If complainant's contention is well founded, it will injure the public, by stifling competition in the manufacture and sale of such repairs and replacements by confining their production to the original producer. The necessity for a common designation for such parts of such machines, by whomsoever the part is made, is most apparent, upon the showing made by the appellant.

Fitzpatrick, an officer of the respondent corporation, stated in evidence that the numerals were registered because they had come to be trade-marks by long user. This I construe as an admission that the marks were originally adopted and used for a purpose other than trade-marks. I do not comprehend, on the facts of this case, how they could become trade-marks by user, if that user had been for another purpose. The marks are now just what they were, say in 1921; they cannot now mean more or less than they did then; their registration did not change their real significance and purpose and the public could not attach to them any different meaning than they did prior to registration. If they were not trade-marks in 1921, they did not become trade-marks in 1927, merely by registration. The marks were really intended to express the quality, size and shape, of parts of a particular clipping machine made by the respondent; this does not, in my opinion, constitute "a trade-mark, properly speaking" and they were not, I think, entitled to registration.

There are practical difficulties in the way of recognizing bare and non-distinctive numerals as trade-marks. A de-

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pendant could always find fairly reasonable excuses for using the same numerals; it is difficult to give to mere numerals the effect of indicating origin or proprietorship; and, just as in this case, it is frequently difficult to establish that the numeral mark was originally designed as a trade-mark. Furthermore, it is difficult to impress the public with the idea that a numeral or numerals applied to any article can be, or was intended to be, a trade-mark.

The English case of *Ardath Tobacco Company Ltd. v. W. Sandorides Ltd.* (1) was cited on behalf of the respondent. There the plaintiff was suing to restrain the infringement of its registered trade-mark "999" by the use of "99" and the words "double nine," and it had several other triple numbers registered; it was suggested that the idea of the plaintiff's mark was the repetition of a digit, but it was held that the idea or distinctiveness of the mark was at the most triplication, and that there was no infringement, and a claim for passing off also failed. The question of the validity of the plaintiff's registration apparently was not in issue, there being no claim, so far as can be gathered from the reported case, for the rectification of the register. It must be borne in mind however, that under the provisions of the present English Trade-Marks Act, a numeral is registerable if it is distinctive, and upon evidence of its distinctiveness. In the case just referred to, something is to be said for the idea that the mark "999" was distinctive, but I should seriously doubt if the respondent's marks here in issue, would be held to be distinctive and registerable even under the provisions of the English Act. Sebastian in his work on Trade-Marks, Fifth Ed. (1911), p. 93, says: "There does not, however, appear to be any case in which the English courts have recognized a mere numeral or combination of numerals, standing alone, as sufficiently special and distinctive to constitute a trade-mark." That statement appeared before the "999" Case arose, but it is not necessarily inconsistent with the fact of the registration of "999," because if "999" is properly on the register, it could only be there because it was shown to possess distinctiveness.

It would appear that in the United States the use of a mere numeral or numerals as a registered trade-mark is per-

(1) (1924) 42 R.P.C. 50.

haps not definitely settled by the courts; the reported cases in this connection generally relate to unfair competition. There is however, considerable judicial authority in the United States in support of the view that bare numerals should not be registered as trade-marks.

I am of the opinion therefore, that the registered marks in question are not properly speaking trade-marks within the contemplation of the Trade-Marks Act, and were not such at the time of registration; they were therefore registered without sufficient cause and should be expunged. The costs of action will follow the event.

Judgment accordingly.

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VESS JONES ET AL. PLAINTIFFS;

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Jan. 29.

Industrial designs—Infringement—Interim injunction—Expunging—Duties of Departmental Officer—Registration

Held, that the applicant for the registration of an industrial design has no absolute right to have the same registered. To allow the registration is within the discretion of the departmental officer charged with duty of administering the Act, but no registration should be lightly made. The exercise of the discretion to register must always contemplate the interests of the public which ought not to be unduly restricted in matters of trade.

This is an action to restrain the defendants from using a certain shape and model of bottle in the sale of its beverages, alleged to be an infringement of the plaintiffs' registered design, and to expunge the defendants' industrial design which was also registered. On the 14th of January, 1930, the plaintiffs moved before the Honourable Mr. Justice Audette for an Interim Injunction against the defendants, and after hearing counsel for both parties, the Court intimated it was of opinion that the injunction should be granted; but that if the defendants preferred, the application for an interim injunction would be continued to the trial, provided defendants gave security in the sum of \$5,000 to meet any damages or costs which the defendants might, by final judgment, be condemned to pay to the plaintiffs. The defendants failing to furnish said security within the

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time ordered, the plaintiffs would have leave to then renew their application for Injunction.

On the 29th January, 1930, counsel for both parties came again before the Court, and declared they had come to an agreement as to the final judgment to be rendered. Counsel for plaintiffs thereupon, by consent of counsel for defendants, converted his motion for Interim Injunction into one for permanent injunction, and for judgment pursuant to prayer of their Statement of Claim, save as to damages and costs which plaintiffs waived; the Injunction only to become operative six weeks from date, to allow defendants to use up so much of the stock on hand as they could, and any then remaining to be delivered over to be destroyed.

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

R. S. Smart, K.C., for plaintiffs.

W. L. Scott, K.C., for defendants.

After hearing counsel for both parties, the learned Judge said:—

Per Curiam:—

I really think the blame of the whole thing rests with the officials of the Department, who are charged with watching over the interests of the public. As Mr. Scott has consented to Judgment as intimated by Mr. Smart, there will be Judgment accordingly.

There will be judgment pursuant to the conclusions of the Statement of Claim as explained by Mr. Smart. I need not repeat them. It is a case that appealed to my sympathy as I thought the defendant was placed in a wrong position, without being guilty of any dishonesty whatsoever; and I cannot conclude without alluding to a matter which I conceive to be of great moment both to the trades and the general public in Canada, and that is the necessity of safeguarding the Register of Industrial Designs from being used to extend monopoly to designs which are not clearly entitled to it. To allow a design to be registered is entirely within the discretion of the departmental officer who is charged with the duty of administering the Act. The applicant has no absolute right to registration. This is abundantly clear under the authorities (See *The Law Times*, Vol.

163, p. 229). No registration should be lightly made; and the exercise of the discretion to register must always contemplate the interests of the public which ought not to be unduly restricted in matters of trade.

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The case before me is obviously one where registration of the defendant's design should have been refused; and the result of allowing it has given rise to litigation and its attendant burden of costs which a sound discretion on the part of the departmental officer would have rendered unnecessary. The plaintiffs' design having already been registered, they should not have allowed the registration of the other. I never saw two designs more alike. As was said at the time of the application they were alike, but the test is not when they are near one another but when they are far apart; it is impossible to tell one from the other.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT

CANADA STEAMSHIP LINES LTD..... PLAINTIFF;

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Feb. 8, 9, 10.
Mar. 20.

VS.

SS. PAISLEY DEFENDANT.

AND

JAMES RICHARDSON & SONS LTD..... PLAINTIFF;

VS.

SS. PAISLEY DEFENDANT.

*Shipping—Collision—Damage to moored vessel—Towage—Negligence—
Onus of proof—Responsibility of tow—Maritime lien*

The owners of the *P.* contracted with a towing company to have the *P.* towed from her berth to a grain elevator to unload her cargo. The *P.* had no motive power. Owing to the breaking of the tow line at one stage of the movement the *P.* continued her forward movement past the elevator and reached the south end of the harbour where the *S.* was laid up, puncturing the latter under the water line, by an anchor left hanging down on the port bow of the *P.* partly under water. This anchor was left so hanging down by those on the tow notwithstanding a warning by the tug master.

Held: That when commencing the towing of a ship her anchor is left, by the joint negligence of the tug master and those in charge of the ship, in such a position as to constitute a danger to other vessels,

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and does in fact cause such damage, the tow and tug are each responsible and liable for the damages so caused.

2. That when a vessel at anchor or moored at a dock is run into by another, the onus is upon the moving vessel to justify or excuse her action.
3. That towage is a joint undertaking, and although the motive power may be wholly that of the tug, yet both tug and tow are bound to take reasonable care and to use reasonable skill in performing the operation. This duty is not affected by the terms of the towage contract, which cannot regulate the relations between the tug and tow and third parties.
4. That persons on board the tow such as a ship-keeper and his helpers, though not a regular navigating crew, in regard to reasonable care and skill, may be treated as agents of the owners of the ship in performing or neglecting to perform such duties as the towage contract or the exigencies of the operation casts upon them.
5. Provision in a towage contract that the operation is at "owner's risk" will not absolve the tug in case of negligence in navigation so far as third parties are concerned.

NOTE.—The responsibility of the tug and tow, as between themselves discussed.

ACTIONS by the owners of the SS. *Saskatchewan* and of her cargo, against the *Paisley* for damages by collision in Owen Sound harbour.

These actions were tried before the Honourable Mr. Justice Hodgins L.J.A. at Toronto.

A. R. Holden, K.C., and *F. Wilkinson* for the Canada Steamship Lines.

S. C. Wood, K.C., and *G. M. Jarvis* for James Richardson & Sons Ltd.

R. I. Towers, K.C., and *O. S. Hollinrake*, for the ship *Paisley*.

The facts are stated in the reasons for judgment.

HODGINS L.J.A., now (March 20, 1928), delivered judgment (1).

Action for damages by the owners of the SS. *Saskatchewan* and of her cargo against the SS. *Paisley* due to a collision which occurred in Owen Sound harbour on the 18th January, 1927.

(1) On appeal to the Supreme Court of Canada, this judgment was reversed [(1929) S.C.R. 359], but was restored by judgment of Judicial Committee of the Privy Council, on 21st January, 1930.

The *Paisley* was being shifted from her berth on the east side of the harbour to the elevator dock on the west side where she was to discharge her cargo. She had been laid up in the harbour since the close of navigation. She had no motive power and was moved by the tug *Harrison*. Owing to the breaking of the tow line at one stage of the movement the *Paisley* continued her forward movement past the elevator and reached the south end of the harbour where the *Saskatchewan* was laid up, puncturing the latter steamer under the water line by an anchor left hanging down on the port bow of the *Paisley* and being partly under water.

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The defence of the *Paisley* is practically that the responsibility for what happened does not lie upon her as she had nothing to do with the navigation, being in that respect wholly under the control of the tug.

The *Paisley* having been laid up in the harbour was put in charge of one Penrice who is called the "shipkeeper." He signed an agreement with the Cleveland-Cliffs Iron Company, Marine Department, who were operating the *Paisley* for the owners, the Paisley Steamship Company. That agreement was put in evidence, and is dated 22nd December, 1926 (signed 24th or 25th December, 1926). The terms of that agreement are given later. Penrice employed three men to sweep out the vessels, tidy up and handle the lines when the ship was being moved. He spoke to Richards, the elevator superintendent on the 15th of January, 1927, with regard to removal and was told that the *Paisley* was next in order. The Captain of the *Harrison*, Waugh, came aboard the same day and talked to Penrice about the contemplated movement. The tug which he commanded was owned by the John Harrison & Sons Co. Ltd., which firm was engaged by the Cleveland-Cliffs Iron Company to move the ship. The importance of the interview lies in regard to what was then done as to the port anchor. It seems that the chain cable of this anchor had been, as appears to be usual, unshackled and used as a mooring line to the dock. This cable was taken in as a mooring line by Penrice, with the assistance of the tug men and drawn in through the hawse hole on the port side and left hanging down beside the anchor, which had been hanging down the port side by wire cables. The chain was then

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shackled on to the anchor which was drawn in to the hawse hole as far as the cable would allow the anchor stock to go. About a foot and a half or two feet got into the anchor pipe, the crown of the anchor sticking out about five feet according to Waugh, and about two or three feet according to Penrice, at an angle of around eighty degrees. This left the flukes drooping down. The parties differ somewhat as to what was said at the time concerning the anchor. Waugh says that he did not like the position of the anchor when hauled up, as it was dangerous, and that Penrice dropped it down till the crown was about two feet or two and a half feet under water as well as part of the stock. The crown of this particular anchor is shown as having a rather sharp point outwards as indicated in Exhibit S-4. Waugh says that at the time he offered to take the cable off and bring the anchor in. He had his men there and Penrice had none. Penrice, however, replied, with a certain amount of blasphemy, that he would leave it as it was till spring and let "them" take it in. Penrice does not to my mind satisfactorily contradict Waugh's statements; indeed he refused to controvert many of them and where they conflict I accept Waugh's testimony as to what was done and said at this time. Penrice, after lowering the anchor asked Waugh if it would be in his way, and Waugh answered "No," meaning it was not in the way of manoeuvring the tug. As a consequence the anchor was left hanging down as I have described and was in that position on the 18th January, 1927, (See Exhibits S.3 and S.4 and S.5), and in my view the responsibility for its position rests equally upon Waugh and Penrice.

No arrangements were made or discussed then or later between Penrice and Waugh as to how or where the ship would be moored when the *Paisley* reached the elevator dock.

The *Paisley* was lying across the harbour from this dock and to the south of and forward of two other vessels in the harbour, with her stern to them, and so was hauled out and towed stern first down the harbour to the northward. When far enough down and with her stern beyond the house marked on the chart "J.H.S." the tug swung the ship's bow towards the west and her stern to the east and then cast off from the stern and went to the bow. Penrice

and his three men, Sykes, Holmes and Bechard, were at the stern when the tug cast off from it. Penrice says he sent the men forward when the tug left, but only one of them seems to have obeyed at once, the others following later. Penrice maintained his position at the stern, fearing, as he said, that his vessel might, while being backed up, run into what he called "riff raff," a term which I understand him to use in reference to the condition of the margin of the harbour at that place, where piles and rocks made it dangerous to vessels. The tug having gone forward, took up its position on the starboard bow of the *Paisley*. A heaving line from the *Paisley* was thrown to the stern of the tug by Sykes. This was taken by Mathewson, mate of the tug, and was attached to the tug's line which was hauled aboard by Sykes and by him put through the starboard chock and on the bitts on that side of the vessel. There was no one there to assist him, otherwise he says would have carried the line over to the port side, which according to him, was the proper place for it to go, and he adds that the tug should have been on the port instead of the starboard bow. Having got assistance, the line was shifted to and through the port chock and to the bitts on the port bow, and after letting out fifteen feet of the line the tug commenced its movement ahead straight for the elevator dock at a point marked "X" on the chart. Waugh says he got the *Paisley's* bow to about thirty feet from the dock, her speed then being, according to him, about one-half a mile an hour. Mathewson corroborates both these statements. Waugh expected the men on the *Paisley* to heave a line ashore then and says it could easily have been done but he could not see as the bow of the ship was between him and those on the deck of the *Paisley*. He kept on ahead hauling the bow past the elevator and then put the tug's wheel hard a port, swung her stern out to clear the steamer and backed up to the port side of the *Paisley* to put the tug's nose against the *Paisley* and push her in. The men in the tug when it backed up carried the line forward on the tug. Waugh, seeing that the *Paisley* had not got any line to the dock, hailed Sykes not to cast the line off and told his mate to take a turn on the timber head forward on the tug so as to back up and stop the *Paisley*. The tug did back up but the line on being moved from the

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stern of the tug to its bow ran out all but four feet and began to slip on the timber head. The tug went ahead to give a chance to make fast, while the mate put the eye of the line over the timber head. When taut the tug went full speed astern, and the line parted. The mate picked up another line and sang out for the *Paisley* to take it, but no one on board her was ready. When a man came and took it, the tug backed slowly so as not to part it but the *Paisley* forged ahead and got into the ice and ran into the *Saskatchewan*. As the *Paisley* continued her way a heaving line was thrown from her to the shore by Penrice but it only reached some piles beyond the south face of the elevator where it was caught by Yeo who had reached that point and caught it there, but it was not long enough to reach a snubbing post, the nearest being some 65 feet away. Penrice called for another line to attach and lengthen it, but due to the delay in getting it and the movement of the vessel he abandoned it. The *Paisley* went on and struck the *Saskatchewan* in the way I have described.

I find as a fact that the damage to the *Saskatchewan* was done by the *Paisley's* anchor and not by the boom which had drifted or been put alongside the *Saskatchewan*.

Under the circumstances which I have outlined the questions arise whether the action of the *Paisley* was due to the negligence of those on board her, or whether the negligence causing the accident was that of the tow and tug jointly or if by the tug alone whether the *Paisley* is liable for the damages so caused.

The contract under which the tug undertook to move the *Paisley* is contained in the correspondence put in as Exhibits P. 6, the final letter of which is dated December 27, 1926, from John Harrison & Sons Company, Limited, the owner, to Mr. Schneider, Manager of the Marine Department of the Cleveland-Cliffs Iron Company of Cleveland. It is as follows:

Dear Sir:

Your letter of the 23rd received.

Please give us the Wheat Capacity of your Steamers now in Harbour here. Our understanding is that the rate for one move to and from the Elevator will be one-quarter cent ($\frac{1}{4}$ c.) per bushel, on the Wheat Capacity of each steamer. Other Owners have arranged in this way and wish you would be good enough to give us the figures so that there will be no misunderstanding.

Thanking you in advance for this and wishing you the Compliments of the Season, we remain,

Yours very truly,

JOHN HARRISON & SONS CO. LTD.

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It is, I think, unnecessary to refer to the previous correspondence which began on the 6th November and is contained in Exhibit P. 6, except to say that in the letter from the tug company of December 11/26 Exhibit (S.9) in which it is stated that their offer is to move steamers with storage cargoes to and from the elevator, there is a paragraph reading:

It is understood this work will be done at Owner's risk and that your ship-keeper will direct the mooring of Steamers after being unloaded, the Harbour Master to settle any dispute as to location.

In the telegram of December 13, the tug company say "Will require favourable weather and no mishaps to break even at our offer." The offer was accepted on the same day. The tug *Harrison* was in the correspondence designated by the Harrison Company to do the work in question.

It was urged by the plaintiff's counsel that the words "Owner's Risk" prevented the defendants from asserting that the tug company was an independent contractor so as to absolve the *Paisley* from liability. Whatever its meaning and effect may be as regards the tug and tow *inter se* I am unable to see how it affects or increases the right of the plaintiffs under the circumstances of this case.

I think that this must be considered to be a towage contract or in the nature of a towage contract because the service required would be to transfer the *Paisley* from one dock to another, a movement which necessitated that the operation should be conducted under the sole power of the tug and by means of lines between the tug and the *Paisley* and from the *Paisley* to the elevator dock. The incidents of a towage contract, of course, vary, but substantially the contract here seems one that should be judged by the ordinary relationship of tug and tow, especially as the events which happened occurred while the *Paisley* was in fact under the control of the tug as to motive power, and being towed from one dock to another.

The exact position of Penrice the shipkeeper of the *Paisley* and his helpers is not easy to determine. They were not a navigating crew and their actions must be considered

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in the light of what they necessarily had to do and did or did not do, having regard to the fact that the whole operation while under the control and direction of the tug master was a joint one.

Penrice in his evidence says that the purpose of having the three men he employed was to assist me in handling the lines, taking off hatches and principally to sweep out the boat when she arrived into the elevator and was being unloaded.

The contract between the operating agents of the *Paisley* and Penrice (Ex. P. 8), is as follows:

CLEVELAND, OHIO,
 December 22, 1916.

Mr. A. R. PENRICE,
 Owen Sound, Ontario.

DEAR SIR:—

You are hereby appointed shipkeeper on the Steamer *R. J. Paisley*. Your salary is to be \$65.00 per month.

Your regular duties will be to look after the boat you live on, as well as other vessels of this Company that may be near you. The shipkeeper should sound all tanks, peaks, and engine room well; record all movements of vessel and work done in connection with loading or unloading storage cargoes; get vessel ready for inspection or fumigation; look after repairs, and perform such work as chipping, scraping rust, painting, removing snow from hatches, as well as any other work called on to do, without extra compensation.

The shipkeeper is to report in writing to the "Cleveland-Cliffs Iron Company's office, 1460 Union Trust Bldg., Cleveland, Ohio," every Monday morning.

This contract is to terminate at any time the owners or their representatives are not satisfied with the services or conduct of the shipkeeper.

C. O. RYDHOLM,
 THE CLEVELAND-CLIFFS IRON Co.

COR C

I hereby agree to the above contract:

A. R. Penrice,
 Shipkeeper.

Dec. 16th, 1926.

Date commenced keeping ship.

1000 2nd Ave E.,
 Mailing address,
 Owen Sound, Ont.

It is a matter of some difficulty in such a case as this where the tow is a large steamer entirely deprived of her motive power and laden with a heavy cargo, without a navigating crew, but with men on board who must play some part in the operation, to say whether, the tow having run into and damaged a moored ship, under the circum-

stances I have outlined, a maritime lien can be established against her by reason of what happened. Was the Harrison Company, the owner of the tug an independent contractor so as to absolve the owners of the *Paisley* and consequently the *res* from liability for the negligent navigation of the tug, or can the owners and the *res* be held liable by reason of the fact that their employees in the *Paisley* took part in the enterprise, and by negligently doing, or omitting to do something which contributed to the accident?

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In the *Canadian Dredging Company v. Northern Navigation Company* (1), I had to consider the position of a large vessel and a tug which was moving her and the responsibility of both. I there held that as the *Huronie* was not under her own power, but was moved by that of the tug *Sarnia*, the operation of taking the *Huronie* from the dry dock to the passenger dock at Port Arthur in the harbour of that name was a joint or combined operation and not one in which either vessel could be said to have had exclusive charge or control. I found both vessels negligent because in performing their part of the joint operation the crew of each omitted certain precautions which if taken would in my judgment have prevented the collision. I think this case is somewhat similar because although the men on the *Paisley* were not a navigating crew they were undoubtedly during the movement required and bound to do certain things, such as co-operating with the tug in relation to handling lines both from and to the tug and the dock which they were making.

See also the *Socrates & Champion* (2). Referring to *Cory & Son Ltd. v. France, Fenwick & Co. Ltd.* (3), Bucknill (In Tug and Tow, 2nd Ed., p. 5), says:—

The towage is a joint undertaking, and both tug and tow are bound to take reasonable care, and use reasonable skill, a duty which cannot be removed by the terms of the towage contract. Such a duty is independent of contractual duties, and is in accordance with the general duty which rests upon everybody, whether using a river or a road, to take care not to omit anything which is reasonably necessary for the protection of others, and to do nothing which will be reason of want of care inflict injury upon others. Per Kennedy L.J., in that case, at p. 130.

(1) (1923) Ex. C.R. 189.

(2) (1923) P. 76.

(3) (1911) 1 K.B. 114 at P. 130.

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There is also the statement of Bruce J. in *Penny's case* (1) quoted by A. L. Smith L.J. in *The Snark* (2), as follows:

When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor. *Pickard v. Smith* (3), is an authority for the proposition that no sound distinction in this report can be drawn between the case of a public highway and a road which may be and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do.

As to this statement, Smith L.J. says:

"I subscribe to every word of this passage as being the law."

The relationship between tug and tow which causes them to be regarded as one vessel is confined to their navigation and with regard generally to third parties. But when the tug alone or the tow alone injures a third vessel then questions arise as to the responsibility of the one which did not itself collide with or injure the third vessel. In this case, the tow only is before me and claims to be an innocent ship and the tug to be the sole cause of the collision. I do not think it is necessary for me to pursue the question of independent contractor further. The tug is not a party defendant, and if those on the *Paisley* in the course of the joint operations were negligent to such an extent as to make them the sole, or part of, the cause of the accident, then, as I understand the law, the ship would be liable for the whole of the damages, nor if negligence is to be imputed to them it would also be useless to discuss the very intricate and at present unsettled question discussed in the cases of the *Ripon City* (4) by Gorrell Barnes J., and the *Sylvan Arrow* (5) by Hill J.

I may note in passing that the following extract from the judgment of Gorell Barnes J. in the *Ripon City*, *supra*, is quoted with approval in *Strandhill v. Hodder Co.* (6).

This right (a maritime lien) must therefore in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner. . . . It does not follow that

(1) (1898) 2 Q.B. 212.

(2) (1900) P. 105.

(3) (1861) 10 C.B. (N.S.) 470.

(4) (1897) P. 226.

(5) (1923) P. 14 & 220.

(6) (1926) S.C.R. 680, at p. 685.

a right to a personal claim against the owner of the *res* always co-exists with a right against the *res*.

This must, I think, now be read as subject to the questions raised in that case and in the *Sylvan Arrow*.

The harbour of Owen Sound in winter is a long and narrow one in which many vessels are moored, and their movement to the elevator from the docks at times directed by the superintendent of the elevator by a tug or tugs may not in itself suggest conditions in which peril was likely to be encountered. But I must determine whether in what was done antecedent to and in the course of that navigation those on the *Paisley* did or omitted anything which might constitute negligence, for in that case the *res* and the owners of the *Paisley* would be subjected thereby to a maritime lien in favour of the plaintiff.

Those on the *Paisley* were clearly servants of the owners of that vessel, and I am satisfied that the contract with Penrice makes no difference in determining his or their obligations and duties during the movement of the vessel. *The Niobe* (1). The work outlined in it was that proper to a shipkeeper merely, but I think it is a reasonable inference to draw that his owners expected him to use his knowledge as a mate and his previous experience in moving vessels, and he admits he had some, and that those whom he employed should take their part in the navigation of the ship so far as called upon by the tug master or such part as could only be rendered by them in the operation undertaken. Indeed, the transfer of the ship to the elevator dock necessitated their assistance on board her, and I think demanded that they should render such service as was within their power. They were under the orders of the tug master when he needed them to give assistance on the *Paisley*, but none the less were they taking their part as employees of the owners during that time and could not be discharged by the tug owner. See *Fenton v. City of Dublin, S. Packet Co.* (2). The tug might have put a crew or men on board, but finding men there they dispensed with that necessity and the owners of the *Paisley* must accept whatever responsibility their presence and actions entailed.

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(1) (1888) 13 P. 55.

(2) (1838) 8 Ad. & E. 835.

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The general scope of the duty of those on the *Paisley* may be described in the words of Lord Loreburn L.C., in *Owners of Lightship Comet v. Owners of W. H. No. 1* (1), in speaking of a hopper barge:

It is the duty of the barge to do her part under all circumstances to avoid collision.

There are several circumstances which the plaintiffs urge would render the *Paisley* liable by reason of the acts or omissions of Penrice and his men, notwithstanding the fact that the motive power and the direction of the movement of that vessel was the tug, and I will consider them as put forward by Mr. Holden.

It is plain upon the evidence that Penrice, if judged by what was his reasonable co-operation under the proved circumstances pursued a course which it is hard to reconcile with the idea of a joint operation.

I have already outlined what occurred between him and Waugh regarding the port anchor and expressed my view that both are responsible for its position. As it was intended to move the vessel with the anchor so placed, it added an element of danger to the movement contemplated, in that it became a menace to other ships laid up in a narrow harbour, and possibly hampered the movement or position of the tug when at the bow of the *Paisley*. Its placing was not merely a wrongful act such as occurred in *Currie v. McKnight* (2), nor one negligent but not in navigation, see the *Alde* (3), but was one which though antecedent to the movement of the vessel yet in the events which happened not only aggravated the damage but in fact caused it to happen as the result of the negligent navigation. I think in this regard it altered the situation radically and made the navigation of the *Paisley* when undertaken, one in which the duty spoken of in *Cory v. France* and *Penny's* case (ante) arises when danger may or ought reasonably to be anticipated. Waugh, Captain of the tug, was to tow the *Paisley*, which when afloat would be under his charge, and he was to cause her to move across the harbour and place her close enough to the dock to enable her to be moored in safety. In that manoeuvre she would have to be moved both backward and forward under the steam

(1) (1911) A.C. 30.

(2) (1897) A.C. 97, at p. 106.

(3) (1926) P. 211.

power of the tug, and I think the duty of seeing that everything was ship shape on the vessel that he was to tow rested primarily upon the tug master. Had he chosen to exercise his authority or insist on doing what he said he offered to do, namely, to take the cable off and raise the anchor properly into the hawse hole, he could have accomplished it without difficulty for he had his men there and Penrice had none, and Penrice would not and could not have withstood him if he had insisted upon so doing. Neglect to do this might be such a default on his part that in the subsequent movement of the ship under his command, his negligence would consist in towing a vessel in a confessedly dangerous condition and so a case of negligent navigation. The *Six Sisters* (1). This, however, cannot be finally determined as the tug is not before me. But so far as Penrice's responsibility is concerned what he did in his position as shipkeeper was to urge and persuade Waugh to allow the anchor to occupy a dangerous position and to take part in leaving it so. The safe stowing of this anchor was, if not specifically covered by the contract, within its scope and purpose. As I understood him at the trial, the stowing of this anchor was part of his duties in assisting in safely moving the *Paisley* across the harbour, and in the events that happened his neglect and that of Waugh jointly became the cause of the damage.

The next allegation is that when the tug cast off from the stern and went to the bow, the men on the *Paisley* were not promptly despatched, or did not go at once, to receive the lines at the bow. Penrice says he ordered the men forward, but either through their neglect, or possibly because Penrice did not order them as he said he did, only one of them was at the bow when the line was heaved from the tug to the *Paisley*, resulting in a delay which Sykes said might be from 1 to 3 minutes. When Sykes got to the bow he says the *Paisley's* bow was 125 feet out from the dock and the stern about 100 feet. This indicates a more or less parallel course. The towing continued according to him until the bow of the *Paisley* had got as far as the south side of the elevator.

I accept the stories of Waugh and Mathewson that they got the bow of the *Paisley* within 30 feet of the dock, and

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(1) (1900) P. 302.

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that the course taken would throw the stern in, and I have no doubt that had those on her been ready and proper arrangements made to have men at the dock to receive them, they could have got their lines out in time to have helped to check the steamer and with the shoving of the tug to safely dock her. This had been done shortly before on the *Pres'quile* which the tug *Harrison* had shifted in precisely the same way, Penrice, being aboard her as I understood from his evidence. The vessel was somewhat larger than the *Paisley* and had 30,000 bushels more of grain on board. The tug seems to have pursued proper methods in what she did and it does not occur to me that her navigation in this regard was at fault.

At the same time lack of arrangement beforehand lies at the door of the tug master, as well as at that of Penrice. They should together have concerted measures both as to having men ready and properly stationed and on the look out on the elevator dock at the proper time and as to the position and duties of those on the *Paisley* to co-operate both with the crew of the tug and the shore men at the elevator, and to be early on the look out and prompt to heave out the lines.

There is no doubt that the absence of any arrangement with the Superintendent of the Elevator or the men there to be on hand at some definite time to handle the lines was a most serious omission. The result is seen in the tale told by these men themselves. They were warned only when the vessel was moving toward the dock. Two emerged from the door of the elevator facing the harbour and seeing the *Paisley* to the north of the elevator, and the day being cold went round the southeast corner of the building to get out of the wind, thus losing sight of the *Paisley*, until they saw her bow passing the south side of the elevator behind which they were sheltering. These two, Ney and Dault, say the vessel when they first saw her was some distance off the elevator, Ney says 250 feet away and in the centre of the slip and standing still.

The other two men came out of the door in the south wall of the elevator which was back two-thirds of the way from the front of the elevator, and were only in time to see the *Paisley's* bow pass the line of that wall by about 75 feet, as Colquette says. Yeo ran to some piles 50 feet south

of the elevator and caught a line but could do nothing at that time as the nearest snubbing post was 65 feet away. Penrice found that the line he had passed to Yeo was too short and not being able to get another line in time, to fasten to it, desisted from his efforts to heave it ashore.

As to what was done on the *Paisley* when she was afloat, the story is equally unsatisfactory. The evidence discloses the following: Penrice went to the stern of the *Paisley* and remained there while she was being towed northerly stern foremost up the harbour. This was proper enough, but when the northward movement was over and that southward was begun, he still remained there while the tug and her tow were nearing the elevator dock and until the bow of the *Paisley* was abreast of the elevator. There was at this time no real necessity for staying on in disregard of a much more pressing need. He admits that he expected that the tug would put the *Paisley* at the dock without any lines being thrown, and in this belief he allowed himself and his men to do little or nothing. He looked up to see where they were going he says, not when the forward movement began, but only when there was trouble with the tug line. He had then got as far as amidships and started forward when the line parted, and when he got there he found the bow of the *Paisley* was 60 or 70 feet from the *Saskatchewan*. This was about twice the distance which the bow should have been south of the elevator if the *Paisley* had been safely docked. He later says that when the trouble with the line occurred the *Paisley* was a full length past the elevator and 150 to 200 feet from the *Saskatchewan*. His reason for staying aft was to watch the stern in relation to the eastern bank, but he admits he did not give a thought to his duty to go forward before the *Paisley* got to the dock.

In other respects he falls short of any standard of reasonable care and forethought.

He had, as I have stated, made no arrangements at the elevator with the superintendent for men to take the lines or with the men themselves, nor as to when the *Paisley* would arrive. He never consulted with the tug master as to how the movement was to be made, how the vessel was to be docked and what his men were to do. He thought he had mooring lines ready, but he gave no definite orders

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or instructions to his crew of three men to be ready or alert, did not assign them any station nor did he know where they were when wanted. He has a ticket, as he expresses it, as pilot, which includes a mate's standing, from the American authorities and had some previous winter experience in moving vessels. All this exhibits complete indifference or incompetence and an apparent disposition to let the tug do everything and himself and his men nothing but what might be forced on them.

The real fault to my mind was that when the *Paisley* was cast off by the tug as she shifted to the port side to nose her in, there was no one to heave lines ashore from any part of the ship and no one to receive them. I do not believe the young men who came out of the elevator, when they assume to give the *Paisley's* distance north of the dock. I think Waugh and Mathewson are more correct and that the vessel had got within 30 feet of the dock at the bow when it was passing the centre of the elevator and while she was going about half a mile an hour, its stern being probably somewhat further out—Mathewson says she passed the piles to which the line was thrown within 40 feet and that she was then heading a little out. There is nothing to show where Dault and Bedard were and it is clear that Penrice did not get forward to amidships until the bow was past the south side of the elevator. Even if the line had not parted this absence of all effort to get a line out to the dock and of all preparation to receive it is not, to my mind, excusable in any way. Penrice's only explanation is that he expected the tug to put the *Paisley* into her position at the dock without being assisted thereby by those on board or on the dock.

The tug master frankly admits that the earlier delay in shifting the line from the starboard side of the *Paisley's* bow to the port side, while causing delay, had no appreciable effect in causing or contributing to the accident and that the parting of his line was the effective cause. But the failure of those on the *Paisley* to do what in them lay to get lines out to the dock in time threw everything upon the ability of the tug to retard the vessel's progress and the strength of its line and when that failed the collision was inevitable.

I blame both the tug master and Penrice for the absence of any pre-arrangement regarding the presence of men on the dock at the critical time, and also as to the proper stationing of the men on the *Paisley* and their duties at the same moment. This was negligence in navigation as I held in *Canadian Dredging Co. v. Northern Navigation Co.* (*supra*).

A further complaint is made that the starboard anchor, which could have been dropped easily and in three seconds according to Penrice, was not dropped to retard the vessel's course. In the statement made by Sykes he says that Penrice admitted that he could have done this, but was not sure of the bottom. From what was stated by the fleet Captain of the Cleveland-Cliffs Iron Co.'s fleet (Rydholm) and not I think, successfully met, I should think that the anchor would not have had time to sink in the bottom of the harbour, so as to fetch up on its chain, and would have dragged through the surface of the bottom, instead of holding the vessel. It becomes a question whether the effort should have been made. It might have been successful in retarding the way of the *Paisley*. But I cannot persuade myself that the omission was negligence in view of the fact that no one could foresee just what the result of dropping the anchor would be, and it might, as has been pointed out, have been a matter of considerable risk to the ship itself. There was no request or order from the tug, and I am not convinced that, failing that, Penrice could be blamed for his inaction.

It is also argued that the hand-steering gear should have been ready for use and used during the movement of the *Paisley*. I have already expressed in *Poplar Bay SS. Co. v. The Charles Dick* (1), my views as to the necessity of a crew standing by an alternative steering gear under certain circumstances and need not repeat them. The question of responsibility in that respect however depends upon whether it was the duty of the tug master to have insisted upon steering gear being available, or whether the crew under Penrice, or Penrice himself, was bound to have made that provision. I cannot say that the same vigilance and responsibility in this respect can be required from those on

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(1) (1926) Ex. C.R. 46.

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the *Paisley* as would be expected from a regular crew of seamen. The men on the *Paisley* were there to assist in any movement which the tug had caused her to make, and if the captain of that tug, knowing the conditions, did not insist before he started the operation, on the hand steering gear, which was stowed away and really almost inaccessible, being got ready and available, I cannot see that it became, under the circumstances, the duty of those on the *Paisley* to uncover it and have it ready for use.

