

1927

CANADA
LAW REPORTS

Exchequer Court of Canada

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1928

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 CHARLES ARCHER, Quebec Admiralty District—appointed 17th February, 1927.

DEPUTY LOCAL JUDGES:

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE ERNEST LAPOINTE, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE LUCIEN CANNON, K.C.

ERRATUM

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

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2. *Donovan Steamship Co. v. SS. Helen* [(1925) Ex. C.R. 114; (1926) Ex. C.R. 59; (1926) S.C.R. 627]. Judgment of Supreme Court affirmed, that of the trial judge restored.
3. *SS. Woron v. Canadian American Shipping Co.* [(1927) Ex. C.R. 1]. Appeal dismissed.

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

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT

1926

THE SS. *WORON* (DEFENDANT) APPELLANT;

Sept. 17.
Nov. 10.

AND

CANADIAN AMERICAN SHIPPING }
 CO., LTD. (PLAINTIFF) } RESPONDENT.

Shipping—Admiralty Courts—Jurisdiction—Action in rem—Breach of charter-party—Colonial Courts of Admiralty Act, 1890 (53-54 Vict., c. 27 Imp.) and Admiralty Act, 1891, (54-55 Vict., c. 29, Can.)—Interpretation.

This was an action *in rem* against the SS. *Woron* for breach of charter-party. Upon motion to set aside the writ and warrant of arrest for want of jurisdiction, it was conceded that if the jurisdiction of this court was limited by the Colonial Courts of Admiralty Act of 1890 and the Admiralty Act of 1891, this court had no jurisdiction *in rem* in the premises.

Held, (reversing the judgment appealed from), that it is the policy of the law that jurisdiction cannot be extended except by clear and unambiguous legislation, and as the Act of 1925 (15-16 Geo. V, ch. 49 Imp.) was not made applicable to Canada, either by express words or by necessary intendment, the Admiralty jurisdiction thereby conferred on the High Court of Justice (England) did not extend to Canada, and that this court had no jurisdiction to entertain this action..

2. The word "existing" in subsection 2 of section 2 of the Colonial Courts of Admiralty Act, 1890, controlled as it is by the words "subject to the provisions of this Act" in subsection 3 of section 2, and the words "under this Act" and "by this Act" in section 3 and the proviso thereto, must be taken to relate to the Jurisdiction existing at the date of the Act, and that only; and that the plain reading of this Act ties the jurisdiction of the Canadian Admiralty Court to that of the English High Court as it existed at the time of the passing of the said Act, and no more.

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3. Held further that the Parliament of Canada has only a limited power of legislation in respect of admiralty jurisdiction. It cannot confer upon the Exchequer Court any jurisdiction which was not conferred by the Colonial Courts of Admiralty Act, 1890, upon a Colonial Court of Admiralty.

ACTION *in rem* by the charterers of the defendant ship, to recover damages alleged to be due to a breach of the charter-party.

The case came before the court upon a motion of the defendant, to set aside the writ and warrant of arrest issued therein, on the ground that the court had no jurisdiction to entertain such an action. On the 6th July, 1926, judgment was rendered on the motion, by the Honourable Mr. Justice Martin, Local Judge in Admiralty for the British Columbia Admiralty District, dismissing the motion (1).

An appeal was taken from this judgment to the Exchequer Court of Canada, which was heard before the Honourable Mr. Justice Audette, at Vancouver.

Alfred Bull for appellant.

W. M. Griffin and *S. Smith* for respondent.

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

AUDETTE J., now this 10th of November, 1926, delivered judgment (2).

This is an appeal from the judgment of the Local Judge of the British Columbia Admiralty District, pronounced on the 6th day of July, 1926, dismissing the application to set aside the writ and warrant of arrest issued herein, on the ground of want of jurisdiction.

The judgment appealed from rests entirely upon section 5 of the Imperial Act, 1920, (10-11 Geo. V, ch. 81), which however was repealed by the Act of 1925 (15-16 Geo. V, ch. 49), as appears by the 6th Schedule thereof—a matter which seems to have escaped the attention of the learned Judge of first instance who dismissed the motion. Therefore it becomes unnecessary to consider the effect of the Act of 1920 upon the question before the court, beyond stating its repeal, and the attention of the court will be

(1) See page 12 for text.

(2) An appeal has been taken to the Judicial Committee of the Privy Council.

directed solely as to the effect of the Act of 1925 (which came into force on the 1st January, 1926), upon the proceedings herein instituted on the 30th April, 1926. However, it is well to add that *some* of the reasons given for supporting the jurisdiction below upon the act of 1920, would equally apply to the act of 1925.

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It may be stated, as was indeed conceded by all parties, that if the jurisdiction of this court is limited by the Colonial Courts of Admiralty Act, 1890, (53-54 Vict., ch. 27 Imp.) and the Admiralty Act, 1891, (54-55 Vict., ch. 29 Can.), and to the time at which these acts were passed, this court has no jurisdiction to entertain an action *in rem* in the premises and consequently the writ and warrant issued herein must be set aside. Furthermore in order to give this court jurisdiction to entertain the same, it must be found that the Imperial Act passed in 1925 (15-16 Geo. V, ch. 49, sec. 22, subsec. XII) is in force in Canada.

In other words the present controversy is narrowed down to the question as to whether or not this court is vested with any jurisdiction given to the High Court in England by Imperial Statutes passed since 1890, although these statutes do not expressly apply to Canada.

This case is one wherein it is sought to proceed *in rem* against the ship for breach of a charter-party—a matter which is not cognizable in this court under the Act of 1890, nor any subsequent legislation, unless it is found that the Imperial Act of 1925 is in force in Canada *ex proprio vigore* and without express words.

From very early times in England the question of jurisdiction between the Court of Admiralty and the Courts of Common Law has been fought, with more or less vehemence. Prohibitions issuing out of the Common Law tribunals upon proceedings in the Admiralty were frequent. Godolphin in his age observed that the quarrel had assumed such complexity between the courts that betwixt land and water, between contracts made beyond the sea and obligations made at sea, the Admiralty was like a kind of derelict. Hence in dealing with a question of admiralty jurisdiction to-day one must exercise great care in determining it to be well-founded. See Herschell L.C., in *Mersey Docks & Harbour Board v. Turner, The Zeta* (1).

(1) (1893) A.C. 468 at pp. 481 and 482.

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Let us now refer to the Colonial Courts of Admiralty Act, 1890, which defines the jurisdiction of any Colonial Court of Admiralty when created by a Colonial Legislature under the authority of its provisions. Subsection (2) of section 2 reads as follows:

(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether *existing* by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that court to international law and the comity of nations.

By the Canadian Admiralty Act, 1891, (sec. 3) the Exchequer Court of Canada was created within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty

shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the said Act and by this Act.

It must not be overlooked that the jurisdiction given to the Exchequer Court under sec. 4 of this Act was confined to rights and remedies in all matters

which may be had or enforced in any Colonial Court of Admiralty under the Colonial Courts of Admiralty Act, 1890.

Under the law as it stood in England when the Colonial Courts of Admiralty Act was passed there was no jurisdiction to entertain the present action *in rem*. Furthermore the latter Act makes it plain that it confers jurisdiction *existing*

whether by virtue of any statute or otherwise.

This word "existing" must, I think, be taken to relate to jurisdiction existing at the date of the Act, and that only. Again by subsection (3) of section 2, of the Colonial Courts of Admiralty Act this jurisdiction is expressly given *subject to the provisions of this Act*.

Passing to sec. 3 of the same Act, it is there again provided that the jurisdiction contemplated is the jurisdiction "*under this act*." The proviso to that section also expressly states that any such

Colonial Law shall not confer any jurisdiction which is not *by this Act* conferred upon a Colonial Court of Admiralty.

Section 4 of the last mentioned Act only enables a Colonial Legislature to pass laws affecting the jurisdiction or practice of a Colonial Court of Admiralty with the approval of His Majesty, and as we have seen above, under the pro-

visions of section 3 no such Colonial law could confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty.

When we are confronted by such provisions as those contained in the last-mentioned sections of the Colonial Courts of Admiralty Act, we realize that the Parliament of Canada has only a limited power of legislation in respect of Admiralty jurisdiction. It cannot confer upon the Exchequer Court any jurisdiction which was not conferred by the Imperial Act of 1890 upon a Colonial Court of Admiralty. Clearly the situation is that the legislative authority of Canada over the subject of Admiralty jurisdiction stops short of autonomy. Not only is there a restricted field of legislation, but legislation within that restricted field cannot become effective until His Majesty's pleasure thereon has been publicly signified in this country. That is the situation briefly stated, and it must remain so until the Parliament of Great Britain sees fit to displace it by further legislation.

In view of this situation it is but natural that some way out of the difficulties that surround it should be sought. The learned judge below has found a way out by interpreting the provisions of section 5 of the Imperial Statute of 1920 (repealed in 1925 as I have before stated) as applying to Canada; but the Act was repealed before the institution of this action and no more need be said about it.

The only Act from which the respondent can get any relief is the Imperial Act of 1925 which is intituled

An Act to consolidate the Judicature Acts 1873 to 1910, and other enactments relating to the Supreme Court of Judicature in England and the administration of Justice therein.

The primary territorial scope of this Act obviously does not include this Dominion, and the Act is absolutely silent with respect to its application to the Dominions or the Colonies.

The case of *Gauthier v. The King* (1) discusses a question somewhat similar to the one raised by the judgment below, namely, as to whether the Colonial Courts of Admiralty Act, 1890, is to be taken by construction as *speaking always in the present tense* (sec. 10 Interpretation Act)

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(1) [1918] 56 S.C.R. 176.

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so that it would impliedly confer upon the Exchequer Court of Canada whatever jurisdiction was given to the High Court of Justice in Admiralty since the year 1890. It is true that the *Gauthier* case dealt with the jurisdiction clauses of the Exchequer Court Act and not with those of the Admiralty Act; but the rules of construction are the same in all cases and where there is an authoritative interpretation of a contemporary Act to be found it affords great assistance. In the *Gauthier* case the Supreme Court was concerned with the question of whether the provincial laws invoked by the Exchequer Court Act as part of the law of the court are to be confined to the provincial laws in force in the year 1887, when the Exchequer Court Act was passed, or whether section 20 of the Exchequer Court Act contemplates that amendments to the provincial laws as they come into force from time to time have to be administered in the Exchequer Court. It is abundantly clear from the reasons for judgment of the judges of the Supreme Court that the liability of the Crown under the Exchequer Court Act must be determined by the general laws of each province in force *at the time when the Exchequer Court Act was originally passed, namely, 1887*. (See per Fitzpatrick C.J., pages 180 and 182; per Anglin J., page 194). At page 182 cited, the Chief Justice puts the matter in a nutshell when he says:

Provincial statutes which were in existence at the time when the Dominion accepted a liability form part of the law of the province by reference to which the Dominion has consented that such liability shall be ascertained and regulated; but any statutory modification of such law can only be enacted by Parliament in order to bind the Dominion Government.

In the *Gauthier* case the Supreme Court of Canada followed the decisions in the well known cases of *Armstrong v. The King* (1); *The King v. Desrosiers* (2); *Filion v. The Queen* (3); *City of Quebec v. The Queen* (4); *Ryder v. The Queen* (5); *The Ship Whitney* and *St. Clair Nav. Co. et al* (6).

So far as the Exchequer Court on its Admiralty side is concerned the learned judge who heard the motion in the

(1) [1908] 40 S.C.R. 229 at 248.

(2) [1908] 41 S.C.R. 71 at p. 78.

(3) [1894] 24 S.C.R. 482.

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

(5) [1905] 36 S.C.R. 462.

(6) [1906] 38 S.C.R. 303 at 320.