It is further contended that the four men on the *Paisley* were insufficient for what they had to do and that one tug was not enough to safely handle so large and heavy a vessel. I think the first proposition, is, upon the evidence, borne out and that the owners of the *Paisley* should have foreseen this. But I am not satisfied that the tug employed was not powerful enough to undertake and safely carry out the shift to the elevator. It had accomplished that task alone with the *Pres'quile*, and besides it was the tug accepted for that purpose by the operators of the *Paisley* SS. Co.

There is no doubt that where a vessel at anchor or moored at a dock is run into by another vessel, the onus is upon the moving vessel to justify or excuse her actions; *Yosemite* (1); *Hatfield v. Wandrian* (2); *H. M. Wrangells v. SS. Steel Scientist* (3). In this case that onus is cast upon the *Paisley* as she was the vessel which did the damage. I have come to the conclusion, though I must admit with some doubt, that in the respects I have mentioned that onus has not been discharged.

The case of the cargo owners is identical with that of the plaintiff, and of the vessel in which it was carried and the recovery of both plaintiffs can be against the *Paisley* although the tug is not jointly sued. See *The Devonshire* (4); *Can. Dredging Co. v. Northern Navigation Co.* (*ante*).

Judgment will therefore be entered for both plaintiffs, condemning the *Paisley*. Reference to the Registrar of this Court at Toronto to assess the damages, with costs of action and reference.

Judgment accordingly.

(1) (1894) 4 Ex. C.R. 241.

(2) (1907) 38 S.C.R. 431.

(3) (1926) Ex. C.R. 202.

(4) (1912) P. 68, (1912) A.C. 634.

BAUSCH & LOMB OPTICAL COMPANY.. APPELLANT;

AND

THE COMMISSIONER OF PATENTS. . . . RESPONDENT.

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Mar. 6.
Mar. 7.*Trade-marks—Specific trade-marks—Expiration—Section 11 (b) and Sec. 17 of the Trade-Marks and Designs Act—Registered trade-mark.*

In December, 1929, B. & L.O. Co. applied to have the letters "B. & L" registered as a trade-mark. This application was refused by the Commissioner of Patents for the sole reason that one Laurence had registered the letters "B.L." as a specific trade-mark in the year 1885. This latter mark was never renewed. Hence this appeal.

Held, that the trade-mark "B.L." having expired in the year 1910, was not at the time of the application of B. & L.O. Co. a registered trade-mark within the meaning of Section 11 (b) of the Trade-Marks and Designs Act; and that the Commissioner of Patents was not justified in refusing the application aforesaid solely because of the registration aforesaid made in the year 1885.

APPEAL from the decision of the Commissioner of Patents dated the 16th December, 1929, rejecting the application of the appellants herein to register the letters "B & L" as a specific trade-mark.

The matter came on before the Honourable Mr. Justice Maclean, President of the Court, at the city of Ottawa.

O. M. Biggar, K.C., for the appellant.

The Commissioner of Patents appearing personally.

The facts are stated in the Reasons for Judgment.

THE PRESIDENT, now (this 7th March, 1930), delivered judgment.

This is an appeal from the decision of the Commissioner of Patents, dated 16th December, 1929, rejecting the application of the Bausch and Lomb Optical Company, for registration of the letters "B & L" as a specific trade-mark to be used in connection with the sale of certain articles. The refusal of the Commissioner of Patents to grant the application for registration, was based upon the ground that a similar mark, "B L", was registered by one Barnett Laurence on the 16th day of July, 1885, which trade-mark expired on the 16th day of July, 1910, and was not afterwards renewed.

The only point for decision here is whether the Commissioner of Patents was justified in refusing the application

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in question by reason of the registration of Laurence in 1885 and which expired in 1910. No other question is involved in the appeal.

Sec. 17 of the Trade-Mark Act is as follows:

A specific trade-mark, when registered, shall endure for the term of twenty-five years, but may be renewed before the expiration of the said term by the proprietor thereof, or by his legal representative, for another term of twenty-five years, and so on from time to time; but every such renewal shall be registered before the expiration of the current term of twenty-five years.

The registration of Laurence having expired in 1910 it was no longer, it seems to me, a registered trade-mark and was in just the same position after 1910 as if it had never been registered at all. I assume the register would show the mark to be one that had expired as a registered mark, that being so, the register should be treated as being entirely silent upon the matter. An expired registered mark is not a registered mark. Section 11 (b) of the Act states that the Minister may refuse to register any trade-mark "if the trade-mark proposed for registration is identical with or resembles a trade-mark already registered." I do not think this refers to a mark once registered but which has expired. I think it refers solely to an unexpired registered mark.

I do not think, therefore, that the Commissioner was justified in refusing the application of The Bausch and Lomb Optical Company upon the ground that the register showed registration in 1885 of a somewhat similar mark but which had expired in 1910. The appeal is therefore allowed.

Judgment accordingly.

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 Feb. 5.
 Mar. 17.

MELLO-CREME PRODUCTS PLAINTIFF;

VS.

EWAN'S BREAD LIMITED ET AL. DEFENDANTS.

Trade-marks—Assignment in gross—Extending of scope of trade-mark—Specific trade-mark

One H., doing business under the trade name of The Carp Flour Mills, registered the trade-mark "Mello-Creme" in 1925, for use in the milling and sale of a breakfast food, and used the same in his business. In 1927, H., by deed, assigned to the plaintiff the said trade-mark with the good will of H., relating to the sale of cereal foods

under the said mark. Notwithstanding this assignment, H. continued to carry on his business as before, using the trade-mark along with his trade name on the cartons of the product milled and sold by him; and the good will aforesaid was never, in fact, transferred. Plaintiff did not manufacture but merely sold the product of H., marked as aforesaid, with nothing on the product associating it with them. Plaintiff later registered the same trade-mark (in 1929), to be used in the sale of all food products, including cattle, hog and hen foods, thereby attempting to extend the scope of the first trade-mark. The present action is to restrain the defendants from using said mark in the sale of bread.

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Held, that an assignment in gross, i.e., by itself, of the right to a name is invalid, and as the good will of H. was never in fact transferred to the plaintiff, and as the trade-mark "Mello-Creme" was assigned by itself, notwithstanding what was alleged in the deed of transfer, nothing passed to the plaintiff by the said transfer, and the plaintiff had no *locus standi* to take the present action.

2. The first trade-mark being only for use in the sale of breakfast foods, the plaintiff could not by subsequent literature extend the scope of its trade-mark. In the true construction of the scope of a trade-mark, reliance must be had alone on the construction of the trade-mark itself and not on the intention of the owner or user of the mark as intimated by literature and booklets distributed with the product. That a trade-mark for breakfast food cannot be extended to restrain its use in connection with the sale of bread, or any other such commodity even though the product bearing such trade-mark was an ingredient of such bread or other commodity.

ACTION by the plaintiff herein to restrain the defendants from using the trade-mark "Mello-Creme" in the manufacture and sale of its bread.

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

H. J. McNulty and *S. Berger* for plaintiff.

R. S. Smart, K.C., for Ewan's Bread Limited.

O. M. Biggar, K.C., and *E. Bristol, K.C.*, for Dominion Bakeries Limited.

The facts are stated in the Reasons for Judgment.

AUDETTE J., now (March 17, 1930), delivered judgment.

This is an action whereby it is sought to restrain the defendants from infringing the plaintiff's two specific registered trade-marks in respect of the words Mello-Creme.

The first specific trade-mark bears date the 15th October, 1925, (Exhibit 2) and it is in respect of a:—

Trade-mark (Specific) to be applied to the sale of a *Breakfast Food*, and which consists of a *shield* with the letters: C.F.M. at the top, and

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immediately below are the words: "*Mellow Creme Wheat Cereal*"; at the bottom appears the words: *Nature's Food for Breakfast*.

The second specific trade-mark bears date the 13th May, 1929, and reads as follows:—

Trade-mark (Specific) to be applied to the sale of *all food products*, including cattle, hog and poultry feeds, and which consists of the hyphenated words: "Mello-Creme."

These words may carry the idea expressed by the word "mellow," that is: soft with ripeness, and *crème*, the French word for cream.

The second trade-mark is only an attempt to extend the scope of the first trade-mark, and indicates a recognition of the limitation of the first trade-mark. It was alleged, on the argument, that the second trade-mark was registered only upon the consent of Hopkins, exacted by the Department; but there is no evidence in the record as to that, and there is no restriction upon the generality of the food covered by this second trade-mark.

The first trade-mark was registered at the request of John C. Hopkins, carrying on the business of flour mill at Carp, Ontario, under the name "The Carp Flour Mills" without incorporation or registration, and was obtained upon the usual statutory declaration that he was the *first* to make use of the same.

Exhibit No. 1 was the first carton used by him in respect of the sales, under this first trade-mark, of a kind of porridge for breakfast food of coarse whole wheat flour. Seeking to extend the product of his mill, he encouraged, at the time this product to be used in the manufacture of bread.

The defendant, Ewan's Bread Limited, having asked the miller Hopkins to grind this product finer as they could thus use a certain quantity of it as part ingredient in baking brown bread, and that was before entering into the agreement exhibit 4, in 1926.

Then, on the 9th December, 1926, Hopkins and this defendant entered into an agreement (exhibit 4) whereby Hopkins allowed him the exclusive right to use the word "Mello-Creme" as applied to bread, cakes and biscuits, within a given territory, under certain conditions, stipulations and covenants, one of which being that "should the terms of the contract not being carried out, either of the parties hereto might cancel the same on 30 days' registered notice to the other party thereto."

In compliance with this proviso, on the 18th January, 1929, notice (exhibit 7) was given to Ewan's Bread Company that "the contract will be considered null and void thirty (30) days from to-day, after which date we cannot permit your use of the *trade name* Mello-Creme.

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This letter was followed by another one bearing date the 31st May, 1929, advising Ewan's Bread Company that their attention had been brought to the fact that they were *selling bread* under the name of "Mello-Creme" and that they were *placing wrappers* on their bread, making use of this name, etc., and that if further use of the same were made action would be taken against them. The defendants continued to use the words Mello-Creme with their bread after that.

Hence the present action.

The defendants are therefore charged with infringing the plaintiff's said trade-mark, from the 18th February, 1929, by using the words Mello-Creme on wrappers similar to exhibits 12a to 12e, as applied to bread.

In the meantime, on the 21st January, 1927, the plaintiff company was incorporated (exhibit 3) and on the 1st February, 1927, an agreement (exhibit 6) was entered into between John C. Hopkins and James Kyd, of the first part, the vendors, and the Mello-Creme Products Limited (the plaintiff) of the second part, the purchaser, whereby the vendors, among other things, sold and transferred to the purchaser (a) the registered trade-mark Mello-Creme, (b) the good will of the vendors relating to the sale of cereal foods under the name Mello-Creme.

How James Kyd became one of the vendors mentioned in that deed, I fail to see, as he had no title whatsoever, directly or indirectly, to this trade-mark. He was only the manager and sale distributor of the plaintiff company.

It is well at this stage to bear in mind that this sale (exhibit 6) appearing good and valid on its face and in form in that the trade-mark seems to have been sold with the good will of the business; however, the evidence discloses that while this sale apparently good in form is bad in substance in that the good will was never transferred and that the vendor or transferror continued as in the past to carry on his same business. That assignment of the trade-mark and apparently the good will from the vendors to the plaintiff amounts to a deception on the public.

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Hopkins who registered this trade-mark, while engaged in his milling business, and attached it to the above mentioned product, did not in any way part with his business or any part thereof when he sold the trade-mark. He continued to manufacture and even sold direct to the public, without paying any commission to any one, this very product under this very trade-mark he had apparently sold to the plaintiff with the good will of his business. The plaintiff does not manufacture at all and the assignment did not operate any change in Hopkins' method of carrying on business in the way it was carried on before the incorporation of the plaintiff company. The business was not in fact transferred with the assignment. Looking at the product put on the market by the plaintiff, exhibit 5 being a fine example, we find nothing associating directly or indirectly this product with the plaintiff. Quite to the contrary, at the top are found the capital letters C.F.M., the initials of the Carp Flour Mills, and at the bottom the full name of Carp Flour Mills. No mention or any intimation showing that the product comes from or is associated with the name of the plaintiff, and a trade-mark is used to distinguish the trader's goods. *Lacteosote, Ltd. v. Alberman* (1); *Bowden Wire Co. v. Bowden Brake Co., Ltd.* (2).

No man is entitled to represent his goods as being the goods of another man. *Singer Manufacturing Co. v. Loog* (3).

Good will is the benefit and advantage of the good name, reputation and connection of a business. It cannot subsist by itself, it has no independent existence. It must be attached to a business. Kerley, on Trade-Marks, 4th Ed. 402. Therefore since a trade-mark cannot be assigned without the actual good will of the business to which it is attached, nothing would seem to have passed by the assignment to the plaintiff. This assignment placed the trade-mark in jeopardy in the hands of the plaintiff and no action will lie for infringement at the instance of the plaintiff under such circumstances.

Under the Canadian Trade-Mark Act, a registered trade-mark is assignable in law, that is at common law. Under the English Act, a registered trade-mark is only assignable

(1) (1927) 2 Chy. D. 117.

(2) (1914) 31 R.P.C. 385, at p. 392; 30 R.P.C. 45.

(3) (1882) 52 L.J. Ch. 481.

in connection with the good will of the business concerned in the goods for which it has been registered and is determinable with that good will.

Prior to the English Act requiring assignment with the good will it was held that at common law the assignment is only valid when made with the good will and in the absence of such specific enactment in the Canadian Act, the common law applies and governs and the words, in the Canadian Act, assignable *in law* mean assignable at common law with the good will.

Property in a trade-mark is the right to the exclusive use of some mark, name or symbol in connection with a particular manufacture or vendible commodity. *Leather Cloth Co. v. American Leather Cloth Co.* (1). And the office of a trade-mark is to distinguish the goods of the owner from the goods of any other person.

A trade-mark cannot be assigned by itself. *Independent Baking Powder Co. v. Boorman* (2). Assignment in gross, that is by itself, of the right to a name is invalid—*Thornloe v. Hill* (3)—otherwise a person might manufacture trade-marks and sell them as a commodity. The result could only work disaster to the public.

In *Pinto v. Badman* (4), after a transfer of a certain brand of cigars, the transferrors kept on manufacturing and selling the same cigars, but under a different name, so that they attempted to sell the benefit of the brand or mark to some one else who did not buy their business or factory or anything of the kind and it was held (p. 191) that all that was sold was the trade-mark and no part of the business was sold as they kept carrying on their business as before. It follows therefore (p. 194) that it has been laid down by the clearest authority that a trade-mark can be assigned when it is transferred together with, to use Lord Cranworth's language, the manufactory of the goods on which the mark has been used to be affixed. It can be assigned, if it is indicative of origin, when the origin is assigned with it. The good will and the trade-mark cannot be split up. See also *Bowden Wire Ltd. v. Bowden Brake Co., Ltd.* (5).

(1) (1865) 11 H.L.C. 523.

(3) (1894) 63 L.J. Ch. 331.

(2) (1910) 175 Fed. R. 448, at p. 451.

(4) (1891) 8 R.P.C. 181.

(5) (1914) 31 R.P.C. 392; 30 R.P.C. 45.

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In the present case, looking at exhibits 5, C, D and E, the trade dealings go further than in the Baking Powder case (*ubi supra*) since the packages put on the market with the trade-mark are not as packages of the plaintiff, but as that of the Carp Flour Mills, Carp, Ontario, and the business is still carried on as formerly by the vendors. In the result there has been no assignment or transfer of the business, nothing passed under that assignment, the transfer being invalid, the plaintiff has no *locus standi*, has no right of action for infringement against the defendants. *Independent Baking Powder v. Boorman, supra*.

Moreover, the first trade-mark (exhibit 2) is for the words "Mellow-Creme Wheat Cereal" described as "Nature's Food for Breakfast", and the plaintiff cannot, by subsequent literature, its little pamphlets sent with the product or any other class of advertisements, as contended at Bar, extend the scope of its trade-mark any more than any one could in a similar manner extend the scope of a patent. In the true construction of the scope of a trade-mark, reliance must be had alone on the construction of the trade-mark itself and not on the intention of the owner or user of the trade-mark as intimated by literature and booklets distributed with the product. *The Canadian General Electric Co., Ltd. v. Fada Radio Ltd.* (1); *Edwards v. Dennis* (2). The plaintiff can no more extend this trade-mark to bread than he can extend it to pudding, pancakes, Yorkshire pudding, etc. He cannot distinguish between bread and biscuits.

If a person had a trade-mark for the manufacture of a certain brand of sugar, that trade-mark could not in any way be extended to all commodities having sugar as an ingredient or to all products made of sugar. The owner of a trade-mark for coffee could not prevent any one using coffee in ice cream. Likewise, the plaintiff cannot extend its trade-mark to all products made of whole wheat flour.

The putting on the market of an article known as "listerated tooth powder" is not an infringement of the trade-mark listerine. *Lambert Pharmacal Co. v. J. Palmer & Son Ltd.* (3), and cases therein cited. See also *Edwards v. Dennis, supra*.

(1) (1930) A.C. 97 at 104.

(2) (1885) 30 Chy. D. 455.

(3) (1912) 2 D.L.R. 359; Q.O.R. 21 K.B. 451.

It does not matter what use this wheat product may be put to after purchasing it. The question is really to what article the trade-mark is attached when sold to the public who buy it under that name. The trade-mark is used to identify that article and does not cover all other commodities that can be made out of it. Hopkins' trade-mark was only associated in its narrow scope with breakfast cereal and no more—it cannot be extended beyond that.

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The registration of the trade-mark did not in itself constitute any new right to the same, it merely preserved whatever rights the registrant had at the time of such registration.

Now the evidence establishes that these words Mello-Creme without any registration have been used by the William Patterson Co. Ltd., with respect to a certain described biscuit since 1922 and by the Telfer Biscuit Manufacturing Company, also with respect to a certain biscuit, from 1921 to 1928, when at that last date the business passed into other hands. This use by these two companies dates back of the time the trade-marks in question were granted and the date at which they were ever used by the vendors. The prior use of the words "Mello-Creme" in connection with biscuits by the two companies above mentioned invalidates the application of the plaintiff's trade-marks to bread, biscuits and other foods of a like nature and composition. The baking business is neither the business of Hopkins nor of the plaintiff. The business of a miller is quite distinct from that of a baker.

The fact of the use of the words Mello-Creme by the Patterson and Telfer companies is said not to have been known to the declarant when he subscribed to the statutory declarations that these words were not in use to his knowledge by any other persons than themselves at the time of their adoption thereof. However when the alleged owner of a trade-mark sues for infringement, it is essential that he should not himself be guilty of misleading representations, even if unintentional. *Eastman Photographic Co. v. Griffith* (1). It is also very questionable whether, under such circumstances, the registration should not be expunged, even if it were only for the maintenance of the

(1) (1898) 15 R.P.C. 106.

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purity of the Register. *Goulet v. Ida Serre* (1). See also *Bowden Wire Ltd. v. Bowden Brake Company Ltd.* (2).

Indeed, if such registration were maintained without any restriction in the scope of such trade-marks, the Patterson and Telfer firms might be subjected to a demand to discontinue the use of the words "Mello-Creme" although their use was prior to the adoption of the plaintiff's trade-marks. *Partlo v. Todd* (3).

However, the defendants, by their pleadings, only ask for the expunging of the second trade-mark which extends to all "food products"; and at the trial, at the end of the argument, counsel for the defendants moved for leave to amend by claiming to also expunge the first trade-mark, asking the court to consider this motion if it became necessary. At trial my opinion rather leaned in favour of expunging the first trade-mark. However, it had not been asked up to that time and considering that the Patterson and Telfer companies made no complaint against the use of Mello-Creme. I have now come to the conclusion to order the defendants to take nothing by this motion to amend and to order the expunging of only the second trade-mark as applying to all food products.

While, indeed, for the reasons already mentioned the plaintiff obviously fails on the issue for infringement, I incline to the view that the Register will be maintained in a satisfactory state if (a) the first trade-mark be limited in its scope, that is to say to the use (with the whole design) of the words "Mello-Creme Wheat Cereal," as applied to the words "Nature's food for Breakfast", that is to a certain and definite kind of porridge (see exhibit No. 1) to be made out of the product in question, from cereal, that is from a grain plant, such as wheat, oat, barley and other grasses, cultivated by agriculturists for the sake of their seed as food; (b) furthermore, the purity of the Register may be maintained by allowing the Patterson and Telfer companies the use of the words Mello-Creme for their biscuits, (c) allowing also the defendants to use the words Mello-Creme with their bread, (b) and expunging totally the

(1) (1922) 21 Ex. C.R. 342.

(2) (1914) 31 R.P.C. 385, at p. 393.

(3) (1888) 17 S.C.R. 196.

second trade-mark, of the 13th May, 1929, applying among other things to *all food products*.

As I find upon the facts that the defendants have not been guilty of infringing the plaintiff's trade-marks, the action must be dismissed with costs.

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Judgment accordingly.

HIS MAJESTY THE KING..... PLAINTIFF;

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Expropriation—Powers of Minister—Speculative value—Advantages to property by expropriation

The Crown expropriated a certain area for use in the building of the terminal of the Hudson Bay Railway at Churchill and for a port on Hudson Bay. At the date of the taking there were no permanent habitations anywhere in the vicinity save a Hudson Bay Post and Mounted Police Post. The future of Churchill was altogether dependent upon the completion of the work for which the land was taken.

Held, that under the Expropriation Act a Minister of the Crown may take any land for the use of His Majesty as he thinks advisable to take, and his decision or judgment that the lands so taken are necessary for a public work is not open to review by the Courts. That this power or authority does not interfere with the security in the enjoyment of private property, as the Crown must compensate the owner of any lands so taken for the value thereof and all damages resulting from the expropriation. [*Boland v. The Canadian National Railway* (1927), A.C. 198 referred to and discussed.]

2. That speculative prices paid by purchasers of real estate in the vicinity, some fifteen years before the expropriation in question, are not a fair criterion of the market value of similar property at the date of the expropriation thereof.
3. That the advantages due to the carrying out of the scheme for which the lands were taken cannot be considered in fixing the compensation to be paid for the said lands.

INFORMATION exhibited by the Attorney-General of Canada to have the amount of the compensation to be paid to the defendant for certain properties expropriated fixed by the Court.

It was contended and argued on behalf of the defendant that more land was taken by the expropriation proceedings than was necessary for the public works in question, that no part of the defendant's subdivision was necessary for

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such works and that no part had, since the expropriation, been made use of for the works except that taken for the railway, and he contends that only such lands can be expropriated as are reasonably necessary for the construction and operation of the public works.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Winnipeg, when H. A. Robson, K.C., and W. C. Hamilton, K.C., appeared for the plaintiff, and A. J. Andrews, K.C., F. M. Burbidge and E. S. Wilson appeared for the defendant.

The action was further heard and tried at the city of Ottawa on the 14th and 15th February, 1930.

W. C. Hamilton, K.C., and H. L. Robson, for plaintiff.

E. S. Wilson, K.C., and W. Manahan for defendant.

The contentions of the parties and the facts are stated above and in the reasons for judgment.

THE PRESIDENT, now (March 24, 1930), delivered judgment.

This is an Information exhibited by the Attorney-General of Canada, on behalf of His Majesty, for the purpose, *inter alia*, of fixing the amount of compensation to be paid to the defendant for certain lands, situated at Churchill, Manitoba, taken by the plaintiff under the provisions and authority of the Expropriation Act, Ch. 143, R.S.C. 1906, for the purpose of public works of Canada, that is to say, the construction of the Hudson Bay terminus of the Hudson Bay Railway and terminal port facilities, at Churchill. A plan and description of the lands taken, was signed by the Secretary of the Department of Railways and Canals on August 11, 1927, and was deposited of record at the office of the District Registrar for Neepawa Land Titles District, Manitoba, on August 15, 1927. The plaintiff asks that it be declared that the sum of \$1,586.25, and interest from the date of taking is sufficient and just compensation to the defendant for the lands so taken; the compensation claimed by the defendant is in excess of \$50,000. The case is in many respects an unusual one, and not without its difficulties. The nature and extent of the evidence is such that I should perhaps state the facts of the case at some length.

The whole of the lands taken for the public works mentioned, inclusive of that of the defendant, is designated on the plans as the East Peninsula of Churchill, Hudson Bay. The Peninsula is about five miles in length, and at its base is about six miles across, the Churchill River being on the one side, and the Hudson Bay on the other. The Peninsula varies in width and ends in a narrow rocky promontory or cape. A high rocky plateau which extends throughout the length of the Peninsula on the Hudson Bay side, comprises a very considerable portion of the peninsula. The continuity of the plateau is broken for short distances in two places, I think. A large area of land, including that taken from the defendant, lies at a suitable level between the edge of the plateau, or the escarpment, and the Churchill River, the railway, docks, sheds, elevators, etc., being beside the Churchill River; the distance between the escarpment, and the railway—which follows quite closely the Churchill River—is about one half of a mile, the distance between the end of the railway and defendant's lands being roughly two miles or more.

The particular lands taken from the defendant consisted of 153 lots, each having a frontage of 50 feet and a depth of 100 feet, in what is known as the Beech subdivision, which altogether comprised 1,413 lots; the whole of the subdivision was taken, and this, I think, comprised all the privately owned lands on the Peninsula. In 1905, as I understand it, the defendant's father obtained a homestead entry for the area later known as the Beech subdivision, under the provisions of the Dominion Lands Act, but in 1909 the Government of Canada apparently withdrew from homestead entry the lands on the Peninsula, and laid out a townsite covering the whole Peninsula. When Beech, Sr., applied for his patent he was granted the townsite lots now referred to as the Beech subdivision. No explanation was given as to why a homestead entry on the Peninsula was granted, or why, later, the townsite was laid out, but this is of no importance; the Peninsula always remained a mere paper townsite.

It was alleged on behalf of the defendant, that more land was taken by this expropriation proceeding than was necessary for the public works in question; that no part

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of the Beech subdivision was necessary for such public works and no part of it has since been used for the public works, except that taken for the railway right of way; that the end of the railway, the railway shops, docks, sheds, elevators and other terminal facilities are more than two miles from the nearest limits of the Beech subdivision, and that the nearest end of the railway terminal yard is one half mile or more removed from the limits of the subdivision. The defendant contends that only such lands can be expropriated as are reasonably necessary for the construction and operation of the public works. It will be convenient to dispose of this point before proceeding further. The Hon. C. A. Dunning, who was Minister of Railways and Canals when the lands in question were expropriated, stated in evidence, that immediately it was determined that Churchill should be the terminal port of the Hudson Bay Railway, he was advised by his officers, engineers and experts, that it was highly desirable that the whole of the Peninsula, privately owned and Crown lands, should be acquired for the purpose of the undertaking. It was said they were dealing with an unusual public undertaking, accompanied by unusual problems, difficulties and uncertainties, which rendered it desirable to control the whole Peninsula in the interests of the undertaking, presently and for the future; in his evidence the Minister admitted, that one consideration in his mind, among many others, was the desire to avoid speculative land transactions at Churchill. I have no doubt the Minister, his officers and expert advisers, believed the facts of the situation justified the action taken in this connection.

Adverting now to the Expropriation Act. It appears to me, upon a consideration of the terms of that Act, that the Minister may, if he deems it advisable so to do, take any lands for the use of His Majesty by depositing a plan and description of the same, signed by himself or an authorized officer of his department, at the appropriate registration office, and such lands thereupon become and remain vested in His Majesty. If, in the Minister's judgment the land thus taken, is necessary for a public work, then I think it is not open to review. Section 3 (b) of the Act authorizes the Minister to enter upon and take possession of any

land or real property, the expropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of a public work, a public work being defined. Having exercised his judgment, and fixed upon the area and the bounds of the lands desired to be taken, the proceedings for consummating the expropriation and vesting title in His Majesty is as I have just mentioned, that is by filing a plan and description under the provisions of sec. 8 of the Act. Thereupon the lands become and remain vested in His Majesty. Sec. 11 provides that when any such plan and description, purporting to be signed by the deputy of the Minister or some other authorized person, is deposited of record, the same shall be deemed and taken to have been deposited by the direction and authority of the Minister, and as indicating that in his judgment the land therein described was necessary for the purposes of the public work; and the said plan and description shall not be called in question except by the Minister or by some person acting for him or for the Crown. The powers granted to the Minister by the Act seem to be unlimited. But, this power or authority cannot be exercised so as to interfere with security in the enjoyment of the private property, or that private property should be confiscated for public purposes without payment to its owner of its fair value. The legislature in such cases has provided what it considers sufficient means for securing adequate compensation to the owner of the land, and leaves to the public authority interested in the undertaking to say to what extent it will be useful to them to exercise the statutory powers. The Act provides that the compensation adjudged for any land or property acquired or taken shall stand in the stead of such land or property. I am therefore of the opinion that it is not open in this proceeding for the defendant to attack the expropriation in question upon the grounds stated. So then, the question here, as in all expropriation cases, is what compensation shall the owner receive for the lands expropriated.

Before departing from this point I should perhaps refer to the case of *Boland v. Canadian National Railway* (1), which was cited by counsel for the defendant, as authority

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for the contention that the powers of the Minister in taking lands under the Expropriation Act, are limited to the present actual physical needs of the undertaking. I do not think that the decision rendered in this case has any such meaning. The Judicial Committee of the Privy Council held that the railway company authorities got the position of the Minister, not absolutely, but solely for the purposes of the undertaking of the railway; that the construction of a certain subway which was the real subject of the litigation was not a part of the undertaking of the railway; and that the Expropriation Act could only come into operation if the necessity for taking the land in question was such, that had sec. 13 of the Canadian National Railway Act not cut out the railway clauses, the land could have been taken under the clauses of the Railway Act. This case is not, I think, authority for the point for which it was cited.

Now as to the general character, location and utility of the property taken, and any conditions affecting its value. It may be conceded, I think, that the property is for all practical purposes valueless except for the purposes of the undertaking, or for building sites of one kind or another. At the date of the taking, there were no permanent habitations of any kind on the Peninsula, though I think there was a Hudson Bay Post and a Canadian Mounted Police Post, across the Churchill River, on the Western Peninsula. The land was described by one witness as "mostly clay flats with gravel sub-soil with a slight overburden of moss and muskeg, and is strewn to some extent with boulders." It is perpetually frozen, except that in summer the frost is released for a distance of two or three feet in exposed places. It cannot be cultivated. It is located in an almost treeless territory. Conveniences, such as a water supply system, will be difficult of successful construction and operation and will, I conclude from the evidence, only be possible if done as a public work by the Hudson Bay Railway; even then, the same may be possible for only a very limited part of the year, the difficulty being to protect pipes and mains from freezing. The climate at Churchill, I gather from the evidence, is not of itself, calculated to add to the value or demand of property in that

vicinity. Churchill is accessible by water only for about four months of the year, and this must of necessity confine the major activities of the port to this period. It was suggested by Mr. McLachlan, the engineer in charge of the terminal development at Churchill, that the employees of the railway and port terminals there should largely be removed at the close of navigation each year, and that only a skeleton organization should be retained during the period of closed navigation; he seemed to entertain the view that Churchills population would and should be largely a seasonal one. The conditions I have described—and which were stated in evidence—are not, ordinarily speaking, those that promote or create an active or stabilized demand or market for real property. The extent of business activities and population at Churchill will, so far as one can now see, be altogether dependent upon the completion and operation of the railway and port facilities, and the dimensions of traffic in and out of that port. It is impossible yet to say with any degree of certainty what will be the character, volume or value of traffic passing through the port, what population the port will sustain,—and what will be the demand for real estate. The expectations of the most enthusiastic concerning the future of the Port of Churchill may be greatly exceeded, and it may transpire, that this will be due to causes which to-day are unseen or unknown. It is not within my duty to speculate upon all this, nor is it necessary to do so, in a consideration of the issue before me. It is sufficient for my purpose, to say that without the railway and port facilities constructed and in operation, the defendant's lands, would, in my opinion, be without any substantial market value. The evidence is altogether that way.

The defendant's principal witness as to the value of the lands taken was Mr. Christie, an experienced and favourably known real estate broker, of Winnipeg. He placed the net sale value of the lots, after a deduction of fifteen per cent commission for selling, at \$9.35, \$8.50, \$7.65, \$6.80 and \$5.95 per foot frontage, all dependent upon the distance of the lots from a stated base, 32nd Avenue; the average value per front foot of each lot would be \$7.65, upon this basis of valuation. Upon this basis, the value of

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each lot would average about \$350 and would give a gross valuation of over one half million dollars, to the whole of the Beech subdivision, some 1,400 and odd lots. Mr. Christie's evidence was rather to the effect that he could sell the lots at his valuation, but I did not understand him to say precisely that he placed this value upon them; probably, he intentionally put his evidence in this form. The defendant's other witnesses generally supported Mr. Christie's valuation. Mr. Ballantyne, a Crown witness, a real estate broker of Winnipeg, who visited the property as Mr. Christie also did, declined to place any valuation on the property at all. In the circumstances he suggested that the whole subdivision should be treated as acreage and not as subdivided property, and that an arbitrary value be placed upon it. He stated that no one would buy land at Churchill except for speculative purposes. Mr. Carruthers another Winnipeg real estate broker, stated in evidence that he would not sell the property to the public at all, and could place no value whatever on the property. The defendant sought to establish a value to the land taken, by evidence of former sales of Beech subdivision lots. In the years 1911, 1912, and thereabouts, some 200 lots of the subdivision were sold at prices ranging from \$250 to \$450 each. Then, a considerable number of lots were purchased, within practically the same period, by the late J. D. McArthur of Winnipeg at \$300 per lot, from Beech, Sr., through an intermediary. McArthur was a railway contractor, and at that time was one of the principal contractors engaged in the construction of the Hudson Bay Railway. At that time Churchill was the designated Hudson Bay terminal port of the railway. In 1913 a Beech subdivision lot was purchased by one Snowden, of Winnipeg, for \$750. This lot was partially subject to regular inundation by the tide, and in any event it seems to have been an imprudent purchase for the purpose for which Snowden required it, and it cannot weigh with me. There was commission evidence taken in this cause between the beginning of the trial at Winnipeg and its conclusion at Ottawa, by which it was shown apparently, that transactions in two Beech subdivision lots took place in 1921, and further transactions in the same lots close to the expropriation date, at figures as

high as \$1,500 and \$1,800 per lot. These figures are so absurdly high, and so much in contrast with the evidence given by the defendant's expert witnesses, that I cannot attach any importance to these transactions, and I propose to disregard altogether any evidence concerning them.

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In 1912 or shortly afterwards, Churchill was abandoned as the probable Hudson Bay terminal port of the railway, and Nelson was officially selected as the terminal port. Railway construction proceeded with Nelson in mind at its destination, and work was also commenced upon the port facilities at Nelson. In the fall of 1917 all construction work ceased, owing I believe to the war, with the rails within ninety miles of Nelson. From then, until the middle of 1927, as I understand it, the railway project lay dead, when it was determined to again proceed with it, but with the Hudson Bay terminus an open question. The question as to whether Nelson or Churchill should be the Hudson Bay terminal port was presented for examination and report to an expert port engineer, with the result, that Churchill was restored as the Hudson Bay port of the railway; the construction of the railway was then renewed with Churchill as its terminus and work was also soon afterwards begun upon the port facilities; the railway, I understand, is practically completed and the balance of the undertaking is nearing completion. In the meanwhile, there was, from the cessation of railway construction in 1917 down to the middle of 1927, no transactions in the Beech subdivision lots, except the two transactions to which I last referred; no improvements were made upon the property for any purpose, no revenue was derived from the lots except from their sale. I should point out that there were no taxes at any time payable upon the Beech subdivision lots, as the whole Peninsula was practically uninhabited and unorganized. It was not onerous therefore upon the proprietors of the Beech subdivision lots to hold the same, if they could not or did not sell them.

There is one other matter referred to by defence which I should mention. On August 10, 1927, the Minister of Railways, with certain officers of his department, and an expert port engineer, Mr. Palmer, who was specially retained for the purpose of investigating the relative merits

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of the ports of Churchill and Nelson and to make a recommendation thereon, were at Churchill. On that day Mr. Palmer recommended to the Minister that Churchill should be selected as the Hudson Bay port of the railway. The Minister thereupon accepted the recommendation of Mr. Palmer, and he immediately communicated with his colleagues at Ottawa and obtained their approval of the selection of Churchill. On the same day the Minister made a public announcement, through a press representative of the selection of Churchill. On the 11th day of August the plan of the expropriation was signed by the Secretary of the Department of Railways, and forwarded at once to the proper registration office in Manitoba. I understood the defendant's counsel to claim, though I am not quite sure of it, that in the interval between the announcement of the selection of Churchill by the Minister, and the filing of the plan, the value of the defendant's land had greatly increased by reason of the announced selection of Churchill as the Hudson Bay terminal port of the railway. If the advantages due to the carrying out of the scheme for which the defendant's lands were taken cannot be considered, in fixing the compensation, as I shall shortly explain, it matters little to the defendant, so far as I can see, if a few days intervene between the announcement of the selection of Churchill and the actual filing of the plan that could not improve the defendant's position. The question of the value of the property should not be influenced by an incident of that nature.

The principles which regulate the fixing of the compensation of lands compulsorily taken have been the subject of many decisions. The compensation to be ascribed, is the value of the property taken to the owner, in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities,—but it is the present value alone of such advantages and possibilities that is to be determined—excluding however any advantage due to the carrying out of the scheme for which the property was compulsorily acquired. In the *Cedar Rapids Case* (1)—I shall not state the facts of the case—it was held that the proper basis for compensation was the amount for

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

which the lands and rights acquired could have been sold had the Cedar Rapids Manufacturing and Power Company, with their acquired powers not been in existence, but with the possibility that that company, or some other company or person, might obtain those powers. Their Lordships stated that where the element of value over and above the bare value of the ground itself consists in adaptability for a certain undertaking, the value is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility. The element of special adaptability was considered with great care and precision in two other cases. In *re Lucas v. Chesterfield Gas and Water Board* (1), and *Sidney v. North Eastern Railway* (2). They lay down the principle that where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration. But if, and so long as there are several competitors including the actual taker who may be regarded as possibly in the market for purposes such as those of the scheme, the possibility of their offering for the land, is an element of value and must be taken into consideration. Another test to be applied in determining the amount of compensation payable to the owner of compulsorily acquired land is this: what amount would a prudent man in the position of the owner have been willing to give rather than fail to obtain it. *Pastoral Finance Association Ltd. v. The Minister* (3).

Having described the lands, and having stated what I conceive to be the general propositions of the law applicable to matters of this kind, the difficult task still remains of fixing the compensation to be paid the defendant for his lands, as of the date of taking. The prices paid for lots by McArthur and others prior to 1914, were, in my opinion, purely speculative prices and events I think, proved this to be so; they are not a test of the value of the lands

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(1) (1909) 1 K.B.D. 16.

(2) (1914) 3 K.B.D. 629.

(3) (1914) A.C. 1083.

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at the date of the expropriation, fifteen years or so afterwards, when much more was known of the actual conditions obtaining at Churchill. Any enhancement in the value of the land arising from the construction of the Hudson Bay Railway and the port development at Churchill, is to be excluded in determining the compensation. The defendant's counsel urged that the lands possessed special adaptability. If it was meant that they were specially adapted for the purpose of the undertaking, as discussed in the authorities I have mentioned, then I do not think that that principle of valuation applies here, because there is no evidence of competition or imminence of competition for the lands for railway or any other purpose. If it was meant that the lands were specially adapted for other or general purposes that is another matter; and is an element of general value only. I do not think there is any room for the factor of special adaptability in this case, except as an element of market value. It seems to me the only question here for decision is the very plain one: what was the market value of the land to the owner at the date of the expropriation? I do not think that the defendants' subdivision lots had at the time of taking, anything like the value claimed for them; and no prudent person would, I think, contemplate paying such prices. There were other equally good building sites available to intending purchasers at the date of taking, for any purpose for which they might be acquired; there was all that area lying between the escarpment and the Churchill River, a much larger area, I think, than the whole of the Beech subdivision. The Beech subdivision had no special utility or value over this area for any purpose, so far as I can see.

In a broad sense, the total quantity of lands on the Peninsula, suitable for almost any purpose, was limited, and the fact that they were located on the Churchill River, easily the best potential port on the Hudson Bay, according to the report of Mr. Palmer, would, I think give them some market value. These lands had market possibilities, even though unimproved and in a state of nature. But what would a prudent man pay for a lot? I do not care much about the idea of fixing the value of the lands taken, by lots, but I see no way of doing otherwise. The proper

way I have no doubt to value them would be by the acre; it might be said that not being agricultural lands, they have no other use than building lots, but perhaps not lots of the size in question. The value placed upon the lands by the plaintiff was, I think, arbitrarily arrived at, at least I do not recall any satisfactory explanation of how the sum was arrived at. The lots clearly vary in value and suitability, for almost any purpose, but I do not intend making any distinction between them and neither did the plaintiff; according to the evidence, the same value was placed upon each block or lot. In this rather difficult case, I confess a desire to err in allowing the defendant a greater compensation than the actual value of the lots, rather than fall below their value. The amount offered by the Crown is I think not sufficient. I propose fixing the compensation for the lands here expropriated upon the basis of \$30 for each lot. This I think is sufficient compensation for the lands taken from the defendant, and I cannot see any grounds for allowing more. The defendant will have his costs of this proceeding, he will be entitled to the usual rate of interest since the date of the expropriation, and there will be the decree usual in matters of this kind.

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Judgment accordingly.

CANADIAN NATIONAL RAILWAY }
 COMPANY } PLAINTIFF;

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 April 10.

vs.

ALEX. M. LEWIS ET AL.....DEFENDANTS.

Expropriation by Canadian National Railway—Jurisdiction—Comity of Court—Effect of Repeal—9-10 Geo. V, c. 13—19-20 Geo. V, c. 10.

On the 13th July, 1927, the plaintiff expropriated certain lands for the purpose of erecting a station in Hamilton, under Section 13 of 9-10 Geo. V, c. 13. Notice was then given defendants by plaintiff, under said Act, that it would apply to Carpenter J., to determine the compensation, and defendants, Lewis et al, gave notice to the plaintiff that they would apply to Evans J. for the same purpose, which cases are still pending before the Provincial Courts. On June 14, 1929, by 19-20 Geo. V, ch. 10, the Exchequer Court of Canada was given jurisdiction to hear and determine actions by the C.N.R. to fix the compensation to be paid by it for lands expropriated, excepting in cases below \$2,500 which were still to be determined by the Provincial Courts.

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Held, that the Exchequer Court of Canada has no jurisdiction to hear and determine an action by the Canadian National Railway, for fixing the compensation to be paid for lands expropriated by it before the 14th June, 1929, date when the C.N.R. Act (19-20 Geo. V, c. 10) came into force, conferring jurisdiction on this court.

2. Held further that the legal proceedings already instituted before the Provincial Courts, under the Railway Act, should be there continued and even enforced, the defendants having a vested right to do so under the law existing at the date of expropriation.
 3. That when the effect of a repeal is to take away a right, *prima facie*, it is not retroactive; but when it deals exclusively with procedure it is retroactive.
 4. That a court must not usurp a jurisdiction with which it is not clearly legally vested, but must keep within the limits of its statutory authority and should not exercise powers beyond the scope of the Act giving it jurisdiction and it cannot assume jurisdiction, unless clearly conferred, in respect of matters of prior origin to the Act.
- Quaere*—Does not Comity of Courts also arise in the present case?

Argument on questions of law raised by the leadings, in an action by the Canadian National Railway to have certain lands expropriated by it in 1927 valued, and the compensation to be paid therefore fixed by the court.

The questions of law were argued before the Honourable Mr. Justice Audette at Ottawa.

C. W. Bell, K.C., and *R. E. Laidlaw*, for plaintiff.

F. H. Chrysler, K.C., and *P. H. Chrysler* for defendants
 Levy.

A. M. Lewis, K.C., appearing personally.

The facts are stated in the reasons for judgment.

AUDETTE J., now (April 10, 1930), delivered judgment.

This matter comes before the court, under the provisions of Rule 126, pursuant to an order directing that the question of law, raised by the pleadings, respecting the jurisdiction of this court, be disposed of before the trial and that upon such hearing the parties may adduce evidence as may be deemed necessary for the proper determination of the said question of law.

No evidence was adduced on the hearing, but a voluminous *statement of facts*, duly agreed upon, was filed of record. The only defendants appearing on this hearing were Alex. M. Lewis, Morris Levy and Gabriel H. Levy, no one appearing on behalf of all the other defendants, although duly notified.

The plaintiff expropriated a certain parcel or tract of land in the city of Hamilton, for the purpose of erecting a new station thereon. This expropriation was effected by depositing, on the 13th July, 1927, a plan and description of the land, under the provisions of the Expropriation Act applicable to such mode of expropriation, under section 13 of "An Act to Incorporate Canadian National Railway Company and Respecting Canadian National Railways" 9-10 Geo. V, ch. 13 (now sec. 17, ch. 172, R.S.C., 1927, which came into force on the 1st February, 1928).

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Under the provisions of this section 13 (which, as said in the case of *Boland v. C.N. Ry.* (1), employs a very involved method of expression) the land taken became vested in the railway by the mere depositing of the plan, as provided by the Expropriation Act, but the compensation to be paid for such land is to be ascertained under the provisions of the Railway Act.

Acting in compliance thereto, notice was given by the plaintiff to the defendants, dated 26th February, 1929, that an application would be made, on the 13th March, 1929, to His Honour Judge Carpenter, to determine the compensation.

The defendants Lewis, M. Levy and G. H. Levy, on the 25th February, 1929, served on the plaintiff a notice that on the 7th March, 1929, an application would be made to His Honour Judge Evans, to determine the compensation.

An application by the plaintiff to set aside proceedings before His Honour Judge Evans was refused and the appointment before him was, from time to time, postponed. The plaintiff appeared nevertheless before His Honour Judge Carpenter on the day appointed.

The matter stood in that stage when, on the 14th of June, 1929, An Act to amend the Canadian National Railways Act, 19-20 Geo. V, ch. 10, came into force, wherein by section 2 thereof section 17 of the Canadian National Railways Act was amended whereby under subsection (d) thereof it is provided that the compensation payable for the land expropriated is to be ascertained by the Exchequer Court, excepting, however, in cases of and below \$2,500, where the latter amount is still to be ascertained under the Railway Act.

(1) 1927, A.C. 205.

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Hence the present controversy which consists in determining which court as between the Exchequer court, which is given jurisdiction on the 14th June, 1929, and the Provincial Court, which had jurisdiction prior to that date, has jurisdiction, in the present case, to ascertain the compensation for land expropriated as far back as the *13th July, 1927*.

It is perhaps well to pause here and bear in mind that the mode of taking, expropriating the land, by the deposit of plan, under the Expropriation Act, is the same before and after the passing of the Act of 1929, so far as this case is concerned. Moreover that the Act of 1929, while giving this new jurisdiction to the Exchequer Court, does not oust the jurisdiction of the Provincial Court, under the Railway Act, to ascertain such compensation. It does not say that in future, from that date, the Provincial Court shall have no further jurisdiction under the Railway Act, it does not formally take away such jurisdiction nor does it say that the Exchequer Court shall have jurisdiction even in respect of cases where the plan has been deposited before 1929. It is silent in that respect. Quite the contrary, such jurisdiction is specifically maintained and is still extant and more especially so, in cases where the taker does not offer an amount exceeding \$2,500. That court, possessing such jurisdiction, is therefore not abolished. The Railway Act is still in force and has not been amended under the Act of 1929.

The three defendants above mentioned refused the offer of \$36,135 made by the plaintiff as compensation.

On the 8th November, 1929, the plaintiff instituted proceedings in this court, under the Act of 1929, by filing a statement of claim and the defendants, Lewis, M. Levy and H. Levy, filed a statement of defence thereto, stating, among other things, that as the expropriation had taken place on the 13th July, 1927, the Exchequer Court had no jurisdiction to hear the question of ascertaining the compensation; but that such jurisdiction was vested in the Provincial Courts, under the Railway Act, as provided by the statute in force at the date of expropriation.

While the case has been instituted in this Court, both the plaintiff and defendants have already instituted pro-

ceedings under the Railway Act before the Provincial Court which is still seized of the matter. The case has not been withdrawn or discontinued before that court. Therefore, there are two cases in respect of the same matter now pending before two different courts. There was *lis pendens* in the Provincial Court, when the case was instituted in this court and the Exchequer Court cannot interfere when litigation is in an appropriate court. Does not comity of court also arise in a matter of this kind? And as said in the case of *Gaylord v. Fort Wayne, Etc. Ry. Co.* (1), the sane rule to adopt, in our mixed systems of state and federal jurisprudence, is that the court which first obtained jurisdiction of the controversy, therefore of the *res*, is entitled to retain it until the litigation is settled.

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The lands in question became vested in the plaintiff company, on the 13th July, 1927, under the provisions of section 13 of the Act of 1919 and clearly not under the provisions of the Act of 1929, and it would seem that the right course to follow now would be to have the compensation ascertained under the Act of 1919.

The language of subsection (d) of section 17, amended in 1929, is clearly not retroactive in terms, but rather prospective.

And in support of that contention the defendants cite the first part of section 19 of the Interpretation Act which enacts that when any Act or enactment is repealed . . . then, unless the contrary intention appears, such repeal . . . shall not, *save as in this section otherwise provided*,

(b) *affect the previous operations* of any . . . enactment so repealed or anything done or suffered thereunder,

(c) *affect any right, privilege . . . accrued, accruing or incurred under the Act so repealed*,

(e) *affect any investigation, legal proceedings or remedy in respect of such privileges . . . and any such investigation, legal proceedings . . . may be continued or enforced . . . as if the Act had not been repealed.*

All of this would clearly go to establish that the legal proceedings already instituted before the Provincial Court, under the Railway Act, should be there continued and even

(1) (1875) 6 Biss. Rep. (U.S. Cir. Ct.) 286-291.

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enforced, the defendants having a vested right to do so under the law existing at the date of expropriation.

It is well established, by the canon of a number of decisions, that when the effect of a repeal is to take away a right, *prima facie*, it is not retroactive; but when it deals exclusively with procedure it is retroactive. And it is with that in mind that one must approach the interpretation of section 19 of The Interpretation Act, because while the defendants seek help by the first subsection thereof, the plaintiff likewise seeks relief by invoking the second section. However, it must be found that the first part of the section deals with rights, privileges, and the second part deals with procedure. That is the only way to reconcile these two parts of section 19, otherwise they contradict and nullify one another and become meaningless. The defendants contend that if the case is tried in this court their substantive *rights* and privileges, attaching to the Provincial Court, which is already seized of the matter, of having a jury and more appellate courts will be denied them, and that in such a case the statute cannot be held retroactive. Section 19 says that the "*legal proceedings*" may be continued and enforced as if the Act has not been repealed. The taking of a second action for the same subject matter in this court, while a similar action is still pending in another court, is hardly consistent with the enactment of section 19. Moreover, public interest is not involved in the present case, the parties hereto are alone interested. Craies 237.

There is more, whether it has any importance or not, and that is that on the 13th July, 1927, when the expropriation took place by the deposit of plans, section 15 of the Act contained the provision that "nothing in this Act shall affect pending litigation." This enactment is not to be found in section 17, ch. 172 of the Revised Statutes of 1927, which came into force on the 1st February, 1928.

Statutory provisions giving jurisdiction must be strictly construed and that is especially true when the statute confers jurisdiction upon a tribunal, like the Exchequer Court, of limited authority and statutory origin, and in such a case a jurisdiction cannot be said to be *implied*. A court must not usurp a jurisdiction with which it is not clearly

legally vested; but must keep within the limits of its statutory authority and should not exercise powers beyond the *scope of the Act* giving it jurisdiction and it cannot assume jurisdiction, unless clearly conferred, in respect of matters of prior origin to the Act.

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Jurisdiction and procedure are quite different. When jurisdiction is given to a court, that court can provide for rules and machinery for exercising that jurisdiction. Jurisdiction goes to the root of the subject matter and procedure goes to the form.

It is quite clear that the expropriation or the taking of land is made in a similar manner both before and after the Act of 1929. The only question left to be determined by this court is one of jurisdiction under the circumstances above recited and I have come to the conclusion that the boundaries between the jurisdiction and authority of the Exchequer Court of Canada and the Provincial Courts are to be determined by the time when the plan was deposited in the Registry Office, as provided by the statute on that behalf.

May I now cite decisions in support of that view.

Craies on Statute Law, 3rd Edition, p. 330, says:

It is a well recognized rule that Statutes should be interpreted, so as to respect vested rights (*Hough v. Windus*) (1), and such a construction should never be adopted if the words are open to another construction (*Cowan v. Lockyear*) (2). This rule is especially important with respect to statutes for acquiring lands for public purposes (*Cholmondley v. Clinton*) (3); (*Clissold v. Perry*) (4). For it is not to be presumed that interference with existing rights is intended by the Legislature, and if a statute be ambiguous the Court shall lean to the interpretation which would support existing rights (*Macdonald (Lord) v. Finlayson*) (5).

Then at page 105:

Express and unambiguous language appears to be absolutely indispensable in statutes passed . . . for altering the jurisdiction of a Court of Law.

See also at pages 109, 113, 163, 330 and 331. At page 329, the author further recognized the axiom of construction that statutes are not to be taken as having a retroactive operation unless express words are used for the pur-

(1) (1884) 12 Q.B.D., 224 at 237.

(3) (1821) 4 Bligh (H.L.) 1.

(2) (1904) 1 Australia C.L.R. 460-466.

(4) (1904) 1 Australia C.L.R. 363, 373.

(5) (1885) 12 Rettie (Sc.) 228, at p. 231. (Sess. Cases, 4th Ser.)

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pose or unless there is an implication of retroactivity necessarily arising from the language used and the statute here is silent in that respect.

In Mr. C. K. Allen's work, "Laws in the making," we find at page 263 this expression of opinion:—

No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

In re *Athlumney* (1); *West v. Gwynne* (2).

In *Doran v. Jewell* (3), the Supreme Court of Canada held that

an Act of Parliament enlarging the right of appeal to the Supreme Court of Canada does not apply to a case in which the action was instituted before the Act came into force.

In *Williams v. Irvine* (4), the same court held that the right of appeal given by 54-55 Vic., ch. 25, does not extend to cases standing for judgment in the Superior Court prior to the passing of the said Act. . . . That a statute is not applicable to cases already instituted or pending before the courts, no special words to that effect being used.

See also *British Columbia Electric Ry. v. Crompton* (5).

And again in *Hyde v. Lindsay* (6), it was held that The Act 60-61 Vic., ch. 34, which restricts the right of appeal to the Supreme Court in cases from Ontario, as therein specified, does not apply to a case in which the action was pending when the act came into force although the judgment directly appealed from may not have been pronounced until afterwards.

In *The Colonial Sugar Refining Company, Ltd. v. Irving* (7), it was

held that although the right of appeal from the Supreme Court of Queensland to His Majesty in Council given by the O.C. of June 30, 1860, has been taken away by the Australian Commonwealth Judiciary Act, 1903, s. 39, subsec. 2, and the only appeal therefrom now lies to the High Court of Australia, yet the Act is *not retrospective*, and a right of appeal to the King in Council in a suit pending when the Act was passed and decided by the Supreme Court *afterward* was not taken away.

See also against retrospective view, *Gardner v. Lucas* (8), *Macdonald v. Finlayson*, *ubi supra*. In re *Ex parte Raison* (9).

(1) (1898) 2 Q.B.D. 547, 551.

(2) (1911) 2 Ch. 1, 15.

(3) (1914) 49 S.C.R. 88.

(4) (1893) 22 S.C.R. 108.

(5) (1910) 43 S.C.R. 1.

(6) (1898) 29 S.C.R. 99.

(7) (1905) A.C. 369.

(8) (1878) 3 A.C. (H.L.) 582.

(9) (1890-1) 7 T.L.R. 185.

See also *Fowler v. Vail* (1).

In *Corporation of Morris v. Corporation of Huron* (2), it was also held that *rights of action accrued at the passing of an Act are not affected thereby*. See to the same effect *Hudson and Hardy v. Township of Biddulph* (3), and the case *Minister of Railways for Canada v. Hereford Railway Company* (4), confirmed on appeal to Supreme Court of Canada.

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For the considerations to which I have above adverted I find that this Court has no jurisdiction to entertain the present action and there will be judgment dismissing the same with costs.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT

COFFIN & O'FLYNN

VS

THE *PROTOCO*

1930

Jan. 27.

Shipping and Seamen—Admiralty—Jurisdiction—Canada Shipping Act, R.S.C., 1927, c. 186—Sec. 349—Wages of Seamen

Held, that subject to the exceptions mentioned in Section 349 of R.S.C., 1927, c. 186, no suit or proceedings for recovery of wages under the sum of \$200 can be instituted by seamen or apprentices in the Exchequer Court of Canada on its Admiralty side.

Action by two seamen to recover wages.

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

R. W. Ginn, for plaintiffs.

C. L. McAlpine, for the *Protoco*.

The facts are stated in the Reasons for Judgment.

Martin, L.J.A. now (January 27, 1930) delivered judgment.

This case, to recover the wages of two seamen, though small in amount has nevertheless occasioned me much reflection, but after a careful consideration of it I can only

(1) (1879) 4 Ont. A.R. 267 at 274.

(2) (1896) 27 Ont. R. 341.

(3) (1919) 46 Ont. L.R. 216.

(4) (1928) Ex. C.R. 223-224.

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reach, not without reluctance, the conclusion that the objection taken to the jurisdiction of this Court, founded on s. 349 of the *Canada Shipping Act*, R.S.C. 1927, c. 186, respecting the recovery of wages under \$200 (as explained in *Cowan v. The St. Alice* (1); *Kouame v. SS. Maplecourt* (2), and *Ostrom v. The Miyako* (3)), must prevail and therefore the claims must be dismissed on that ground alone.

Though there is unquestionably a certain substantial balance due to each of these men, which should have been paid to them long ago, I shall not go into particulars thereof because, failing a settlement, it is still open to the seamen to invoke the assistance of the summary proceedings before the special tribunals designated by s. 344 of the said Act, and therefore I do not wish to create embarrassment by premature expressions. I do feel justified, however, in saying, in aid of an understanding to prevent further litigation, that it is clearly established that no final settlement was reached at the meeting in the solicitor's office on Monday, May 20, 1929, as set up by defendant, and also that O'Flynn on May 15 unjustifiably refused to serve on the vessel on the West Coast of Vancouver Island.

The action therefore will be dismissed but in the special circumstances without costs.

Judgment accordingly.

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Mar. 28.
Apr. 24.

REFRIGERATING EQUIPMENT LIM- } PLAINTIFF;
ITED

vs.

W. A. DRUMMOND AND WALTHAM } DEFENDANTS.
SYSTEM INCORPORATED

*Patents—Impeachment—Interested person—Application in Canada—
Invention—Method or process*

The plaintiff is licensee in Canada of a patent issued to Glacier Company, relating to improvements in cooling containers, and the defendant, Waltham System Incorporated is the owner of a patent for improvements in a method of refrigeration, and the other defendant is licensee under the same patent.

(1) [1915] 21 B.C.R. 540. (2) (1921) 21 Ex. C.R. 226.
(3) (1924) 2 D.L.R. 200; 34 B.C.R. 4.

Held, that where an individual is using an invention in respect of which another person claims to have a patent, which the unlicensed user believes to be invalid; or where a person is desirous of using anything described in a patent, but which patent he has reason to believe is void, then he has such an interest as to qualify him to initiate proceedings to annul such letters patent; and is a person "interested" within the meaning of the Rules of this Court.

2. That a patent for invention, for a new method of refrigerating, granted in Canada, upon an application therefor made more than twelve months after the application for a similar patent was made in the United States, will not be voided for such delay alone, where the Canadian patent is not exactly the same, the language thereof varying somewhat from that in the United States patent, as also do the drawings, and where slight structural changes in the means of applying the method are suggested. That in order to set aside the patent for delay in applying in Canada, the application here must be for the same invention as was applied for abroad, and the claims must not include anything not comprised in the application made abroad.
3. That there is no invention in selecting a triangular shaped cartridge in preference to any other to contain the frozen liquid placed around a container of ice cream to keep it cool nor in providing a rack whereon is set the ice cream can and the cartridge. That moreover, in view of the prior art, it was not new to provide an air space between the said cartridge and the container of ice cream.
4. That the Patent Act recognizes a method or process as having the same title to protection as a machine or article of manufacture; method and process being one and the same thing.
5. That where the method described is not new, it cannot be patented as a process. Where the method is old and the instrumentalities new, the latter may be patented as a machine or manufacture, if to do so required invention.

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ACTION to impeach Canadian Patent for Invention, number 280,516.

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

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

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

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

THE PRESIDENT, now (April 24, 1930), delivered judgment.

The plaintiff here seeks the revocation of Canadian patent no. 280,516, issued the 29th day of May, 1928, to Bemis Industries Incorporated, the assignee of the alleged inventor, Henry C. Folger; the patent was later assigned to the defendant Waltham System Incorporated; the defendant

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W. A. Drummond Ltd., has an exclusive licence for Canada under this patent. The patent is described as an Improvement in Methods of Refrigeration.

The plaintiff is the licensee in Canada, under Canadian patent no. 221,993, issued the 8th day of August, 1922, to Glacifer Company, as assignee of Elihu Thompson, the inventor. The patent relates to improvements in Cooling Containers. The validity of this patent is not here in question.

Revocation of Folger is sought upon the grounds of lack of subject matter, anticipation, and publication in other patents and trade journals of Folger, more than two years prior to the date of application for such patent in Canada. Folger obtained three patents in the United States, each, or all of which read together, describe, it is claimed, the Canadian Folger here in suit. These three patents all issued on October 11, 1924, more than three years prior to the application date of the Canadian Folger; these three patents each relate to a refrigerating apparatus and will be discussed later. Folger also applied for a fourth patent in the United States, on December 7, 1923, but the patent did not issue until November 29, 1927. This patent relates, it is claimed, to a method of refrigerating ice cream and other materials. The plaintiff contends that this patent is in effect the same as Canadian Folger which is sought to be revoked; and the plaintiff further contends, that Folger elected to obtain a patent for this alleged invention in the United States before obtaining a patent for the same invention in Canada, and did not apply for letters patent in Canada within one year from the earliest date on which application for patent was filed in the United States, and that therefore the patent in suit is void under the provisions of sec. 8 of the Patent Act. The defendants contend that the first three mentioned United States patents issued to Folger, and certain trade journals which will be later mentioned, do not describe the Canadian Folger, the patent in suit; that the Canadian patent is distinguishable from these three United States patents in that it is a patent for a method or process, and that it is distinguishable from the last mentioned United States Folger, in that the former possesses improvements not mentioned or described in the latter.

At the trial, the defendants urged that the plaintiff was without status to institute these proceedings. It will be convenient here to dispose of this point. By sec. 25 of the Exchequer Court Act, the Exchequer Court has jurisdiction, in actions to impeach or annul a patent; and by rule 16 of the Exchequer Court Rules, such action may be instituted by a statement of claim filed by any person interested. I think the plaintiff is a party interested. It is pleaded and not denied, that the plaintiff and the defendants are manufacturing and selling to the public, what is practically the same thing, refrigerating apparatuses. If, as the plaintiff alleges, Canadian Folger was described in the three United States Folger patents, and other publications, more than two years prior to the application for letters patent for Folger in Canada, then Canadian Folger is invalid; and if the plaintiff believes it to be invalid, then, in the circumstances of this case, it is a person interested. Where an individual is using an invention, in respect of which another person claims to have a patent, which the unlicensed user believes to be invalid; or where a person is desirous of using anything described in a patent, but which patent he has reason to believe is void, then he has such an interest as to qualify him to initiate proceedings to annul such letters patent. I think therefore that the plaintiff is possessed of sufficient interest to qualify it to institute this action.

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Now turning to Folger, the patent in suit. The patentee describes his own method and former methods of refrigeration as follows:—

In the ice cream industry it has been customary for ice cream manufacturers to deliver ice cream to retailers in large trucks, and ordinarily the ice cream is refrigerated on the trucks and in the customers' cabinets by ice and salt which are packed around the cans containing the ice cream. In one method the ice cream containing cans are placed in tubs packed with ice and salt, and in another method the ice cream containing cans are placed in the body of the truck and ice and salt are packed around the cans so that when it is desired to remove a can from the truck, it is necessary to dig down into the ice and salt to expose and obtain access to the can.

Each customer has a cabinet for receiving the ice cream can or cans while the ice cream is dispensed therefrom. It has been customary to pack ice and salt around the cans in the cabinet to refrigerate the ice cream. The manufacturer of the ice cream supplies the ice and salt for these cabinets. This has made it necessary to provide the truck body with compartments for receiving ice and salt for this purpose. The ice melts to a certain extent while on the truck, and usually water can be

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seen leaking and dripping from the truck. The weight of the ice and salt carried by the truck adds to the expense of transportation. Large quantities of ice and salt are required to refrigerate the ice cream containing cans on the truck and in the customers' cabinets, and the cost thereof materially reduced the profits of the ice cream manufacturer.

It is customary for the driver of the truck on arriving at a customer's destination to carry from the truck to the cabinet a supply of ice and salt, and to pack the same about the can in the customer's cabinet. This is a time consuming operation, objectionably lengthens the time required for the driver to cover his route, and further reduces the profits of the manufacturer.

It is frequently necessary to remove melted ice from the cabinet and repack ice and salt about the can to prevent melting of the ice cream therein. Moreover, the mixture of ice and salt has a variable refrigerating effect, and frequently the ice cream is either too hard or too soft and not in condition for sale.

The present invention is a distinct improvement upon the former methods, and overcomes the objections thereto referred to. In accordance with the present method, the refrigerating effect is produced by cartridges formed of metal containing a frozen liquid or solution which freezes at a temperature substantially below 32°F., and desirably this temperature is as low as 3° above zero. Different liquids may be employed, such, for example, as a solution of salt and water, or alcohol and water, or calcium chloride and water, all of which have a low freezing point. The cartridges after being nearly filled with such a solution are closed and sealed. Then they are placed in a refrigerating room having a temperature sufficiently low to freeze the solution.

To refrigerate the ice cream during transportation from the manufacturer to the retailers, the cans containing the ice cream are placed in a specially constructed truck which has compartments for receiving the ice cream containing cans and a sufficient number of cartridges for refrigerating the ice cream. A truck also has compartments for receiving cartridges for transfer to customers' cabinets, compartments for receiving exhausted cartridges taken from customers' cabinets, and a compartment for receiving empty ice cream cans.

After the truck has been loaded with ice cream containing cans and refrigerating cartridges, the driver starts on his route and delivers an ice cream containing can or cans to each customer, and also a sufficient number of cartridges properly to refrigerate the ice cream in the cabinet.

Cartridges of triangular prism form lend themselves advantageously for use with cylindrical ice cream containing cans in the customer's cabinet. Four cartridges may be placed around each ice cream containing can, one cartridge in each corner of the chamber in which the can is located. In this relation the cartridges will have their whole surface disposed directly to intercept passage of heat into the chamber and to the ice cream can. A further advantage in cartridges of triangular prism form is that they are able to hold their original shape after being subjected to the strains of repeated freezing of the solution therein. They will not swell, bulge or become otherwise distorted on any of their flat sides, and thus they are always in condition for compact stacking between the coils in the refrigerating room.

The patentee makes provision for a rack for supporting the ice cream can and the cartridges in the chamber of the cabinet, and he also claims that the air space between the

cartridges and the cans, and surrounding the latter distributes the cooling effect on the can and its contents, in an effectual manner. These two features were particularly emphasized as new by the defendant's counsel at the trial, and the patentee's reference to the same in the specifications should perhaps be quoted.

It is desirable to provide a rack for supporting the ice cream can and cartridge in proper relation in the chamber of the cabinet. A rack 41 (Figs. 1, 2 and 3) is shown herein formed of wire and comprising loop base members 43 and 45 in transverse relation and welded together at their crossing points. Upright loops 47 and 49 rise from the ends of the base members 43 and 45 respectively, and are continuations thereof. Within and welded to the uprights is a ring 51 located up somewhat from the crossing base members. Rests 53 are welded to and project from the uprights, and are provided with diagonal braces 55 welded to the rests and uprights, said rests and uprights being of wire loop form.

In use the rack is placed into the chamber of the refrigerating cabinet so that one of the base members will extend between diagonally opposite corners of the chamber, and the other base member will extend between the other diagonally opposite corners of the chamber. The uprights will be spaced somewhat from the corners, and the rests and braces will extend from the uprights toward the corners.

After the rack has been placed in the chamber as described, an ice cream containing can is set into the ring of the rack and rests upon the base members. Then the cartridges are slid down into the corner spaces of the chamber and are supported on the rests. They are held spaced from the ice cream can by the uprights which are between the can and the cartridges.

The air in the space between the cartridges and can and surrounding the latter desirably distributes the cooling effect on the can and its contents. The construction of the rack is such that the ice cream can is supported slightly above the bottom of the chamber and the cartridges are supported a substantial distance above the bottom of the chamber. Their length is such that they extend somewhat above the top of the can. This relation of the cartridges to the can has been found in practice to provide very efficient refrigerating effect on the entire contents of the can.

The cabinet 37 referred to, has walls 57 of cork covered by wood layers 59 and sheet metal layers 61. The bottom 63 of the cabinet is formed of cork covered by a wood layer 65. Each chamber of the cabinet has a sheet metal lining 67.

Now, coming to the three United States patents granted to Folger in 1924, nos. 1,511,452; 1,511,453; and 1,511,454. The first mentioned relates to what is said to be new and useful Improvements in Refrigerating Apparatus, really, a vehicle or truck body provided with what is called a cooling chamber, to be used for conveying ice cream or other materials requiring refrigeration, from the place of manufacture to the place of consumption. The apparatus comprises a closed container or containers,—called cartridges in the patent in suit—holding a frozen liquid which is

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transferred from the chamber in which the liquid is frozen, to a cooling chamber for refrigerating purposes. Just as stated in the patent in suit, the frozen liquid in the container might be one of many solutions, such as salt and water, alcohol and water, or calcium chloride and water, or any other appropriate solution, its temperature being lowered to the freezing point or below such point if desired. The containers are then transferred to what is called the cooling chamber of the truck body, provision being made for supporting the containers; the containers, the patentee states, may be variously formed; in the drawings they are shown to be rectangular in form. It will suffice to say that the containers when placed in the truck body are supported by hooks on hangers, there being a plurality of frozen liquid holding containers in the cooling chamber. Substantially, the containers serve to lower the temperature of the cooling chamber and will maintain their cooling effect for substantial periods of time; when the containers have lost their substantial cooling effect, they may be removed from the cooling chamber and returned to the freezing room, for the purpose of again freezing the liquid therein for use again in the cooling chamber of the truck body. So in this patent we find the use of a container, which may be of any shape, containing a liquid frozen to the desired degree in a freezing room, thence transferred to a cooling chamber in a truck body for refrigeration purposes. The details of the construction of the truck body and the cooling chamber are not of importance and it is not necessary to determine whether or not there was invention in this patent.

Then taking the next United States patent granted to Folger, no. 1,511,453. This patent is also described as a new and useful improvement in Refrigerating Apparatus. The patentee states that different methods have been employed for refrigerating ice cream while being delivered to customers on trucks. It mentions the well known method of putting ice cream cans in tubs packed with ice and salt; another method is in providing the truck body with a chamber in which is mounted a tank and piping containing a brine solution of ice and salt for cooling the chamber in which the ice cream containing cans are placed; the

patentee then states that after the cans are transferred from the truck body to a customer's cabinet it is necessary to pack ice and salt around the cans in the cabinet to keep the cans cool in the cabinet, all of which requires time, labour and expense. The patentee then proceeds to state that his method is an improvement upon former methods, and in carrying out his method he states, that containers or cartridges are filled with a liquid which freezes at a temperature substantially below 32°F. just as in the patent just above described. Then the cartridges are transferred from the freezing chamber to a truck body, which is provided with cells for receiving the ice cream cans. The cells project into chambers provided for receiving the cartridges, and are so related thereto, that the air cooled by the cartridges may circulate around the cells and effectually cool the same. The cells and the chambers are however so separated, that when the ice cream cans are taken from the cells, the chambers containing the cartridges will not be exposed to the warm outside air, and when the cartridges are taken from the chambers, the cells containing the ice cream cans will not be exposed to the outside air. The body box is divided into compartments, each containing two cells for receiving ice cream, and an intermediate chamber for receiving the refrigerating cartridges, the cartridges in each compartment serving to refrigerate the materials in the two cells of the compartment. The cartridges are preferably of oblong form. Another feature claimed for the invention is the adaptation of the cartridges for use both in refrigerating the materials while on the truck, and after the material has been delivered to the customer. For example, the patentee states, when an ice cream containing can is delivered to a customer, one or more cartridges may be removed from one of the chambers in the truck and delivered to the customer, in order that the cartridge or cartridges may accompany the ice cream containing can and continue the refrigerating thereof; and to accomplish the latter function, the customer may be provided with a specially constructed cabinet adapted to receive the ice cream containing can and a cartridge or cartridges in proximate relation, so that the cartridges may properly refrigerate the ice cream in the can. The patentee states that the

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cabinet is the subject of his copending application for patent, which is the next patent to be considered; he states that his method of refrigeration employing the truck and cabinet is the subject of another copending application filed Dec. 7, 1923, which is the fourth mentioned United States patent granted to Folger, no. 1,651,198, issued on November 29, 1927. It is not necessary to mention the details of the construction of the truck body, the compartments, or the form of the ice cream cans and the cartridges. Briefly, while the patent is for a refrigerating means or apparatus, a truck body only, yet it describes a method or process of refrigerating ice cream right from the point of manufacture down to the premises of the customer or consumer, and the invention is described as a distinct improvement upon former methods.