British Columbia Admiralty Court very truly says: "There is no decision upon the exact point." Here we have to deal with an alleged breach of charter-party. And he refers to the *Harris Abattoir Co., Ltd. v. The SS. Aledo* (1), wherein the late Mr. Justice MacLennan decided that an action *in rem* for damages to goods carried or to be carried out of a Canadian port to a foreign country could not be entertained for lack of jurisdiction under sec. 6 of the Admiralty Act, 1861, and the judgment appealed from here says that the statute of 1920 (which is now repealed by that of 1925), which repealed this section 6 of 1861 escaped the attention of the court and counsel in the *Aledo* case. Mr. Justice MacLennan may or may not have overlooked the Act of 1920. He may have considered it and come to the conclusion that by sec. 21 thereof, sec. 5 relied upon applied "only" to England and Wales and thereby excluded Canadian territory. Or he may have considered that the words "England and Wales" mentioned in proviso (a) of sec. 2 had reference only to Acts passed before 1890, a view which would seem consistent with subsec. 2 of sec. 2. Hence his silence upon the point.

In re wolfe et al v. SS. Clearpool (2), Mr. Justice MacLennan held, in 1920, that

The Exchequer Court derives its Admiralty jurisdiction from two statutes, the Colonial Courts of Admiralty Act, 1890, (53-54 Vict., c. 27, Imperial), and the Admiralty Act, 1891, (54-55 Vict., ch. 29, Canada). From these statutes it is clear that the jurisdiction of the Exchequer Court, as a Court of Admiralty, is no greater than the Admiralty jurisdiction of the High Court in England. The expression "Admiralty jurisdiction of the High Court" does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court, or may be conferred by statute giving new Admiralty jurisdiction, citing *Bow McLachlan & Co. v. Camosun* (3).

Adverting to the *Camosun* case it will be seen that in that case the Judicial Committee held that

the jurisdiction of the Exchequer Court in Canada, as a Court of Admiralty constituted under the Colonial Courts of Admiralty Act, 1890, (Imperial) and the Admiralty Act, 1891 (Dom.), is no greater than the Admiralty jurisdiction of the High Court in England," and that "The Judicature Acts by which every judge of the High Court can exercise every kind of jurisdiction possessed by the High Court, conferred no new Admiralty jurisdiction upon the High Court.

(1) [1923] Ex. C.R. 217.

(2) [1920] 20 Ex. C.R. 153 at 154.

(3) [1910] 79 L.J.P.C. 17; [1909] A.C. 597.

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In the same case, at p. 20, Lord Gorell further says that the Exchequer Court was constituted by the Exchequer Court Act (50-51 Vict., c. 16) and that it has no common law jurisdiction and that

its Admiralty jurisdiction is derived under the Colonial Courts of Admiralty Act, 1890, and the Canadian Act of 1891.

And at p. 22:

In their Lordships' opinion this case is unaffected by the Judicature Acts . . . and if applied it would have the effect of altering the Admiralty jurisdiction into a general jurisdiction.

Adding at p. 23:

Therefore as the Exchequer Court has no common law jurisdiction and the respondents had no right under the Admiralty jurisdiction . . . they could not enforce their counter-claim in that court.

Again at p. 19, in the quotation of Burbidge J. it is said:

It is argued that because a judge of the High Court in England has otherwise authority to hear and decide such a claim . . . this court has a like jurisdiction and authority. That, it seems to me is not the effect of the statute referred to. The jurisdiction which this court (Canadian) may exercise under the statute mentioned (Acts of 1890, etc.), is the Admiralty jurisdiction and not the general or common law jurisdiction in England.

See Clement's Canadian Constitution, 3rd ed., p. 24.

The plain reading of the Act of 1890 ties the jurisdiction of the Canadian Admiralty Court to that of the English High Court as it existed in 1890. Thus the Canadian jurisdiction is, so to speak, static and stereotyped. Canada has the full jurisdiction existing in England at the time of the passing of the Act and no more.

Moreover, by the preamble of The Admiralty Act, 1891, (Canada) it is said that the Exchequer Court shall be a Court of Admiralty jurisdiction, with the jurisdiction in the said Act mentioned.

That is the Imperial Act of 1890. See also *The Ship W. J. Aikens* (1).

Therefore the position or jurisdiction of the judge of the High Court in England is quite different from that of the Admiralty Judge in Canada. Indeed, in the *Cheapside case* (2), wherein the question of jurisdiction with respect to a counter-claim (as in the *Camosun* case) was again considered, it was also found that

the judge of the Court of Admiralty does not cease to be a judge of the High Court because he is a Judge of the Court of Admiralty, and although as Judge of the Court of Admiralty, he may have no jurisdiction in such

(1) [1893] 4 Ex. C.R. 7 et seq.

(2) [1904] P. 339, at p. 343.

a case as this . . . as judge of the High Court he has, and whether or not he can blend those two jurisdictions is a matter for his discretion . . . In this case the judge of the Court of Admiralty has endeavoured to do justice by not dividing the two jurisdictions, but by availing himself of the fact that he has a double jurisdiction, which will enable him to do justice in this way.

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To return to the question of jurisdiction under the Imperial Act of 1925, sec. 22, reads as follows:

22. (1) The High Court shall, in relation to Admiralty matters, have the following jurisdiction (in this Act referred to as "Admiralty jurisdiction") that is to say—

(xii) Any claim—

(1) arising out of an agreement relating to the use or hire of a ship; or

(2) Relating to the carriage of goods in a ship; or

(3) in tort in respect of goods carried in a ship; unless it is shown to the court that at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England;

(b) Any other jurisdiction formerly vested in the High Court of Admiralty;

(c) All admiralty jurisdiction which, under or by virtue of any enactment which came into force after the commencement of the Act of 1873, and is not repealed by this Act, was immediately before the commencement of this Act vested in or capable of being exercised by the High Court constituted by the Act of 1873.

This Act of 1925 should be read in the light of the *Camosun* case (*ubi supra*) which holds that:

The Judicature Acts, by which every judge of the High Court can exercise every kind of jurisdiction possessed by the High Court, conferred no new Admiralty jurisdiction upon the High Court.

The jurisdiction of the Exchequer Court on its Admiralty side cannot be wider than it was at the time of the passage of the Colonial Courts of Admiralty Act, 1890, unless supplemented by clear and express legislative provisions.

As said in Craies, on Statute Law (3rd ed., p. 79), Coke's rule has been adopted by the English Courts, and for modern use is best expressed by Lord Esher in *Sharpe v. Wakefield* (1). The words of a statute must be construed as they would have been *the day after the statute was passed*, unless some subsequent Act has declared that some other construction is to be adopted or has altered the previous statute.

See also *The Alina* (2).

Again at p. 66:

If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound these words in their ordinary

(1) [1889] 22 Q.B.D. 239 at p. 241. (2) [1880] L.R. 5 Ex. D. 227, at p. 230 et seq.

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and natural sense. The words themselves alone do in such case best declare the intention of the law-giver.

At p. 70:

If we depart from the plain and obvious meaning . . . we do not in truth construe the Act, but alter it.

At p. 113:

A distinct and unequivocal enactment is also required for the purpose of either adding to or taking from the jurisdiction of a Superior Court of Law. . . "The creation of a new right . . . is plainly an act which requires (distinct) *legislative authority*."

Lord Mansfield in *Rex. v. Vaughan* (1) says that

No Act of Parliament made after a colony is planted is construed to extend to it without *express words* showing the intention of the legislature to be that it should.

Lord Bowen in *Hill v. Brown* (2) says that

after a colony is founded subsequent legislation in England altering the law does not affect the rights of the settlers unless it is *expressly made to extend* to the province or colony.

See Tarring On Law Relating to Colonies, 4th ed., pp. 3 and 4.

The policy of the law that jurisdiction cannot be extended except by clear and unambiguous legislation is attested by all modern books. And we have so far back as the first quarter of the eighteenth century, Cowper L.C. in *Reeves v. Buttler* (3) exclaiming:

God forbid that judges upon their oath should make resolutions to enlarge jurisdiction.

Holt C.J. in the famous case of *Ashby v. White* (4) said: I agree we ought not to encroach or enlarge our jurisdiction; by so doing we sever both on the right of the Queen and the people.

Later on in the century, Sir William Scott (Lord Stowell) said in *The Two Friends* (5) that this court is not hungry after jurisdiction.

Kekewich J., in *re Montagu Derbshire v. Montagu* (6) said:

It is part of my duty to expound the jurisdiction of the court. It is *not* part of my duty to expand it.

It is especially true of the jurisdiction of the Admiralty Court, owing to the jealous eye turned upon it by the common law courts, that the foundations of its jurisdic-

(1) [1769] 4 Burr. 2500.

(2) [1894] A.C. 124.

(3) Gilbert's Eq. 195, at p. 196.

(4) 2 Raym. Ld. 938 (Lord Raymond's Rep.)

(5) [1799] 1 C. Rob. 280.

(6) [1897] L.R. 1 Ch. D. 685 at 693.

tion have to be made doubly sure. See Roscoe's Ad. Pr.— Introduction, *passim*.

If any other rules than those above mentioned were to be followed, the result would be that the court would be *legislating*. It is for the legislature to enlarge the jurisdiction if it sees fit and it is not a matter for the court.

Now besides the considerations to which I have just adverted, we have the Colonial Laws Validity Act passed by the Imperial Parliament in 1865 (28-29 Vict., ch. 63), which by section 1 enacts that

An Act of Parliament, or any provision thereof, shall . . . be said to extend to any colony when it is made applicable to such colony by *express words* or necessary intendment of any Act of Parliament.

Then if we consult text-books on the subject we find Lefroy, *Canada's Federal System*, at p. 51, who says:

The legislative bodies which have power to make statutes of one sort or another, binding upon Canadians, are the Imperial Parliament, the Dominion Parliament. . . . The British North America Act contains no renunciation of the paramount authority of the Imperial Parliament. . .

At n. 54:

But the intention of an Imperial Act to apply to self-governing colonies must be *clearly expressed*.

The same view is propounded by Dicey, *Law of the Constitution*, 8th ed., pp. 100, 102, 103, 108, 109, 114 and 115.

See also Todd, *Parliamentary Government in the British Colonies*, 2nd ed., pp. 29 and 155, wherein at p. 215, after recognizing the paramount authority of the Imperial Parliament to legislate for Canada, he says:

Henceforth it is only such Imperial Laws as were in force at the time of the establishment of the colony that apply to the same, not such as may be thereafter enacted; unless "*by express words or by necessary intendment*," they are made applicable."

The same opinion is also to be found in Clement's *Canadian Constitution*, 3rd ed., at p. 31; at p. 54 he says:

As then the British Parliament may legislate imperially, that is to say, may extend its enactments to the colonies generally or to some one or more of them in particular, it is important to know *when a British Act does so extend*. *Primâ facie* the British Parliament must be taken to legislate for the United Kingdom (1) only, and there *must* be manifest indication of its intent in that respect if a statute is to be read as extending to a colony.

Having considered the question of jurisdiction in this case with great care in the light of the authorities cited

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(1) 15-16 Geo. V, ch. 49, sec. 227 (Imp)

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above, I have reached the conclusion that the Exchequer Court of Canada under the Imperial Act of 1925 (15-16 Geo. V, ch. 49, sec. 22, subsec. 12) has no jurisdiction to entertain the action in which the proceedings were taken which form the subject of this appeal; and I rest my conclusion upon the fact that this statute not only lacked express words but also "necessary intendment" to bring it into force in Canada.

Having reached this conclusion on the question of jurisdiction, I must find that the action in which the writ and warrant were issued is not cognizable by the court, and that the writ and warrant themselves must be set aside.

However, I am glad to realize that the respondent is not deprived of all remedy by reason of this appeal being allowed. The respondent still retains his right to institute an action *in personam*.

The appeal will be allowed and the writ and warrant set aside.

The whole with costs.

Judgment accordingly.

Solicitors for appellant: *Tupper, Bull & Tupper.*

Solicitors for respondent: *Griffin, Montgomery & Smith.*

(1) The following are the reasons for judgment of Martin L.J.A.

This is a motion to set aside the writ and warrant of arrest on the ground that the court has no jurisdiction to entertain this action for damages, by the charterers of the ship, occasioned, as alleged, by deviation from a specified route across the Pacific from Vancouver to Yokohama in November, 1925, and by not going to the nearest port in the Aleutian Islands for coal, if necessary, instead of to Honolulu.

The question turns upon the construction of sec. 5 of the Administration of Justice Act, 1920, (Imp.) (1), as follows:

"5. (1) The Admiralty jurisdiction of the High Court shall, sub-

ject to the provisions of this section, extend to—

(a) any claim arising out of an agreement relating to the use or hire of a ship, and

(b) any claim relating to the carriage of goods in any ship; and

(c) any claim in tort in respect of goods carried in any ship;

Provided that—

(i) this section shall not apply in any case in which it is shown to the court at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England or Wales; and

(ii) if in any proceedings under this section the plaintiff recovers a less amount than twenty pounds, he shall not be entitled to any costs of the proceedings, or, if in any

such proceedings the plaintiff recovers a less amount than three hundred pounds, he shall not be entitled to any more costs than those to which he would have been entitled if the proceedings had been brought in a county court, unless in either case the court or a judge certifies that there was sufficient reason for bringing the proceedings in the High Court.

(2) The jurisdiction conferred by this section may be exercised either in proceedings *in rem* or in proceedings *in personam*."

It is conceded that if the effect of this section extends to Canada then there is jurisdiction, but otherwise none. Said jurisdiction is primarily derived from the Colonial Courts of Admiralty Act, (1890) (Imperial) (1), and the Admiralty Act of 1891 (Canada) (2), now chapter 141 of R.S.C., 1906. Sec. 2 (2) of the former act provides that:—

"The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that court to international law and the comity of nations."

And subsec. (3) declares:

"Subject to the provisions of this Act any enactment referring to a Vice-Admiralty Court, which is contained in an Act of the Imperial Parliament or in a Colonial law, shall apply to a Colonial Court of Admiralty, and be read as if the expression "Colonial Court of Admiralty" were therein substituted

for "Vice-Admiralty Court" or for other expressions respectively referring to such Vice-Admiralty Courts or the judge thereof; and the Colonial Court of Admiralty shall have jurisdiction accordingly."

To carry out the intention of the said Imperial Act, the Parliament of Canada passed in 1891 the said Admiralty Act of that year, and its title declares that it is—

"An Act to provide for the exercise of Admiralty Jurisdiction within Canada in accordance with the Colonial Courts of Admiralty Act, 1890."

Sections 3 and 4 provide that:—

"The Exchequer Court is and shall be, within Canada, a Colonial Court of Admiralty, and, as a Court of Admiralty, shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the *Colonial Courts of Admiralty Act, 1890*, and by this Act."

"Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty court as elsewhere therein, have all rights and remedies in all matters, including cases of contract and tort and proceedings *in rem* and *in personam*, arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under the *Colonial Courts of Admiralty Act, 1890*."

For the motion it is submitted that the Imperial Act of 1920 does not extend its increased British jurisdiction to Canada because our

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(1) 53-54 Vict., c. 27.

(2) 54-55 Vict., c. 29.

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Canadian jurisdiction was "stereotyped" by the Imperial Act of 1890 and so this court "cannot exercise powers conferred by Imperial Statutes of a later date . . . unless such statutes in terms are made applicable to the Colonial Courts." In answer to this the plaintiff's counsel submits that the exact question is not whether the Imperial Act of 1920 is in force here but whether when any new jurisdiction is conferred upon the Admiralty Court in England this court "falls heir to the same jurisdiction"—*The King v. The Despatch* (1). There is no decision upon the exact point but there are some cases which require attention. Thus in *Harris Abattoir Co. v. The Aledo* (2), in the Quebec Admiralty District of this court it was decided that an action *in rem* for damages for goods carried or to be carried out of a Canadian port to a foreign country could not be entertained for lack of jurisdiction under sec. 6 of the Admiralty Act 1861 (extended to Canada by the conjoint operation of the Acts of 1890 and 1891, *supra.*) but, unfortunately, the existence of the statute of 1920, which repeals sec. 6, escaped the attention of the court and counsel and therefore the present point was not even considered. There is, however, this expression of apportionate value at p. 219:—

"Section 6 above referred to has been the subject of many judicial decisions in the English Court of Admiralty, and being remedial of grievances which British merchants had against the owners of foreign ships for short delivery of goods brought to England in foreign ships or their delivery in a damaged state, ought to be construed with as great latitude as possible so as to afford the utmost relief which the

fair meaning of its language will allow; *The St. Cloud* ([1863] Br. & Lush. 4); *The Pieve Superiore* ([1874] L.R. 5 P.C. 482), and *The Cap Blanco* ([1913] P. 130)."

To these cases should be added *The Bahia* (3), a decision of Dr. Lushington which was approved by the Privy Council in the *Pieve Superiore* case, *supra.*, at pp. 490 and 492, their lordships saying, p. 492:—

"The statute being remedial of a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow. And the decisions upon it have hitherto proceeded upon this principle of interpretation."

It is in this light, therefore, that the solution of the present question must be approached, as later to be considered.

The point is not touched by the decisions of the said Quebec District of this court in *Ferns v. The Ingleby* (4), because in it there was the express declaration in the Imperial Merchant Shipping (Stevedores and Trimmers) Act, 1911, cap. 41, sec. 3, that "all the courts having jurisdiction in Admiralty" could enforce it, which clearly included this court as it is the Imperial Parliament that, alone, can confer jurisdiction upon it.

Then in the *D. C. Whitney v. St. Clair Navigation Co.* (5), Mr. Justice Idington, at p. 320, in a dissenting judgment referred to the present point as one which "may become an interesting inquiry" and went on to say, "but in the view I take of this case the neces-

(1) [1915] 22 B.C.R. 365-6.

(3) [1863] Br. & L. 61.

(2) [1923] Ex. C.R. 217.

(4) [1923] Ex. C.R. 208.

(5) [1906] 38 S.C.R. 303.

sity for following such inquiry . . . does not arise," and so no assistance is to be derived from his decision so reserved, nor do I think that, having regard to the subject matter and context, any real light is derived from the expressions used by the Privy Council in *Bow, McLachlan & Co. v. The Camosun* (1).

It is to be noted that by sec. 21 of the said Administration of Justice Act, 1920, said sec. 6 of the Act of 1861 is repealed and said sec. 5 in effect substituted therefor with a considerable amplification of jurisdiction admittedly covering the facts of this case.

Approaching, then, the subject in the light hereinbefore indicated, it was said by Lord Chancellor Halsbury in *Herron v. Rathmines and Rathgar Improvement Commissioners* (2) that:—

"* * * The subject-matter with which the legislature was dealing, and the facts existing at the time with respect to which the legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the legislature in passing the Act they did."

And in *Eastman Photographic Materials Company v. Comptroller General of Patents* (3), the same very learned judge said, also in the House of Lords, p. 576:—

"My Lords, it appears to me that to construe the statute now in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. These three things being compared, I cannot doubt the conclusion."

These remarks are most appropriate to the present case, and in proceeding to apply them to the consideration of the said Acts of 1890 and 1891 one major "evil" to which their "remedy" of "amplifying the jurisdiction" was directed was the very unsatisfactory state of affairs in Canada occasioned by the exercise of Admiralty Jurisdiction under various Imperial statutes (*vide* said Act of 1890, *passim*) by many Vice-Admiralty courts in the several provinces with no appellate tribunal in Canada from their disconnected decisions but only to the Privy Council in London (as in e.g., *Redpath v. Allan* (4), with attendant delay and expense so great in many cases as to lead in practice to a denial of justice, and also a lack of harmony in decisions.

This very important question of local appeal is remedied by sec. 5 of the Act of 1890 and the existing ultimate appeal to His Majesty in Council is preserved by sec. 6 (as to which, see *Mayers' Admiralty Law and Practice* ([1916] p. 295) but with certain restrictions as therein provided.

By sec. 17 of the same act the Vice-Admiralty Courts in Canada were abolished upon the coming into force of this court as established under the Canadian Act of 1891, but if those former courts were still in existence and exercising locally the jurisdiction of the High Court of Admiralty, it would, I apprehend, be clear that their jurisdiction would march with that of said High Court and increase or decrease as the case might be in accordance with Imperial legislation affecting that Imperial Court. Such being the case it follows, to my mind, that the present Admiralty Court of Canada (i.e., the Exchequer Court) being substantially

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(1) [1909] 79 L.J.P.C., 17 at p. 22.
 (2) [1892] A.C. 498, at p. 503.

(3) [1898] A.C. 571.
 (4) [1872] L.R. 4 P.C. 511, 517.

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and essentially the substitute for and successor of all the said Vice-Admiralty Courts (with additional inland powers and jurisdiction *cf.*, secs. 4 and 17) likewise marches in the same jurisdiction and it would require clear language to the contrary to deprive it of the same continuous jurisdiction as is cumulatively possessed by the Imperial Court for the local exercise of whose jurisdiction it is in reality the local machinery and nothing more, within that same court's powers.

This construction is so appropriate to the comprehensive "object and purpose of the legislature" in 1890, that I find myself unable, after very careful consideration to take any other view of it. Bearing in mind the common object of the two statutes in the special circumstances, I can find nothing in reason to support the view that the two legislatures concerned intended to reduce the local application of this special Imperial jurisdiction to a stereotyped form and thereby arrest the local progressive development to meet those new conditions which must inevitably arise in the case of all legislation of an important general nature such as this. By the Interpretation Act of Canada, R.S.C., 1884, section 7 (3) "the law shall be considered as always speaking" and this is only a declaration of an ancient principle of construction of English statutes, and in my opinion, it was not contemplated by either of the said legislatures that the voice of that executive one which was "speaking" at large at the time should thereafter be silenced locally so as to retard that beneficial progress which could be attained by the various Imperial possessions marching together in maritime legislative development in pursuance of a general and harmonious scheme, sub-

ject always to minor exceptions for special reasons.

An additional indication of this intention is to be found in the unusual, but in the circumstances very appropriate way in which the desired result is obtained by simply making interchangeable expressions between the names of the new Colonial Courts of Admiralty and the old Vice-Admiralty Courts, and, also, the repeal of said sec. 21 of the Act of 1861 and the substitution of sec. 5 therefor, as before noted, supports this view.

I do not, in brief, think that it is necessary to resort to implication to sustain the jurisdiction invoked because, having regard to the subject matter and obvious intention, the object in view has been clearly attained by that "liberal" construction of the statutes in the manner hereinbefore laid down as the guiding principle therefor.

The plaintiff's counsel in support of his position submitted in his favour the view taken by the learned author of that work of exceptional merit, Mayer's Admiralty Law, *supra*, p. 5, as of assistance, and it unquestionably is, and in many circumstances (conveniently set out in Craies Statute Law, 3rd ed., 136) the court will entertain the views of text-writers, and in this case I may say, adopting the language of the Master of the Rolls (Sir George Jessel) in *Re Warners Settled Estates* (1), that:

"I should not have any difficulty without the assistance of the text-writers, but it is very satisfactory to find they have considered it independently in the same way."

It follows that the motion is dismissed with costs to the plaintiff in any event.

Judgment accordingly.

THE POPE APPLIANCES CORPORA- }
TION LIMITED } APPELLANT;

1926
Nov. 4.
Nov. 16.

AND

THE MINISTER OF CUSTOMS AND }
EXCISE } RESPONDENT.

Revenue—Income Tax Act, 1917, and Amendments—Non-resident person—Royalties from licensees under patent—Return of capital—“Income.”

The appellant was a foreign corporation with its head office in the United States of America, having no office or place of business in Canada. It was the owner of certain inventions for paper machines for which letters patent had been issued by the Dominion of Canada. It did not manufacture or sell the patented machines, but granted licenses to persons in Canada to use the inventions aforesaid, for which it received royalties.

Held that the use of these patents in Canada under the licenses was a use of a “thing” in Canada as contemplated by section 3 of chapter 46, 14-15 Geo. V (1924).

- 2. That, as there was a “thing” sold or used in Canada for which a royalty was paid, the appellant was carrying on a business in Canada, within the meaning of the Income War Tax Act, 1917, and amendments thereto, and the payment made under the licenses was not the return of capital, but “income” within the meaning of the statutes and was properly assessed as such.

APPEAL from the decision of the Minister of Customs and Excise assessing the appellant for income tax.