Then there is the United States patent to Folger, No. 1,511,454, which relates to an alleged improvement in an apparatus for refrigerating ice cream or other materials, the apparatus being a cabinet, intended I think for use by a customer and also in a truck body, in which refrigerating effect is produced by placing in the cabinet containers or cartridges containing a frozen liquid as described in the last two mentioned patents. The cabinet has a partition of insulating material which divides the same into two compartments or chambers each being provided with separate covers; each of the chambers is adapted to receive a cell or chamber containing the materials for refrigeration, the cell being in the form of an ice cream can of cylindrical form. The can may be yieldingly supported on a rectangular frame having at opposite sides wire springs of yoke form, and having feet projecting downward from the frame. The cartridge is of oblong form preferably corrugated, with a handle. The chambers in the cabinet are formed to receive the cartridges, each chamber having a space at opposite sides of the can for receiving two cartridges. When the cover of one of the chambers is opened two of the cartridges may be lowered into these spaces, and will serve to refrigerate the ice cream or other material in the can placed in the chamber. At the bottom of each chamber there may be provided a frame comprising four blocks connected by a pair of slats. Secured to the latter and extending transversely thereof are a pair of slats. The

cartridge may rest upon the blocks. It is pointed out that when the caps are opened for removing ice cream from the cans, the construction is such, that the spaces occupied by the cartridges are not exposed to the outside air. The patentee states that it is to be noted that "there is an air space around the can, and at the top and bottom thereof through which the cooling effect of the cartridges may be transmitted and distributed to the can". Again, the patentee refers to a copending application—which is not before me—for a truck having a body specially constructed to utilize the frozen liquid containing cartridge for refrigerating materials during transportation; the truck body is well adapted, it is said, for transporting cans of ice cream from the manufacturer to customer, each of whom might be supplied with a cabinet constructed in accordance with this patent. It is pointed out that when the ice cream cans are conveyed to customers, in the truck referred to, the driver on reaching each customer, may take two ice cream containing cans and four cartridges from the truck and place one of the cans and two of the cartridges in each of the chambers of the cabinet, and thus, the same cartridges which refrigerate the ice cream cans while on the truck, will also serve to refrigerate the ice cream cans after the latter are placed in the cabinet. The patent describes throughout a method of refrigeration with particular means of applying the same.

Folger also obtained a further patent in the United States, being No. 1,651,198, and it will be convenient at this stage to refer to this patent, upon another point raised by the plaintiff. The invention here is described as a method of refrigeration; it is to all intents and purposes the same as the patent in suit. Yet it is not exactly the same, the language of the latter varies somewhat as also do the drawings, and slight structural changes in the means of applying the method, are suggested. The application for this patent was made in the United States on December 7, 1923. The plaintiff contends that the patent in suit, is essentially the same as the United States patent issued in November, 1927, upon this application, and that inasmuch as the Canadian application was not made within twelve months from the date of the United States application that the patent is therefor void under sec. 8 (2) of the Patent

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Act. While I agree that both patents virtually describe the same subject matter, yet, they differ in the respects I have already mentioned. I do not think that the application for the patent in suit can be treated as a convention application. In that case, the application must be for the same invention as is applied for abroad, and the claims must not include anything not comprised in the application made abroad. No modification or enlargement however slight, is possible as it then clearly would not be for the invention applied for abroad. I think therefore that this contention of the plaintiff fails, and that the patent in suit cannot be voided upon that ground.

The defendant claims that the patent in question is one for a method of refrigeration; that this method was not described in any of the three United States patents issued in 1924 or elsewhere, more than two years prior to the date of the application of the patent in suit; and that these three patents were each for a refrigerating apparatus and not a method of refrigeration. The defendant at the same time contends that the means described in the patent in suit differ from those described in the three United States patents. We may first consider wherein the means in the patent in suit differs from those of the three United States patents, although, strictly speaking, it is perhaps unnecessary in view of the fact that the patent in question is one for a method only. In the former case the cartridges used are of triangular form and the patentee claims that the shape of the cartridges lend themselves advantageously for use with cylindrical ice cream containing cans in the customer's cabinet. It is claimed that another new element is introduced into the patent in suit which does not appear in any of the three United States patents, and that is, the provision of a rack for supporting the ice cream can and the cartridges in proper relation in the chamber of the cabinet. It is also alleged that provision for an air space between the cartridges and the can is provided for in this patent, which, it is said, distinguishes it from all the other patents referred to. I have already quoted from the specifications references to these three points.

There is nothing new in my opinion in the means employed for carrying out the method described in the patent in suit. The triangular shape of the cartridge does not rep-

resent invention, even if it was first given to the public through the publication of this patent. However, that form of cartridge was in use in the United States long before the application for the patent in suit was made. This form of cartridge was described and pictorially exhibited in trade journals published in the United States more than two years before the patent in suit was applied for. In the Ice Cream Review, dated June, 1925, there appears a picture of a man standing over an ice cream cabinet and inserting at the corners of the ice cream cabinet two triangular cartridges, which are said to be standard for any Waltham truck or cabinet. This advertisement was inserted by the Waltham System. The Ice Cream Trade Journal, of November, 1924, contains practically the same thing. It shows triangular cartridges partially inserted at two corners of the space occupied by a circular ice cream can in a soda fountain, and two triangular cartridges fully inserted at the other two corners of the space. Another illustration, appearing in a trade journal in 1925, shows the driver of a truck departing from a drug store with four used triangular cartridges, the suggestion being that he had just placed four newly frozen containers in the soda fountain. There was nothing new whatever in the use of a triangular cartridge. There could be no invention in selecting a triangular cartridge, in preference to one of any other shape. Neither is there anything new in the provision of an air space between the cartridge and the can. This was pointed out in one of the patents issued to Folger in 1924, and I have already quoted from patent no. 1,511,454 the reference to the air space. Neither do I think there is any invention in the provision of the rack whereon is set the ice cream can and the cartridge. There are so many obvious ways of doing this that there could not possibly be any invention in the selection of any one method. One of the Folger patents of 1924 described one means of doing the same thing. Considering alone the means described in the patent in suit for applying the method, there is nothing in the way of invention, over the information published in the group of three patents issued in 1924, and the trade journals to which I have referred. The slight changes found in the construction of the several refrigerating apparatuses

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described in the patent in suit, as compared with those described in the earlier patents granted to Folger, are in my opinion far from approaching invention. Therefore, if the selection of the instrumentalities described in the patent in question are in any way involved in the invention patented, that is a method of refrigeration, then I hold they were old and were published more than two years before the date of the application for such patent.

The Patent Act recognizes a method or process as having the same title to protection as a machine or article of manufacture; I conceive method and process to be one and the same thing, but in any event that "art" may include a method or process patent is well settled. Conceding for the moment that the patent in question describes a true method or process patent as distinguished from an apparatus or manufacture, yet before the applicant became entitled to a patent, it would be necessary that the method be new. If the method described is not new it cannot be patented as a process. Where the method is old, and the instrumentalities new, the latter may be patented as a machine, or manufacture, if to do so required invention. But the method described in the patent before me was not new, it was old, it was practised precisely as described in the United States more than two years prior to the application for patent; it was described in the three United States patents of 1924. What is the method of refrigeration claimed in the patent? It is merely the introduction of a metal container containing a frozen liquid—which is not claimed to be new—and placed in proximate relation to another container containing material, which, it is desired to continue in a frozen condition; and this method is said to be an improvement over other known methods of doing the same thing, notably by the application of ice and salt. Once the idea existed in the mind of the superiority of the use of a frozen liquid in a container over ice and salt, for refrigerating purposes, nothing remained to be done with the method except the introduction of means of applying the method, which, it seems to me, in the facts of this case, was a matter for the constructor and not the inventor of the method. Whether this method is used in a cabinet or truck body matters not. It is not more a method because

it is used in both than if it was used in one only, because, the method is the same. Taking the last of the group of three patents issued to Folger in 1924, no. 1,511,454, we find there the method described just as plainly and fully as in the patent sought to be revoked, and any one competent in this particular art could readily construct the instrumentalities necessary to practise the method, the other two patents also describe the same method. The patent owned by the plaintiff's licensor described the same method, though the means may differ. Further, the method described in the patent in question was well described in an advertisement appearing in one of the trade journals to which I have already referred; there I find the following:—

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The Waltham System is extremely simple. Sealed inside these interchangeable cartridges is a special chemical compound, whose temperature can be reduced far below the freezing point. It is a routine matter to freeze these cartridges in your hardening room to ten below zero.

The driver, delivering cream at a store, simply leaves fresh cartridges at the same time. The used cartridges still retaining most of their refrigerant, come back to the hardening room and stay there just long enough to drop the temperature by the few degrees that it has risen in the store. The freezing cost is obviously slight. Cabinets, soda fountain inserts and truck bodies made by this company have been worked out to handle this system so that it yields remarkable profits.

That is really a very correct and complete description of the system or method described in Canadian Folger; that is all there is in the method, the precise instrumentalities used to apply the method is another thing.

In whatever way one looks at the patent in question whether as a method or process, as a manufacture, or as a method with means, everything described or claimed is old, and was disclosed in published patents and other publications, more than two years before the date of application for the patent in suit. I am therefore of the opinion that the patent should be revoked.

The plaintiff therefore succeeds in its action, and costs will follow the event.

Judgment accordingly.

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Apr. 8.
Apr. 30.

INTERNATIONAL FIRE EQUIPMENT } PLAINTIFF;
CORPORATION }

vs.

FIREGAS SERVICE LIMITED.....DEFENDANT.

Patent—Infringement—Combination—Ingenuity of invention

Held, that where all the defendant has done was to adopt the plaintiff's combination of materials and device, functioning similarly, producing similar results obtained in a similar manner, with slight mechanical changes, there is no ingenuity of invention; and where in view of the disclosures in plaintiff's patent no ingenuity of invention was required to construct defendant's device, then such latter device is an infringement of the said patent.

ACTION by plaintiff to restrain the defendant from infringing his patent for Fire Extinguishers.

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

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

J. Lorne McDougall for defendant.

The facts are given in the reasons for judgment.

AUDETTE J., now (April 30, 1930), delivered judgment.

This is an action, by the plaintiff company against the defendant, for an alleged infringement of their Canadian Patent No. 283,423, bearing date 18th September, 1928, for "Fire Extinguishers," or rather for a support or bracket of the grenade containing the fire extinguisher, granted to the plaintiff, the assignee of the inventor, Wilhelm B. Bronander.

The grant contained in the patent is for certain new and useful improvements in Fire Extinguishers and relates to "a grenade support."

The invention has for its salient object to provide a support for a grenade so constructed that the grenade can be easily and readily removed therefrom and, furthermore, so constructed and arranged that in case of fire the grenade will automatically drop, break, and dispense the fire-extinguishing fluid.

Another object of the invention is to provide a bracket or holder for grenades comprising few parts, and a structure than can be economically manufactured.

Or in other words:

The invention briefly described consists of a grenade support comprising a bracket or plate adapted to be secured to a wall or other sup-

porting structure, a pair of resilient supporting members adapted to embrace the grenade and form the support therefor and means including a fusible element engaging the supporting members and retaining them under tension. In the form of the invention shown, the means for holding or retaining the supporting members under tension is located on the opposite side of the grenade from the bracket or plate on which the members are mounted and when the fusible element melts, the resilient supports spring apart, permitting the grenade to drop. The grenade is preferably formed of glass or other frangible material and is broken when it strikes the floor, thereby freeing the fire extinguishing liquid, such as carbon tetrachloride, contained therein.

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The plaintiff charges the defendant of infringing claims 12, 21 and 22, which read as follows, viz:—

12. A grenade support comprising a pair of resilient elements adapted to embrace and support a grenade, and fusible means for holding said elements under tension and in position to support the grenade.

21. A support for fire extinguisher containers comprising a bracket, a pair of container embracing members carried by said bracket, one of said members being movable away from the other member, and fusible means retaining said members against separation.

22. A support for fire extinguisher containers comprising a bracket, a plurality of elements associated with said bracket for embracing and supporting the container from below, said elements being connected by heat controlled means.

This is a small and narrow patent, and there is not on the record a tittle of evidence of any prior art and there is no attack on the validity of the plaintiff's patent.

While one cannot take a patent for a principle alone, a patent may be granted for a principle coupled with a mode of carrying the principle into effect. It is quite apparent that both the plaintiff's and the defendant's devices are built on the same principle. The plaintiff, under his patent, can prevent anyone from using the *same* method of carrying the principle therein described and can also prevent anyone from using the same thing with a colourable difference. *Nicolas*, on Patent Law, 6.

Although much debated at trial, I must find that there is in the defendant's, as in the plaintiff's, two supporting members embracing the grenade, held together by fusing means which separate on the melting of the fuse. In both devices, both embracing members support the grenade. In the defendant's, the grenade rests for the most part on the socket of one member and the bracket being installed in a slanting position the grenade rests also on the other member for that portion which is outside the centre of gravity. The defendant's bracket is not rigid, there is resiliency in

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its supporting members embracing the grenade; there is more resiliency in one of the two members than in the other, but there is resiliency in both.

The defendant has adopted, without invention, the same idea of function and contrivance which is found in the plaintiff's invention, and the adaptation of such function and contrivance to the same class of article, without any new result, cannot constitute invention. The construction and mode of operation of the defendant's device rests on mechanical principles and laws of operation absolutely identical to that of the plaintiff's device and embodies the whole of it with slight unimportant mechanical changes. There is no contrivance or device that is new in the defendant's bracket, nor any new feature, the same feature having been previously obtained in the plaintiff's bracket. Practically the same specific arrangement of elements is to be found in both brackets. There is no invention in the defendant's bracket and if there is no invention there is infringement. All the defendant has done was to adopt the plaintiff's combination of materials and device, functioning similarly, producing similar results obtained in a similar manner, with slight mechanical changes, without invention.

The defendant would not blunder to the extent of copying servily the plaintiff's bracket, what he has done was to follow as closely as a mechanic might suggest, with the same result, without invention and improvement, the plaintiff's device.

And paraphrasing the holding in *The American Dunlop Tire Company v. The Anderson Tire Company* (1), I find that the defendant's bracket, which obtained no improvement on that of the plaintiff, involves the very substance of the plaintiff's device and constitutes an infringement upon the same. See also *Dunlop Pneumatic Tyre Company Ltd. v. Clifton Rubber Company Ltd.* (2).

There is no invention in merely applying well-known things, in a manner or to a purpose which is analogous to the manner or to the purpose in or to which it has been previously applied. *Nicolas*, on Patent Law, 23, and cases therein cited.

(1) (1896) 5 Ex. C.R. 195.

(2) (1903) 20 R.P.C. 393 at 404.

Of the defendant's patent filed in the course of the trial (exhibit A) suffice it to say that it is no defence to the plaintiff's patent. Witness Grill, who had seen the plaintiff's circular and advertising literature, says that the plaintiff having complained of the device made under exhibit A, they abandoned the same and manufactured exhibit 2, the device attacked herein.

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The facts before the court show that while the defendant has produced a device somewhat different in size and shape, yet it retains the features perfectly familiar to the plaintiff's device, without giving it any new function and without accompanying it with new result, bringing the bracket within the principle so often stated that:

The mere carrying forward of the original thought, a change only in form, proportions or degree, doing the same thing in the same way, by substantially the same means, even with better results, is not such an invention as will sustain a patent.

The Railroad Supply Co. v. Elyria Iron and Steel Co. (1).

Again in the case of *Harwood v. G.N.R. Co.* (2), it was held that:

A slight difference in the mode of application is not sufficient, nor will it be sufficient to take a well known mechanical contrivance and apply it to a subject to which it has not been hitherto applied.

The placing of known contrivances to a use that is new, but analogous to the uses to which they have been previously put to, without overcoming any fresh difficulty, is no invention. *Re Merten's Patent* (3); *Layland v. Boldy & Sons* (4).

And in *Blake v. San Francisco* (5), Wood J., delivering the opinion of the court cited the following words of Gray J., in *Pennsylvania Railway Co. v. Locomotive Engine Safety Truck Co.* (6) with approval, to wit:

It is settled by many decisions of this court . . . that the application of an old process or machine to a similar and 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.

(1) (1917) Patent Office Gaz.
 U.S., Vol. 239, p. 656.

(2) (1864) 11 H.L. Cas. 654.

(3) (1914) 31 R.P.C. 373.

(4) (1913) 30 R.P.C. 547.

(5) (1885) 113 U.S. 679 at 682.

(6) (1884) 110 U.S. 490.

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There will be judgment declaring that the defendant has infringed the plaintiff's patent, the whole as prayed by the plaintiff's statement of claim and with costs.

Judgment accordingly.

THE ROYAL TRUST COMPANY..... APPELLANT;

vs.

THE MINISTER OF NATIONAL }
 REVENUE } RESPONDENT.

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 Mar. 24.
 Apr. 30.

Revenue—Income Tax—Contingent Trust—Section 2 of Income War Tax Act, 1917—"Trust"—Residents in Canada—Interpretation

One J., resident in the United States, executed a Trust Deed of Donation in favour of the Royal Trust Company, as Trustee, giving certain Canadian securities unto the Trustee, in trust, for his surviving children, also residing in the United States, to be held by the Trustee until five years after his death, together with all accumulations and additions thereto; when the entire Trust Estate was to be converted into cash, and distributed to his children as in the said Deed provided. The Crown assessed the income accruing from this contingent trust asset for the year 1927. Hence this appeal.

Held, that under the Income War Tax Act, 1917, and Amendments thereto, only the income of residents in Canada is taxable, and that, as none of the beneficiaries under the trust aforesaid resided in Canada, the present appeal was allowed and the assessment was set aside.

2. That the word "Trust", defined in Section 2 of the said Act, must, under the rules of interpretation, *ejusdem generis* and *noscitur a sociis*, be interpreted to mean a corporate or other body, a trust association or merger, combination of companies or interests created for the purpose of carrying on trust business.

APPEAL by the Royal Trust Company, Trustees under Trust Deed of certain assets belonging to an American citizen, from a decision of the Minister assessing the appellant upon the income accruing from this trust for the year 1927.

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

Eugene Lafleur, K.C., and *F. G. Dixon* for appellant.

C. F. Elliott and *S. Fisher* for respondent.

The facts are stated in the head-note and in the reasons for judgment.

AUDETTE J., now (April 30, 1930), delivered judgment.

This is an appeal, under the provisions of The Income War Tax Act, 1917, and Amendments thereto, from the assessment of the appellant, for the year 1927, on the income received from contingent trust assets belonging to American citizens non-residents of Canada.

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John Day Jackson, a resident of the city of New Haven, in the United States of America, executed a Trust Deed of Donation before W. B. S. Reddy, Notary Public, Montreal, on the 19th February, 1918, in favour of The Royal Trust Company, as Trustee, whereby in consideration of the love and affection he bears towards his children, he gave as a donation *inter vivos* and irrevocable, unto the Trustee in trust for the purposes therein mentioned, the Canadian securities described in the schedule to the said Trust Deed.

And it is in the said Trust Deed, among other things, provided, covenanted and agreed that the Trustee shall hold these Canadian Securities upon trust as follows:—

(a) For the benefit of the surviving children of the Donor until five years after the death of the Donor, the property described and set forth in Schedule A hereto, together with all accumulations and additions thereto, when the entire *Trust Estate* is to be equally divided amongst his surviving children, and in the event of any or all of his said children predeceasing the Donor or being unable to take, the division shall be made to the survivor or survivors, and the issue of such predeceased child or children, as representing their parent, *per stripes*;

(b) Upon the termination of the said Trust, the said *Trust Estate* shall be converted into cash and distributed as set forth in the preceding paragraph hereof, with all due diligence.

At the opening of the trial the following admission of facts was filed, that is to say:—

1. John Day Jackson and his wife are both alive at this time.
2. The age of Mrs. Jackson is . . . Mr. Jackson . . .
3. There are eight children by this marriage presently living, all minors.
4. The capital of the trust fund set forth in Schedule A is invested in Canadian stocks and bonds, which are held by the trustee in the City of Montreal where the income therefrom is accumulating and being invested in Canadian stocks and bonds by the trustee, the income from the investment likewise accumulating and subject to the same trusts.
5. The trustee is a Canadian Company incorporated under the laws of the Province of Quebec and carrying on business in Canada with the power to act as a trustee.

The respondent rests his contention for making the assessment in question upon section 2, subsection (d) of The Income War Tax Act, 1917, where the word *person* is

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declared to cover a *trust*, and on section 4 of 10-11 Geo. V, ch. 49 (1920) amending subsection 6 of section 3 of the Act, dealing with income from an estate or accumulating in trust; but overlooks the provision of section 4 which enacts, as a condition precedent to any taxation being levied, that the person so taxed must be a resident of Canada. (See now for the two last sections sections 9 and 11, R.S.C., 1927, which came into force on the 1st February, 1928).

The definition of the word "person" in the Act of 1917, which is the Act which applies here, reads as follows: "person" means any individual or person and any syndicate, *trust*, association or other body and any corporate body.

While, in the view I take of the case, the interpretation of the word "Trust" has no practical bearing, I wish to say that this word "Trust" used as it is in that section does not mean a trust such as that constituted by an instrument under the deed of donation above mentioned.

The word "Trust" defined in section 2 must be read under the rule of interpretation, generally known as the *ejusdem generis* rule, or the rule *noscitur a sociis*. That is where several words are followed, as here, by a general expression (such as "*or other body and any corporate body*"), that expression is not limited to the last particular unit of the group, but applies to them all. *Great Western Railway Co. v. The Swindon and Cheltenham Extension Ry. Co.* (1). *Craies*, on Statute Law, 3rd Edition, 162.

This rule of construction was thus enunciated by Lord Campbell in *R. v. Edmundson* (2):

I accede to the principle laid down in all the cases which have been cited, that when there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.

If such a rule is not followed it would lead to absurd results. *Craies*, 162, 163.

The word *Trust* used in section 2 should be interpreted to mean a corporate or other body, a trust association or merger, combination of companies or interest created for the purpose of carrying on Trust business, and *exempli gratia*, such a corporation, or body, as the appellant in this case, and should not be held to contemplate a trust created

(1) (1884) 9 Ap. Cas. 787.

(2) (1859) 28 L.J.M.C. 213.

under an instrument which empowers the trustee to hold certain property and to exercise a certain power over it for the benefit of some other person as expressed in the instrument. In a trust created by deed, the trustee is bound to hold the property for the benefit of another, the *cestui que* trust.

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Now, the respondent, assuming that the word "Trust" covers the trust created under this instrument of donation further contends that the tax is leviable under subsection 6 of section 3 of The Income War Tax Act, 1917, as amended by section 4 of 10-11 Geo. V, ch. 49, which reads as follows: (see now section 11, R.S.C., 1927):—

The income, for any taxation period, of a *beneficiary* of any *estate* or *trust* of whatever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.

2. Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of an unmarried person.

The income could also have been sought to be taxed, in a proper case, under subsection 1 of section 3, because it includes the interest, dividends or profits, directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits *are divided or distributed or not*, and also the annual profit or gain from any other source, including the income from but not the value of property acquired by gift, bequest, devise or descent.

What is sought to be subjected to taxation in this case is not the actual property of the trustee, but it is the income of the beneficiary of a trust. While, if such income were liable to taxation, it would be payable in the hands of the trustee, yet, on the other hand, the trustee cannot be made liable therefor if the beneficiary, for any reason, is not taxable under the Act.

In the present case, none of the beneficiaries reside in Canada, a condition which, as I read the Act, is made a precedent to any taxation thereunder.

Section 4 of the Act, as amended, provides that the taxation shall be levied only upon persons residing in Canada. Section 9 of R.S.C., 1927, re-enacts the same provision in a more comprehensive manner and may be referred to for the present purpose.

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The *McLeod* case (1), must be distinguished from the present case, in that all of the beneficiaries there except one resided in Canada.

At page 109 of the Exchequer Court Reports (1925) the trial judge prefaces his decision by stating: "Every person ordinarily resident in Canada is liable to income tax." And in the report of the case in the Supreme Court of Canada, it is stated by Mignault J.:

The parties also agree that any income to which Miss Gladys A. Curry is entitled or which is vested in her is *not taxable under the Act*, inasmuch as she does not reside in Canada.

Indeed, the principle that the Act only applies to residents in Canada, is there recognized beyond question. The income which is sought to be taxed here in the hands of the Trustee is not his income, but the income of the beneficiaries under the trust who reside outside of Canada. Therefore, the action fails in that respect and for that reason alone.

The corpus of the trust in this case, as well as the income derived therefrom, are not the property of a resident in Canada. A foreigner who is a shareholder of a Canadian company receives his dividend, but is not subject to taxation of the same if he does not reside in Canada.

Under section 11, the trustee, who acts in a fiduciary capacity, is merely the channel through which the income of a beneficiary resident in Canada is duly taxed. This section does not purport to establish a taxation against any new person. The subject matter mentioned in sections 9 and 11 does not come into operation unless a person residing in Canada has first been found.

Before a condemnation to pay a tax is made, a clear and unambiguous enactment must first be found. In the present case the general clause of the Act (section 9) makes it a condition precedent to taxation that a person be a resident of Canada. The test of liability is residence in Canada, that prevails through the whole Act.

The liability to pay taxes, as provided by the deed of donation, can only apply to legal taxes.

The case of *Williams v. Singer* (2) has been cited by the respondent in support of his views; but that case is not

(1) 1925 Ex. C.R. 105, at p. 109;
 1926 S.C.R. 457.

(2) (1918) 7 Report of Tax
 Cases, 399.

apposite in that there is special legislation in England covering a case like the present one which does not exist in Canada. That case is decided upon a statute which reads as follows:

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For and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of *Her Majesty or not, although not resident within the United Kingdom, etc.*

This legislation is possible in England because the tax is there payable at the source. Failing the Parliament of Canada passing such legislation, such tax is not payable by a non-resident of Canada.

The case of *Kent v. The King* (1), cited at bar by the appellant, decided by the Supreme Court of Canada, in the head-note, sets forth, viz:—

Section 155 of the Taxation Act, R.S.B.C. (1911) c. 222, as re-enacted by section 25 of c. 89 (1918) has not the effect of making taxable an income of non-residents, as well as the income of residents, derived from the working of mines. The words thereon as provided in Part I have reference not only to the manner and machinery of taxation of incomes but also as to the persons to be taxed; and, by Part I, the non-residents are expressly not assessable to income tax.

And Duff J., at page 296, says:—

The enactment is a taxing statute, and if construed according to the view advanced by the Crown, imposes a new liability to taxation. In conformity with settled principles, the enactment ought not to receive such a construction unless, on the fair reading of it, its language clearly discloses an intention to create such a liability. Words, which are equally consistent with the absence of such an intention, are not sufficient.

All of this is quite apposite to the present case.

A just appreciation of the circumstances and facts of the case fails to bring the appellant within the scope of the law for imposing a tax upon them. There is no equitable construction of a taxing statute in favour of the Crown, the exact meaning of the words used in the Act must be adhered to. *Partington v. Attorney-General* (2).

The word "income" 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. and P. Main Sewerage Board v. Bensted* (3).

There will be judgment allowing the appeal and with costs.

Judgment accordingly.

(1) 1924, S.C.R. 389.

(2) (1869) L.R. 4 H.L. 100 at 122.

(3) (1907) A.C. 264.

1930

April 19.
May 12.

MARY J. TORMEY.....SUPPLIANT;

vs.

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Lease—Perpetuities—Option to purchase—Tenancy—Interpretation of Contract

On the 11th March, 1845, the Crown leased certain ordinance lands to one McL. for a term of 30 years, it being provided that upon the expiration of the said term "upon the reasonable request, and at the proper cost and charges of the said John McLaurin by Indenture similar to this present lease, renew the same for the like term of thirty years, upon the like conditions and rents hereinbefore contained and reserved, to the said John McLaurin, his executors, administrators and assigns forever." The lessee failed to avail himself of this right and the lease was not renewed, but the assigns of McL. continued to occupy the said lands to the present, paying the yearly rent stipulated in the lease. The lease also provided that the lessee upon paying a certain stated sum would be entitled to a conveyance of the lands in fee simple. In 1927, the present occupants sent the Crown a cheque for the amount mentioned in the lease and requested a deed to the lands in question. The Crown returned the cheque and refused to convey the land for the sum offered, hence the present Petition of Right.

Held, that the option to purchase contained in the lease in question herein, being unlimited as to time, was therefore inoperative and void because of the rule against perpetuities, and is not now exercisable, and that the suppliant is not entitled to the relief sought.

2. That the tenant who holds over with the consent of the landlord becomes a tenant from year to year and holds upon the terms created by the lease, so far as they are applicable to a tenancy from year to year. An option contained in a lease to purchase the reversion and so destroy the tenancy is not one of the terms of the tenancy; it is a provision outside of the terms which regulate the relations between the landlord as landlord, and the tenant as tenant, and is not one of the terms of the original tenancy which will be incorporated into the terms of the yearly tenancy created by the tenant holding over after the expiration of the lease.

PETITION OF RIGHT by the suppliant herein to have it declared that the suppliant is entitled to exercise the option to purchase the property occupied by it under a lease made and passed on the 11th March, 1845.

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

A. E. Fripp, K.C., and *A. F. Burrett*, for suppliant.

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

The facts herein and the questions of law raised are stated in the Reasons for Judgment.

THE PRESIDENT, now (May 12, 1930), delivered judgment.

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By Indenture of Lease made the 11th day of March, 1845, certain lands belonging to the Crown and known as "Ordinance Property," situated in what is now known as the city of Ottawa, were leased unto one John McLaurin, his executors, administrators and assigns, for and during the term of thirty years. The lease provided that upon the expiration of the term of thirty years,

upon the reasonable request, and at the proper cost and charges of the said John McLaurin by Indenture similar to this present lease, renew the same for the like term of thirty years, upon the like conditions and rents hereinbefore contained and reserved, to the said John McLaurin, his executors, administrators and assigns forever.

The lease was not renewed upon the expiration of the term, but assigns of McLaurin continued, and now are, in occupation of the lands. The yearly rent stipulated in the lease was paid down to 1927 by those in occupation of the lands; payments were made irregularly, the rent not having been paid for a period of years at a time, but eventually any balance overdue was paid and accepted; nothing, however, I think turns upon that point.

The lease also provided that the lessors, their successors in office and assigns

shall and will at any time or times hereafter, on payment of the full sum of eighteen pounds ten shillings and four pence of lawful money of Canada aforesaid and of the rents hereinbefore reserved, and performance of the conditions and agreements hereinbefore contained, on the part of the said John McLaurin his . . . assigns, to be paid, done, and performed, which payment and performance is a condition precedent, execute and deliver to the said John McLaurin his . . . assigns, a conveyance in fee simple, without covenants, of the said parcel or lot of land and premises herein mentioned and described.

In January, 1927, the suppliant, requested in writing from the proper authorities a conveyance in fee simple of the land in question, then and now occupied by her, and this request was accompanied by a certified cheque for the amount of the consideration mentioned in the clause of the lease just referred to. The Crown returned the cheque to the suppliant by letter in July, 1927, and she was advised that she would later be informed as to any decision reached regarding the purchase of the land. In March, 1928, there was served upon the suppliant a notice to quit and deliver up possession of the land and premises in question. I should perhaps state, though I think it is not of import-

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ance, that buildings had in the meanwhile been erected upon the land by some one holding under the lease or in occupation as a yearly tenant; the Crown agreed to convey the fee simple to the suppliant or any other persons similarly situated—and there are I understand many other cases similar to this—at a price equivalent to the municipal assessment upon the land alone.

The suppliant contends that she is an occupant of the lands under the terms of the lease to McLaurin, and that the option to purchase is still subsisting, and she asks for a declaration that she is entitled to a grant of the land in question upon payment of the principal sum mentioned in the lease to McLaurin, or in the alternative, to a declaration that she is entitled to remain in possession of the premises so long as she performs the terms and conditions contained in the lease to McLaurin. The respondent's case is that upon the construction of the lease, the covenant to convey the fee simple upon payment of the stipulated purchase price, only subsisted during the currency of the lease, which expired in March, 1875; that since that date occupants of the lands have been yearly tenants only; and that in any event the option to purchase the fee simple is void because it infringes the rule against perpetuities.

It may, I think, be taken as settled law, that the tenant who holds over with the consent of the landlord becomes a tenant from year to year and holds upon the terms created by the lease, so far as they are applicable to a tenancy from year to year. This does not, however, mean that the tenant has the benefit of all the provisions of the expired lease whether they were terms of the tenancy or not. An option contained in a lease to purchase the reversion and so destroy the tenancy is not one of the terms of the tenancy; it is a provision outside of the terms which regulate the relations between the landlord as landlord, and tenant as tenant, and is not one of the terms of the original tenancy which will be incorporated into the terms of the yearly tenancy created by the tenant holding over after the expiration of the lease: *In re Leeds and Batley Breweries Limited, and Bradbury's Lease* (1); *Rider v. Ford* (2); *Woodall v. Clifton* (3). In the case before me, it is clear I

(1) (1920) 2 Ch. D. 548.

(2) (1923) 1 Ch. D. 541.

(3) (1905) 2 Ch. D. 257, at p. 279.

think that since 1875, the assigns of McLaurin have occupied the lands in question as yearly tenants, and it follows, I think, that the relationship of landlord and tenant continues at least down to the time when notice to quit was served upon the suppliant. It would appear from the authorities, as stated by Russell J. in *Rider v. Ford*, that an option to purchase, unlimited in time, exists so long as the relationship of landlord and tenant continues, providing the rule against perpetuities is not infringed. In the case just mentioned, it was held, that the option to purchase, being unlimited as to time, was void under the rule against perpetuities; it was also held that a covenant for a renewal of a lease was outside the rule against perpetuities, and for this reason, some of the authorities cited to me by suppliants counsel are inapplicable, because they relate to covenants to renew leases while the relationship of landlord and tenant existed. In the case before me, the option to purchase seems to me to be unlimited as to time, and is therefore inoperative and void because of the rule against perpetuities and is not now exercisable, and upon that ground the suppliant must fail.

In view of all the circumstances of the case, and it being a test case, there will be no order as to costs.

Judgment accordingly.

LOWE-MARTIN COMPANY LTD., ET AL. . PLAINTIFFS;

VS.

OFFICE SPECIALTY MANUFACTURING COMPANY LTD. } DEFENDANT.

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1930
 April 25.
 May 17.

Patents—Prior Art—Ingenuity of invention—Subject-matter

Claim 4 of the plaintiff's patent states that it is for "a file wrapper or folder including front and back leaves, the back leaf having a projecting tab formed integrally with the back and reinforced by an integral extension of the back doubled over at the top edge of the tab and pasted to the back," called "a straight edge tab," and claim 5 is for the same idea only for a "partial tab," part of the turned over edge being cut away.

Held, that the plaintiff's patent did not involve ingenuity of invention and was invalid for want of subject-matter.

2. *Held* further that, even if the same was patentable, inasmuch as the idea of turning over the edge of paper and gluing it down to reinforce such edge and to give it a smooth finish was clearly disclosed in

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the prior art, and was actually in use in the trade in the manufacture of folders similar to the plaintiff's, the plaintiff's alleged invention was anticipated and was not patentable.

ACTION by plaintiffs to have it declared that the defendant is infringing Canadian Letters Patent No. 218,775.

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

*O. M. Biggar, K.C.*, for plaintiffs.

*F. M. Featherstonhaugh, K.C.*, and *H. G. Fox*, for defendant.

The facts are stated in the Reasons for Judgment.

AUDETTE J., now (May 17, 1930) delivered judgment.

This is an action for the alleged infringement, by the defendant, of claims 4 and 5 of the Canadian Patent No. 218,775, granted, on the 23rd May, 1922, to the plaintiff Edward A. Dunn. The plaintiff Lowe-Martin Company is an exclusive licensee of the said patentee Dunn under the said letters patent.

The defendant, by its statement in defence, avers that the plaintiffs' patent is null and void for want of subject-matter. Moreover, at the opening of the trial, counsel for the defendant admitted that the defendant manufactured files or folders covered by the said claims, thus only leaving for determination by the Court the question of the validity of the patent.

The grant contained in the patent is for a file or folder to hold papers in filing case or drawer and

the object of the alleged invention is to strengthen or stiffen such a folder at the point where the identification name or symbol of the file is applied, without increasing the weight or thickness of the file as a whole in the least, thereby enabling a folder to be made as a whole of relatively light and thin stock, while being at the same time greatly strengthened at the portion where the name or symbol occurs and where the folder is most frequently grasped and handled.

Another object is to make the edge of the folder or file which is subjected to handling rounded and smooth, merging gradually with the faces of the stock on a continuous curve, instead of presenting raw edges and sharp corners.

\* \* \* \* \*

The folder as a whole is represented by *a*, and the back or rear leaf thereof by *b*. This back is longer or higher than the first leaf either throughout its entire width, or for a limited extent. The projecting part of the back is adapted to bear the name of the person or of the matters

to which the contents of the file relate. This part of the folder is subjected to a much greater amount of handling than any other part, particularly in the course of searching through a cabinet for any particular file tucked between others, and it is the purpose of this invention to reinforce such part locally. In the form shown in Figure 1 this reinforcement is made by providing the back of the folder with a flap *c* which is doubled against the back and pasted down. The vertical extent of the flap is relatively slight as compared to the entire height of the file, and preferably is such that when the file is empty and closed the front leaf will not overlap it, whereby it does not increase the thickness of the file in the slightest. Thus the file is given more than double strength in the part where strength is most needed, without requiring the use of heavy stock.

Claims 4 and 5 read as follows, viz:—

4. A file wrapper or folder including front and back leaves, the back leaf having a projecting tab formed integrally with the back and reinforced by an integral extension of the back doubled over at the top edge of the tab and pasted to the back.

5. A wrapper or folder having a back, an integral extension of such back being folded against the back and permanently secured thereto by an adhesive, a part of the upper folded edge of the back being cut away and leaving a projecting tab, the outer edge portion of which is transversely rounded, and the tab being thereby formed integral with the back and of double thickness.

From the wording of the specifications and the two claims in question it appears that the patent covers two kinds of folders which may be referred to as *a straight edge tab* as shown by exhibit 2; and also *a partial tab* as shown by exhibit 3. Witness Dolan testified he would not say exhibit 2 has a tab. He would describe it as a file with the back projecting higher than the front. A tab is chiefly used for indexing and it projects beyond the main body for indexing purposes.

This alleged invention is the same as the one covered by the American Patent, filed as exhibit 4, bearing date the 16th December, 1913, and for which the application was filed on the 14th September, 1910.

At all events, the plaintiffs' patent in question is a very narrow and limited patent in a crowded art and must receive a narrow construction in view of the prior art.

The outstanding question left to the determination by the court is as to whether the devices in question are *per se* subject-matter as involving ingenuity of invention and further as to whether or not these devices have been anticipated by the prior art. The devices are undoubtedly of great simplicity involving a structure well defined in the prior art and to be valid must involve ingenuity of inven-

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tion. *Haskell Golf Ball Co. Ltd. v. Hutchison* (1); *Edison Bell Phonograph Corporation Ltd. v. Smith* (2).

These devices appear to be such as might, at that date, well have occurred to a skilled mechanic in that art and without any exercise of that inventive faculty which is necessary as the ground for a patent. It is always necessary to consider the rights of the general public to avoid monopolies on such simple devices as would occur to anyone familiar with the art. *Bonnard v. The London General Omnibus Co.* (3).

Now, the evidence, respecting the history of the art, discloses that before 1896 the usual method of filing papers was to lay them *flat* in the box and that the *vertical* system came into universal use after 1893. The first vertical files, for filing papers on edge, used no folders.

Witness McKee, a witness heard on behalf of the plaintiff, relates (p. 9) that the introduction of the plain folder was about 1900 and it was not until some time between 1905 and 1907 that the use of the partial tab began; the partial tab folder projects above the contents of the drawer and is subject to the wear of handling in referring to the contents of the drawer. These tabs or projections being subject to wear, various attempts were made to improve them. One of the first methods was the pasting of a *cloth* or *paper* on this partial tab projection to reinforce and strengthen it. A separate piece of cloth or paper was pasted on both sides—a *separate piece folded over* and that was done between 1901 and 1902 and until 1915 (p. 9).

Then came the Dunn American Patent exhibit A.

Witness McKee claims that the reinforcement is the invention and not the cutting away of the tab.

Witness Dolan, who has been with the defendant company, testified that in 1900 they used the ordinary vertical folder, that is a double sheet of manila paper folded to protect the contents, without any projecting part. Then with the development of the folder came the back flap projecting higher for the purpose of identifying the contents, and the partial tabbing, much in the manner of cutting the

(1) (1908) 25 R.P.C. 194 at 204 (2) (1894) 11 R.P.C. 389, at 398.  
*et seq.*

(3) (1919) 36 R.P.C. 279 C.A.; 38 R.P.C. 1.



edges for the purposes of an index. Then in 1905 or 1906 or before, says witness Dolan, came the reinforced tabs, with the foreign substance such as linen or additional paper.

Q. What was the peculiarity of the reinforced thing?

A. Merely *folded over* with a foreign substance, an additional piece of paper or linen.

It *increased the thickness* of the tab, reinforced it, but not the thickness of the folder below the tab, and it produced *rounded edges*. That seems to be the crux of the claims by the patent.

Then witness Dolan produced exhibit B which he said they used prior to 1909-10, and it was used as long as he can remember in paper business for flat files. It is a file back with a reinforced top, which is thus reinforced by folding the top over and gluing it down, producing a smooth edge, as claimed in the plaintiff's patent. And the witness adds that the folding over of paper to get a rounded or reinforced edge is a common practice in the manufacture of paper products.

Witness Helmer says he has been in the paper business for 25 years and that he has been familiar with the folding of paper for the purpose of reinforcement, in different forms, ever since he started work. Exhibit B was made ever since he was in business, it is commonly used.

The following patents, among others, were filed as part of the prior art.

Exhibit A (1894), the Edgar Patent, shows a folder having a front and back flaps or leaves, the front one being shorter than the back, the extending portion of the back having a *reinforced projecting strip of wood*, stiff *paste-board* or other suitable material.

The Levey Patent, 3rd May, 1910, exhibit F, shows a cheque book wherein the edge of the paper is reinforced by folding it over and pushing it underneath.

Exhibit G, the Chynoweth Patent, 17th January, 1882, shows a folder in which the upper portion of a sheet is folded downwards, thereby constituting a reinforcement.

Exhibit H, the McKnight patent, 26th March, 1878, has a tab secured to both sides of the sheet, having a folded over portion offering a rounded surface, thus avoiding a cut or edged portion.

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Exhibit J, the Harris Patent, 19th January, 1909, has a folder provided with a tab on the upper side of the back flap and a folded over portion designated 15.

Exhibit K, the Kravik Patent, 23rd September, 1902, shows a folder comprising front and back leaves, the back leaf having its upper portion folded over as indicating at 9 and the other end of the leaf provided with an indicating tab. The folded over portion 9 is secured to the back by a fastener going through the paper.

Exhibit L, the Ayres Patent, 12th July, 1904, shows an index with a folded over portion at the side, the folded over portion being glued.

In Exhibit M, the Jones Patent, 11th April, 1876, the tabs are folded over and attached on both sides to a leaf providing a rounded edge, stiffening or reinforcing the projecting portion.

Exhibit N, a British Patent to Kenrick & Jefferson Ltd., 18th April, 1904, shows an index card doubled over throughout its length, with a cut away portion at the top forming a tab, which is doubled over integrally with the sheet and provided with a rounded transverse edge, in the same manner as in the plaintiffs' patent.

Under the Canadian Patent Act, s. 7, a patent may be granted to any person who has invented any new and useful art, machine, manufacture or composition of matters; or any new and useful improvement therein, which was *not known or used by any other person before his invention* thereof, and which has *not been in public use* or sale with the consent or allowance of the inventor thereof, for more than one year previously to the application for the patent.

The subject-matter of the letters patent must therefore be a manufacture or a device that is new, useful and involving ingenuity of invention. There must be something new in the art and the primary test is invention. All of which are wanting in the plaintiffs' patent.

From the above mentioned summary review of the prior art I am forced to the conclusion that, if the claims of the plaintiffs' patent could *per se* be patentable, a most doubtful matter, they are absolutely anticipated both by common use and by the prior art.

It is quite clear we had in the trade, long before the patent was thought of, folders of some kind or another that had that doubled soft rounding edge, constituting a reinforcement. There is no element entering in the patent which cannot be found in the prior art. The prior art describes the same function in practically the same manner, without involving, in any sense, a creative work of inventive faculty, which the patent laws are intended to encourage and reward. The plaintiffs came too late in this narrow field, they came when common knowledge of the art was extensively spread and well known. There is no new function or invention in the patent that could amount to invention under the circumstances of the case.

The facts before the court show that the patentee has produced features and functions perfectly familiar to the prior art, without giving it any new functions and without accompanying it with new results, bring the patent within the principle so often stated that:

The mere carrying forward of the original thought, a change only in form, proportion or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent.

*The Railroad Supply Co. v. The Elyria Iron and Steel Co.* (1).

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.

And in *Blake v. San Francisco* (2), Wood J., delivering the opinion of the court, cited the following words of Gray J., in *Pennsylvania Railroad Co. v. Locomotive Engine Safety Truck Co.* (3) with approval, to wit:—

It is settled by many decisions of this Court . . . that the application of an old process or machine, to a similar and 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 contemplated.

See also *Nieblo Manufacturing Co. Inc. v. Reid* (4), confirmed on appeal to the Supreme Court of Canada; *The King v. Tessier* (5); *Copeland-Chatterson v. Paquette*

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|-----------------------------------|-----------------------------|
| (1) (1917) Patent Office Gaz.     | (3) (1884) 110 U.S. 490.    |
| (U.S.) Vol. 239, p. 656.          | (4) (1928) Ex. C.R. 13.     |
| (2) (1885) 113 U.S.R. 679 at 682. | (5) (1921) 21 Ex. C.R. 150. |

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(1), confirmed on appeal (2); *Canadian General Electric Ltd. v. Fada Radio Ltd.* (3); *Detroit Rubber Products Inc. v. Republic Rubber Company* (4), confirmed on appeal to Supreme Court of Canada (5); *Treo Company Inc. v. Dominion Corset Company* (6); *Ball v. Crompton Corset Co.* (7); *Eagle Lock Co. v. Corbin Cabinet Lock Co.* (8); *The Northern Shirt Co. v. Clark* (9).

The action is dismissed with costs for want of validity of the plaintiffs' patent.

Judgment accordingly.

1930
March 19.
May 23.

HIS MAJESTY THE KING.....PLAINTIFF;

VS.

PEAT FUELS LIMITED.....DEFENDANT.

Crown—Contract—Interpretation—Words repugnant to real intention

Held, that where the real intention of the parties can be clearly collected from the language within the four corners of a deed or instrument in writing, Courts are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous what is repugnant to the real intention so gathered.

- 2. That a contract ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole agreement, greater regard being had to the clear intention of the parties than to any particular words which may have been used in the expression of their intent. The terms of the agreement are to be drawn partly from the written document and partly from all the surroundings of the written document, such as the nature of the transaction with regard to which the document is brought into life.
- 3. That the Crown is not bound by the error or inadvertence of its officers, nor by any deliberate intention of its officers without proper authority to alter the terms of a written agreement.

INFORMATION exhibited by the Attorney-General of Canada to recover from the defendant a certain amount alleged to be due under an agreement entered into between the plaintiff and the defendant on March 1, 1927.

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

- (1) (1906) 10 Ex. C.R. 410.
- (2) (1907) 38 S.C.R. 451.
- (3) (1930) 1 D.L.R. 449.
- (4) (1928) Ex. C.R. 29.
- (5) (1928) S.C.R. 578.
- (6) (1918) 18 Ex. C.R. 115.
- (7) (1886) 13 S.C.R. 469 at 475.
- (8) (1894) 64 Fed. Rep. 789.
- (9) (1917) 17 Ex. C.R. 273; 57 S.C.R. 697.

R. S. Robertson, K.C., and J. A. Robertson for plaintiff.
Ainslie Greene, K.C., for defendant.

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The facts herein and the questions of law raised by the parties are stated in the Reasons for Judgment.

THE PRESIDENT, now (May 23, 1930), delivered judgment.

The matter in controversy here arises from a written agreement entered into on March 1, 1927, between the defendant company, and the plaintiff represented by the the Minister of Mines of Canada. The parties to the agreement entertain conflicting views as to the proper construction of the agreement.

Before reference is made to the precise provisions of the agreement a matter preliminary should be alluded to. There are no recitals in the agreement disclosing the history of the steps leading up to the agreement. A plain reading of the agreement would leave one with the impression that the parties were strangers in respect of the subject-matter of the agreement, at the time of entering into the negotiations resulting in the written document itself. Such being the case, and it being apparent from the pleadings that the parties were in disagreement as to the construction of the agreement, Mr. Robertson for the plaintiff, sought to tender evidence explaining the circumstances bringing the parties together, and the causes leading to the agreement; to this Mr. Greene for the defendant objected. I decided to hear such evidence subject to the defendant's objection, reserving the right to reject the same or any part of it, if after its effect became apparent such evidence was found inadmissible. The substance of that evidence was this: between 1918 and 1922 a committee set up by the Government of Canada expended public funds to an amount exceeding \$300,000 in an effort to demonstrate the feasibility of producing commercially, peat fuel from peat bogs, at Alfred, Ontario. In 1922, the governmental committee ceased further experimental work, and by agreement made in 1923, such property, plant and equipment as this committee had acquired during the years it carried on its experimental work was turned over to a syndicate, and by the syndicate later transferred to the defendant company;

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the condition of the transfer was that the plant and equipment would be used only in the development of the peat fuel industry at Alfred, and that fresh capital would be procured to operate the plant. The company substituted electric power for steam power, it rebuilt the old machines, and endeavoured to carry out certain other recommendations made by the governmental committee and deemed requisite in furtherance of the project. The company failed to complete its program of plant equipment on account of lack of capital and was obliged to cease operations, it having failed to sell its shares or securities in any substantial amount.

The location of the plant was, at this time, evidently not regarded as suitable, and it was thought, should be removed to another place; certain new machines, such as an excavator and a macerator were required; and improvements and extensions in plant were generally required. The company for lack of funds was unable to provide for these necessary expenditures, and in fact, had incurred liabilities which were unpaid when it ceased operations. In such circumstances the company approached the Department of Mines for assistance and support, and after some delay negotiations ended in the agreement here in issue. It is clear, from the evidence of Mr. Moore, who was then, I think, an officer of the defendant company, and who had much to do with negotiating the agreement in question, that all the requirements in the way of new or improved plant and a new location for operations were the subject of discussions between the parties to the agreement; and the parties seem to have been in agreement upon those matters.

Evidence relating to the facts I have just narrated, was, I think, properly admissible, but any evidence going beyond this is not admissible in my opinion, particularly any evidence directed to what is the real issue here, that is, whether or not the defendant was, at its option, to take over the whole of the property and plant, or less, upon the expiration of the lease.

Now as to the agreement itself. The defendant agreed, for a rental of twelve thousand dollars, to lease to the plaintiff for a period of one year and eight months from and after March 1, 1927, its plant and equipment at Alfred,

Ontario, and any peat bogs there or in that vicinity in which the defendant had any right or interest. It was agreed that the plaintiff should during that period have the sole right of operating the plant and it was stipulated that the plaintiff "may acquire property in the vicinity of Alfred aforesaid and remove the said plant thereto and install such further or other equipment as he may deem necessary for the efficient operation of the said plant." Then follows clause 4 of the contract which is an important and contentious clause, and it had better be recited in full:—

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Upon the expiration of this lease, or sooner determination thereof by the Company as herein provided, the Company will repay to His Majesty all sums hereafter expended by His Majesty hereunder in respect of property, plant or equipment and taken over by the Company together with the cost of removal of the said plant should His Majesty remove the same under the provisions of paragraph 3 hereof, together with interest upon all monies so expended by His Majesty from the date of expenditure.

Clause 5 of the agreement provided that there should be deducted *from the sum of monies so expended by His Majesty and repayable by the Company*

such sums as may be found reasonably to represent wear and tear upon property, plant and equipment purchased and installed by His Majesty hereunder

and also any

net profit derived from the manufacture and sale of peat products produced during His Majesty's possession and occupation of the said plant hereunder.

The next important provision of the agreement was to the effect that if the company, upon thirty days notice, and after

payment of all monies hereby agreed to be paid by the Company, and upon satisfying the Minister of its financial capacity for successful operation, determine the said lease, and resume possession, occupation and operation of the said plant and equipment and property.

This option was never exercised. The last clause provided that in the event of His Majesty continuing the operation of the plant and equipment until the termination of the period of the lease,

the company may pay the monies and interest herein agreed to be paid by amortized payments over a period of two years upon duly securing His Majesty in respect thereof by mortgage upon the total plant and equipment of the company for all monies expended by His Majesty or payable by the company hereunder to His Majesty or in such other manner as shall be approved by and acceptable to His Majesty.

The plaintiff now sues the defendant in the sum of \$85,326.53, being the amount claimed to be due for expendi-

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tures made by the Department of Mines for new plant, the purchase of peat bogs, repairs and alterations to plant, cost of moving plant, administrative expenses, etc. The plaintiff contends that the proper construction to put on the agreement is, that the defendant was to take over all the plant and property as it stood at the end of the period of the lease, and pay the plaintiff all sums expended by him on account of property, plant or equipment. Mr. Robertson argued that the "plant" to be taken over, was the entire property, plant and equipment as assembled and in possession of the plaintiff at the termination of the period of the lease; that the property and plant acquired by the plaintiff became merged in the leased plant and was not divisible, and that "property, plant or equipment" could only mean the complete property, plant and equipment as found assembled as an operating unit on the termination of the lease. The defendant contests this construction of the agreement, and says it does not mean that at all; that the agreement provided that the defendant should pay to the plaintiff only such sums as were expended for property, plant and equipment acquired by the plaintiff "and taken over" by the defendant; and that there was no agreement on the part of the defendant to take over any of the plant acquired by the plaintiff, it being optional only, and that the defendant is entitled to the return of so much of the plant as was leased by it.

A contract ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement, and it is said on good authority, that greater regard is to be had to the clear intention of the parties than to any particular words which may have been used in the expression of their intent. The terms of the agreement are to be drawn partly from the written document and partly from all the surroundings of the written document, such as the nature of the transaction with regard to which the document is brought into life. Bowen L.J. in *Lamb v. Evans* (1). The court will not therefore make an agreement for the parties, but will ascertain what their agreement was, if not by its general purport, then by the literal meaning of its words.

(1) (1893) 1 Ch. Div. 218, at p. 230.

After a very careful study of the agreement, I have reached the conclusion, that the plaintiff's construction of the agreement is the proper one, in fact the only one, if any business sense is to be given to the contract. The plaintiff's construction effectuated what I believe was the intention of the parties, and reading the agreement as a whole, and considering the circumstances in which it was made, I am quite free from doubt that the agreement means, that upon the termination of the lease—if the company did not earlier determine the lease under clause 10—the defendant was to take over all the property, plant and equipment and repay the plaintiff all sums expended by him in respect of the same. That is, I think, the general import of the agreement and the literal meaning of its words as well. When the defendant approached the Department of Mines in December, 1925, the plant was not considered to be sufficiently equipped, and if peat fuel was to be produced commercially, it was necessary to alter and improve the whole plant, purchase some new plant, purchase new peat bogs, and also select a new location for operations; and both parties were in agreement that probably all this would have to be done. This in fact was later done without protest of any nature by the defendant. What the plaintiff really did say to the defendant in the end, was this: "I will lease your plant, but you must agree to allow me to acquire property in the vicinity of Alfred and remove your plant to the new property, and you must agree that I shall have the right to add to your plant by the installation of such further equipment as I may deem necessary for the efficient operation of your plant, and when the lease is terminated you must repay me for whatever I may have expended upon such property, plant or equipment"; clause 3 gave the plaintiff power to purchase new property, and install new equipment. In other words, the plaintiff was to add to the leased plant if the same was deemed necessary, and any acquired property or plant became part of the leased plant, and all would go back to the defendant on the termination of the lease. If the plaintiff was to purchase property, plant or equipment for himself and at his own cost, it was hardly necessary to have the defendant agree in writing that this might be done. What more

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natural or businesslike in the circumstances than that the defendant should agree to take over the whole property and plant upon the terms stated and as it stood upon the termination of the lease. Had any doubt been raised as to this at the time of the execution of the agreement, I have no doubt the officers of the defendant company would have said "we are to take over the property and plant as a whole at the end of the lease, and if the agreement does not make this clear it should." It seems to me, that wherever the agreement speaks of property, plant or equipment, it means, the property and plant leased to the plaintiff and by him altered or added to. I cannot believe it was ever contemplated by the parties that the old plant should on the termination of the lease, at the option of the defendant, be separated from the plant as later improved and enlarged; in some instances it would hardly be a practical thing to do in any event; it would not be a sensible or businesslike thing to contemplate and would hardly effectuate what the defendant really wanted at the time the agreement was entered into, that is, an efficiently equipped property and plant for the production of peat fuel, with two years within which, if necessary, it might repay the plaintiff for sums expended by him. In my opinion there was at all times material here but one plant, that is the leased plant, and that plant the defendant agreed might be removed, altered or enlarged by the plaintiff, and the defendant was to repay the plaintiff any sums expended by him for property, plant or equipment.

Clause 4, as already stated, provides that the defendant will pay to the plaintiff upon the expiration of the lease, "all sums hereafter expended in respect of property, plant or equipment and taken over by the company, together with the cost of removal of the said plant," if the same were removed under the provisions of clause 3. The contentious words in this clause are "taken over by the company," which words the defendant contends are to be construed as meaning that the taking over was optional with the defendant. If from the whole of the agreement it is to be gathered that upon the termination of the lease, the property, plant and equipment automatically reverted to the defendant, the lessor, then these particular words do

not appear at all confusing, as they merely express what inevitably would occur upon the termination of the lease. These words, I think, simply express something as done which was agreed to be done; they are mere surplusage and the agreement would read intelligibly without them. The general tenor of the document is against the defendant's construction of these words, and if it were intended that the taking over was optional with the defendant it would be necessary that this should have been clearly expressed (1). No one else but the defendant could have been expected to take over the plant at the expiration of the lease; it belonged to the defendant, and any additions to it which were made with the consent of the defendant, did not alter this fact. Clause 5 (a) supports the view that the agreement was that the defendant was to take over the whole property and plant upon the termination of the lease, and repay the plaintiff for any sums of money reasonably expended for additions to the property and plant, because a deduction was to be made for "wear and tear upon property, plant and equipment purchased and installed by His Majesty hereunder." This clause seems clearly to imply that the plant was to pass into the possession of the defendant and that any moneys reasonably expended by His Majesty for property, plant and equipment was unconditionally repayable by the defendant, but there was to be a deduction for wear and tear of newly acquired property and plant. Then 5 (b) is also illuminative of what, I think, was the intention of the parties. It says that any profits derived by the plaintiff from the manufacture and sale of peat products "during the plaintiff's possession of the said plant," was to be deducted from the sums of money expended upon property, plant and equipment and repayable by the defendant. The words "the said plant" could here only refer to the original leased plant together with any additions thereto; and "possession" refers to possession under the lease not of the original property and plant only, but also of any additions which were made thereto, and implies that upon the termination of the lease possession was to pass from the plaintiff to the defendant. Clause

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(1) See per Kelly C.B. in Gwyn vs. Neath Canal Navigation Company, (1868) L.R. 3 Ex. 209, at p. 215.

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11 of the contract is very convincing to me of the plaintiff's construction of the contract. Some precise provision would be expected to be found in the contract indicating how and when any moneys repayable by the defendant to the plaintiff were to be paid, upon the termination of the lease. And this paragraph reads:—

In the event of His Majesty continuing to operate the said plant and equipment during the entire period of one year and eight months aforesaid, the company may pay the monies and interest *herein agreed to be paid* by amortised payments over a period of two years, etc.

This can only mean that on the expiration of the lease the property and plant passed over to the defendant, and the defendant was to repay to the plaintiff the moneys "herein agreed to be paid," and the repayment of such moneys might be extended over a period of two years. This clause does not reasonably indicate that it was optional on the part of the defendant to take over the plant; the clause reads as if that were contemplated, and the clause sets forth the terms of repayment of certain moneys expended by the plaintiff. It could not well be assumed that the plaintiff might retain the plant. Clause 11 seems to me to harmonize with the other provisions of the agreement, and read together with the other clauses, makes very clear, I think, the construction I put upon the agreement.

There is another portion of the evidence tendered by the plaintiff to which I must refer. On October 19, 1928, the Deputy Minister of Mines notified the defendant in writing that the lease would expire on October 31, 1928, "and that the only option now remaining to the company to secure return of the plant and equipment leased was by compliance with clause 11 of the agreement." The wording of this notice might give rise to an inference that in the opinion of the Deputy Minister it was optional with the defendant to take over the property and plant. If this was his opinion it was clearly erroneous and in any event the Crown is not bound by the error or inadvertence of its officers, nor would the Crown be bound by any deliberate intention of its officers without proper authority to alter the terms of a written agreement, and no such authority was established by the evidence. The defendant replied to this letter substantially as follows:—

As explained at interview which I had with you and Mr. McLeish on Wednesday the 17th instant, it is the intention of this company to take over the Alfred plant and operate it next year.

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* * * * *

I do not believe this company will be in a position to make any cash payment to the Government, so that we will avail ourselves of the clause which provides for a payment over a period of two years.

I do not think this reply is of importance one way or the other,—whatever construction be placed upon it—it cannot alter the terms of the agreement.

I am of the opinion therefore, that the plaintiff's construction of the agreement is the proper one, and that at the time of the execution of the agreement, what was in the minds of the parties was just what I have attempted to state, and nothing else. The plaintiff is entitled to judgment for any sums reasonably expended in respect of property, plant or equipment, and the cost of the removal of the plant, together with interest. This does not however, in my opinion, apply to everything set forth in the plaintiff's particulars of claim. There will be a reference to the Registrar or his Deputy to ascertain the amount owing to the plaintiff under the agreement. Costs of this action will follow the event, but the costs of the reference will be reserved.

Judgment accordingly.

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PANY LIMITED

} SUPPLIANT;

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June 23.
Aug. 8

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Contract—Rectification of contract—Lease—Eviction—Intrest.

The Crown leased from the suppliant a certain space on two floors of a building owned by it, by a written lease duly executed by the Minister as provided for by section 18 of the Public Works Act, and under authority of an Order in Council. The measurements stated in this lease were made by officers of the Department of Public Works and the contract and plans accompanying the same were prepared by them. It was claimed by Suppliant, concurrently with the execution of the lease, that the superficial area mentioned in the lease was in error and should be greater and that the total rental based thereon should be accordingly increased. It was agreed between the parties that the area leased was improperly measured and thereupon a second

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or amending Order in Council was passed recognizing that an error had been made in stating the area in square feet leased and authorizing the amending of the first Order in Council accordingly. No new contract however was executed in conformity with this amending Order in Council.

The Crown took possession under the lease and later, before its termination, rescinded the several Orders in Council, vacated the premises and returned the keys, and repudiated its obligation to be bound under the lease. Suppliant then notified the Crown that it would hold it responsible for the rent for the balance of the term, but that it would endeavour to rent the space vacated on the Crown's account, and would give the Crown credit for any sums so received.

The present action is *inter alia* for the rectification of the contract pursuant to the second Order in Council, for rentals on the increased space, and damages by way of interest on the unpaid matured rentals.

Held that the acts of the suppliant did not constitute eviction of the Crown from the leased premises, and that the Crown was liable for the rent for the entire term of the lease. That to constitute an eviction at law the lessee must establish that the lessor without his consent and against his will wrongfully entered upon the demised premises and evicted him and kept him evicted.

2. That notwithstanding the provisions of section 18, of the Public Works Act (R.S.C., 1927, c. 166) the suppliant is entitled to have the lease as executed rectified, so that the real intention of the parties with regard to the exact area or portion of the building demised will be effected, and is entitled under such lease as rectified to recover the rental for the increased space.
3. That in matters of contract the legal rights and liabilities of the Crown are substantially the same as those arising between subject and subject.
4. That the Suppliant was entitled to recover damages in the way of interest upon the unpaid matured rentals as from the several maturity dates by reason of the Crown wrongfully detaining payment in breach of the contract of lease.

PETITION OF RIGHT by the Suppliant to recover damages alleged to be due to it by reason of an alleged breach of a contract of lease by the Crown.

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

Ainslie Greene, K.C., for suppliant.

W. L. Scott, K.C., and *C. Scott* for respondent.

The facts are stated in the Reasons for Judgment.

THE PRESIDENT, now (August 8, 1930), delivered judgment.

This is an action for damages for breach of contract. The salient facts of the case are as follows. By Indenture of

Lease dated the 11th day of September, 1926, the petitioner leased to the respondent certain space on two floors of the Journal Building in Ottawa, for the term of five years from the 25th day of August, 1926, at an annual rental of \$5,680.32, payable in instalments, the first instalment falling due on October 1, 1926, and thereafter in equal quarterly instalments on the first day of January, April, July and October in each year; the balance, a broken instalment, was payable on the last day of the term. The respondent, represented by the Minister of Public Works, was authorized to enter into the lease by an Order of the Governor General in Council dated the 26th day of August, 1926. The respondent entered into possession of the demised premises on August 26 and remained in occupation of the same until the following February when he vacated the premises. On September 28, 1926, His Excellency the Governor General approved of an Order in Council rescinding the Order in Council of August 26 and purporting to cancel the lease made thereunder, and rescinding also another Order in Council passed on September 21, which will be later mentioned. The Department of Public Works on September 30 advised the petitioner of the purport of this Order in Council. Just prior to the respondent vacating the demised premises, the petitioner, on January 25, 1927, wrote a letter to the Deputy Minister of Public Works, through its solicitors, stating that it considered the lease to constitute a valid and binding contract, and demanding payment of rentals which had fallen due on October 1, 1926, and January 1, 1927, and which apparently had remained unpaid though the respondent was still in occupation from the beginning of the term. The letter also stated:—

We beg further to advise you that our clients refuse to accept the surrender of the said lease as amended, but, in view of the vacation of the premises and the repudiation under Order in Council number 1475 of September 28, 1926, they will endeavour to relet the premises on behalf of and as agent of the Crown, in order to reduce the lessor's claim under the lease, unless you advise us that you desire the leased premises to be held ready at the disposal of the lessee. They desire it to be understood, however, that they hold the Crown responsible for the rent payable, and to become payable during the whole term of the said lease as amended.

The solicitors wrote two further letters to the Department of Public Works requesting a reply to this letter, but the only response forthcoming was on March 2, 1927, and which

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was only to the effect that the matter had been referred to the Department of Justice. The petitioner thereafter made all reasonable efforts to rent the demised premises with the view of minimizing its claim for damages against the respondent, and in the petitioner's particulars of damages credit is given the respondent for any rentals thus received.

The facts leading to the passage of a second Order in Council on September 21, 1926, which is the second Order in Council just mentioned as having been rescinded, had better be explained at length. The annual rental to be paid under the lease was reached on the basis of the demised premises containing 5,917 square feet, the rate being 96 cents per square foot, and the Order in Council authorizing the lease mentions this as the area to be leased and as well this rental rate. Mr. Parkinson, Managing Director of the petitioner, stated in evidence that having previously rented space on the same two floors of the Journal Building to Departments of Government, he knew approximately what space was available for rental purposes, and in the early negotiations leading to the lease in question he states that he represented the area available as being roughly 6,600 square feet. He had in mind the renting of open floor space, not knowing how the respondent intended to divide it, if negotiations ended in a lease. Both floor spaces were then open; later they were partitioned by the petitioner in accordance with specification furnished by the respondent. A difference of opinion as to the precise superficial area to be demised soon arose. On September 8, 1926, Mr. Parkinson wrote the Deputy Minister of Public Works, that he had learned from Mr. Rogers, one of the officers of that Department, that he (Rogers) had in his calculation of the floor space area to be leased

disallowed us the space required for a hall running from the hall adjoining our elevator to certain private offices at the south end of the building. We are not prepared to make this allowance inasmuch as the hallway in question is for the sole use of the Department of Agriculture and was created by the erection of partitions following the taking over of the floor and is not necessary except as a matter of privacy in reaching the offices in question.

This referred to the third floor and a somewhat similar question was raised as to the second floor. The measurements of the space to be rented, the lease and the plans

accompanying the same, were evidently made and prepared by the officers of the respondent without consultation with the petitioner. From correspondence put in evidence I would conclude that the question of the proper measurement of the space to be rented was again the subject of discussion between representatives of the parties at the time of the execution of the lease. Evidently an understanding was reached concurrently with the execution of the lease that the passage of another Order in Council should be requested, revising the precise area to be leased as mentioned in the Order in Council of August 29, because, on the day of the execution of the lease, Mr. Parkinson wrote the Deputy Minister of Public Works as follows:

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With reference to lease executed by us this morning in accordance with the decision reached by yourself, Mr. Rogers and myself, we would request that at as early a date as possible the necessary additional Order in Council be passed providing for the discrepancy in space in relation to the area allotted to the passageway on the third floor and any further difference which may be determined on the total floor areas after discussion by Mr. Rogers and our architect, Mr. Burgess.

On the 16th day of September, the Deputy Minister of Public Works wrote Mr. Parkinson acknowledging receipt of his letters of the 8th and 11th of September, and further stating:

I have had an officer of this Department confer with your Architect and the space has been remeasured and the passageway on the third floor included in the area as occupied by the Agriculture Department. The figures as agreed upon by your Architect and our officer are as follows:

	sq. ft.
Second floor	3,195
Third floor	3,417
	<hr/>
Total	6,612

This would mean a difference of 695 sq. ft. and at the same rate, i.e., 96 cents per square foot would be an additional amount of \$667.20 per annum. The leasing of this additional space is being given attention and as soon as authorized you will be advised.

On September 24 the Assistant Chief Architect of the Department of Public Works wrote the petitioner that "an amending Order in Council has been passed providing for the increased area required, viz., 6,612 sq. ft., the annual rental in payment thereof to be \$6,347.52." The Order in Council in part recites:

That the area required was incorrectly measured, and on remeasurement by an Officer of the Department it has been found that the space

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needed is as follows, as explained in the accompanying report of the Assistant Chief Architect,

	sq. ft.
Second floor	3,195
Third floor	3,417
	<hr/>
Total	6,612

That the Assistant Chief Architect of the Department of Public Works, with the concurrence of the Deputy Minister, advises that the above mentioned Order in Council be amended so as to provide for the increased area required, viz: 6,612 sq. ft. the annual rental in payment therefor to be \$6,347.52.

The Minister, therefore, recommends that authority be granted accordingly.

It was on September 28 that an Order in Council was passed rescinding this amending Order in Council as well as that of August 26.

Adverting now to the facts I have earlier stated. It is hardly open to serious contention, I think, that the petitioner was a consenting party to the vacation of the lease by the respondent, or in any way agreed to accept a surrender of the demised premises or to relieve the respondent from his covenants to be performed under the lease. The petitioner accepted the keys from the respondent after vacating the premises, but it is agreed that this of itself is not sufficient evidence of an acceptance of the surrender of the premises by the lessor; and there is ample authority to that effect. There is not a single element in the case, I think, to support the contention that in fact or in law the petitioner released, expressly or impliedly, the respondent from his covenants under the lease; nor is there anything in the way of conduct on the part of petitioner which might constitute eviction of the lessee, or waiver or rescission of the contract. To constitute an eviction at law the lessee must establish that the lessor without his consent and against his will wrongfully entered upon the demised premises and evicted him and kept him evicted. See Smith J. in *Baynton v. Morgan* (1). In *Walls v. Atcheson* (2) the Lord Chief Justice stated that the lessor ought to have given the lessee, the defendant, notice of her intention to let the apartments on account of the defendant; in *Crozier v. Trevarton* (3) Boyd C. stated that the plaintiff might have preserved his claim under the defendant's lease had

(1) (1888) 21 Q.B.D. 101, at p. 102. (2) (1826) 3 Bing. 462.

(3) (1914) 32 O.L.R. 79.

he notified the defendant, the lessee, that he was reletting on the former tenant's account. In the present case the petitioner made it quite clear that it intended to hold the respondent liable upon its covenants for the full term of the lease, and that any reletting of the premises would be on behalf of the respondent "in order to reduce the lessor's claim under the lease;" that is, I think, conclusive upon this phase of the case.