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

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

P. D. Wilson for the respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, on the 16th day of November, 1926, delivered judgment.

This is an appeal from an assessment made against the appellant, under the Income War Tax Act, 1917, and the appellant asks that the said assessment be set aside.

The appellant is a corporation, incorporated under the laws of the State of Maine, U.S.A., having its head office and principal place of business in the United States, and having no office or place of business within Canada. The

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corporation is the owner of certain inventions relating to improvements on machines used for the manufacture of paper, and letters patent have been issued by the Dominion of Canada in respect to such inventions. The appellant has by several licenses, granted to certain persons and corporations in Canada the right to use inventions covered by such letters patent, and such persons or corporations have been operating in Canada, machines embodying such inventions and have paid to the appellant royalties in respect of the licenses granted to them. The appellant does not manufacture or sell the patented machines, but grants to licensees the right to use the inventions, which implies the right to make them.

The principal paragraph in the usual form of license is as follows:—

The licensor hereby grants to the licensee the right to use the inventions described and claimed in said letters patent on the aforesaid machines of the licensee, located as aforesaid including any improvements on said inventions which the licensor may acquire upon the following terms and conditions.

The licenses are not assignable, and no license passes with the sale of any machine sold by the licensee, but the licensor agrees not unreasonably to refuse to grant a license in the case of a sale of a machine by the licensee. The royalty paid by the licensee, is fixed on the basis of so much per ton of paper produced on machines equipped with the appellant's inventions; for instance, the royalty is 10 cents per ton for machines running less than 600 feet per minute, and 25 cents per ton for machines running 800 feet and over per minute. Royalties are payable quarterly and are remitted directly to the appellant at its place of business in the United States. The licensor reserves the right to inspect all the licensed machines in the mills of the licensee, and all production records for the purpose of investigating any claims for royalty, and also the right of placing plates on each machine containing patent dates, etc. The licensor may cancel the license upon failure to pay the royalties, or for any non-performance of the licensing agreement.

By the Statutes of Canada, 1924, chap. 46, sec. 3, there was added to subsection 3 of the Income War Tax Act, 1917, the following paragraph:—

Any non-resident person soliciting orders or offering anything for sale in Canada through an agent or employee, and whether or not any con-

tract or transaction may result therefrom is contemplated within Canada or without Canada, or partly within and partly without Canada, or any non-resident persons who lets or leases anything used in Canada, or who receives a royalty or other similar payment for anything used or sold in Canada, shall be deemed to be carrying on business in Canada, and to earn a proportionate part of the income derived therefrom in Canada. The Minister shall have full discretion as to the manner of determining such proportionate part.

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The appellant claims that it does not receive royalty for "anything used or sold in Canada," and that the transactions of the appellant in Canada in connection with the licensing of patents, is not a carrying on of business in Canada within the contemplation of the statute, and that the payments made to the appellant by the licensees are not taxable. The appellant also contends that the licensing in Canada of its patents is virtually a sale of their patents with payments deferred, and that the payment of royalties therefor periodically, is but a receipt of payments on account of such sale, and are capital sums and not income.

The amendment to the Income War Tax Act, to which I have referred, clearly discloses I think the object of the amendment, and it is equally clear I think that the amending sections fully accomplish that object. The licenses granted by the appellant permit the use in Canada of machines made under its patents, and if it were not for such licenses, the machines could not be made or used in Canada, unless the appellant failed in some way to meet the public demand or requirements for such patents, in which circumstances the Patent Act makes due provision for such default. To say that the provisions of the statute do not apply here because the appellant does not sell a tangible or physical thing, such as one of the machines made under its patents, but merely licenses somebody else to make and use them, is altogether too narrow a construction of the statute, and such a contention is not I think tenable. There can be no doubt that here there is a "thing used in Canada," within the meaning of the statute. Mr. Wilson for the respondent referred to Holland on Jurisprudence, at page 101, wherein the author describes a "thing" as the "object of a right," i.e., is whatever is treated by the law as the object over which one person exercises a right, and with reference to which another person lies under a duty. This text writer proceeds

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to state that "things are of two kinds: (1) material objects or physical things, and (2) intellectual objects or artificial things; and he mentions patents, copyright, trademarks, etc., as illustrative of the second group, and he states that the fiction by which patents, etc., are regarded as "things" is not only harmless but indispensable. It seems to me that the view thus expressed by this writer is well founded, and is quite pertinent here. I am of the opinion that the use of the appellant's patents in Canada under license, is clearly a use of a thing in Canada as contemplated by the statute.

If I am right in this view, then it follows that there is a "thing" sold or used in Canada, for which a "royalty" is paid. If the statute covers the licensing and use here in question, and I think it does, then the appellant is carrying on business in Canada, because the statute explicitly states that the receipt of royalty or other similar payments for anything used in Canada, shall be deemed to be a carrying on of business in Canada.

The contention that the payments made under the licenses is a capital sum, and not income, cannot I think be maintained. The royalty received by the appellant is for the use of its inventions. The payment or royalty is in respect of the user of the inventions measured by the quantity of production of paper which may vary according to the machine to which the invention is attached, the speed, etc. That is the substance of the arrangement. The bargain is that the licensee pay, not a capital sum, but a sum dependent on the volume of paper produced, and which would vary according to market demands and other factors. What the appellant receives is income from the earnings or use of the inventions. These payments have none of the characteristics of a capital sum. I think they are clearly income within the statute, and that the assessment in question was properly made. See *Jones v. Commissioners of Inland Revenue* (1); *Constantinesco v. Rex* (2).

I would therefore dismiss the appeal with costs to the respondent.

*Judgment accordingly.*

(1) [1920] L.R. 1 K.B. 711.

(2) [1926] 42 T.L.R. 383 and 685.

THEODORE VAILLANCOURT .....SUPPLIANT;

1926

June 29, 30.  
Oct. 12.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Master and servant—Dismissal—Notice—Wrongful dismissal—Summary dismissal*

*Held*, that when under Rules and Regulations in force on the Canadian Government Railways relating to the conduct and discipline of its employees, it is provided that "employees will . . . be subject to *summary dismissal* for insubordination, drunkenness," etc., any employee guilty of a breach thereof may be forthwith legally dismissed without notice.

2. *Held* further, that in any event, where the dismissal of an employee is for cause, he is not entitled to any notice.  
(*Lévesque v. C.N.R. Q.R.* 39, K.B. 165, referred to and distinguished.)

PETITION OF RIGHT to recover \$13,630 for wages since the alleged illegal dismissal.

Rivière du Loup, P.Q., June 29 and 30, 1926.

Action now tried before the Honourable Mr. Justice Audette.

*L. P. Lizotte* for suppliant.

*Louis Saint-Jacques* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 12th October, 1926, delivered judgment (1).

The suppliant seeks, by his Petition of Right, to recover the sum of \$13,630, an amount representing his wages as locomotive engineer since his alleged "unjust and illegal dismissal," as averred by paragraph 32 of the petition.

On the 11th September, 1920, the suppliant was on the "spare list" of locomotive engineers of the C.N.R. at Rivière du Loup, P.Q., That is, there was no special engine assigned to him. The names of those on that list change from month to month (see Rule 29 of Exhibit No. 2).

Victor Saindon, the locomotive foreman of the Round House at that point, under whose direction trains move out, having been under the obligation, at about 7 o'clock on the evening in question, to discharge from duty an engineer under the influence of liquor, directed his employee Dumas

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

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to telephone to the suppliant to come down immediately and take charge of that train.

It was, as conceded by all parties, a case of emergency. (See again Rule 29 of Exhibit No. 2.)

The suppliant answered that it was correct and that he would go immediately. It is at this stage well to bear in mind that Vaillancourt testified that it takes from four to five minutes to walk from his home to the Round House and that on that day he went down running.

However, Foreman Saindon seeing, about twenty minutes after this first telephone call, that Vaillancourt was delaying, asked witness Dumas to call him up again, and Saindon then spoke on the telephone and contends he spoke to Vaillancourt himself (notwithstanding some evidence to the contrary), and

found out he was not fit, that he was not in normal state, that he was not speaking distinctly,—his tongue was rolling in his mouth, and that he then, on the occasion of this second telephone message, told him to stay home. Saindon thereupon placed his train in the hands of another engineer. The train had been retarded by the delayed appearance of Vaillancourt.

Notwithstanding Saindon's direction to stay home, Vaillancourt arrived at the Round House between 15 to 20 minutes after the second telephone message. That would be in all between 35 to 40 minutes after the first call.

Now the evidence in respect of the second telephone call is conflicting and it may be well to dispose of that point at once. Vaillancourt contends, and in that he is corroborated by his wife, that when Saindon telephoned the second time he had left his house and that it was his wife who answered. It is quite impossible to reconcile that latter contention with the other facts. Indeed, if the second call was made 20 minutes after the first call and that it takes 4 to 5 minutes to walk from Vaillancourt's house to the Round House,—and Vaillancourt testified he ran down on that day—and he only arrived at the Round House 15 to 20 minutes after the second call, he must have been at home at the time of the second telephone call—confirming thereby Saindon's testimony that he spoke to Vaillancourt on the second call and recognized his voice.

On arriving at the Round House, Vaillancourt said to Saindon, how comes it that I do not board my train and

Saindon told him I told you to stay at home. Then addressing this superior officer, Saindon, the foreman, Vaillancourt began swearing and cursing at him, adding blasphemy thereto, telling him (mon petit Christ noir) my little black Christ, you will pay both my time "and my voyage" and entering the shops he pitched his dinner pail into a pit, when Saindon told him to go home that he was not in a state to go out on a locomotive.

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Now Saindon testified that Vaillancourt, on that occasion had taken intoxicating liquor (il avait pris de la boisson), that he smelt liquor, adding, "upon my oath il était en boisson," he was not in a normal state. Witness Dumas confirms Saindon, and testified that when they went in the office he then perceived that Vaillancourt smelt liquor and was swearing. Witness Filion says Vaillancourt was swearing in face of Saindon and witness Guy said he heard him blaspheme, using towards Saindon, his superior officer, offensive language, and further that Vaillancourt appeared to him to be under the influence of liquor.

On this question as to whether or not Vaillancourt had taken intoxicating liquor and smelt liquor the evidence is conflicting. We have the negative evidence adduced by the suppliant's wife who testified that *she had no knowledge that her husband had taken any liquor*, and the evidence of a number of other acquaintances of the suppliant who casually met him in the street or on the gallery of his dwelling, who testified in a rather vague manner they had not noticed Vaillancourt had taken any liquor. Now this evidence based on observation from a casual meeting resulting in this negative opinion cannot stand in face of the evidence of those whose duty it was to observe and decide it, and moreover to do so in a building as compared to in the open air. Moreover, it is a rule of presumption that in the estimation of the value of evidence of equal credibility, in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative. *Magis creditur duobus testibus affirmantibus quam mille negantibus. Lefeunteum v. Beaudoin* (1).

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

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I have also had the advantage of seeing the witnesses and to observe their demeanour in the witness box. Without hesitation, and attaching very little credit to Vaillancourt's testimony of doleanée, I give full credit to the testimony of witnesses Victor Saindon and Dumas corroborated as it is by Vaillancourt's conduct at the shops.

Now, on the 11th September, Foreman Saindon suspended Vaillancourt upon the ground of being under the influence of liquor, of using offensive language to him and of being guilty of insubordination, until the investigation of his case would take place, and witness Mitchell, Assistant Master Mechanic, came to Rivière du Loup on the 14th September, 1920, to investigate the complaint made against Vaillancourt.

Vaillancourt was advised to come and be heard and he came and was heard. (See Rule 46, Exhibit 2.) Witness Mitchell testified he took Vaillancourt's statement in reporting for duty, in emergency, and appearing while under the influence of liquor and using abusive language to the locomotive foreman. Mitchell says Vaillancourt denied intoxication, but admitted using abusive language to locomotive foreman and of having talked too much. Several witnesses were heard and the decision was given within ten days, as provided by Rule 46 above cited. Vaillancourt under that rule had the right to be present and to have a fellow employee appear for him. He made no request or demand to that effect. Re: *Low Hong Hing* (1).