If one of two parties to a contract breaks the obligation which the contract imposes, a new obligation arises, a right of action conferred upon the party injured by the breach. Here, the respondent expressly repudiated his contractual obligations by renouncing his liabilities under it in a very formal way, that is, by rescinding the Order in Council authorizing the contract and without which the contract could not validly have been made, and then vacating the premises. Though the contract was unequivocally renounced by the respondent, that of itself did not put an end to the contract, because one party to a contract cannot alone rescind it; but the respondent by wrongfully renouncing the contract, entitled the petitioner, if it so chose, to treat the renunciation as putting an end to the contract, subject to the retention of the right to bring an action upon it for the damages sustained in consequence of the breach of it. That was what the petitioner did. The law upon breach of contract by repudiation and its consequences was carefully discussed by Collins M.R. in *Michael v. Hart & Co.* (1), and by Esher M.R., in *Johnstone v. Milling* (2). I would refer also to *Hochester v. De-La-Tour* (3); *Baynton v. Morgan* (4); *Rhymney Railway Co. v. Brecon and Merthyr Tydfil Railway Co.* (5); *Planche v. Colburn* (6); and *Fitzgerald v. Mandas* (7). But a man whose contract has been broken must act reasonably and if he has the opportunity of mitigating the damages which the breach of contract has caused or is likely to cause him, it is his duty to take it; it is a question of fact and not of law, in each case, if he has acted as a reasonable man might have been expected to act. See *Payzu v. Saunders* (8) and the author-

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(1) (1902) 1 K.B.D. 482.

(5) (1900) 49 W. Rept. 116.

(2) (1886) 16 Q.B.D. 460.

(6) (1831) 8 Bing. 14.

(3) (1853) 2 E. & B. 678.

(7) (1910) 21 O.L.R. 312.

(4) (1888) 21 Q.B.D. 101 and 22

(8) (1919) 2 K.B. 581.

Q.B.D. 74.

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ities there cited. It cannot here be said that the petitioner acted in an unreasonable way; it notified the respondent that it would relet such of the premises as it could on account of the respondent in mitigation of damages, and this it did. Broadly, in my opinion, the petitioner is entitled to succeed in its claim for damages for breach of contract. There are however two other matters which require some discussion.

Counsel for the respondent contended at the trial that the petitioner could not, in any event, recover rental upon the additional area authorized by the amending Order in Council, because no formal contract or writing embodying this change in the area rented, was entered into between the parties. It is not claimed that there is no writing to satisfy the Statute of Frauds, but it is urged that section 18 of the Public Works Act, Chap. 166, R.S.C., 1927, is a bar to this portion of the petitioner's claim. That section reads:

No deed, contract, document or writing in respect of any matter under the control or direction of the Minister shall be binding on His Majesty or be deemed to be the act of the Minister, unless the same is signed by him or the Deputy Minister, and countersigned by the Secretary of the Department or the person authorized to act for him.

While it must be conceded that formal compliance with the requirements of this section of the Act is necessary to entitle the petitioner to a remedy in the courts for a breach of any written contract within the purview of this section, yet, the very fact that the situation between the petitioner and the respondent is one of contract enables the Court to grant relief, which, if not granted would result in injustice to the petitioner. It is now a well established principle of law that a petition of right will lie against the Crown for the recovery of damages for breach of contract. It follows therefore that in matters of contract the legal rights and liabilities of the Crown are substantially the same as those arising between subject and subject. In an action between subject and subject, upon the identical facts established in this case, I apprehend there would be no hesitation by the Court in directing a rectification of the contract so as to make it conform to the agreement of the parties. Here there was a written contract, but as it stands, it does not express the agreement of the parties; it is agreed wherein

the contract should be altered so as to express the complete agreement of the parties. I am of the opinion that the suppliant is entitled to a rectification of the lease in question, so that the real intention of the parties with regard to the exact area or portion of the building demised to the respondent, will be effected. I therefore declare that the petitioner is entitled to have the indenture of lease in question rectified, that is to say, by striking out the exact number of square feet demised as stated in the lease, and substituting therefor the number of square feet mentioned in the amending Order in Council, and by making the necessary alterations in the amount of the annual rental consequent upon the change in the area demised. At the trial it was agreed that the petitioner have leave to amend its pleadings, claiming rectification of the contract, and this amendment has been made; the amended plea is not however quite correct in that it does not claim rectification of the lease in respect of the vital matter, that is to say, the area of floor space demised or intended to be demised; I shall however consider that as done and the pleadings so amended in this respect so as to meet the facts disclosed at the trial.

There remains one further point for consideration. The petitioner claims by way of damages an amount equal to interest at five per cent upon matured rentals after deducting rentals received from reletting, and upon balances estimated in the same way for the remainder of the term. If money is payable upon a fixed date and is not then paid but has been wrongfully detained, the person who has not received the same has suffered damage in that he has for the time being lost the use of that money. To that extent he is less well off than if the contract had been performed, as was stated by Riddell J., in *Fitzgerald v. Mandas* (1). The rule of law is, that if a person sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position with respect to damages, as if the contract had been performed. In the circumstances of this case it would appear to me to be oppressive if damages by way of interest should not be allowed for the wrongful detention of the rentals as they matured, subject to the

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deductions mentioned, and I can conceive of no more reasonable or just method of assessing such damages than upon the basis of an interest charge upon moneys so wrongfully detained, and at the statutory rate. In *Watkins v. Morgan* (1), interest was allowed by way of damages in an action upon a contract to pay money on a particular day. See also *Atkinson v. Jones* (2); and *Price v. Great Western Railway Co.* (3). In respect of this particular claim for damages, which I allow, I think, the same should be reached by deducting from the matured rentals the amounts received in the same period from reletting to other tenants, and then by calculating interest on such balances at the rate of five per cent up to the date when judgment is entered. In respect of maturing rentals, the damages should, I think, be computed upon the basis of the present worth of such maturities after deducting the estimated rentals to be received from reletting, as of the date when judgment is entered.

The petitioner, in its particulars of damages, credits the respondent with rentals received from reletting to other tenants, and for the remaining portion of the term it estimates such credits upon the basis of rentals now being received. This was not objected to by counsel for the respondent, and is, I think, eminently just and not unfavourable to the respondent.

The petitioner is entitled to a declaration that the indenture of lease in question be rectified in the manner already stated and that the same be valid and effectual between the parties as and from the date of the execution of the same. There will be judgment for the petitioner for the amount sued upon, less the amount claimed for the cost of partitioning the floor space and which claim was at the trial abandoned; and to that there will be added a further sum for damages by way of interest, to be calculated upon the basis already explained. The petitioner will have its costs of action.

Judgment accordingly.

(1) (1834) 6 C. & P. 661.

(2) (1835) 2 Ad. & El. at p. 444.

(3) (1847) 16 M. & W. 245 at p. 246.

QUEBEC ADMIRALTY DISTRICT

1930
Sept. 26.

REDERIET ODFJELL A/S PLAINTIFF;

VS.

STEAMSHIP VESUVIO DEFENDANT.

AND

SOCIETA ANONIMA PER L'INDUS-
TRIA E IL COMMERCIO MARI-
TIMO } PLAINTIFF;

VS.

STEAMSHIP OLDER DEFENDANT.

*Shipping and seamen—Collision—Negligence—Signals—Navigation—Har-
bour—Weight of evidence.*

A collision occurred between the *O.* and the *V.* on the 20th of September, 1928, at 10.15 a.m., in the channel of the St. Lawrence River, in the Harbour of Montreal, a little below gas buoy 194M. The weather was fine and clear, with a light northeast breeze, and with a current of between 3 and 4 knots. The *V.* was proceeding up the channel, on the north side, and the *O.* was coming down on the south side. On reaching buoy 193M. the *O.* turned to cut across the current to her berth at the upstream side of Laurier Pier. The *V.* observing the *O.* turning around buoy 194M., her bow getting abreast buoy 195M. into the channel, gave a signal of five blasts, with the order to stand by, followed by order of slow astern on the engine. The *O.* held her course across the channel and shortly after gave a signal of two blasts. Thereupon the *V.* replied by three blasts and put her engines full speed astern. The collision occurred shortly after, both vessels being on the north side of the channel, about 200 feet below buoy 194M., the *V.* then having no way upon her. When the *O.* was between buoy 195M., and 193M., she saw the *V.* leaving her dock, and saw her coming up, before she (*O.*) made her turn of buoy 193M., and when the five-blast signal was given, the *O.* could have reversed in time to allow the *V.* to pass. The master was not on the bridge.

Held, that, under the circumstances, the *O.* was guilty of negligence in not signalling before turning in to the channel at buoy 193M., and in attempting to cross the bow of the *V.* contrary to the rules of good seamanship, and was solely to blame for the collision.

- (2) That the five-blast signal does not necessarily mean that there is actual danger. It may mean a signal of attention, and the *O.* receiving this signal was bound by rules 21, 22 and 23 to avoid the *V.* and to go astern.
- (3) That as ships turning below buoy 193M. may be going to Laurier Pier or Tarte Pier, the *V.* was therefore justified in expecting the *O.* to pass astern and when the *V.* became uncertain of the *O.*'s movements the five-blast signal was the proper signal to give.

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(4) That the evidence of those on the ship who are responsible for its navigation, as to the signals given, is of greater weight with the court than that of outsiders who had no special reason to note the signals given.

ACTION and counter action to recover damages due to collision between the *Vesuvio* and the *Older*.

The actions were tried before the Honourable Mr. Justice Demers, Local Judge in Admiralty for the Quebec Admiralty District, at Montreal.

Lucien Beaugard, K.C., for the SS. *Vesuvio* and her owners.

R. C. Holden for the SS. *Older* and her owners.

The facts are stated in the reasons for judgment.

DEMERS L.J.A., now (September 26, 1930), delivered judgment.

These cases have been united for proof; hearing and judgment, and by consent have been submitted upon the evidence taken before the Wreck Commissioner, and also some evidence before the Court which will be referred to later on.

It appears that the collision between the *Older* and the *Vesuvio* occurred on the 20th of September, 1928, at 10.15 a.m., in the channel of the River St. Lawrence, in the harbour of Montreal, a little below gas buoy 194M.

There was a light northeast breeze. The weather was fine and clear. There was a current of about three to four knots.

The contention of the *Older* is as follows:

The *Older* was laden with grain and was proceeding down the Harbour towards a berth at the upstream side of the Laurier pier. As is customary for canal size vessels coming down and intending to cross to that berth, the *Older* came down outside and just to the southward of the line of buoys marking the south side of the channel, and on reaching buoy 193M her helm was put hard to starboard and she turned to cross the current and make her berth in the usual manner. The *Vesuvio* was manoeuvring off the end of the Laurier and Tarte piers, with the assistance of tugs, and after the *Older* had turned the *Vesuvio* got under way and started up the harbour. The *Older* gave a signal of two short blasts, and expected that the *Vesuvio* would answer with two blasts and would direct her course to port, but the *Vesuvio*, without giving any signal to indicate that she was doing so, put her helm to the right. Owing to the *Older's* position and the great strength of the current, which she was then partially stemming, there was nothing the *Older* could do except

keep her helm hard to starboard and keep on at full speed, with a view to getting out of the way. The *Vesuvio* could and should have avoided the collision, but she came on and struck the *Older*.

On the contrary, the collision is explained by the *Vesuvio* as follows:

As the SS. *Vesuvio* was proceeding forward along the channel, and on the north side, the SS. *Older*, which had been proceeding in the opposite direction south of the channel, was observed turning around Buoy 194M, and as her bow was getting abreast with Buoy 195M into the channel a danger signal of five blasts was given by those on board the SS. *Vesuvio*, and the order was given stand-by followed immediately by the order slow astern on her engine and the helm to the right so as to keep the vessel heading in the current straight up the river on her course. The SS. *Older* held her course towards and across the channel, and shortly after she gave a signal of two blasts. Immediately upon hearing the SS. *Older's* signal of two blasts the SS. *Vesuvio* immediately replied by three blasts and her engines were put full speed astern and her helm kept hard to the right to keep her straight. The SS. *Older* kept crossing the channel at right angles and crossing the SS. *Vesuvio's* bow, and shortly after the last signal had been given the collision occurred, both vessels being on the northern side of the channel and about 200 feet below Buoy 194M; the SS. *Vesuvio* having at the time of the collision no way upon her.

I am of the opinion that the version of the *Vesuvio* as to the signals is the correct one. She gave the five-blast signal first and the *Older* replied by two blasts and immediately after the *Vesuvio* replied by three blasts.

The *Vesuvio* on this point is corroborated by the Pilot of the *Older* who says that after his two blasts, he heard only the three-blast signal.

It is true that some disinterested witness brought before me, more than a year after, bring evidence favourable to the *Older's* contention, but one must not forget that the first question as to the credibility of witnesses is—who was in a better position to know? Evidently those who had the responsibility of the ships, not those who came before the Court over a year after and who had no special reason to remark the signals.

It is also to be noticed that the evidence of the *Older's* crew as to the signal is admittedly of no value. On the contrary, the evidence of the *Vesuvio* is quite satisfactory and it should be adopted.

This five-blast signal, as it has been often decided, does not necessarily mean that there is actual danger. It may mean and it meant, in my opinion, a signal of attention. After that signal, the *Vesuvio* kept her course and her engines were checked to slow speed. At that time, the

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1930 *Older*, receiving such a signal, was bound by Rules 21, 22
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Ships turning below buoy 193M may intend to go to Laurier pier or Tarte pier; so that the *Vesuvio* at first evidently expected the *Older* to pass astern, and the moment she became uncertain, she gave the five-blast signal, and it was the proper course to do.

That was, in the opinion of the Assessor and in my opinion, the only thing to do.

Marsden on Collisions, page 303, says:

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If a ship sees another in a position that may involve risk of collision, but is unable to make out what course the other is on, she should keep her course, and not alter her helm, or take decisive step until she has ascertained the other ship's course.

The *Older*, against all rules of good seamanship, undertook to cross in front of the ascending ship without any regard for the other. Instead of obeying the signal of the *Vesuvio*, she continued at full speed. She contends that it was the only thing she could do to avoid the collision.

I quite agree that, after the three-blast signal of the *Vesuvio*, such was the position. At that moment, the accident was inevitable, but that was not the condition of affairs when the five-blast signal was given.

It must be added also that the *Older* previously had been very negligent. She was between buoy 195M and 193M when she saw that the *Vesuvio* was leaving her dock, and she saw also that the *Vesuvio* was coming up before making the turn of buoy 193 and she should have signalled before.

It is not to be denied that before starting to make the turn, she did not ascertain the position of the *Vesuvio*, that she recklessly attempted to cross in front of the ascending ship without any regard for direction. When she took particular notice of the *Vesuvio*, she kept on turning and later on crossing at full speed.

There is no doubt that the ship was navigated carelessly. The Master was not on the bridge and the Pilot was not attending, and when she received the five-blast signal, she could have reversed in plenty of time to have allowed the *Vesuvio* to pass up the river; then she could have proceeded to the intended berth in safety.

The faults of the *Older* cannot be denied.

We have to examine now what was the conduct of the *Vesuvio*.

It has been argued that the *Vesuvio* violated Rule and Regulation 11 for the River St. Lawrence, and at the argument it was pointed out that this accident occurred in St. Mary's current, then the *Vesuvio* was obliged to stop and that the *Older* had the right of way.

It is not proved that this accident occurred in St. Mary's current. On the contrary, map 1 shows that St. Mary's current is above this place at a narrow passage opposite St. Mary's Ward and Ile Ronde, but this collision occurred opposite Hochelaga wharf, and I see on the map also that the river is far wider at that place.

By the evidence also it is clear that the *Vesuvio* was navigated with care and prudence after giving the five-blast signal, and checked to slow speed. Seeing that the *Older* proceeded on her course, she blew three blasts and her engines were put full astern; being a left-handed propeller ship, if she had reversed sooner than she did after the attention signal was blown, she would have sheered slightly to the left and possibly have been nearer to the *Older* at the time of the collision.

It is proved that the ship was stopped over the ground at the moment of the accident.

The most serious reproach to be made to the *Vesuvio* is that she did not drop her anchor.

It is not proved that by the dropping of the anchor the collision would have been avoided or minimized, and my Assessor is of the opinion that the dropping of the anchor of the *Vesuvio* could not have helped to avoid the collision, as the anchor would not have had the chance to lead in the proper direction to do any good, to either stop the *Vesuvio* or keep her head in one direction.

Under the circumstances, the faults of the *Older* are clear; she having violated all rules of navigation. If there was a doubt, it was as to the dropping of the anchor, and the *Vesuvio* should have the benefit of the doubt. *Bryde v. Canadian Pacific Ry. Co.* (1)

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(1) (1913) Can. Rep. (A.C.) 472.

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For these reasons, the action of the Societa Anonima Per L'Industria E Il Commercio Maritimo against the steamship *Older* shall be maintained, and the action of the Rederiet Odfjell A/S against the steamship *Vesuvio* shall be dismissed with costs against the *Older*, and the Rederiet Odfjell A/S, and the same shall be referred to the Registrar for assessment of damages.

Judgment accordingly.

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HENRY GLASS & COMPANY.....PLAINTIFF;

vs.

1930
 Sept. 22, 23.
 Sept. 26.

THE HAMPTON MANUFACTURING }
 COMPANY LIMITED } DEFENDANT.

Trade-Marks—Specific Trade-Marks—Expunging—“Calculated to deceive.”

Plaintiff's trade-mark consisted of the words "Peter Pan" with a representation of Peter Pan, used in the sale of "woven piece goods," and defendant registered a trade-mark consisting also of a representation of Peter Pan, with the words "Genuine Peter Pan Garments," to be applied to "Ladies', Misses' and Children's Ready-to-Wear Garments."

Held, that while the Trade-Mark and Designs Act permits registration of a specific trade-mark, and without there being any provision for the classification of goods, nevertheless trade-marks resembling one another should not be registered for different classes of goods, if the result of the junior registration "be calculated to deceive or mislead the public"; and that, in consequence, defendant's trade-mark should be expunged, notwithstanding it was applied to garments only whilst plaintiff's was applied to piece goods.

ACTION by plaintiff herein to have the specific trade-mark of the defendant expunged.

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

G. E. Mabee for plaintiff.
W. A. Merrill for defendant.

The facts are stated in the Reasons for Judgment.

THE PRESIDENT, now (September 26, 1930), delivered judgment.

The plaintiff is the registered owner of a specific trade-mark, consisting of the words "Peter Pan" together with "a representation of Peter Pan." The representation of Peter Pan is a youth, seated, with a palette in one hand and a brush in the other. This mark, which was registered in Canada in 1925, was intended to be used in connection with the sale of "woven piece goods." In practice the mark has been applied to a particular light cotton print fabric manufactured by the plaintiff in the United States, which is now being sold in quite substantial quantities in Canada, and which was also sold in Canada in substantial quantities prior to the registration of the defendant's mark. This particular class of woven fabric was and is being advertised in Canada in a substantial way under the trade name of Peter Pan, through the medium of journals circulating throughout Canada. When Peter Pan goods are sold by the plaintiff to persons proposing to manufacture the same into garments, it has been and is the practise of the plaintiff to supply such persons or concerns with an unregistered label bearing the words "Made of Genuine Peter Pan, Registered in the United States Patent Office. Guaranteed Fast Colors"; the label also contains the figure or representation of Peter Pan as shown in the application for registration, immediately above the words "Registered United States Patent Office." The labels thus supplied, are applied by the manufacturer to the garments made of the plaintiff's Peter Pan fabric. The defendant, prior to the registration of its trade-mark, which is the alleged infringing mark, manufactured and sold in Canada, garments made of Peter Pan fabric purchased of the plaintiff, and has at times used upon such garments the label I have just described. The plaintiff's trade-mark is not attacked in any way.

The defendant registered in Canada in January, 1927, as a specific trade-mark, to be applied, to "Ladies, Misses and and Children's Ready-to-Wear Garments" the words Peter Pan associated with a representation of Peter Pan as exemplified in a copy of such specific trade-mark annexed to the application for registration. This copy of the mark annexed to the application bears the words "Genuine" and "Garment"; these words are separated, the former

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being above the words "Peter Pan" and the latter below the same. These words superimposed upon the representation of Peter Pan, to the casual reader appears as "Genuine Peter Pan Garment", and are part of the defendant's registered trade-mark. The defendant's representation of "Peter Pan" is said to be an adaptation of the Peter Pan statue in Kensington Gardens, London, and in my opinion, for the purposes of this case, is not to be distinguished from the plaintiff's adaptation of the same statue, particularly because of the fact that the words "Peter Pan" are associated with the figure or representation of Peter Pan. The defendant's representation of Peter Pan differs somewhat from the plaintiff's in that the youth appears to be in a standing position and playing upon a pipe, as he is represented in the famous statue in Kensington Gardens.

It has, I think, been sufficiently established by the evidence that the words "Peter Pan" accompanied by a representation of Peter Pan, when applied to a particular class of cotton print goods, denotes in Canada a certain fabric or class of cotton goods manufactured by the plaintiff. In fact these goods are sold only under the name of Peter Pan, the maker's name not appearing anywhere on the goods as sold. As already stated, the plaintiff has adopted the practise of supplying to purchasers of its Peter Pan goods and who intend to convert the same into women's or children's garments, with labels, to be attached to such garments for the purpose of representing that the same are "Made of Genuine Peter Pan"; the label, I should also say, bears the plaintiff's representation of Peter Pan, in other words, the label bears the plaintiff's full trade-mark, in order to indicate that the garment is made of the plaintiff's fabric Peter Pan. The defendant sells garments made of material, other than the plaintiff's Peter Pan, and thereto it affixes its trade-mark printed upon a small piece of cotton. There is nothing so far as I know which prevents the plaintiff supplying to garment manufacturers, using its product, the label which I have described, in fact such manufacturers could, I think, do so themselves without the plaintiff's authorization.

The Trade-Marks Act states that a trade-mark may be refused registration, if it "is calculated to deceive or mis-

lead the public." I think the defendant's mark attached to garments, is likely to be construed by the public as representing that such garments are made of the plaintiff's material, "Peter Pan," and which material or fabric has become known in Canada as Peter Pan, the plaintiff's manufacture. "Genuine Peter Pan Garment," the words prominently appearing in the defendant's registered mark, might easily, I should say, be understood by the public to represent that the garment is made of Peter Pan material, and this they would associate with the manufacture of the plaintiff. It may be said that the words "Genuine" and "Garment" should be read together, and apart from the words "Peter Pan." It is however, more easily open to the other reading, and I am inclined to the view that the public generally would read the words as "Genuine Peter Pan Garment." At least the words are very liable to be read in that way, and if so, the same is calculated to mislead the public. It was said, I think, that the defendant does not now employ the words "Genuine" and "Garment" in the use of its registered trade-mark. That, in my opinion, is no answer to the plaintiff's claim that the mark as now registered should be expunged; as it now stands registered the two words "Genuine" and "Garment" form part of the mark, and the defendant might revert to their use at any time upon the ground that they are a part of its registered mark. The elimination of these two words in the present use of the defendant's registered mark may minimize the danger of misleading the public, but I do not think it wholly removes the objection to the mark. I very strongly suspect that when the defendant first designed its mark and as later registered, it had then in mind the use only of the plaintiff's Peter Pan goods in the making of garments to which this mark was to be applied. The sketch of the mark accompanying the application for registration, in my opinion, strongly suggests this.

Evidence given by a representative of an independent business concern of Toronto, Nesbit, Auld & Co., wholesale distributors of women and children's ready-made garments, would indicate that the public do in fact associate the mere name, of "Peter Pan", when applied to ready-made cot-

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ton print garments, whether made by the defendant or by others, with the plaintiff's Peter Pan fabric. The plaintiff advertises very extensively that Peter Pan fabrics are "guaranteed fast colour fabrics", and the labels attached to garments made of Peter Pan material, as already explained, contain the words "Guaranteed Fast Colours". Nesbit, Auld & Co. sell in Canada in substantial quantities certain garments made of the plaintiff's Peter Pan. Persons in Canada have made demands upon them under the advertised guarantee, upon the ground that garments they had purchased and bearing the mark "Peter Pan"—but not made of the plaintiff's Peter Pan—had faded. Whether such garments were those of the defendant's make matters little, the point is, that such purchasers were misled into the belief that the garments were made of the plaintiff's Peter Pan goods. This evidence seems to furnish very strong proof of the fact that confusion is likely to arise in the mind of the public where the word mark "Peter Pan", with or without the representation of Peter Pan, is attached to ready-made garments not made of the plaintiff's Peter Pan goods.

But the defendant says: "our mark is not only different in get up from the plaintiff's, but is applied to garments only, whereas the plaintiff's is applied only to woven fabric." While the Act permits the registration of a specific trade-mark and without there being any provision for the classification of goods, still, I think, that the same mark, or marks resembling one another, should not be registered even for different classes of goods if the result of the junior registration "be calculated to deceive or mislead the public." That, I think, is the fact in this case, and that, I think, was not contemplated by the Act. In England, where goods are divided into classes for the purposes of registration, it has been judicially stated that too much stress must not be laid on the classification of goods in determining whether two sets of goods are of the same description. *The Australian Wine Importers Case* (1). On the other hand, there may be an intimate connection between two different sets or classes of goods, and the trade-mark used in connection with each of them may be so de-

signed and used as to mislead the public; in such a case one or the other should go. In this case, there is a very intimate connection between "Peter Pan" fabric, and "Peter Pan" garments.

The defendant contended also that the plaintiff acquiesced in the registration of its mark. I cannot make this deduction from the documentary evidence produced relative to this point, in fact, the inference I draw from this evidence is the very reverse. The defendant, in good faith, may have drawn the inference of acquiescence from the correspondence which passed between it and the plaintiff, but that inference rests on rather flimsy ground, and importance cannot, I think, be fairly attached to it. Acquiescence in a case of this kind, should be reasonably clear. It is improbable that the plaintiff would have agreed to the defendant using its mark, or anything resembling it, for use in the sale of garments not made from its Peter Pan goods. In any event the public interests are to be protected, and that, in my opinion, can only be done by expunging the defendant's mark. If this proceeding be regarded more in the nature of a passing off action than one of mere infringement, my conclusion would be the same. Jurisdiction in respect of a passing off case is, I think, given to the Court under the provision of Sec. 3, Chap. 23 Statutes of Canada, 1928.

The plaintiff is therefore, in my opinion, entitled to the relief claimed, reserving however, until the settlement of the minutes, the plaintiff's claims, 9c and 9d, as appearing in paragraph 9 of its statement of claim, to be then spoken to before me. In the circumstances of this case, I trust it will not be necessary to mention these two matters. Claim 9c should, I think, be disallowed if the defendant's mark may be removed from any goods unsold and in its possession. Without prejudice, I might now intimate that I do not think damages or an account of profits should be allowed, but if any, nothing but a mere nominal amount. The plaintiff will have its costs of action.

Judgment accordingly.

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 Oct. 15.

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF;

AND

JOSEPH J. BERUBE AND WIFE.....DEFENDANTS.

*Expropriation—Market value—Purchase price—Evidence of market value*

*Held*, that, although under certain circumstances, the price paid for land cannot properly be taken as the market value thereof, nevertheless, where a careful purchaser, not obliged to buy, parts with his money, without pressure or inducement from the owner, willing but not obliged to sell, and after carefully considering the matter, and more especially the special advantages the land in question offered for the carrying on of the business he proposed to start, then the price so paid is cogent evidence of market value.

INFORMATION exhibited by the Attorney-General of Canada to have certain lands expropriated by the Crown valued by the Court.

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

*J. T. Hebert* for plaintiff.

*A. J. Dionne* and *A. M. Chamberland* for defendants.

The facts are stated in the reasons for judgment.

AUDETTE J., now (October 15, 1930), delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, among other things, that certain lands, therein described and belonging to the defendants, were expropriated by the plaintiff, for the purpose of a public works of Canada, i.e., a right of way for a spur line of the Canadian National Railways, at Edmundston, in the county of Madawaska, N.B., by depositing, on the 9th November, 1920, a plan and description of such lands in the office of the Registrar of Deeds for the said county where the lands are situated.

The lands taken consist of lot 9, 100 x 100 feet, and lot 11, 50 x 50 feet, for which the plaintiff, by the information, offers \$730.65 including all damages resulting from the expropriation. The defendants, by their statement in defence, aver that the amount offered is inadequate and claim \$5,000 with interest and costs.

The defendants, on the 12th August, 1920, bought lot No. 9 (Exhibit B) for the sum of \$1,500; and on the 19th August, 1920, bought lot No. 11 (Exhibit A) for \$750—for which they then and there paid cash, without having any idea or knowledge of the expropriation, as established by the evidence.

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These deeds of purchase, exhibits A and B, forthwith give to the defendants

the privilege of right of way to and from the said described lands to Victoria street with free ingress, egress and regress to and for the said Joseph J. Bérubé and Euphémie Bérubé, their heirs and assigns and their tenants and undertenants with carts, vehicles, carriages, horse or cattle as to him or them shall be necessary and convenient in common with them the said Levite J. Cyr and Eva L. Cyr (the vendors) their heirs and assigns, tenants or undertenants, till the Town of Edmundston acquires the necessary lands for streets leading to the said land hereby transferred from the said Levite J. Cyr and Eva L. Cyr, their heirs and assigns.

This road or right of way is to serve both the defendants, their tenants and undertenants, as well as the vendors, their tenants and undertenants and the cost of this road and its maintenance would obviously have been shared between them, until the municipality had taken hold of it.

This question of road or right of way has been much debated at trial; but it has been established beyond peradventure by witnesses who knew the *locus in quo* in 1920—the year of the purchase and the expropriation—that there was at the time a road from these lots to Victoria street. As said by witness Ouellet, it was a farmer's road and it was the *exit* used by the people residing on the north of the Canadian Pacific Railway. People were using it all the time. This road is now partly covered by the extensive filling made by the railway; a filling which at some place is seven to eight feet in depth. Yet there are still some indications of it at places.

Now it will be seen that the amount offered by the plaintiff is much less than the amount actually paid by the defendants for these lots in 1920. The defendants' evidence as to value is that the price paid at the time is fair and just. Some of the defendants' witnesses testified they tried, without success, to purchase similar lots from the same vendors at the same prices and even higher. And the price paid is in no sense more than the price that legitimate competition of purchasers would reasonably force it

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up to. *Sidney v. North Eastern Ry. Co.* (1). And after all what is it the owner of these lots has lost? It is at least what he has paid for them. The basis of the compensation to be arrived at is the value of the land to the owner at the date of the expropriation. And the market price or value of the lands may be tested by the imaginary market which would have ruled had the land been exposed for sale. The defendants' evidence, however, is not shared by the three witnesses heard on behalf of the Crown. However two of these witnesses only saw the land a couple of years ago, when it was all covered by an extensive filling and one of them is the employee of the C.N.R. The third witness might have been influenced by the fact that he had been in litigation with the vendors. The weight of the evidence, as established by the numerous witnesses on behalf of the defendants, is preponderantly in favour of the defendants not to say any more with respect to the class of evidence heard on behalf of the plaintiff. The defendants' evidence is earmarked by a knowledge of the *locus in quo* before the expropriation, its environs and the business activities in the city.

The defendant Bérubé has some experience in business, has the necessary capital to carry on the business for which he purchased these lots.

It is true it may be that in certain circumstances the purchase price may not be the market value; but in a case like the present one, much weight must be given to the action of the defendant Bérubé when he parts with his money, after carefully considering the matter, and more especially to the special advantages these two lots afforded from their nature for the business he intended to carry thereon.

The eastern lot—No. 9—which was more on a level, he intended to use for firewood. Lot No. 11—the one closer to Victoria street—which was on a slope, he intended to use the lower part thereof for coal, using the balance for cement, lime, lumber, etc. The two lots are adjoining the railway and the unloading from the same would have been done with great advantage and financial benefit, saving heavy cost of hauling and second handling. The coal

could be unloaded from the cars through chutes down to the lower part of lot 9. It is said to be the most favourable site, for the purpose, in Edmundston.

Is not the fair market value of property the amount of money which a purchaser, like in the present case, willing but not obliged to buy, will pay to an owner willing but not obliged to sell, taking into consideration all uses to which the land can be adapted and might in reason be applied? *Nichols*, on Eminent Domain, 658.

Indeed for the special business purposes for which the defendants have purchased these lands, i.e., for coal, cement, contractors' supplies, fuel wood and lumber, the advantages resulting from the topography of these lots adjoining the railway, making them what is called track-age lands, would justify a prudent man in the position of the defendant to give this price rather than fail to acquire the land. Defendant Bérubé, heard as a witness, declared he would be willing to give a higher amount for similar lands, but the evidence does not disclose if any available. The land was not offered to him by the vendor, he went to him and asked him to sell.

The special suitability of the land for the business the defendant intended to carry on and the savings and additional profits which he would derive thereby, are essential elements in assessing compensation. *Pastoral Finance Association, Limited v. The Minister* (1). And the price of a piece or parcel of land may often be gauged by the need of the purchaser's business. *Nichols*, on Eminent Domain, 673.

The area taken is small. The lots are physically distinct and are independent parcels, standing by themselves. The ratio per acre payable as indemnity to the owner of a large tract of land, cannot be used as a criterion or as a test to arrive at the value of a small lot, much more so when the very site of the small lot is especially valuable from its special adaptability in carrying on a certain class of business, as the one mentioned in this case.

I have come to the conclusion that there is abundant evidence to support the view that the lands in question were at the time of the expropriation well worth at least the

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price paid for them by the defendants, namely \$750 for lot 11 and \$1,500 for lot 9.

Therefore there will be judgment as follows:

1. The lands expropriated are hereby declared vested in the Crown as of the 9th November, 1920.
2. The compensation for the lands so taken and for all damages whatsoever resulting from the expropriation is hereby fixed at the sum of \$2,250 with interest thereon at the rate of five per centum per annum from the 9th November, 1920, to the date hereof.
3. The defendants, upon giving to the Crown a good and satisfactory title, free from all mortgages, hypothecs, charges or encumbrances whatsoever, are entitled to recover from the plaintiff the said sum of \$2,250 with interest as above mentioned.
4. The defendants are entitled to the costs of the action.

*Judgment accordingly.*

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Sept. 17.  
Oct. 23.

HIS MAJESTY THE KING.....PLAINTIFF;

VS.

GEORGE W. RICHARDS ET AL.....DEFENDANTS.

*Crown—Land Patent—Cancellation—Soldier Settlement Act, 1919—9-10 Geo. V, ch. 71—Section 94 of Dominion Lands Act—Right of Attorney-General to take action.*

The Information exhibited herein seeks to have certain letters patent for land issued to Richards declared void as having been issued improvidently and in error. Some of the defendants oppose the cancellation of the said patent unless they be paid the advances made by them to R. in good faith, and for which they held liens duly registered as encumbrances against the said lands.

*Held* that this Court has jurisdiction to hear and determine the present action. (*The King v. Deacon*, 18 Ex. C.R. 308 referred to.)

2. That those provisions of "The Soldier Settlement Act" 1919 (9-10 Geo. V, c. 71) purporting to provide security to the Board without registration of said security and in priority to other bona fide creditors whose security has been registered are *intra vires* of the powers of the Parliament of Canada.
3. That sec. 94 of the Dominion Lands Act does not give the Minister of the Interior the exclusive right to institute such actions and does not take away the usual right and power of the Attorney-General to institute the same. That right is cumulative and may be exercised by either of them.

ACTION by the Crown to have certain Letters Patent for lands cancelled and annulled. Judgment was given against the grantee by default.

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The issues between the Crown and certain creditors contesting were tried before the Honourable Mr. Justice Audette at Calgary.

*C. W. Niblock* for plaintiff.

*J. J. Kelly* for defendants contesting.

The facts as agreed upon are stated in the Reasons for Judgment.

AUDETTE J., now (October 23, 1930), delivered judgment.

This is an information exhibited by the Attorney-General of Canada, on behalf of His Majesty the King, whereby it is sought, *inter alia*, to have certain letters patent respecting land declared void, as having been issued improvidently and in error, under the circumstances hereinafter mentioned. Furthermore praying

that all instruments or documents setting forth a claim as against the said land or any estate or interest on the part of the said defendants the Municipal District of Acadia No. 241 and Joseph Nels Anderson, or either of them are null and void and of no effect and are clouds upon the title of His Majesty the King, and that the same be, as to the said land, set aside.

On the 20th January, 1920, judgment by default was rendered against the added defendants Alice B. Richards, widow of the defendant George Wellington Richards, in her own behalf and as guardian of their infant children, declaring the letters patent issued to the late George Wellington Richards null and void and of no effect as against them.