Witness Mitchell then suspended Vaillancourt until further orders for violation of Rule G of exhibit No. 1 which says that the "use of intoxicants" by employees, while on duty, is prohibited and also for abusing locomotive foreman (exhibit A). Moreover, exhibit B, a regulation in due force, provides and decrees that employees will, as heretofore, be subject to *summary dismissal* for insubordination . . . or using intoxicating liquor when on duty . . . and I find that Vaillancourt has been guilty of insubordination and of having used liquor.

At the time witness Mitchell suspended Vaillancourt, the latter asked when he would resume duty and Mitchell told him that he was afraid *he would not resume duty*

(1) [1926] 3 D.L.R. 692 at 698.



under the circumstances. Mitchell recommended dismissal and that was effected by Exhibit A.

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What does suspension mean, if not suspension of work which carries with it suspension of the right to wages? Vaillancourt was suspended and told he would not resume duty for cause. Does this not amount to dismissal? How can he now claim?

And when Regulation, exhibit B, provides for *summary dismissal* in case of insubordination and of using intoxicating liquor, this word "summary" which connotes of an immediate and speedy dismissal, means nothing else, that in such cases the dismissal is without notice.

Exhibit No. 2 contains, as admitted, an understanding between the Brotherhood of Locomotive Engineers and the C.N.R. and is signed by both parties, and under art. 53 thereof the right to make and interpret contracts, rules, rates and working agreements for locomotive engineers is vested in the regularly constituted Committee of the Brotherhood.

The suppliant rests his claim upon these rules. However, the Brotherhood did not find fault with the suspension and dismissal of Vaillancourt and refused to interfere on his behalf. Vaillancourt himself, about 15 days after Mitchell's investigation, came to Saindon's office and told him that the Brotherhood was unable to do anything in his case. Their chairman himself said he would not intercede for Vaillancourt. And witness Sharpe says that Vaillancourt's case was not referred to him by the Brotherhood.

Furthermore, E. Ouellet, heard on behalf of the suppliant, testified he was President of the Brotherhood and that he had nothing to do with the Committee of Complaints (Comité des Griefs) when he went to Mr. Moraison, not in his official capacity but on his personal initiative, to ask for some work for Vaillancourt,—but *not to reinstate* him in his position. He further added that if any engineer has any grievance he comes to the meeting and makes a report in writing. No such steps were taken.

Vaillancourt claims under exhibit 2, which, he says, amounts to a contract between himself and the C.N.R. However, this exhibit 2, as admitted by the parties at trial, contains an understanding between the Brotherhood and

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the C.N.R. and the Brotherhood has refused to interfere with Mitchell's finding, after his having made an investigation as provided by art. 46 thereof. (See also Rule 53 thereof.) How can the suppliant assert that there has been any breach of contract by the respondent, as resulting from the understanding contained in Exhibit 2? If any breach of contract exists, the shoe is on the other foot, and it is Vaillancourt who is guilty of breach of contract in both using intoxicating liquor and by being guilty of insolence and insubordination towards his superior officer.

Then exhibit "A," already referred to, which bears on its face the absolute dismissal of the suppliant, is signed by all the high officials who finally had anything to do with it. But the suppliant lays great stress on the contention that he was never notified of such dismissal.

Witness Mitchell testified that dismissal may be verbal or in writing.

Now the question arises as to whether or not a notice was necessary under the circumstances of the case,—the dismissal being for *good cause, legitimate grievance*,—I answer that in such a case, as distinguished from wrongful dismissal, no notice is required. See Beaudry-Lacantinerie—*Du contrat de louage*, vol. 21, pp. 600, 620 and 624. Damages or wages may be claimed only when the dismissal is made without cause, *sans motifs légitimes* (Idem, p. 598.) See also p. 606 where the author deals with the case in which the employee *commet des actes d'indiscipline, par exemple en insultant son chef*. Idem pp. 613, 615, 616.

The appointment of all servants of the Crown is an engagement at pleasure (*à bon plaisir*) which resorts from the object itself for which they are so appointed, which in the administration of things form part of the public domain. This right is inherent to the good administration of the State. *Samson v. Syndic Chemins à Barrières, etc.* (1).

*Dakley v. Norman* (2) is also authority for the dispensation of notice of dismissal.

La conduite grossière d'un serviteur vis à vis des maîtres est cause suffisante pour le renvoyer du service sans avis préalable.

L'insolence et l'insubordination d'un gérant d'une compagnie incorporée vis à vis des directeurs ou du président de la Cie justifient les directeurs de le renvoyer sans avis préalable.

(1) [1880] 6 Q.L.R. 86.

(2) [1886] 9 L.N. 213.

*Dick v. Canada Jute Co.* (1).

Art. 1667 C.C. enacts that the lease or hire of personal service can only be for a limited term. See *Beaudry-Lacantinerie*, vol. 21, p. 666.

However, Guillaud (3rd ed., vol. 2, p. 293) says que la durée du louage de service soit ou non limitée, chaque partie peut y mettre fin sans s'exposer à des dommages-intérêts, si l'autre partie manque elle-même à ses engagements. De même le maître ou le patron auquel le domestique ou l'employé refusent d'obéir, ou qui peut leur imputer *un manquement grave à leurs devoirs professionnels*, a le droit de les congédier immédiatement et sans indemnité, quelles que soient les stipulations du contrat qui les lie.

All of this is in confirmation of the *summary dismissal* provided by Regulation Exhibit B.

The imputation set up at bar that Vaillancourt was dismissed *without cause* is quite erroneous and without foundation. Insubordination and the use of intoxicating liquors were proved. They are both forbidden by the Rules governing the case, and were it not so provided it would be still a justifiable reason for dismissal. It is a fundamental rule that the authority administering a railway must be free from such insubordination.

Therefore, let it be well understood that the case of the *Can. National Rys. Co. v. Lévesque* (2) and other cases cited at bar by the suppliant, have no analogy with the present case, because these cases deal clearly with dismissal *without cause* as is distinctly set out in the reasons for judgment. The present case is a dismissal for *good cause*.

Railroading and booze like the East and the West in Kipling's poem are things that can never meet if the operation of trains is to be carried on with safety.

One must bear with and give a rigorous and efficient support to the authority in the administration of a railway, the want of which would tend to destroy that control and management which have for object to protect the public and the life of passengers. All employees owe loyalty and obedience to their superior officer acting within the scope of his duties and mandate.

Having found that Vaillancourt was rightly suspended and dismissed for good cause as having been guilty of in-

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(1) [1889] 18 R.L. 555; 30 L.C.J. 185; 34 L.C.J. 73.

(2) [1925] Q.R. 39 K.B. 165.

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subordination, and having used intoxicating liquor when on duty in contravention to exhibit No. 2,—the alleged contract between the parties—and made liable to summary dismissal in such case by exhibit B, there will be judgment declaring that the suppliant is not entitled to the relief sought by his Petition of Right.

*Judgment accordingly.*

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POPE APPLIANCE CORPORATION..... PLAINTIFF;

AND

THE SPANISH RIVER PULP AND  
PAPER MILLS, LTD. .... } DEFENDANT.

*Patents—Infringement—Commercial use—Patentability—Treaty of Peace, Germany, Order 1920, 11-12 Geo. V, c. 44.*

Pope applied for a patent in April, 1919, which was granted in September, 1919. He did not make application therefor under the provisions of the Treaty of Peace (Germany) Order, 1920, or under chapter 44, 11-12 Geo. V, but under the Patent Act.

*Held*, that where a patent was not validated by any of the post war validating legislation respecting patents, but the patentee elected to exercise his rights under the Patent Act, a party sued for infringement thereof cannot invoke such legislation, and the fact that they commenced to use the infringing device prior to the enactment of chapter 44 aforesaid, did not confer upon them any right to continue such use regardless of the validity of the said patent.

- 2. That the commercial use of an invention in a plant, from which the public is usually excluded, is a "use" within the terms of the Patent Act.
- 3. Where a patent is but the adaptation to a new purpose of an old method or appliance which is analogous to the purpose to which it has already been applied, and that the mode of application is also analogous, and where the patent appears to be an effort to limit the use of inventions already given to the public, by patenting, not improvements or freshly invented means, but only alterations in the form or size of well known methods and appliances, they fall within the field of the mechanic rather than that of the inventor, and are not patentable.

**ACTION** for infringement of patent.

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

*R. S. Smart, K.C.* and *J. L. McDougall* for plaintiff.

*A. W. Anglin, K.C.*, and *J. J. Gibson* for defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now this 5th day of August, 1926, delivered judgment.

This is an action for infringement of a patent, the invention of one Pope, the plaintiff's assignor. The invention is described as an improvement in methods and machines for making paper, and relates to a method or means for directing paper through a calendering machine. This is the last step in the manufacture of paper, and is designed to give the paper a smooth surface, and the operation is termed calendering.

The plaintiff also brought action against the Abitibi Power and Paper Co., Ltd., for infringement of the same patent, and that action was tried immediately following the conclusion of this one, the evidence in the one case being evidence in the other by agreement. Should I have occasion herein to refer to the second action I shall designate it as the Abitibi case.

It might be convenient first to describe generally a calendering machine and its operation. This machine consists of heavy steel rolls arranged in a vertical stack, one above the other and in close contact, and usually number from eight to ten. The rolls are rotated frictionally by driving the lowermost roll which is the heaviest of all. The paper ordinarily enters the stack between the top and second roll, passing downward first in one direction and then in the other through the rolls, until it has passed through them all, when it is wound upon a revolving reel and ready for market. The great pressure to which the paper is thus subjected gives it a smooth surface. Paper, in passing through the calender rolls of a modern high speed paper making machine travels at a very fast speed, anywhere from 600 to 1,000 feet per minute and it is said that the tendency is for the paper to follow upwards the top roll of the two through which it is at the time passing. Attached to the rolls is what is known as a "doctor," which is simply a scraping plate or blade, about 6 inches in width extending the full length of the rolls, and which scrapes against the upper roll with considerable pressure so as to prevent any paper passing beyond it and giving it a downward direction towards and around the lower roll. The

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doctor blade is rigidly held at either end in a plate or heavy angular frame attached to the standard or frame of the calender rolls and which is a part of the "doctor." It is agreed I think that without the aid of doctors, paper might possibly thread itself downwards through the rolls without any manual assistance, and it is also agreed that static electricity aids in some degree the paper to follow and adhere to the lower roll. In practice, however, men were required to assist with their hands the progress of the paper through the rolls until the full width paper web was perfectly formed, the men being stationed both behind and in front of the stack of rolls, and this practice was attended with some danger to such men. It is not the practice to introduce into the calendar rolls at the beginning a sheet of paper of the full width of the calender rolls, but by mechanical means which need not be here described, a narrow strip of paper called a "lead strip" about six inches wide is first formed, and this lead strip is first introduced into the end of any two of the calender rolls. While the lead strip is running through the calender rolls, the process of widening out the sheet of paper takes place until it becomes the full width and is running through the calender rolls. The doctors are retained against the rolls during the broadening out of the sheet of paper which takes but a few moments, but when this has been completely done and a continuous web of paper is passing through the rolls they cease to function and are mechanically removed a distance away from the rolls.

The patent in suit discloses a pneumatic device designed to facilitate and assure the passage downwards of the paper, after passing through any two rolls, so as to pass between the next two rolls in the opposite direction and so on through the remaining rolls, and the inventor claims that air under pressure directed against the upper roll will ensure this with certainty and without manual aid. The plaintiff's inventor takes the ordinary doctor frame, there being two well known and standard doctors known respectively as the Dillon and Warren, and through the horizontal part of the doctor frame he introduces a pipe which furnishes compressed air to a jet, or two parallel jets, and which air is directed against the upper roll and under the

doctor blade. The air entering this space goes in the general direction of the bite between any two rolls, the major portion it is said being above the bite where it develops pressure. It then flows downwards it is claimed, following the path of the lower roll, deflecting the moving paper downwards and keeping it in contact with the lower roll until it reaches the bite of the next series of rolls through which it passes when it meets on the other side another air current employed precisely in the same manner.