A joint statement in defence on behalf of the Municipal District of Acadia, No. 241, and Joseph Nels Anderson, duly signed by same counsel appearing at trial, has been duly filed.

At the opening of the trial, as no one seemed to appear for the Municipal District of Acadia, in answer to the Court, counsel for the defendant Anderson declared he had no special instruction, on behalf of the Municipal District, but had been informed that the Crown, the Treasurer's Department of Alberta, had satisfied the Municipal District. However, counsel admitted he was acting for the Municipal

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District and that he had been served with both the information and notice of trial.

The following admission of facts has been duly filed at trial and reads as follows, viz:—

Audette J.

The following facts have been agreed to by the solicitors both for the Plaintiff and the Defendants, the Municipal District of Acadia No. 241 and Joseph Nels Anderson and are respectfully submitted for the consideration of this honourable court in determining the matters in question herein.

1. On the 17th day of February, 1912, the Defendant George W. Richards made homestead entry under the provisions of the Dominion Lands Act for the Northwest quarter of Section 35, in Township 24, and Range 1 West of the 4th Meridian in the Province of Alberta;

2. On the 30th day of June, 1919, and before the issue of letters patent for the said land, the Defendant George W. Richards received from the Soldier Settlement Board of Canada an advance by way of loan of the sum of \$2,555, which said sum was so advanced to the said Defendant under the authority of The Soldier Settlement Act, being Chapter 71 of the Statutes of Canada, 1919;

3. In consideration of the said advance, the Defendant George W. Richards on the said 30th day of June, 1919, did execute and deliver to The Soldier Settlement Board of Canada an agreement or charge in writing whereby he agreed that until the repayment of the said advance, together with interest in the manner set out in the said agreement, the amount so advanced should be a first lien and charge upon the homestead and pre-emption of the said defendant, and that neither the said defendant, nor his heirs, executors, administrators or assigns, should be entitled to the issue of Letters Patent for the said lands until the said amount with all interest thereon should have been fully paid and satisfied, but that if His Majesty, or any of His successors, should see fit to issue Letters Patent for the said lands, the said amount should continue to be and remain a first lien and charge thereon.

4. The said agreement was, on the 29th day of July, 1919, duly registered against the said homestead of the defendant in the office of the Agent of the Dominion Lands at Calgary, Alberta.

5. On the 8th day of July, 1920, the Defendant Richards further charged his said homestead with repayment to the said Board of the sum of \$100 advanced to him by the said Board, and by the terms of the said charge agreed that the said advance should be a first lien or charge on the said land and that he should not be entitled to issue of Letters Patent for the said land until repayment of the said advance. Notice of the said charge was duly given to the Agent of Dominion Lands at Calgary, on or about the 17th day of July, 1920.

6. During the month of November, 1919, the said Defendant Richards made application for Letters Patent covering the said homestead;

7. On or about the 17th day of February, 1920, His Majesty in the right of the Dominion of Canada, having regard to the facts set forth in the first paragraph of the Information filed herein and His officers in that behalf overlooking the facts set forth in the second, third, fourth and fifth paragraphs of the said Information, issued a patent to the said George Wellington Richards for the lands described in the said first paragraph, which said patent was issued improvidently and in error, and on or about the 16th day of March, 1920, forwarded to the Registrar of the



South Alberta Land Registration District at Calgary and was registered by the said registrar in his office at Calgary aforesaid on the 23rd day of March, 1920, as No. 1683 C.V.;

8. On or about the 18th day of March, 1920, in good faith and having no knowledge of the facts as stated in Paragraphs 2, 3, 4 and 5 hereof the Defendant, the Municipal District of Acadia No. 241 on application having been made by the Defendant Richards, as provided for in the Municipal Districts Seed Grain Act of Alberta Chapter 3 of the Revised Statutes of Alberta, 1922, and by virtue of the powers granted to the said Municipal District under the said Act, through its officers supplied seed grain to the Defendant, George Wellington Richards, to the value of \$51.50 and \$173.70 and on or about the 10th day of May, 1920, caused two seed grain liens to be registered as Nos. 8011 CY and 8012 CY respectively in the Land Titles Office for the South Alberta Land Registration District at Calgary against the title to the land in question herein to secure payment to the said Municipal District of the said sums, no portion of which has been paid and the said liens still remain registered as encumbrances against the title to the said lands.

9. On or about the 20th day of September, 1920, the Defendant Richards applied to the Defendant, Joseph Nels Anderson, to purchase certain building materials on the said North West quarter of Section 35, in Township 24 and Range 1 West of the 4th Meridian and informed the said Joseph Nels Anderson that he had obtained patent to the said lands and that it was free from encumbrances with the exception of certain seed grain liens in favour of the Municipal District of Acadia No. 241 and certain unpaid taxes and the said Joseph Nels Anderson caused a search of the said title to be made which disclosed that the said title was as stated to be by the Defendant Richards, and relying on the then state of the title to the said lands and having no knowledge of the facts as referred to in Paragraphs 2, 3, 4 and 5 hereof and in good faith, the Defendant Joseph Nels Anderson, supplied material on credit to the Defendant, George W. Richards, to the value of \$505 and on the 24th day of September, 1920, caused a mechanics lien, pursuant to the Mechanics Lien Act of Alberta and as therein provided for, to be registered in the Land Titles Office for the South Alberta Land Registration District at Calgary as No. 1214 CO to secure payment of the aforementioned sum and the materials so supplied were used in the construction of a building on and which still remains on the said lands and no portion of the said sum of \$505 or interest thereon has been paid to the said Joseph Nels Anderson and the said lien still remains an encumbrance against the title to the said land.

10. The said advances made by the Soldier Settlement Board have not been repaid in whole or in part;

11. As a result of the improvident and erroneous issue of the said letters patent the liens of the Defendants, the Municipal District of Acadia and Joseph Nels Anderson are registered against the said land in the said Land Titles Office in priority to the charges made by the Defendant Richards against the said land in favour of the said board.

12. On or about the 5th day of April, 1922, the Defendant George Wellington Richards executed three separate mortgages in favour of the Soldier Settlement Board of Canada against the said lands under the Land Titles Act for the Province of Alberta for amounts then representing the total indebtedness of the said Richards to the said board, which said mortgages were registered in the Land Titles Office for the South Alberta Land Registration District at Calgary one on the 18th day of

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April, 1922, as No. 8043 CO and the other two said mortgages on the 27th day of April, 1922, as Nos. 8338 CO and 8339 CO by or on behalf of the Soldier Settlement Board of Canada and the said mortgages still remain encumbrances against the title to the said lands.

Agreed to and approved as to form.

It is admitted that the defendant George Wellington Richards was a returned soldier.

The Exchequer Court of Canada has ample power and jurisdiction to hear and determine the present issue and controversy for the reasons mentioned in the case of *The King v. Deacon* (1) and the cases therein cited.

The defendant contends that "The Soldier Settlement Act, 1919" (9-10 Geo. V, Ch. 71) is *ultra vires* of the Parliament of Canada, in so far as it purports to provide security to the Board without registration of the said security and in priority to other bona fide creditors whose securities have been registered (Par. 6 of Statement in Defence). Here again I must find, also for the reasons mentioned in the case of *The King v. Deacon* (2), that such legislation is within the power of the Parliament of Canada. See also *Veilleux v. The Atlantic and Lake Superior Railway Co.* (3).

Section 26 of The Soldier Settlement Act, 1919, reads as follows, viz:

Sec. 26. When a settler obtains Dominion Lands, whether by soldier grant or otherwise, and whether before or after having secured from the Board any advance pursuant to this Act, while there is owing by him to the Board any sum or sums of money as the result of any sale made to him by the Board, or otherwise by reason of the exercise by the Board of any of its powers under this Act, such sum so owing shall constitute a first charge on the lands so obtained and no patent shall be issued to such settler therefor until such sum or sums, with accrued interest, have been fully paid or repaid.

See also sections 33 and following.

Moreover, in the present case, it may be added that the defendant has contracted himself into this very obligation, recited in the statute, by the agreement (Exhibit No. 1) mentioned in paragraph 3 of the admission hereinbefore recited, whereby he acknowledges that the advances made to him *shall* be a first lien and charge upon his homestead and pre-emption. He further acknowledges thereby that

(1) (1919) 18 Ex. C.R. 308, at p. 319.      (2) (1919) 18 Ex. C.R. 308, at p. 317.

(3) (1910) Q.R. 39, S.C. 127.

he will not be entitled to the issue of letters patent until the full amount of the advances have been paid and satisfied.

Section 25 of the Dominion Lands Act (7-8 Ed. VII, Ch. 20) ceased to apply when the defendant entered into the agreement exhibit No. 1 and obtained advances under section 26 of The Soldier Settlement Act, 1919. He is now controlled and bound by the latter statute by the agreement.

Furthermore, the defendants contend that the present action should not have been instituted on behalf of the Crown by the Minister of Justice; but by the Minister of the Interior, resting his contention on section 94 (now 92 of R.S.C., 1927) of The Dominion Lands Act (7-8 Ed. VII, Ch. 20).

This section 94 reads as follows, viz:

94. Whenever letters patent, leases or other instruments respecting lands have issued through fraud, or improvidence, or in error, any court having competent jurisdiction in cases respecting real property in the province where the lands are situate may, upon action, bill or plaint respecting the lands, and upon hearing the parties interested, or upon default of the said parties after such notice of proceeding as the said court orders, decree or adjudge the letters patent, lease or other instrument to be void; and upon the filing of the decree or adjudication in the Department of the Interior at Ottawa, the letters patent, lease or other instrument shall be void; and if the letters patent, lease or other instrument have been registered in the registry office or the land titles office for the district in which the land described in the letters patent, lease or other instrument is situate, and if such letters patent, lease or other instrument have been adjudged void at the suit of the Minister he shall cause a copy of the decree or adjudication, certified to be a copy as provided by section ninety-eight of this Act, to be recorded forthwith in the said registry office or land titles office.

What this section actually says is nothing more than "if such letters patent, lease or other instrument *have been adjudged void at the suit of the Minister,*" etc., then certain procedure should be resorted to. It does not say that all such actions as those provided by the section shall be instituted exclusively by the Minister, who under the Act is the Minister of the Interior. That section cannot be constructed in any manner that would deprive His Majesty's Attorney-General of his established capacity as the legal representative of the Crown in the Courts. See Robertson, On Civil Proceedings, 9 *et seq.*

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 ———

Under our Canadian Act, Ch. 106, R.S.C., 1927, the duties of the Minister of Justice are clearly defined. And under section 5 thereof he is given the regulation and conduct of all litigation for or against the Crown. Moreover, he is entrusted with the powers and charged with the duties which belong to the office of the Attorney-General of England by *law or usage*, so far as those powers and duties are applicable to Canada.

Under Rule 2 of the General Rules and Orders of the Exchequer Court of Canada, "All suits on behalf of the " Crown in the interest of the Dominion of Canada are to be instituted by information filed in the name of the Attorney-General of Canada, etc."

In England, as set out in 7 Hals. 71, the King cannot appear in his own courts to support his interest, but he is represented by his attorney, who bears the title of His Majesty's Attorney-General; and that would also obtain in Canada.

The term "action" used in section 94 of the Dominion Lands Act, would in England, under the Rules of the Supreme Court, also include a proceeding by the Attorney-General formerly known as an information (1).

If there were ambiguity, in respect to this question, in the phraseology of section 94 of The Dominion Lands Act, which I find does not exist, it should be construed with reference to the existing state of the law. It is a fundamental rule of statute construction that Parliament must be assumed to have legislated with reference to the existing state of the law, and if there are no express words or necessary intention to the contrary in the enactment the existing law will only be taken to be changed in so far as is necessary for the efficient working of the Act. Consequently when a new jurisdiction is created, and there is no express or implied intention to supersede, by the new remedy, any remedy existing at the time of the passage of the Statute in question, the new remedy will be taken as an additional one to that already existing—in other words it would be a case of cumulative remedies. Lord Mansfield said in *R. v. Lordale* (2):

(1) (1907) 1 Hals. 3.

(2) (1758) 1 Burr. 447.

Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.

And see Maxwell, On Statutes, 7 Ed. 144.

But repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the statute-book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonant with the real intention.

It is sometimes found that the conflict of two statutes is apparent only, as their objects are different and the language of each is restricted, as pointed out in a preceding chapter, to its own object or subject. When their language is so confined, they run in parallel lines, without meeting.

Therefore I find that while section 94 of The Dominion Lands Act gives by implication the right, *with others*, to the Minister of Finance, to institute an action in such cases, that it does not take away the usual right and power of the Attorney-General to also institute such action. They both have the right to institute such action, the right is cumulative and may be exercised by either of them and I find that the present action is rightly instituted. This section 94 does not afford any ground for the contention that the action was wrongly instituted by His Majesty the King, on the information of the Attorney-General of Canada.

Therefore there will be judgment in the terms of the prayer of the information; but without costs to either party, as the circumstances of the case would not justify a condemnation for costs against either party.

*Judgment accordingly.*

CATHERINE SPOONER ..... APPELLANT;

VS.

MINISTER OF NATIONAL REVENUE. . . RESPONDENT.

1930  
Sept. 16.  
Oct. 23

*Revenue—Royalty—Income—Capital—Depletion or Depreciation—Section 5 of the Income War Tax Act, 1917*

The appellant sold all her right, title and interest in a piece of land, including the mines and minerals thereon, to an oil company for a certain sum in cash, plus certain shares in the company, subject to her reserving a royalty consisting of 10 per cent of all oils, etc., taken

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out. The Crown assessed the appellant, for the year 1927, for income tax, on the amount received by her in that year representing this ten per cent royalty. Hence the present appeal.

*Held* that such a royalty is a reservation, operating as an exception out of the demise, in favour of the vendor, of the profits derived from the working and development of the land sold and is in its very nature income, and could not, in any sense, amount to capital. It is variable in quantities and is properly taxable as income under the Income War Tax Act.

2. *Held*, further, that the statutory allowance for depletion or depreciation (Section 5 of the Act), should be deducted from the amount of the tax.

APPEAL by the appellant from the decision of the Minister assessing certain royalty or reservation.

The appeal was heard by the Honourable Mr. Justice Audette at Calgary.

*H. S. Patterson* for appellant.

*C. Fraser Elliott, K.C.*, for respondent.

The facts are stated in the Reasons for Judgment.

AUDETTE J., now (October 23, 1930), delivered judgment.

This is an appeal, under the provisions of The Income War Tax Act, 1917, and Amendments thereto, from the assessment of the appellant, for the year 1927, on her income received from the Vulcan Oils Limited, in the nature of ten per cent royalty of all petroleum, natural gas and oil, under the reservation mentioned in the deed of agreement hereinafter recited.

The question to be determined is whether such royalties are capital or income.

At the opening of the trial the parties filed the following admission of facts which reads as follows:

*Agreed upon by Counsel for the parties hereto.*

1. The Appellant in 1902 purchaser from the Canadian Pacific Railway the lands referred to in the hereinafter referred to Agreement along with other lands, the whole for the purpose of conducting ranching operations thereon. The Appellant was not and is not a dealer in or in the business of buying and selling oil lands or leases.

2. The Appellant was in 1927 and is now a resident in Canada.

3. The Respondent determined the income of the Appellant to be in the sum of \$9,570.41, being monies received as "Royalties" under the Agreement hereinafter referred to.

4. Vulcan Oils Limited was and is a Company incorporated on the 13th day of April, 1925, under the laws of the Province of Alberta, organized and operated for the purpose of drilling for and procuring the production and vending of oil.

5. That Vulcan Oils Limited and the Appellant entered into an Agreement dated the 15th day of April, 1925, a true copy of which has been filed with and forms part of the records of this Court.

6. That of the property referred to in the said Agreement the Appellant was the owner in fee simple except as to the coal therein and thereunder.

7. That in accordance with the said Agreement Vulcan Oils Limited entered upon the property as in the Agreement described and commenced the operations of drilling for oil with equipment and in a manner satisfactory to the Appellant.

8. That during the fall of 1926 Vulcan Oils Limited struck oil (as referred to in the contract) "in commercial quantities on the said lands."

9. A transfer of the petroleum, natural gas or oil has not been effected and the Appellant is still the owner in fee simple of the said lands except as to coal.

10. That due to the mining operations the whole of the oil produced in the year 1927, the year in question, was sold by Vulcan Oils Limited and out of the monies received from the sale of the oil (before the Company deducted expenses or made any reduction therefrom) one-tenth of the gross proceeds were paid over to the Appellant.

11. That the oil produced by Vulcan Oil Limited is not in fact physically divided by the Company, nor is it sold in two distinct portions of 90 per cent and 10 per cent, but the whole is handled in bulk. Vulcan Oils Limited never in fact delivered any of the actual oil to the Appellant, but has in fact delivered (as per the Agreement), "to the order of the said Vendor the royalties hereby reserved to the Vendor" (the Appellant), the delivery in fact being effected by payment in cash.

12. That the Appellant, or her Agent, has in fact from time to time entered upon and viewed the operations and workings of Vulcan Oils Limited as to the operations of the mining of oil on the property.

13. The Appellant upon entering into the said Agreement received the sum of \$5,000 in cash and 25,000 shares of Vulcan Oils Limited at a par value of one dollar each, as fully paid up and since the production of oil and the sale thereof has been receiving "royalties" under the contract.

This admission is a corrected one substituted for a former one to which was attached an exhibit, called transfer of land, and withdrawn from the record.

The deed of agreement (exhibit A) upon which these royalties are paid, reads as follows, viz:

AGREEMENT made in duplicate this Fifteenth day of April, 1925.

BETWEEN:

CATHERINE SPOONER of Vulcan, Alberta, hereinafter called the  
"Vendor"

OF THE FIRST PART,

AND

VULCAN OILS LIMITED of Vulcan, Alberta, hereinafter called the  
"Company"

OF THE SECOND PART.

WHEREAS the Vendor herein is the owner of the North West Quarter of Section Thirteen (13), Township Twenty (20), Range Three (3), West

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of the Fifth Meridian, including all mines and minerals thereon or under the said lands.

WHEREAS the said Catherine Spooner has agreed to sell to the Company herein the South twenty acres of the said Section thirteen (13), Township twenty (20), Range three (3), West of the 5th Meridian. Subject to the provisos, conditions, restrictions, stipulations and royalties hereinafter reserved.

NOW THEREFORE THIS INDENTURE WITNESSETH:

1. That the Vendor hereby sells, assigns, transfers, and sets over unto the Company, its successors and assigns, all her right, title and interest, in and to the following property; namely, the South twenty acres of the North West quarter of Section thirteen (13), Township twenty (20), Range three (3), West of the 5th Meridian, which includes all mines and minerals, on, in or under the said lands. Subject to the provisos, conditions and royalties hereinafter reserved.

2. The Company hereby agrees in consideration of the said sale to it, to pay to the said Vendor the sum of Five Thousand (\$5,000) dollars in cash upon the execution of this Agreement by the Company, and to issue to the Vendor or her nominee certificates of stock of the Company to the aggregate amount of twenty-five thousand shares of the par value of One Dollar each and the said shares shall be deemed to be and are hereby declared to be fully paid shares and not liable to any call thereon, and the holders of such stock shall not be liable to any further payment thereon.

3. The Company hereby further agrees in consideration of the said sale to deliver to the Order of the said Vendor the royalty hereby reserved to the Vendor, namely; ten per cent of all the petroleum, natural gas, and oil, produced and saved from the said lands free of costs to the said Vendor on the said premises. And the said petroleum, natural gas and oil shall be delivered under the instructions and upon the method decided by the Vendor, and the Company further covenants and agrees that it will deliver to the said Vendor the before-mentioned percentage of petroleum, natural gas and oil saved on the said land at least once in every thirty days and will not sell or remove any petroleum, natural gas or oil from the said premises until the said percentage or share thereof belonging to the Vendor shall have been delivered as aforesaid.

4. The Company shall keep or cause to be kept proper books of account at its registered office showing correctly the quantity of petroleum, natural gas, and oil produced from the said lands, and of all oil and gas taken away or removed therefrom and will from time to time on demand produce the said books of account and permit the said Vendor or her attorney or agent to inspect them and take extracts therefrom or copies thereof, and the Company will permit and suffer the Vendor, her attorney or agent at all times to enter upon the said premises for the purposes of inspecting the operations of drilling or pumping and working in any well or wells finished or in the course of construction on the said premises.

5. The Company covenants and agrees with the Vendor that it will proceed forthwith to obtain standard drilling machinery fully equipped and will commence drilling operations upon the said lands as expeditiously as possible, and to continue such drilling operations without interruption, except as may be unavoidable until oil and/or gas in commercial quantities is struck or to a minimum depth of 4,500 feet.



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6. Upon oil or petroleum being discovered the said Company hereby covenants and agrees to install and properly maintain the necessary machinery for pumping or procuring said oil or petroleum from the well or wells and delivering it in pipes, reservoirs or tanks and the said Company hereby agrees to carry on the operations of pumping or otherwise procuring the said oil or petroleum or gas from the said lands.

7. In the event of oil or gas being discovered in commercial quantities on the said lands the Vendor as part of the consideration for this Agreement, covenants to transfer to the said Company by good and sufficient transfer in fee simple the said twenty acres of land freed and discharged from all encumbrances and also shall transfer to the said Company by good and sufficient transfer in fee simple, freed and discharged from all encumbrances the South twenty acres of the North West Quarter of Section twenty-four (24), Township twenty (20), Range three (3), West of the 5th Meridian, and such transfers shall be completed and delivered forthwith after oil or gas is discovered in commercial quantities by the said Company, reserving always however to the Vendor the said Royalty of ten per cent of all petroleum, natural gas and oil in respect to the said South twenty acres of the N.W. ¼ of Section 13, Township 20, Range 3, West of the 5th Meridian, and also free access on and over all said lands described in this paragraph to an extent not exceeding three trails and the location of the said trails shall be selected by the Vendor.

8. The Vendor further covenants and agrees with the Company upon the request and at the cost of the Company to execute and do all such further assurances and things as shall reasonably be required by the Company, for vesting in it the property and rights agreed to be hereby sold and giving to it the full benefit of this Agreement.

9. It is further declared and agreed that these presents and everything herein contained shall enure to the benefit of and be binding upon the parties hereto, and each of their heirs, executors and administrators and successors and assigns, respectively.

IN WITNESS WHEREOF the Party of the First Part has hereunto set her hand and seal, and the Vulcan Oils, Limited, has hereunto affixed its corporate seal, attested by the signatures of its proper officers. \* \* \*

This grant of express liberty to work such property, upon the payment of a fixed sum of money, with the reservation that if oil or petroleum are discovered in commercial quantities, to pay a certain share of the profits derived therefrom, seems to present no ambiguity or difficulty. It is the usual reservation provided in such circumstances.

Reservations of royalties are found in almost all Crown grants; they are also found in most of the C.P.R. land sales. The rights or superiorities of the King thereunder are called royalties. The word royalty reserved to the landlord of mines is also thus called apparently in analogy to such superiorities of the Crown. Brown's Law Dictionary, 470.

And this secondary sense or meaning of the word "royalty" signifies in mining leases, that part of the Red-

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dendum clause, whereby certain profit is reserved and which is variable and depends upon the quantity of mineral gotten. Stroud, *Judicial Dictionary*, 2nd Edition, pp. 1772, 1688.

The word "royalty", as used in a gas lease, generally refers to "a share of the product or profit reserved by the owner for permitting another to use the property." *Indiana Natural Gas & Oil Co. v. Stewart* (1). The word "royalty" as employed in coal mining lease means the share of the profit reserved by the owner for permitting the removal of the coal and is in the nature of a rent. *Kissick v. Bolton* (2).

The royalty payable under the agreement in question in this case is in the nature of a reservation operating as an exception out of the demise. *The King v. The Inhabitants of St. Austell* (3).

This royalty, mentioned in the agreement, is a reservation, operating as an exception out of the demise, in favour of the appellant, of the profits derived from the working and development of this land and is in its very nature income and could not amount, in any sense, to capital. It is quite variable in quantities and is taxable as income under the Act. See 11 Hals. 219. See also 20 Hals. 559, 560, *Edmonds v. Eastwood* (4); *Commissioners of Inland Revenue v. Marine Turbine Co.* (5); *Commissioners of Inland Revenue v. Sangster* (6). That reservation of ten per cent in the agreement was never sold and never passed out of the hands of the appellant.

The oil and gas having been discovered in commercial quantities, the \$5,000 and the \$25,000 of paid up shares having been duly satisfied and moreover the royalties having already been paid the appellant is now bound by clause 8 of the agreement, exhibit A, which says:

8. The Vendor further covenants and agrees with the Company upon the request and at the cost of the Company to execute and do all such further assurances and things as shall reasonably be required by the Com-

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|--------------------------------------------------------|--------------------------------------|
| (1) (1910) 90 N.E. Rep. 384,<br>386; 45 Ind. App. 554. | (4) (1858) 2 Hurlstone & Norman 811. |
| (2) (1907) 112 N.W.R. 95, 96;<br>134, Iowa, 652.       | (5) (1920) 1 K.B. 193.               |
| (3) (1822) 5 Barn. & Ald. 693<br>(1821-22).            | (6) (1920) 1 K.B. 587.               |

pany, for vesting in it the property and rights agreed to be hereby sold and giving to it the full benefit of this Agreement.

The facts and circumstances of the case having brought us to the time when oil and gas have been found in commercial quantities and when the royalties became payable, we have gone beyond the speculative questions and conjectures discussed at trial as to what would be the effect of the agreement before that time.

I, therefore, find the appellant is liable for income tax on the royalty; but before rendering account for the amount of the tax collectible, the statutory allowance for depletion or depreciation (section 5) must be ascertained and deducted. By doing so the amount of the claim by the Crown in the case will be reduced by crediting that amount to the appellant and under such circumstances there will be no costs to either party.

There will be judgment dismissing the appeal, each party paying his own costs.

*Judgment accordingly.*

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**CROWN** —1 *Information of intrusion—Estoppel—Revocable licence to occupy—Title—Alienation by the Crown.*—Held, that the old doctrine that the Crown is not bound by estoppels is so far modified by modern decisions that in a proper case the Crown may be held liable for acts or conduct of its responsible officers, which, if occurring between subject and subject, would amount to an estoppel *per pais*.—2. Where a railway company was permitted by responsible officers of the Crown to enter upon the right of way of a government railway and erect telegraph poles thereon and to maintain the same without hindrance or objection by the Crown for a period of some forty years, the railway company were held to be lawfully on the said right of way under a revocable licence from the Crown dating from the time of the erection of the telegraph poles.—3. That upon the facts, the licence in question was not an irrevocable one, which would be tantamount to an alienation of the Crown property. **HIS MAJESTY THE KING v. THE CANADIAN PACIFIC RAILWAY COMPANY.**..... 26.

2 — *Lease — Perpetuities — Option to purchase — Tenancy — Interpretation of Contract.*] On the 11th March, 1845, the Crown leased certain ordinance lands to one McL. for a term of 30 years, it being provided that upon the expiration of the said term "upon the reasonable request, and at the proper cost and charges of the said John McLaurin by Indenture similar to this present lease, renew the same for the like term of thirty years, upon the like conditions and rents hereinbefore contained and reserved, to the said John McLaurin, his executors, administrators

**CROWN—Continued**

and assigns forever." The lessee failed to avail himself of this right and the lease was not renewed, but the assigns of McL. continued to occupy the said lands to the present, paying the yearly rent stipulated in the lease. The lease also provided that the lessee upon paying a certain stated sum would be entitled to a conveyance of the lands in fee simple. In 1927, the present occupants sent the Crown a cheque for the amount mentioned in the lease and requested a deed to the lands in question. The Crown returned the cheque and refused to convey the land for the sum offered, hence the present Petition of Right.—*Held*, that the option to purchase contained in the lease in question herein, being unlimited as to time, was therefore inoperative and void because of the rule against perpetuities, and is not now exercisable, and that the suppliant is not entitled to the relief sought.—2. That the tenant who holds over with the consent of the landlord becomes a tenant from year to year and holds upon the terms created by the lease, so far as they are applicable to a tenancy from year to year. An option contained in a lease to purchase the reversion and so destroy the tenancy is not one of the terms of the tenancy; it is a provision outside of the terms which regulate the relations between the landlord as landlord, and the tenant as tenant, and is not one of the terms of the original tenancy which will be incorporated into the terms of the yearly tenancy created by the tenant holding over after the expiration of the lease. **TORMEY v. THE KING..... 178.**

3 — *Contract — Interpretation — Words repugnant to real intention.*—*Held*, that where the real intention of the parties can be clearly collected from the language within the four corners of a deed or instrument in writing, Courts are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous what is repugnant to the real intention so gathered.—2. That a contract ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole agreement, greater regard being had to the clear intention of the parties than to any particular words which may have been used in the expression of their intent. The terms of the agreement are to be drawn partly from the written document and partly from all the surroundings of the written document, such as the nature of the transaction with regard to which the document is brought into life.—3. That the Crown is not bound by the error or inadvertence of its officers, nor by any deliberate intention of its officers

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without proper authority to alter the terms of a written agreement. **THE KING v. PEAT FUELS LIMITED..... 188**

4 — *Contract — Rectification of contract — Lease — Eviction — Interest.*] The Crown leased from the suppliant a certain space on two floors of a building owned by it, by a written lease duly executed by the Minister as provided for by section 18 of the Public Works Act, and under authority of an Order in Council. The measurements stated in this lease were made by officers of the Department of Public Works and the contract and plans accompanying the same were prepared by them. It was claimed by Suppliant, concurrently with the execution of the lease, that the superficial area mentioned in the lease was in error and should be greater and that the total rental based thereon should be accordingly increased. It was agreed between the parties that the area leased was improperly measured and thereupon a second or amending Order in Council was passed recognizing that an error had been made in stating the area in square feet leased and authorizing the amending of the first Order in Council accordingly. No new contract however was executed in conformity with this amending Order in Council.—The Crown took possession under the lease and later, before its termination, rescinded the several Orders in Council, vacated the premises and returned the keys, and repudiated its obligation to be bound under the lease. Suppliant then notified the Crown that it would hold it responsible for the rent for the balance of the term, but that it would endeavour to rent the space vacated on the Crown's account, and would give the Crown credit for any sums so received.—The present action is *inter alia* for the rectification of the contract pursuant to the second Order in Council, for rentals on the increased space, and damages by way of interest on the unpaid matured rentals.—*Held* that the acts of the suppliant did not constitute eviction of the Crown from the leased premises, and that the Crown was liable for the rent for the entire term of the lease. That to constitute an eviction at law the lessee must establish that the lessor without his consent and against his will wrongfully entered upon the demised premises and evicted him and kept him evicted.—2. That notwithstanding the provisions of section 18, of the Public Works Act (R.S.C., 1927, c. 166) the suppliant is entitled to have the lease as executed rectified, so that the real intention of the parties with regard to the exact area or portion of the building demised will be effected, and is entitled under such lease as rectified to recover the rental for the

**CROWN—Concluded**

increased space.—3. That in matters of contract the legal rights and liabilities of the Crown are substantially the same as those arising between subject and subject.—4. That the Suppliant was entitled to recover damages in the way of interest upon the unpaid matured rentals as from the several maturity dates by reason of the Crown wrongfully detaining payment in breach of the contract of lease. **THE JOURNAL PUBLISHING COMPANY LTD. v. THE KING**..... 197

5 — *Land Patent — Cancellation — Soldier Settlement Act, 1919—9-10 Geo. V, ch. 71—Section 94 of Dominion Lands Act—Right of Attorney-General to take action.*] The Information exhibited herein seeks to have certain letters patent for land issued to Richards declared void as having been issued improvidently and in error. Some of the defendants oppose the cancellation of the said patent unless they be paid the advances made by them to R. in good faith, and for which they held liens duly registered as encumbrances against the said lands.— *Held* that this Court has jurisdiction to hear and determine the present action. (*The King v. Deacon*, 18 Ex. C.R. 308 referred to.)—2. That those provisions of "The Soldier Settlement Act" 1919 (9-10 Geo. V, c. 71) purporting to provide security to the Board without registration of said security and in priority to other bona fide creditors whose security has been registered are *intra vires* of the powers of the Parliament of Canada.—3. That sec. 94 of the Dominion Lands Act does not give the Minister of the Interior the exclusive right to institute such actions and does not take away the usual right and power of the Attorney-General to institute the same. That right is cumulative and may be exercised by either of them. **THE KING v. RICHARDS et al.**..... 222

See also SHIPPING AND SEAMEN No. 3.  
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**CUSTODIAN — Alien Property Custodian—Beneficial ownership in Securities—Canadian Consolidated Orders—Treaty of Peace—Classes of Property passing to Custodian—Canadian War Measures Act—Vesting Order.] Certain "securities" (shares, note certificates and stocks) in the above companies, listed and dealt in on recognized stock exchanges, and the certificates for which were held in the United States, being owned by enemy nationals, were, upon demand of the Alien Property Custodian of the United States, surrendered to him or to others for him, in 1918, under the War legislation of that country, and were subsequently transferred to him on the books of the said companies, or new certificates issued.**

**CUSTODIAN—Concluded**

In regard to one of the above companies no vesting order was ever obtained by the Canadian Custodian, but as to the others vesting orders were obtained subsequent to the action by the American Custodian, namely, in 1919, but none of the "securities" were ever transferred to him nor is it in evidence that such orders were served on the companies.— *Held*: That the beneficial ownership in or title to the securities herein was in him who held the paper, and that it is the law of the place where the paper was that determined who was the holder. The contention that certificates of securities are but evidence of ownership, is not inconsistent with the idea that an assignment and delivery of the certificates, carries the title and property in the securities.—2. That under The Canadian Consolidated Orders enemy property was not automatically confiscated, but the owners' enjoyment thereof was suspended until the restoration of peace, and, subject to any legislation to the contrary or anything to the contrary contained in the Treaty of Peace, such enemy was then entitled to his property, or if liquidated, to its proceeds. It was only the transfer of securities by or on behalf of an enemy that was prohibited by the publication of these Orders.—3. That under the Peace Order only two classes of enemy property passed to Canada: 1st. Property in Canada belonging to an enemy on January 10, 1920, and not in the possession or control of the Custodian, and, 2nd. Enemy property in the possession and control of the Custodian on that date.—4. That there was nothing to be found in the Canadian War Measures prohibiting or avoiding the transfers of the securities in issue as made by the American Custodian; that, on the 10th January, 1920, the property, right or interest in the securities mentioned and the title to the same did not belong to an enemy, and was not at that date in the control or possession of the Canadian Custodian; and that the property, right or interest in such securities and the title to the same belonged to the Alien Property Custodian of the United States. **THE SECRETARY OF STATE FOR CANADA, AS CUSTODIAN OF ENEMY PROPERTY v. THE ALIEN PROPERTY CUSTODIAN FOR THE UNITED STATES AND THE CANADIAN PACIFIC RY. CO., IMPERIAL OIL LTD., TORONTO POWER COY. AND THE CITY OF MONTREAL**..... 75

**DEPARTMENTAL OFFICER**

See TRADE-MARKS.

**DEPLETION**

See REVENUE No. 3.

**DISCRETION**

of *Public Officer, re Trade-Marks.* See  
TRADE-MARKS No. 2.

**DISTINCTIVENESS.**

See TRADE-MARKS.

**DOMINION LANDS**

See CROWN No. 5.

**ESTOPPEL**

See CROWN No. 1.

**EVICITION**

See CROWN No. 4.

**EVIDENCE**

See SHIPPING AND SEAMEN No. 4.  
See EXPROPRIATION

**EXPROPRIATION** — *Powers of Minister—Speculative value—Advantages to property by expropriation.*] The Crown expropriated a certain area for use in the building of the terminal of the Hudson Bay Railway at Churchill and for a port on Hudson Bay. At the date of the taking there were no permanent habitations anywhere in the vicinity save a Hudson Bay Post and Mounted Police Post. The future of Churchill was altogether dependent upon the completion of the work for which the land was taken.—*Held*, that under the Expropriation Act a Minister of the Crown may take any land for the use of His Majesty as he thinks advisable to take, and his decision or judgment that the lands so taken are necessary for a public work is not open to review by the Courts. That this power or authority does not interfere with the security in the enjoyment of private property, as the Crown must compensate the owner of any lands so taken for the value thereof and all damages resulting from the expropriation. [*Boland v. The Canadian National Railway* (1927), A.C. 198 referred to and discussed.]—2. That speculative prices paid by purchasers of real estate in the vicinity, some fifteen years before the expropriation in question, are not a fair criterion of the market value of similar property at the date of the expropriation thereof.—3. That the advantages due to the carrying out of the scheme for which the lands were taken cannot be considered in fixing the compensation to be paid for the said lands. KING, THE, v. BEECH..... 133

2 — *Market value — Purchase price — Evidence of market value.*]—*Held*, that, although under certain circumstances, the price paid for land cannot properly be taken as the market value thereof, nevertheless, where a careful purchaser, not obliged to buy, parts with his money, without pressure or inducement from the owner, willing but not obliged to sell, and after carefully considering the matter, and more especially the special advant-

**EXPROPRIATION—Concluded**

ages the land in question offered for the carrying on of the business he proposed to start, then the price so paid is cogent evidence of market value. THE KING v. BERUBE AND WIFE..... 218  
See also JURISDICTION.