The claims in Pope alleged to be infringed by the defendant, are 13, 14, 15 and 16. Infringement of claim 17 was also alleged, but this was dropped at the trial. Claim 16 is typical of the other claims said to be infringed, and reads as follows:

16. In combination with the calenders of a paper machine, a doctor arranged to strip the paper from an upper calender and an air passage arranged to direct air substantially horizontally against such upper calender roll beneath the point of contact of said doctor therewith, so as to impinge on said roll and be directed against the paper passing between such upper calender and the next lower calender and press the paper against the same, and an unobstructed space beneath said doctor for the passage of the air and paper.

It is contended by the defendant that Pope has been anticipated. Beach was referred to not so much as a direct anticipation, but to indicate that as long ago as 1858 paper sheets were controlled and directed by air pressure. In all the prior art referred to by the defendant, there are five patents, Smith (three), Imray, and Schulte, that are particularly relied upon to constitute anticipation. Smith and Imray relate to pneumatic devices for leading paper through calender rolls. Schulte relates to the application of air in paper making machines for the purpose of assuring the continued course of paper upon felts after passing through rollers or cylinders, but at a stage prior to the calendering operation.

Smith, 1885, shows on the downward moving side of each roll in a calender stack, a semi-tubular sheet of metal called by the inventor a wind shield, which is concentric with the curvature of each roll, and closely blanketing the one half of the periphery of each roll to which it is adjacent. Each shield has a very sharp edge which may be a detachable portion and which acts as a doctor blade for

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scraping the paper web from the upper roll. In each shield is a series of conduits or pipes which are perforated, carrying the air under pressure to guide the paper web downwards through and around the rolls. The air projected from the pipes impinges upon the roll obliquely and it is said passes in the direction of the path of movement of the paper web. The doctor scrapes off the paper, and the air then directs and guides the paper web through and around the rolls. The patentee in describing generally the nature and purpose of his invention says:

This invention relates to means whereby a continuous rapidly traveling paper web may be automatically induced to pass between and around the "calender rolls," so called, and thus in its passage to receive a smooth and finished surface and is thereby adapted for general commercial purposes.

Hitherto in the process of calendering the paper web, as it passes continuously from the driers of the machine, has been conducted and guided through the stack of calender rolls by the fingers of the machine-tender, and serious accidents are continually occurring, in which the fingers of the operator get jammed and terribly bruised and the danger multiplied, since the paper web has to be restored every time its continuity is interrupted for any cause whatsoever. Moreover in the process of "mending up" a large amount of "broken" is produced, because the draft and tension across the paper web is not uniform, and folds or wrinkles are caused, which at once make a crack or break in the paper, and these continue until said tension is properly restored, the paper during this interval being rendered useless for commercial purposes.

To overcome these objections, and to render the waste of paper less and make the effort of mending-up not so laborious to the operative, and reduce the danger to a minimum, I have constructed the following improvements, which embody the subject of my invention: First, in the employment, in combination with a series of wind cases or shields alternately arranged and disposed over one-half the periphery of each roll, of a current of air, steam, or gas (either pressure or suction) to guide the paper web through the stack; secondly, in the use of spring-actuated "doctors" so called to prevent the web from winding up around a roll in lieu of advancing down over its surface of the next adjacent lower roll, etc.

In Smith, 1886, the method or means of applying the air in substantially the same as in the former patent though the doctor is somewhat changed, and it is claimed that the principal distinction between this and the first Smith is that the air is directed towards or in opposition to the motion of the rolls instead of obliquely. In Smith, 1893, the doctor is made hollow and supplied with compressed air through a conduit therein, or it might be said that the device consists of a tubular pipe to which a doctor or scraper is attached and into which pipe compressed air is

supplied. From the doctor blade or pipe is attached a series of vertical strips of pipes between the ends of the rollers, and perforated on the inside through which currents of air are directed so as to impinge against the sheet of paper passing around the lower roll, thus pressing it against the roll. I might here interpolate that as calendering machines became larger in size, the doctors came to be made stronger and more rigid as they are to-day.

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Another important patent said to anticipate Pope is Imray (British), 1884. The first paragraph of this patent reads:

The present improvements have for their object the better guiding of the paper while passing between and along the rollers of the calendering machine, and consist essentially of means for enabling the use of compressed air or steam for this purpose.

After stating that the paper may be in sheets or in continuous web, the inventor states that he arranges parallel to the rollers, which according to the drawings are alternately disposed upon opposite sides of the several rolls, a set of tubes or pipes having perforations or slits opposite to the rollers with currents of air supplied and forced through the perforations. There are four perforated tubes tied together, lying parallel with each other and the roll, and encircling the exposed face of the roll. The air issuing from the top tube is directed towards the lower portion of the upper roll and deflects the paper downward, while the air from the other three lower tubes presses the paper against the lower roll in its downward course until it enters between the next two rolls and so on. Imray has no doctor and everything is done by the air jets. The specifications state:—

The paper passing under the first highest roller and having a tendency to adhere to it, is blown off it by the blast proceeding from the uppermost perforated tube, and is pressed against the second (lower) roller by the blast proceeding from the lower perforated tubes.

The next patent to which I shall refer is Schulte (German and British), 1905. In the claims and specifications there is disclosed the provision of tubes with slots or holes through which pressure air flows in connection with a doctor blade or scraper. The purpose of the air current in Schulte, and which was applied at various angles of incidence, was to transfer at different points, paper in the

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making and in its wet condition, from pressure rollers, drying cylinders, and transporting cloths and felts, and did not relate or apply to the process of calendering dry paper which, the plaintiff urges, entirely differentiates Schulte from Pope. Prof. Reeve, the expert witness of the defendant, saw applied the Schulte air device to a calendering machine at the Abitibi Mills at Iroquois Falls, and owned by the defendant in the other action. The calender to which the Schulte air device was applied, was a 160 inch machine and was moving 785 feet per minute. This air device was applied to a doctor found installed in the Abitibi Mills, but altered so as to conform so nearly as could be to the Schulte disclosure, and in such circumstances and under the observation of Prof. Reeve, paper was run through this calendering machine. The paper web was first broken and a fresh lead strip started and a full width web was duly formed. This was done fifteen times without failure. This witness stated that on the lowest roll of the calender stack, the doctor blade was arranged at a higher angle than in the others, the frame of the doctor being reversed so that the angle or L-shaped bar of the doctor frame turned up instead of down in order to give freer passage for the paper to go to the reel, while jets of air travelled along parallel with the doctor blade, impinging on the upper surface of the lower roll. According to Prof. Reeve, the air jet was applied in the case of the other rolls of the calender just as described in Schulte on the wet portion of the paper machine. Another witness said the air was applied at various angles. This device was still on the calendering machine at the time of the trial. Whatever the true value to be attached to the evidence of Prof. Reeve in connection with this experiment, I should perhaps here say that I readily accept his statements as to the results of the experimental application of Schulte to the calendering machine at the Abitibi mills. Mr. Buncke, in the Abitibi case also gave evidence regarding the application of Schulte to the calendering machine at the Abitibi Mills, and which was confirmatory of Prof. Reeve's testimony.

I might here state that in the Abitibi case, Mr. Buncke gave evidence regarding an experimental application of Imray to a paper machine in the Abitibi Mills. The actual

device constructed was made an exhibit in that case. Buncke states that the air blasts coming from the upper pipe were directed against the bottom of the upper roll, while the air blasts from the other three pipes were set at the angle shown in Imray, there being no doctor. This witness states that such experiments or tests were all successful in carrying the lead strip through all the calenders by using the upper pipe alone, and as well by using the whole four pipes shown in Imray, and that the lower pipes did not interfere with the paper. I have no reason for declining to accept fully the evidence of Mr. Buncke in this regard.

Two patents granted to Pope in Canada prior to the patent in suit are also invoked by the defendant as an anticipation of the latter. I shall refer to one only, and that is patent No. 159,959 granted on January 5, 1915, and which relates to methods and means of preventing paper web from following the upper of two press rolls and carrying it to the felt which moves between the rolls. The specifications clearly describe the invention and its purpose a part of which is as follows:

In paper-making machines, the felt passes between the first one or more sets of press-rolls and the web is carried between the press-rolls with and by the felt, and the tendency is for the web, when leaving the bits of the said rolls, to follow the cylindrical surface of the upper press-roll, thus being removed from the felt, and winding upon said press-roll.

In starting the machine after a break has occurred or after it has been stopped for any other reason, the web always or almost always, sticks to the upper press-roll and follows it around to the usual doctor by which it is scraped from the roll and on which it masses in a huge pile of waste until a highly skilled operative is able to remove the web by hand from the press-roll and stick it to the felt so that it will move with it. When this has been done successfully the pull of the web will ordinarily be sufficient to overcome the tendency for the web to stick to and wind upon the press-roll and thereby cause the web to follow the felt, so as to be moved with and by it. Whatever effort may have been made to cause the web to leave the roll by other than manual means, have not been sufficiently successful to displace manual methods.

The difficulty is increased in proportion to the speed of the machine. At the present time machines are often run at a very high speed and efforts are being made constantly to increase the speed, with the result that the taking off of the web from the press-roll and carrying it to the felt, by a manual operation, notwithstanding the skill of the highly trained operator, is a serious problem. A machine cannot be run faster than it is possible to do this work.

This invention involves a novel method of taking off the web from the press-roll and carrying it to the felt; and also involves means for

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carrying out said method, which means is associated with the upper press-roll and is arranged adjacent to the felt by which the web is taken off of said roll and carried to the felt, and the well-known manual operation thereby dispensed with.

In the embodiment of my invention here shown for illustration, means are provided for forcibly delivering a thin sheet of air substantially tangential to the cylindrical surface of the press-roll, which is directed downwards or towards the felt, thereby to take off the web from the press-roll (in case it should have a tendency to adhere thereto or to wind thereon) and carry it to the felt. The pneumatic take-off device here shown by which such thin sheet of air is delivered may consist of a hollow shell or case, more or less triangular in longitudinal vertical section, having converging upper and under sides and inclosed ends and having a narrow slot or passage at the apex of the triangle which is extended across the width of the shell or case, and said shell or case is supported by suitable means adjacent the press-roll with its apex pointed in a direction substantially tangential to the cylindrical surface thereof, so that a thin sheet of air which issues, when desired, from the slot or passage, is directed substantially tangentially against said cylindrical surface and in a direction towards the felt, thereby to take off or blow off the web from the roll, so that it will pass to the felt. Said shell or case will be connected with any suitable air-forcing device by which the air will be delivered thereto under a suitable pressure, in order that it may be caused to forcibly issue therefrom.

Two of the claims in this patent, typical of the others, might be referred to.

12. In a paper-making machine, the combination with rotatable press-rolls and a web-carrying felt passing between them, of a pneumatic device arranged to direct a thin sheet of air between the upper press-roll and a web in contact with said roll, to prevent the web from winding on said roll and to direct it towards the felt on which it is carried, said device being movable whereby the direction of issuance of the current of air may be varied and means for adjusting the force of the current of air, substantially as described.

15. That improvement in the art of making paper which consists in directing a thin sheet of air with considerable velocity, tangential to the cylindrical surface of the press-roll, and towards the felt which is in moving engagement with said press-roll, thereby to cause the web to maintain its engagement with the felt and prevent it from winding on the press-roll.

This case is not without its complications, and the defence has raised many formidable questions. One point raised by Mr. Anglin may first be disposed of and that is, that the defendant commenced to use the infringing air device on calender machines prior to the enactment of chap. 44 of the Statutes of Canada, 1921, and that it thereby acquired the right to continue such use regardless of the validity of the plaintiff's patent. After reading over the evidence and the argument of counsel upon this point,

I find myself quite unable to appreciate exactly upon what ground this point was taken, and I hope I am not overlooking any of the reasons urged by Mr. Anglin in support of his contention. Pope applied for his patent on April 7, 1919, and it was granted on September 16, 1919. He consequently did not make application for his patent under the provisions of the Treaty of Peace (Germany), Order, 1920, or under chapter 44 of the Statutes of Canada, 1921, or any other special statute, but under the provisions of the Patent Act, chap. 69, R.S.C., 1906, and the plaintiff so pleads. I am of the opinion that none of the post war enactments regarding patents have any bearing upon this case whatever, they are not I think available to the plaintiff, nor are they open to the defendant to validate any user it may have made of any of the subject matter comprised within the patent in suit. The patent in question was not validated by any of such enactments, nor does its validity rest upon such enactments. They were never invoked by Pope in any way so far as I can see. He elected to exercise his rights under the Patent Act, and not having taken advantage of, or in any way relied upon, any post war validating legislation respecting patents, I do not see how others seeking to void his patent can invoke such legislation. The user by the defendant of the infringing air device was subsequent to the issue of Pope, and this user by itself cannot in any way disturb the validity of the patent. I think therefore this contention fails.

The evidence disclosed that Pope applied the invention here in issue to a paper machine in a mill of the Great Northern Paper Co. in Maine, U.S.A., sometime between March and June, 1917. The defendant contends that this was a public use under sec. 7 of the Patent Act, chap. 69, R.S.C., 1906, and Pope not having applied for a patent in Canada till April, 1919, more than one year after such public use, his application therefore was void and the grant as well. It was an employee of Price Bros., of Quebec, who was permitted to see Pope's air appliance in this mill, and which was against the customary practice of that mill. The use as of that date was admitted by one or more of the plaintiff's witnesses at the trial. I am satisfied that the commercial use of an invention in a plant from which

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the public is usually excluded, as was the case in this instance, is a use within the terms of the statute, and just as much as if it had been made openly in public. The statute was never intended to make an exception of such a use, and such a contention is not I think entitled to consideration. That, however, is not meant to be exclusive of the point. Inasmuch as this defence was not substantially contested, I do not feel justified in voiding the plaintiff's patent upon that ground. The evidence supporting the point came unexpectedly I think. The user in the mill in Maine may well have been experimental, or Pope may have patented his invention in the United States prior to that time, and if so he would have had one year from the date of issue in the United States to apply in Canada for a patent. No evidence one way or the other was tendered respecting these two points. Upon the evidence before me, I do not feel warranted in holding the plaintiff's patent void upon this ground. Possibly the defence did not lay greater stress upon this point because of the contention that Pope had been validated by the legislation to which I have already referred.

The defendant also contends that the patent in suit is void by reason of anticipation and want of subject matter; that it is the application of a well known and understood thing to an analogous use; and further that the most that can be successfully claimed for Pope is that it is a particular method of applying air against the upper roll only, which the defendant claims it does not do, but instead directs the air against the doctor blade.

Let me refer now to the last point. The defendant says that all that Pope describes in his specifications, all that is set forth in his claims, is that the air is to be applied against the upper roll, and that the field for the inventor being narrow in any event the patent must be narrowly construed, and at the most all that Pope is entitled to upon the construction of his patent is a grant for the method of directing a blast of air against the upper roll alone. It is true that Pope with particularity insists upon the application of the air to the upper roll in his drawings, specifications and claims. The defendant claims that in its device the air is directed against the doctor blade and the evidence

is that way, and that there is therefore no infringement. I quite recognize the force of the contention. That the patent must be narrowly construed, that I think is unanswerable, and possibly one might be justified in holding that Pope having unequivocally tied himself to a blast of air directed against the upper roll, it is not infringement by the same or equivalent means to direct the blast of air against the doctor blade. In each case the air deflects the paper downwards, but to say that there is a distinction because the precise point of application of the air blast is different, is a refinement upon which I would not care to determine the issue between the parties. I think the effect of the air blast is the same in one case as the other, and the evidence is not to the contrary. Inventors are not always expected, I know, to fully understand their inventions, and I doubt if Pope understood scientifically the effect of his air blast, though he doubtless realized the practical results. To find a distinction between Pope and the defendant's device, based upon the exact direction of the air blast, or as to whether it first strikes the upper roll or the doctor blade, would not seem to be a satisfactory or proper solution of the issue, and therefore I prefer to deal with the case upon what I think are more substantial grounds.

The patent in suit clearly does not involve a new principle, and means for applying a new principle, I do not understand it to be claimed, and therefore I need not discuss it upon that basis. There is much to say, however, in support of the view that in describing the air blast as one to be applied to the upper roll only, that a claim to a principle is made and nothing else. But whether Pope be a method, principle, process or combination mechanism, it is in the means or the combination of means for applying the air where is to be found the invention, if any there be. Considering the prior art, including Pope's earlier inventions, I cannot conclude there is invention in the particular means or combination or means here described and claimed by Pope. His device has utility and perhaps novelty, but in order to support a patent utility and novelty must be *de jure* as well as *de facto*, that is there must be invention. It is the utility evidenced by the general adop-

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tion of Pope by paper mills in Canada and the United States either under license or without license, and the saving of labour thereby that gives me most concern and is the strong point in the plaintiff's case, but the question remains to be answered, does Pope represent invention. The means in any of the prior art or in Pope does not mean intricate mechanism. The dominant element in each is the effect of the air when applied as in each described. Having the idea or principle many slightly different means are doubtless available for applying the air in combination with the rolls and doctor blade, but in the end all such means must have great similarity and must in principle, though not in form, be substantially the same. The compressed air must be carried in a pipe, and from there it must be directed through a nozzle or a perforated tube or pipe which acts as a nozzle or their equivalents.

The apparent distinction between the cited prior art and Pope is what might be called an improvement in the means in that in the latter the appliance is simpler, more convenient and less costly. It is not however an improvement that is claimed. The idea is the same, the result to be attained is the same. The beginning and the end mechanically, so far as the means is concerned, are the same. It is in the intermediate area that is between the compressed air pipe and the nozzle or jet directing the air, where the distinction in the appliances between the prior art and Pope is to be found. Having the idea, can it be said that the adoption of a single nozzle or air jet instead of a perforated pipe or series of pipes constitutes invention, and such as to warrant a monopoly to Pope. The conversion or alteration of the prior art, and particularly of Pope's senior inventions to the patent suit, could hardly require inventive skill. Alterations in the size or form of the apparatus or device for applying the air should show distinct novelty, particularly where all the known prior devices or means embody the same principle. The prior art and Pope involve so much of the same general idea or principle and such little difference in the particular ideas, of means, that it is difficult to distinguish between them. In the very nature of things, any means adopted for preventing paper from following the upper of two rolls by



the application of air blasts are bound to be much the same. The adoption of the lead strip in paper making would suggest a limitation in the size and form of the device supplying and applying the air, and the lead strip is not claimed in the patent in suit. Pope had done practically the same thing in the way of applying air in his earlier inventions, though the application was at an earlier stage in the process of manufacturing paper. I am not impressed with the contention about the weight of calender rolls, speed, the force of the air blasts, the presence or absence of carrying felts, economy in the use of air, or the distinction between dry paper and wet paper. The effect of air blasts is not influenced by such considerations, though they may suggest or require minor variations in the mode and means of application. There is nothing in the evidence that I can recall, which would justify the conclusion, that special difficulties obtain in applying air blasts to calender rolls as compared with other rolls in a paper machine. Look at it how one will, we find in the prior art the principle or idea that compressed air will control the movements of paper if properly applied, and that the air must be applied through a nozzle, jet or slot, or something of that kind, in the appropriate direction. It is to be assumed that Pope was conversant with all the prior art. To apply to calender rolls what Pope had already applied to other rolls in a paper machine, to transform Smith, Schulte, or Imray to Pope, did not I think require that amount of skill and ingenuity which might be called invention, but only experiment and ordinary mechanical skill. He finds the rotating calender rolls and the doctor blade and doctor frame all ready for his purposes. He did not discover the principle of the application of the air against stationary or rotating bodies. He knew of the influence of compressed air upon paper when applied in the region where paper was passing between two rolls. The pipe carrying the compressed air to the side of the calendering machine of course was old. He then introduces a nozzle to direct the air from the pipe against the upper roll. In shape and size this nozzle is different from the corresponding devices disclosed in the prior art, but I do not think it required invention to make the change. The patent in question looks too

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much like an effort to limit the use of inventions already given to the public, and to control at every turn in a continuous manufacturing process by patenting not improvements or freshly invented means, but only alterations in the form and size of well known methods and appliances, and which fall within the field of the mechanic rather than that of the inventor.

It is perhaps the application of the doctrine of analogous use that is most appropriate to a disposition of this case. It is a well settled principle of law that the application of a well known thing to a new and analogous use is not the subject matter of a patent unless there is invention in the application or the mode of application. See *Harwood v. Great Northern* (1); *Morgan v. Windover* (2); *Elias v. Grovesend Tinplate Co.* (3). Lord Westbury in the first-mentioned case laid down the principle that you cannot have a patent for a well known mechanical contrivance, merely, when it is applied in a manner and to a purpose which is not quite the same, but is analogous to the manner or the purpose in or to which it has been hereto notoriously applied. Lord Herschell in the same case said that the mere adaptation to a new purpose of a known material or appliance, if that purpose be analogous to a purpose to which it has already been applied, and if the mode of application be also analogous so that no inventive faculty is required, and no invention is displayed in manner in which it is applied, is not the subject matter of a patent. Again Lord Halsbury in *Morgan and Co. v. Windover Co.* said:—

When so applied "speaking of the invention in that case," it may well be for what I know to the contrary (indeed I will assume in favour of the patentee that it is so) that they have the useful effect which is attributed to them. But if it is simply the application of a well known and well understood thing to an analogous use, although it may be true it is accompanied by advantages not thought of or practised before, that will not save him from the fatal objection that there is no invention.

It seems to me that Pope's device falls within the principles to which I have just referred. Taking alone the earlier Pope Canadian patents, it does not appear to me that one can say that the new application laid so much out of the track of the former as not to suggest itself to

(1) [1864] 11 H.L.C. 654.

(2) [1890] 7 R.P.C. p. 131.

(3) [1890] 7 R.P.C. p. 455.

a person turning his mind to the subject, which in this case Pope did. As was said by Lindley L.J. in *Elias v. Groves and Tinsplate Co.*, it is impossible to say that here there is absolutely no ingenuity, no novelty, no invention, there is a little of everything, but so little when you come to look at it, it is reduced to this: taking an old idea and applying it to a similar purpose to that which the old idea has been applied before. The old idea was a means to prevent paper following the upper roll, whether a press roll or a calender roll, and with a blast of air with or without the aid of a doctor blade, to deflect it downwards to the next roll or to a felt. The physical outline or form of the appliance or means might differ, but in each case there was the pipe carrying the compressed air to a nozzle, jet, or perforated pipe, and therefrom forced in the direction calculated to consummate the end in view. In view of the knowledge disclosed in the prior art, in view of the similarity of purpose and mode of application between Pope and others, including Pope himself, it seems to me that the patent in suit is but the adaptation to a new purpose of a known method or appliance which is analogous to the purpose to which it has already been applied, and the mode of application is also analogous, and that no invention is displayed in the manner in which it is applied. It would not seem reasonable to me to exclude the whole world from doing the same thing, and that is what it would mean if Pope is a valid patent. Upon this ground I think the plaintiff must also fail.

Altogether the plaintiff's action for infringement fails. The defendant will have its costs of action.

*Judgment accordingly.*

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Jan. 3.  
April 6.

BRITISH COLUMBIA ADMIRALTY DISTRICT

COMMERCIAL PACIFIC CABLE CO. . . . . PLAINTIFF;

AGAINST

## THE PRINCE ALBERT

*Shipping—Exchequer Court—Jurisdiction—Colonial Court of Admiralty Act, 1890 (Imp.)—R.S.C., 1906, c. 141, sections 3 and 4.*

Plaintiff company was owner, or licensee and bailee, of a submarine trans-pacific (Honolulu) cable, and in sole control and operation thereof. Defendant wilfully anchored to said cable, off Montara point, near San Francisco, on high seas, using it as a deep sea anchor, contrary to all rules of good seamanship, and with the object of keeping herself in a favourable position off the coast, for smuggling liquor into the United States, and thereby damaged the said cable. Hence this action. The ship was arrested within the jurisdiction of this court to answer the claim for such damages, and it was contended that the court had no jurisdiction to entertain such action.