**EXPUNGING**

See TRADE-MARKS..

**FIXED CHARGES**

See REVENUE.

**FOG**

See SHIPPING AND SEAMEN No. 2.

**IMPEACHMENT**

See PATENTS FOR INVENTION No. 2.

**INCOME TAX**

See REVENUE NOS. 1, 2 AND 3.

**INCOME WAR TAX ACT**

See REVENUE No. 3.

**INDUSTRIAL DESIGNS**

See TRADE-MARKS No. 2.

**INFORMATION BY CROWN**

for *Intrusion.* See CROWN No. 1.

**INFRINGEMENT**

See PATENTS FOR INVENTION No. 1.  
See TRADE-MARKS.

**INGENUITY OF INVENTION**

See PATENTS FOR INVENTION No. 3.

**INJUNCTION**

See TRADE-MARKS.

**INSURANCE** — *Capital — Superintendent of Insurance—Powers of—Appeal.*] In 1865, the appellant company was incorporated by an Act of the late province of Canada, with power to carry on the business of insurance generally, and its capital was stated to be two million dollars, with power to increase the same to four million dollars. By an Act of Parliament of 1870, the capital was reduced to one million dollars with power to increase the same to four million dollars in sums of not less than one million dollars. The business of the company was to be carried on in two distinct branches, Life and Accident Insurance business and to be known as the Life Branch, and other forms of insurance to be known as the General Branch business. The capital stock of one million dollars was to apply to the Life Branch only, with power to increase the same to two million dollars; authority was given to raise one million dollars for the purposes of the General Branch business with power to increase the same to two million dollars. In 1871, the powers of the company were by statute restricted to Life and Accident Insurance, and it was further provided that "All



**INSURANCE—Concluded**

provisions of the Act of Incorporation of the said company, and the Act amending the same, which are inconsistent with the provisions of this Act, are hereby repealed."—In its report to the Department of Insurance the company stated its capital to be four million dollars, and the Superintendent of Insurance ruled that it could only be two million dollars and amended the report accordingly. Hence the present appeal.—*Held*, that the capital of the company for Life and Accident insurance business was fixed at two million dollars by the Act of 1870 and was not altered by subsequent legislation. The ruling of the Superintendent of Insurance was upheld, and the appeal dismissed. **THE SUN LIFE ASSURANCE COMPANY OF CANADA AND THE SUPERINTENDENT OF INSURANCE**..... 21

**INTEREST**

*See* CROWN No. 4.

**INTERESTED PERSON**

*See* PATENTS FOR INVENTION.

**INTERPRETATION**

*of Statutes.* *See* REVENUE No. 2.  
*of Contract.* *See* CROWN No. 2.

**INVENTION**

*See* PATENTS FOR INVENTION No. 2.

**JURISDICTION** — *Expropriation by Canadian National Railway—Jurisdiction—Comity of Court—Effect of Repeal—9-10 Geo. V, c. 13—19-20 Geo. V, c. 10.* On the 13th July, 1927, the plaintiff expropriated certain lands for the purpose of erecting a station in Hamilton, under Section 13 of 9-10 Geo. V, c. 13. Notice was then given defendants by plaintiff, under said Act, that it would apply to Carpenter J., to determine the compensation, and defendants, Lewis et al, gave notice to the plaintiff that they would apply to Evans J. for the same purpose, which cases are still pending before the Provincial Courts. On June 14, 1929, by 19-20 Geo. V, ch. 10, the Exchequer Court of Canada was given jurisdiction to hear and determine actions by the C.N.R. to fix the compensation to be paid by it for lands expropriated, excepting in cases below \$2,500 which were still to be determined by the Provincial Courts.—*Held*, that the Exchequer Court of Canada has no jurisdiction to hear and determine an action by the Canadian National Railway, for fixing the compensation to be paid for lands expropriated by it before the 14th June, 1929, date when the C.N.R. Act (19-20 Geo. V, c. 10) came into force, conferring jurisdiction on this court.—2. Held further that the legal proceedings already instituted before the Provincial Courts, under the Railway Act, should be there continued and even enforced, the defend-

**JURISDICTION—Concluded**

ants having a vested right to do so under the law existing at the date of expropriation.—3. That when the effect of a repeal is to take away a right, *prima facie*, it is not retroactive; but when it deals exclusively with procedure it is retroactive.—4. That a court must not usurp a jurisdiction with which it is not clearly legally vested, but must keep within the limits of its statutory authority and should not exercise powers beyond the scope of the Act giving it jurisdiction and it cannot assume jurisdiction, unless clearly conferred, in respect of matters of prior origin to the Act.—*Quære*—Does not Comity of Courts also arise in the present case? **THE CANADIAN NATIONAL RAILWAY v. LEWIS**..... 145  
*See also* SHIPPING AND SEAMEN No. 5.

**LAND PATENT**

*See* CROWN No. 5.

**LEASE**

*See* CROWN No. 4.

**LEGISLATIVE AUTHORITY**

*Works under.* *See* SHIPPING AND SEAMEN

**LICENCE**

*See* CROWN No. 1.

**MARITIME LIEN**

*See* SHIPPING AND SEAMEN No. 4.

**MARKET VALUE**

*See* EXPROPRIATION No. 2.

**METHOD OR PROCESS**

*See* PATENTS FOR INVENTION.

**MINISTER OF THE CROWN**

*Powers of.* *See* EXPROPRIATION.

**MOORED VESSEL**

*See* SHIPPING AND SEAMEN No. 4.

**NAVIGATION**

*See* SHIPPING AND SEAMEN No. 1.

**NAVIGABLE WATERS PROTECTION ACT**

*See* SHIPPING AND SEAMEN No. 3.

**NEGLIGENCE**

*See* SHIPPING AND SEAMEN  
Nos. 3, 4 AND 6.

**NET PROFITS AND FIXED CHARGES**

*See* REVENUE.

**OFFICERS OF THE CROWN**

*See* CROWN No. 3

**ONUS OF PROOF**

*See* SHIPPING AND SEAMEN No. 4.

**OPTION TO PURCHASE**

*See* CROWN No. 2.

**ORDER IN COUNCIL**

*See* SHIPPING AND SEAMEN No. 3.

## OVERHOLDING TENANT

See CROWN No. 2

## PATENTS FOR INVENTION—

*—Specification — Claims — Subject-matter—Validity—Infringement.]* The patent in suit herein related to a window glass substitute. The patentee states that he employed a "reticular metallic base, the width of the meshes and size of the wire strands thereof being so designed as to insure maximum transparency and strength of the final product. The composition of the lacquer or filler used to produce, when dried, a thin, tough transparent coating of film between the wire meshes and firmly adhering to the strands of the base material, must be so selected as to not only withstand weather conditions but to possess the property of being a poor conductor of heat which makes the ultimate article specially suitable for specific uses such as green-houses, poultry houses and the like. We have found that cellulose acetate or cellulose nitrate mixed with a suitable plasticizer and the mixture dissolved in a suitable solvent, has given excellent results from the standpoint of producing a coating substance endowed with the above characteristics." The Specification ends as follows: "While our invention has been set forth in several modifications, it will be understood that others may be made by those skilled in the art without departing from the spirit and scope thereof. For example other compositions or lacquer may be found for coating the fabric or material other than those suggested and because of their inherent properties, will be especially valuable for such use,—but all such modifications are desired to be regarded as contemplated by the invention as defined in the appended claims." And he then claims: "An article of manufacture comprising a reticular metallic base covered with a flexible transparent film adapted to wet the strands of said base and follow the expansion and contraction thereof, the thickness of said film being such that the outlines of the meshes of the base are substantially preserved in the surfaces of the film, whereby said surfaces are substantially divided into sections corresponding in number and general design to the meshes of the bases."—*Held*: That inasmuch as the quantities of the ingredients to be used to successfully produce the object covered by the patent was nowhere given, the patent failed in this respect to comply with the provision of Section 14 of the Patent Act.—2. That as the final clause of the specification took in all the prior art and was a blanket claim, it was too wide and vague in view of the prior art, and failed in that respect to comply with the Statute. That a claim to every mode of carrying a principle into effect

## PATENTS FOR INVENTION

—Continued

amounted to a claim to the principle itself and is bad.—3. That the questions of anticipation and subject-matter are so much bound up together that it would seem impossible to deal with one without touching the other.—4. That upon the enquiry as to whether or not the patent is good or bad, as to whether the subject-matter can be sustained by letters patent, regard must be had exclusively to the patent itself and not to the product the patentee might see fit to produce under a secret process outside and foreign to the patent. MICO PRODUCTS LIMITED v ACETOL PRODUCTS INC. .... 64

2 — *Impeachment — Interested person—Application in Canada — Invention — Method or process.]* The plaintiff is licensee in Canada of a patent issued to Glacifer Company, relating to improvements in cooling containers, and the defendant, Waltham System Incorporated is the owner of a patent for improvements in a method of refrigeration, and the other defendant is licensee under the same patent.—*Held*, that where an individual is using an invention in respect of which another person claims to have a patent, which the unlicensed user believes to be invalid; or where a person is desirous of using anything described in a patent, but which patent he has reason to believe is void, then he has such an interest as to qualify him to initiate proceedings to annul such letters patent; and is a person "interested" within the meaning of the Rules of this Court.—2. That a patent for invention, for a new method of refrigerating, granted in Canada, upon an application therefor made more than twelve months after the application for a similar patent was made in the United States, will not be voided for such delay alone, where the Canadian patent is not exactly the same, the language thereof varying somewhat from that in the United States patent, as also do the drawings, and where slight structural changes in the means of applying the method are suggested. That in order to set aside the patent for delay in applying in Canada, the application here must be for the same invention as was applied for abroad, and the claims must not include anything not comprised in the application made abroad.—3. That there is no invention in selecting a triangular shaped cartridge in preference to any other to contain the frozen liquid placed around a container of ice cream to keep it cool nor in providing a rack whereon is set the ice cream can and the cartridge. That moreover, in view of the prior art, it was not new to provide an air space between the said cartridge and the container of ice cream.—4. That the Patent Act recognizes a

**PATENTS FOR INVENTION***—Concluded*

method or process as having the same title to protection as a machine or article of manufacture; method and process being one and the same thing.—5. That where the method described is not new, it cannot be patented as a process. Where the method is old and the instrumentalities new, the latter may be patented as a machine or manufacture, if to do so required invention. *REFRIGERATING EQUIPMENT LTD. v. DRUMMOND ET AL.*..... 154

3 — *Infringement — Combination — Ingenuity of invention.*—*Held*, that where all the defendant has done was to adopt the plaintiff's combination of materials and device, functioning similarly, producing similar results obtained in a similar manner, with slight mechanical changes, there is no ingenuity of invention; and where in view of the disclosures in plaintiff's patent no ingenuity of invention was required to construct defendant's device, then such latter device is an infringement of the said patent. *INTERNATIONAL FIRE EQUIPMENT CORPORATION v. FIREGAS SERVICE LIMITED.*..... 168

4 — *Prior Art—Ingenuity of invention—Subject-matter.*] Claim 4 of the plaintiff's patent states that it is for "a file wrapper or folder including front and back leaves, the back leaf having a projecting tab formed integrally with the back and reinforced by an integral extension of the back doubled over at the top edge of the tab and pasted to the back," called "a straight edge tab," and claim 5 is for the same idea only for a "partial tab," part of the turned over edge being cut away.—*Held*, that the plaintiff's patent did not involve ingenuity of invention and was invalid for want of subject-matter.—2. *Held* further that, even if the same was patentable, inasmuch as the idea of turning over the edge of paper and gluing it down to reinforce such edge and to give it a smooth finish was clearly disclosed in the prior art, and was actually in use in the trade in the manufacture of folders similar to the plaintiff's, the plaintiff's alleged invention was anticipated and was not patentable. *LOWE-MARTIN COMPANY LTD. ET AL v. OFFICE SPECIALTY MANUFACTURING Co. LTD.* 181

**PATENTS FOR LAND***See* CROWN No. 5.**PERPETUITIES***See* CROWN No. 5.**PERSON INTERESTED***See* PATENTS FOR INVENTION.**PRACTICE***Re granting of Trade-Marks.* *See* TRADE-MARKS No. 2.**PRIOR ART***See* PATENTS FOR INVENTION.**PROCESS***See* PATENTS FOR INVENTION.**PROFIT OR GAIN***See* REVENUE.**PROOF***Onus of.* *See* SHIPPING AND SEAMEN No. 4.**PUBLIC INTEREST***See* TRADE-MARKS No. 2.**PUBLIC NUISANCE***See* SHIPPING AND SEAMEN No. 3.**PURCHASE PRICE***See* EXPROPRIATION—*as to evidence of value.***PROPERTY PASSING TO CUSTODIAN***See* CUSTODIAN.**RECTIFICATION***of contract.* *See* CROWN No. 4.**REGISTRATION***See* TRADE-MARKS.*Of liens against soldiers' lands—See* CROWN No. 5**REPEAL***Effect of.* *See* JURISDICTION.**RESIDENCE IN CANADA***See* REVENUE.**RESPONSIBILITY***See* SHIPPING AND SEAMEN No. 4.

**REVENUE — Use and Occupancy Insurance—Insurance on Net Profits and Fixed Charges—Income Tax—Profit and Gain.**] The appellant carried on the business of manufacturer and dealer of lumber. Besides fire insurance it was insured against loss or damage which it might sustain in the event of its plant, in whole or in part, being shut down or suspended in consequence of fire or damage, which insurance is known as Use and Occupancy Insurance. These policies insured plaintiff for \$60,000 in respect of loss "On Net Profits" and \$84,000 "On Fixed Charges," the former being defined to mean net profits that would have accrued had there been no interruption of business caused by the fire, and the latter, all standing charges and expenses which must necessarily continue to be paid or incurred by the assured during the time the plant is inoperative.—A fire having occurred in the appellant's premises destroying part of the property, they received from the Insurance Company \$43,000 for loss of net profits and \$52,427 for fixed charges. This amount, or part thereof, was assessed for income tax. Hence the appeal.—

## REVENUE—Continued

*Held*, as the amounts constituting Fixed Charges were incurred and paid by the appellant in carrying on its business, and had been allowed as a deduction in determining its net income, that the amounts received by it from the Insurance Policies covering Fixed Charges are applicable to such deduction and should be applied in reduction of the deduction claimed.—2. That the amount received for "Net Profits" aforesaid falls within Section 3 of the Income War Tax Act, and is taxable as income. That the said amounts were gain or profit connected with and arising from the business of the appellant. That it was not a receipt or revenue on account of loss or replacement of capital. **THE B.C. FIR AND CEDAR LUMBER COMPANY LTD. v. THE MINISTER OF NATIONAL REVENUE.. 59**

2.—*Income Tax—Contingent Trust — Section 2 of Income War Tax Act, 1917—"Trust"—Residents in Canada—Interpretation.*] One J., resident in the United States, executed a Trust Deed of Donation in favour of the Royal Trust Company, as Trustee, giving certain Canadian securities unto the Trustee, in trust, for his surviving children, also residing in the United States, to be held by the Trustee until five years after his death, together with all accumulations and additions thereto; when the entire Trust Estate was to be converted into cash, and distributed to his children as in the said Deed provided. The Crown assessed the income accruing from this contingent trust asset for the year 1927. Hence this appeal.—*Held*, that under the Income War Tax Act, 1917, and Amendments thereto, only the income of residents in Canada is taxable, and that, as none of the beneficiaries under the trust aforesaid resided in Canada, the present appeal was allowed and the assessment was set aside.—2. That the word "Trust," defined in Section 2 of the said Act, must under the rules of interpretation, *ejusdem generis* and *noscitur a sociis*, be interpreted to mean a corporate or other body, a trust association or merger, combination of companies or interests created for the purpose of carrying on trust business. **THE ROYAL TRUST COMPANY v. THE MINISTER OF NATIONAL REVENUE.. 172**  
3 — *Royalty — Income — Capital — Depletion or Depreciation—Section 5 of the Income War Tax Act, 1917.*] The appellant sold all her right, title and interest in a piece of land, including the mines and minerals thereon, to an oil company, for a certain sum in cash, plus certain shares in the company, subject to her reserving a royalty consisting of 10 per cent of all oils, etc., taken out. The Crown assessed the appellant, for the year 1927, for income tax, on the amount received by

## REVENUE—Concluded

her in that year representing this ten per cent royalty. Hence the present appeal.—*Held*, that such a royalty is a reservation, operating as an exception out of the demise, in favour of the vendor, of the profits derived from the working and development of the land sold and is in its very nature income, and could not, in any sense, amount to capital. It is variable in quantities and is properly taxable as income under the Income War Tax Act.—2. *Held*, further, that the statutory allowance for depletion or depreciation (Section 5 of the Act), should be deducted from the amount of the tax. **SPOONER v. MINISTER OF NATIONAL REVENUE..... 229**

## REVOCABLE LICENCE

See CROWN No. 1.

## RIGHT OF WAY

See SHIPPING AND SEAMEN No. 1.

## ROYALTY

See REVENUE No. 3.

**SHIPPING AND SEAMEN**—*Collision — Canal navigation—Right of way—Creating a situation of danger.*] A collision occurred between the *K.* and the *O.* about 3.30 a.m., June 5, 1927, at the upper end of the Lachine Canal. The night was dark. The *K.*, upbound and light, had moored to the south revetment wall of the Canal near the place of collision on account of wind and rain. Her harbour lights were on and her red and green lights extinguished. She was drawing 3 feet 6 inches forward and 12 feet 8 inches aft, and a fresh southwest breeze was blowing across her beam. When the weather cleared, the *K.* cast off her four lines, beginning from the stern and casting the breast line last, on account of the wind. Before casting off, the *K.* had seen the starboard lights of the *O.* and knew that she was making with the current for the entrance of the Canal. After casting off, her stern, pushed by the wind, left the wall first and the ship moved towards the north side in a slanting position in the Canal, at this point about 275 feet wide. The *K.* then blew two blasts indicating she would pass starboard to starboard, forcing the *O.* to pass between her and the north side, towards which the *K.* was drifting. The *O.* answered by two blasts, but within a very few seconds perceiving the *K.* across the Canal and realizing there was not enough room to pass, the *O.* gave the danger signal and reversed full steam astern, which act, having a right hand propeller, forced her bow to the south, and the *K.* drifting across, the collision occurred, the stem of the *O.* striking the starboard side of the *K.* The ships were 250 feet long, with a 42 foot beam. Up

## SHIPPING AND SEAMEN—Continued

to almost the time the *K.* gave the two blasts signal, the *O.* had reason to believe from the lights on the *K.* that she still moored.—*Held*, on the facts, (reversing the judgment appealed from) that, the *K.*, without justification, created a situation of perplexity and danger, and that the *O.* did all, in the circumstances, that good seamanship required of her; and as she was coming down with the current she had the right of way, and the *K.*, on the evidence, failed to satisfy the burden resting upon her to excuse the collision.—Furthermore, moored at the revetment wall of the Canal, the *K.*, a light ship of 250 feet in length, with a fresh breeze blowing strong enough to affect her, on a dark night, casting off and getting unnecessarily under way, in a Canal of 275 feet in width, with the knowledge of a downbound vessel coming in at the time with the current, having thereby the right of way (Rule 25), will be held at fault for a collision which would not have happened had she lain fast at her berth and delayed casting off but a few minutes.—Casting off under such circumstances and spreading, in a slanting way, her 250 feet in length in a Canal of 275 feet in width was bad seamanship amounting to negligence.

CANADA STEAMSHIP LINES LTD. v. THE SS. *Kindoc* AND PATERSON STEAMSHIPS LIMITED v. THE SS. *Oxford*. . . . . 1

2—*Collision—Rule 16 of the Regulations for preventing Collisions at Sea—Speed—Fog.*] The *P.A.*, a passenger steamer, left Vancouver, bound for Victoria in a dense fog. After passing the first narrows, she was running at a rate of twelve knots, on a course of S.W.  $\frac{1}{4}$  S., which course she kept till the collision was imminent. She stopped her engines about a minute before the collision, upon hearing a signal from a tug to port, and one from a ship to starboard, the *H.*, and which she first saw emerging from the fog at a distance of about 300 feet, and between two and three points on her starboard. The *P.A.* then attempted to clear the *H.* by putting her helm hard a starboard with full speed ahead, but without success, the stem of the *H.* cutting into the *P.A.* on her starboard side, a little ahead of amidships, she was swinging with a speed of about eleven knots.—The *H.* inward bound, passed Point Atkinson at 10.05 a.m. on a course of E. by N. and at a speed of four knots, but seeing the density of the fog decided not to enter the narrows, but to proceed cautiously, by "slow ahead" and "stop" alternatively, to a southerly part of English Bay, and altered her course at 10.25 to E.N.E. Later, at 10.50, hearing signals of other vessels, she changed her course E.S.E. giving proper signals. From 10 o'clock

## SHIPPING AND SEAMEN—Continued

to 11.12 she was proceeding by "slow ahead" and "stop" at close arrivals. At 11.12 the *H.* heard the signal from the *P.A.* about 5 or 6 points on her port bow. She stopped her engine, blew the whistle, to which the *P. A.* replied. There followed another exchange of whistles, and while the *P. A.* was whistling for the third time, she emerged from the fog, heading for the *H.* The *H.* then reversed her engine full speed and put her helm hard a port, but too late to avert collision. When they first saw each other the *P. A.* was running at ten knots, and the *H.* at one and a half knots and the collision occurred about half a minute after.—*Held*, on the facts (varying the judgment appealed from) that the *H.* by proceeding at a very moderate speed and otherwise acting as aforesaid was obeying rule 16 of the Regulations for Preventing Collisions at Sea, but that the speed of the *P.A.* (10 knots), in fog, was in the circumstances excessive, and that the *P. A.* was alone to blame.—2. That a vessel in fog should run at such a speed that upon sighting an approaching vessel, she can pull up in the distance she can see.—3. That Article 16 aforesaid does not require a vessel running in fog to reverse her engine upon hearing of a fog signal apparently forward of her beam, but only to stop her engines and then navigate with caution, and that as the *H.* could come to a stop in thirty feet and could see a vessel at three hundred feet she was navigating with caution within the meaning of Article 16, and was not called upon to reverse before she did.

FRED OLSEN & COMPANY v. THE SS. *Princess Adelaide* AND THE CANADIAN PACIFIC RAILWAY COMPANY v. THE SS. *Hampholm*. . . . . 10

3 — *Crown — Navigable Waters Protection Act—Order in Council—Board of Railway Commissioners—Collision with bridge—Negligence. Public Nuisance—Works done under legislative authority.*] Plaintiff, under its Charter (9-10 Edward VII, Chapter 74) erected a railway bridge over the second Narrows of Burrard Inlet, B.C. By its Charter, the Railway Act was made applicable to the undertaking. The site and plans of the bridge, as originally projected, were first approved by the Governor in Council on June 10, 1913, on recommendation of the Minister of Public Works. No steps were taken for ten years, then in April, 1923, amended plans were approved by the Governor in Council. These amended plans were, in July, 1923, sanctioned by the Board of Railway Commissioners and the company was authorized to begin construction, plans of sub-structure and superstructure to be filed for approval of the Engineer

SHIPPING AND SEAMEN—*Continued*

of the Board. A Board of Consulting Engineers made certain recommendations in regard to the elevation of the piers, the number of spans, etc. Plans embodying these changes were submitted to the Governor in Council for approval by the Minister of Marine and Fisheries and the plans of the bridge, as finally completed, were approved by Order in Council in August, 1925. In March, 1925, the Railway Board had approved of the said plans. The Charter provided that the bridge be built "so as not to interfere with navigation." It was contended by defendant that the plaintiff had no title to the land on which the bridge was built and that it was a trespasser thereon; that approval should have been obtained as required under the Navigable Waters Protection Act, and this not having been done the bridge was a public nuisance; that the approval of the amended plans having been approved by the Railway Board before approval by the Governor in Council, such latter approval was a nullity; that the plaintiff without justification had begun construction before final plans were approved; and that the plaintiff's Charter having enacted the limitation that the bridge should not be built so as to interfere with navigation, neither the Governor in Council nor the Board of Railway Commissioners had power to authorize a bridge which interfered with navigation, and that as it in fact so interfered, it was contrary to its Charter and constituted a public nuisance.—*Held* (affirming the judgment appealed from), That plaintiff being in possession of the land in question, at least by licence of the owner, the defendant had no status to attack such occupancy.—2.—That the Navigable Waters Protection Act not having been made applicable to the undertaking, and it having been enacted that the Railway Act should apply, and the undertaking being authorized by an Act of Parliament of Canada, the Navigable Waters Protection Act did not apply to the undertaking.—3. That even if there had been laxity on the part of those interested in the matter, in observing from time to time the precise directions of the statute, all such procedural defaults were waived in the final sanction of the plans of the bridge as completed. That the fact that the order of the Railway Board preceded the approval of the same plans by the Governor in Council was not of importance; their combined effect being a sanction, as required by Statute, of a bridge proposed to be built over a navigable water.—4. That the words, in the Company's Charter, "so as not to interfere with navigation," mean not reasonably calculated to interfere with navigation, and the Governor in Council and the

SHIPPING AND SEAMEN—*Continued*

Board of Railway Commissioners having approved the plans of the bridge under the authorization of Parliament, and having exercised the discretion resting in them, the bridge in question could not be said to be a public nuisance even though it might contribute some difficulties to navigation at the point in question.—5. That the consent of the Governor in Council, required under Sec. 248 (2) of the Railway Act, to deviations in the plans, need not be obtained upon the recommendation of any particular Minister.—6. That when a vessel passing through a bridge collides with it causing damage to the bridge, the owners of the bridge can only recover such damage upon proof that the vessel was negligently navigated. *BURRARD INLET TUNNEL & BRIDGE COMPANY v. THE Eurana* ..... 38

4 — *Collision — Damage to moored vessel — Towage — Negligence — Onus of proof — Responsibility of tow — Maritime lien.*] The owners of the *P.* contracted with a towing company to have the *P.* towed from her berth to a grain elevator to unload her cargo. The *P.* had no motive power. Owing to the breaking of the tow line at one stage of the movement the *P.* continued her forward movement past the elevator and reached the south end of the harbour where the *S.* was laid up, puncturing the latter under the water line, by an anchor left hanging down on the port bow of the *P.* partly under water. This anchor was left so hanging down by those on the tow notwithstanding a warning by the tug master.—*Held*: That when commencing the towing of a ship her anchor is left, by the joint negligence of the tug master and those in charge of the ship, in such a position as to constitute a danger to other vessels, and does in fact cause such damage, the tow and tug are each responsible and liable for the damages so caused. —2. That when a vessel at anchor or moored at a dock is run into by another, the onus is upon the moving vessel to justify or excuse her action.—3. That towage is a joint undertaking, and although the motive power may be wholly that of the tug, yet both tug and tow are bound to take reasonable care and to use reasonable skill in performing the operation. This duty is not affected by the terms of the towage contract, which cannot regulate the relations between the tug and tow and third parties.—4. That persons on board the tow such as a ship-keeper and his helpers, though not a regular navigating crew, in regard to reasonable care and skill, may be treated as agents of the owners of the ship in performing or neglecting to perform such duties as the towage contract or the exigencies of the

## SHIPPING AND SEAMEN—Continued

operation casts upon them.—5. Provision in a towage contract that the operation is at "owner's risk" will not absolve the tug in case of negligence in navigation so far as third parties are concerned.—*Note*.—The responsibility of the tug and tow, as between themselves discussed. CANADA STEAMSHIP LINES LTD. v. THE SS. Paisley AND JAMES RICHARDSON & SONS LTD. v. THE SS. Paisley..... 105

5 — Admiralty — Jurisdiction — Canada Shipping Act, R.S.C., 1927, c. 186—Sec. 349—Wages of Seamen.]—*Held*, that, subject to the exceptions mentioned in Section 349 of R.S.C., 1927, c. 186, no suit or proceedings for recovery of wages under the sum of \$200 can be instituted by seamen or apprentices in the Exchequer Court of Canada on its Admiralty side. COFFIN ET AL v. THE *Protoco*. 153  
6 — Collision — Negligence — Signals — Navigation — Harbour — Weight of evidence.] A collision occurred between the *O.* and the *V.* on the 26th of September, 1928, at 10.15 a.m., in the channel of the St. Lawrence River, in the Harbour of Montreal, a little below gas buoy 194M. The weather was fine and clear, with a light northeast breeze, and with a current of between 3 and 4 knots. The *V.* was proceeding up the channel, on the north side, and the *O.* was coming down on the south side. On reaching buoy 193M. the *O.* turned to cut across the current to her berth at the upstream side of Laurier Pier. The *V.* observing the *O.* turning around buoy 194M., her bow getting abreast buoy 195M. into the channel, gave a signal of five blasts, with the order to stand by, followed by order of slow astern on the engine. The *O.* held her course across the channel and shortly after gave a signal of two blasts. Thereupon the *V.* replied by three blasts and put her engines full speed astern. The collision occurred shortly after, both vessels being on the north side of the channel, about 200 feet below buoy 194M., the *V.* then having no way upon her. When the *O.* was between buoy 195M., and 193M., she saw the *V.* leaving her dock, and saw her coming up, before she (*O.*) made her turn of buoy 193M., and when the five-blast signal was given, the *O.* could have reversed in time to allow the *V.* to pass. The master was not on the bridge.—*Held*, that, under the circumstances, the *O.* was guilty of negligence in not signalling before turning in to the channel at buoy 193M., and in attempting to cross the bow of the *V.* contrary to the rules of good seamanship, and was solely to blame for the collision.—(2) That the five-blast signal does not necessarily mean that there is actual danger. It may mean a signal of atten-

## SHIPPING AND SEAMEN—Concluded

tion, and the *O.* receiving this signal was bound by rules 21, 22 and 23 to avoid the *V.* and to go astern.—(3) That as ships turning below buoy 193M, may be going to Laurier Pier or Tarte Pier, the *V.* was therefore justified in expecting the *O.* to pass astern and when the *V.* became uncertain of the *O.*'s movements the five-blast signal was the proper signal to give.—(4) That the evidence of those on the ship who are responsible for its navigation, as to the signals given, is of greater weight with the court than that of outsiders who had no special reason to note the signals given. REDERJET ONFJELL A/S v. *Vesurio* AND SOCIETA ANONIMA PER L'INDUSTRIA, ETC., v. THE *Olden*.... 207

## RULES FOR PREVENTING COLLISIONS AT SEA

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## SIGNALS

See SHIPPING AND SEAMEN.

## SOLDIER SETTLEMENT ACT

*found intra-vires*.

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## SPECIFICATION

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## SPECIFIC TRADE-MARK

See TRADE-MARKS NOS. 3, 5.

## SPECULATIVE VALUE

See EXPROPRIATION No. 1.

## SPEED

See SHIPPING AND SEAMEN No. 2.

## SUBJECT MATTER

See PATENTS FOR INVENTION.

## SUPERINTENDENT OF INSURANCE

See INSURANCE.

## TENANCY

See CROWN No. 2.

## TITLE FROM THE CROWN

See CROWN No. 1.

## TOWAGE

See SHIPPING AND SEAMEN No. 4.

TRADE-MARKS — Numerals — Expunging—*Distinctiveness*.1—*Held*, that the registered trade-marks "No. 360," "No. 361," "No. 90" and "No. 99," applied to the upper and lower blades of an animal clipping machine, and not in its original use intended as a trade-mark, and being without distinctiveness, are not properly trade-marks within the meaning of the Trade-Mark and Designs Act and should be expunged.—2. That there can be no distinctiveness, as a rule, in a numeral or numerals alone, although conceivably they might be so arranged, selected or used, that they would lose, partially at

## TRADE-MARKS—Continued

least, the characteristic of numerals, and acquire a distinctiveness qualifying them for registration as trade-marks. *GRANVILLE S. DECATUR v. FLEXIBLE SHAFT COMPANY, LTD.*..... 97

2 — *Industrial designs — Infringement — Interim injunction — Expunging — Duties of Departmental Officer—Registration.*]—*Held*, that the applicant for the registration of an industrial design has no absolute right to have the same registered. To allow the registration is within the discretion of the departmental officer charged with duty of administering the Act, but no registration should be lightly made. The exercise of the discretion to register must always contemplate the interests of the public which ought not to be unduly restricted in matters of trade. *JONES ET AL v. TEICHMAN ET AL*..... 103

3 — *Specific trade-marks — Expiration — Section 11 (b) and Sec. 17 of the Trade-Marks and Designs Act—Registered trade-mark.*] In December, 1929, B. & L. O. Co. applied to have the letters "B. & L." registered as a trade-mark. This application was refused by the Commissioner of Patents for the sole reason that one Laurence had registered the letters "B.L." as a specific trade-mark in the year 1885. This latter mark was never renewed. Hence this appeal.—*Held*, that the trade-mark "B.L." having expired in the year 1910, was not at the time of the application of B. & L. O. Co. a registered trade-mark within the meaning of Section 11 (b) of the Trade-Marks and Designs Act; and that the Commissioner of Patents was not justified in refusing the application aforesaid solely because of the registration aforesaid made in the year 1885. *BAUSCH & LOMB OPTICAL COMPANY v. THE COMMISSIONER OF PATENTS*..... 123

4 — *Assignment in gross—Extending of scope of trade-mark—Specific trade-mark.*] One H., doing business under the trade name of The Carp Flour Mills, registered the trade-mark "Mello-Creme" in 1925, for use in the milling and sale of a breakfast food, and used the same in his business. In 1927, H., by deed, assigned to the plaintiff the said trade-mark with the good will of H., relating to the sale of cereal foods under the said mark. Notwithstanding this assignment, H. continued to carry on his business as before, using the trade-mark along with his trade name on the cartons of the product milled and sold by him; and the good will aforesaid was never, in fact, transferred. Plaintiff did not manufacture but merely sold the product of H., marked as aforesaid, with nothing on the product associating it with them. Plaintiff later

## TRADE-MARKS—Concluded

registered the same trade-mark (in 1929), to be used in the sale of all food products, including cattle, hog and hen foods, thereby attempting to extend the scope of the first trade-mark. The present action is to restrain the defendants from using said mark in the sale of bread.—*Held*, that an assignment in gross, i.e., by itself, of the right to a name is invalid, and as the good will of H. was never in fact transferred to the plaintiff, and as the trade-mark "Mello-Creme" was assigned by itself, notwithstanding what was alleged in the deed of transfer, nothing passed to the plaintiff by the said transfer, and the plaintiff had no *locus standi* to take the present action.—2. The first trade-mark being only for use in the sale of breakfast foods, the plaintiff could not by subsequent literature extend the scope of its trade-mark. In the true construction of the scope of a trade-mark, reliance must be had alone on the construction of the trade-mark itself and not on the intention of the owner or user of the mark as intimated by literature and booklets distributed with the product. That a trade-mark for breakfast food cannot be extended to restrain its use in connection with the sale of bread, or any other such commodity even though the product bearing such trade-mark was an ingredient of such bread or other commodity. *MELLO-CREME PRODUCTS v. EWAN'S BREAD LTD. ET AL.*.. 124

5 — *Specific Trade-Marks—Expunging —"Calculated to deceive."*] Plaintiff's trade-mark consisted of the words "Peter Pan" with a representation of Peter Pan, used in the sale of "woven piece goods, and defendant registered a trade-mark consisting also of a representation of Peter Pan, with the words "Genuine Peter Pan Garments," to be applied to "Ladies', Misses' and Children's Ready-to-Wear Garments."—*Held*, that while the Trade-Mark and Designs Act permits registration of a specific trade-mark, and without there being any provision for the classification of goods, nevertheless trade-marks resembling one another should not be registered for different classes of goods, if the result of the junior registration "be calculated to deceive or mislead the public;" and that, in consequence, defendant's trade-mark should be expunged, notwithstanding it was applied to garments only whilst plaintiff's was applied to piece goods. *HENRY GLASS & CO. v. THE HAMPTON MANUFACTURING COY. LTD.*..... 212

## TREATY OF PEACE

*See* CUSTODIAN.

## TRUSTS

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