*Held*, that the words "subject to the provisions of this Act" in section 2 (2) of the Colonial Courts of Admiralty Act, 1890, did not reduce the jurisdiction of this court below that of the High Court of Justice in England.

2. That furthermore the words "within Canada" and "throughout Canada and the waters thereof" in sections 3 and 4 of the Admiralty Act of 1891, (R.S.C., 1906, c. 141), did not limit this court's jurisdiction to those merely domestic matters which, with all their attendant circumstances, arise within Canada's borders, and that this court had jurisdiction in the present action.

ACTIONS to recover damages resulting from the acts of defendant in using plaintiff's cable as a deep sea anchor.

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

*E. C. Mayers* for plaintiff.

*L. G. McPhillips, K.C.*, and *R. M. Maitland* for defendant.

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

MARTIN L.J.A., now this 6th day of April, 1925, delivered judgment.

These are two consolidated actions for damages amounting to \$191,000 done to the plaintiff's submarine Trans-Pacific (Honolulu) cable by the defendant ship in November, 1923, and again in January, 1924, on the high seas

about 26 miles off Montara point near San Francisco south of the Farallon Islands, California, by knowingly and wrongfully anchoring the said ship thereto and thereby causing it to break or become inefficient. The plaintiff company is a foreign corporation, resident in the United States, and the ship was arrested within the jurisdiction (in this port) to answer said claim for damages, but it is objected *in limine* that in such circumstances this court has no jurisdiction to entertain such an action.

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The defendant's counsel supports his submission by the decision of the Supreme Court in the *D. C. Whitney v. St. Clair Navigation Co.* (1), but in that case the vessel was arrested not in Canadian waters in the ordinary sense but in the Detroit river when lawfully navigating its waters pursuant to International rights especially conferred by article VII of the Ashburton Treaty of 1842 between Great Britain and the United States and hence Mr. Justice Davies said (McLennan and Duff JJ. concurring), p. 309:—

I do not think that the *D. C. Whitney*, a foreign ship, while sailing from one port of a foreign country to another port of that country and passing through, in the course of her voyage, one of the channels declared by convention or treaty to be equally free and open to the ships, vessels and boats of both countries, can be said to be within any jurisdiction conferred on any Canadian court by the sovereign authority in the control of the Dominion of Canada, even though that channel happened to be Canadian waters.

And at p. 311:—

Jurisdiction only attaches to the *res* when it comes or is brought within the control or submits to the jurisdiction of the court and not till then. Such jurisdiction does not exist against a ship passing along the coast in the exercise of innocent passage or through channels or arms of the sea which, by International law or special convention, are declared free and open to the ships of her nationality, unless expressly given by statute, I do not think it is possible successfully to argue that the right to initiate an action, make affidavits and issue a warrant, can exist before the foreign ship even comes within our territorial jurisdiction.

Being of this opinion the court declined (p. 310) to entertain any discussion as to the alleged limited character of the Admiralty jurisdiction conferred upon the Exchequer Court of Canada as this question did not arise for adjudication. Mr. Justice Idington, who dissented, based his judgment upon the ground that in fact that part of the river's

(1) [1906] 38 S.C.R. 303.

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channel in which the ship was navigating was Canadian territory to such an extent that, p. 320:—

We can suppose this arrest of the appellant to have taken place on the Thames in England.

and therefore the court had jurisdiction over the *res* being arrested within its jurisdiction. At page 324 the learned judge, after a review of several leading authorities, says:—

This case rests upon the maritime lien that arises from a collision and attaches to the offending vessel by virtue of such collision and the resulting damages in favour (to the extent thereof) of the owners of the innocent and damaged vessel.

Wherever the offender goes, she is subject to that lien, and it becomes the duty of the court having such right to enforce a lien of that kind whenever the offender comes within its jurisdiction, upon being applied to, to take steps to enforce the lien. To refuse it would be a denial of justice. Yet questions might in the exercise of such jurisdiction so arise that a proper discretion might lead to refusal to exercise it.

The exact question raised in the Supreme Court upon the effect of the Ashburton treaty was, apparently, not raised in the court below (the Toronto Admiralty District of this court, because that treaty is not mentioned by the learned judge in his reasons (1), and he deals with his jurisdiction in the light of many authorities, upon the broad ground that where a tort is committed by any ship in foreign waters or upon the high seas it is answerable for that tort in any Court of Admiralty in whose jurisdiction it may be found even if the action is between foreigners, and concludes thus, p. 8:—

I must therefore hold that this Canadian Court of Admiralty having the same jurisdiction over the like places, persons, matters and things as the High Court of Admiralty in England, has jurisdiction to try the maritime question of collision raised by the pleadings in this case.

To the cases cited by my learned brother, I think it only necessary to add the *A. L. Smith v. The Ont. Gravel Co.* (2) and the very recent one of the *Jupiter No. 2* (3), a decision on disputed possession by Lord Merivale, affirmed on appeal, wherein he is thus reported:

He said that the subject matter of the action—a ship lying in an English port—was a subject matter over which that court had jurisdiction, and although the court had a discretionary power to refuse juris-

(1) [1905] 10 Ex. C.R. 1.

(2) [1914] 51 S.C.R. 39.

(3) [1925] 69 Sol. J. 547; 94 L.J. Adm. 59 at p. 69; [1925] P. 69.

diction in an action between foreigners as to the ownership of a foreign vessel, he did not think that the present case was one in which he ought so to refuse jurisdiction.

The defendant's counsel laid great stress upon the words "subject to the provisions of this Act" in sec. 2 (2) of the Colonial Courts of Admiralty Act, 1890, cap 26, as in some way reducing the jurisdiction of this court below that of the "High Court of England," which is declared to possess "in like manner and to as full an extent," and sections 3 and 4 of the Canadian Admiralty Act of 1891 (cap. 141, R.S.C.) are referred to and it is submitted that their effect is to "limit territorially or otherwise the extent of such (High Court) jurisdiction" as may be done under sec. 3 of the Act of 1890. A careful consideration of these sections does not however in my opinion support this view, and the expressions in said sections of our Canadian Act "within Canada," and "throughout Canada and the waters thereof," etc., do not limit this court's jurisdiction to those merely domestic matters which with all their attendant circumstances arise within Canada's borders; such a view is moreover at complete variance with the concluding directions in sec. 2, that the newly established Canadian court "shall have the same regard as that (High) Court to International law and the comity of nations." The correct view of the effect of the said statutes is, I think, that taken by Idington J. in the *D. C. Whitney* case *supra*:—

The jurisdiction of the court must be exercised within Canada. Again it must be exercised throughout Canada and the waters thereof. These terms designate the place within which the jurisdiction must be exercised; and the place within which the appellant came and was seized clearly and indisputably was within the area thus designated. That by no means implies that the offences or the contract out of which the necessity for proceedings may arise *in rem* or *in personam*, must have taken place within Canada or upon the waters thereof.

And at page 320:—

It seems to me as if to all intents and purposes the result is just the same as if the Parliament and Sovereign Powers that enacted the "Colonial Courts of Admiralty Act of 1890" had constituted the Canadian Court a branch of the High Court in England for convenience sake, to exercise the powers which that court might at the time of the passing of the Act have been endowed with.

In this court the jurisdiction now questioned has been exercised in several cases for more than 20 years to my know-

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ledge and no good reason has been shown in this case for discontinuing to do so.

Turning briefly to the facts, it is sufficient to say that I have no doubt that the defendant ship wilfully caused the serious injury complained of to the cable, by wrongfully using the same as a deep sea anchor in a place and manner contrary to all rules of good seamanship with the object of keeping herself in a favourable position off the Californian coast for the purpose of smuggling liquor into the United States, and I regret to say that in essentials I can place no reliance upon the very unsatisfactory evidence of the principal witnesses on her behalf, and in particular her master J. F. Nichol. What was done was in short an extraordinary and reprehensible abuse of the rights of navigation, and where a ship is found conducting herself in the unprecedented and unseamanship way this vessel was doing, it has herself to blame if its more than suspicious conduct make it difficult for it to establish clearly the propriety of such action.

The damage done here was not occasioned by the lawful endeavour to make a port in the actual course of navigation but in the attempt to keep a fixed position on the high seas away from a port with the object of thereby assisting in the unlawful importation of goods into a foreign country.

Objection was also taken to the right of the plaintiff company to maintain the action but at the least it is the licensee or bailee of the cable, and in sole control and operation thereof, and in such circumstances that possession would be sufficient to found an action for damages thereto of the nature disclosed by the facts before me—*The Clara Killam* (1); *Glenwood Lumber Co. v. Phillips* (2); *The Swift* (3); *The Winkfield* (4), and *The Zelo* (5).

In the first case which was the first one of that description, in the Admiralty Court Sir Robert Phillimore said, p. 165:—

I must consider that the telegraph cable was lawfully placed at the bottom of the sea, and in the spot where it received the injury. I must

(1) [1870] L.R. 3 A. & E. 161.

(3) [1901] P. 168.

(2) [1904] A.C. 405 and 410.

(4) [1902] P. 42.

(5) [1922] P. 9.



also consider that the vessel which did the injury to it was in the exercise of her right both in navigating the surface of the sea, and in dropping her anchors when and where she let them go. The law requires that each party should exercise his right so as if possible, to avoid a conflict with the rights of the other.

The ship was held liable because though she had in a gale properly dropped her anchors which fouled the cable, yet in weighing them she did so in a way which, contrary to ordinary nautical skill, caused unnecessary injury to it. In the case at bar, the circumstances as have been shown are much stronger against the offending ship and constitute a wilful improper use of the cable contrary to all nautical usage, and therefor judgment will be entered in favour of the plaintiff for the damage so occasioned, the amount thereof to be assessed by the Registrar with merchants in the usual way.

*Judgment accordingly.*

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HIS MAJESTY THE KING.....PLAINTIFF;  
AND  
MYERS CANADIAN AIRCRAFT CO., }  
LTD., ET AL ..... } DEFENDANTS.

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Nov. 19.  
Nov. 22.

*Practice—Security for costs—Virtual plaintiff—Proceedings before Commissioner of Patents*

Plaintiff alleged that the defendant Myers had applied to the Commissioner of Patents, under section 48 of the Patent Act, to determine what should be reasonable compensation to him for the use of his invention by the plaintiff. That on such application plaintiff could not raise the validity of the patents involved and was forced to take the present action to impeach the same. That his action was in the nature of a defence to defendant's claim, that the said defendant was really a plaintiff and should give security for costs of the present action. By the defense Myers only sought to maintain his patents, and no more.

*Held* (affirming the decision of the Registrar), on the facts disclosed, that there was no relation proximate or remote between the proceedings before the Commissioner and the present action and, as the defendant herein did not assert any substantive right whereby he would become a virtual plaintiff, he should not be compelled to give security for costs.

APPEAL from decision of the Registrar dismissing application of plaintiff for an order to compel the defend-

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ant Myers to give security for costs on the ground that he was virtually a plaintiff.

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

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

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

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

THE PRESIDENT, this 22nd day of November, 1926, delivered judgment.

In March, 1913, there was issued in Canada to the defendant Myers, a patent relating to improvements in flying machines. In December, 1918, another patent was issued to the same defendant, also relating to flying machines. In April, 1918, the defendant Myers granted to the defendant Company a license for the use within the Dominion of Canada of the first-mentioned patent, and by assignment he conveyed the last-mentioned patent to the defendant company in April, 1924. The defendant Myers claiming that the Government of Canada during the war, manufactured and used aeroplanes which infringed certain claims of these two patents, applied to the Commissioner of Patents under section 48 of the Patent Act, to determine thereunder what should be a reasonable compensation to him for such use of his inventions by the Government of Canada. The plaintiff alleges that he was not able on such application to urge as an answer to the fixing of such compensation the invalidity of the patents in question, and accordingly this action was commenced asking for a declaration that the patents be declared null and void, and that they be revoked. In the meanwhile the proceedings under sec. 48 have been stayed. The defendant company is within the jurisdiction, while the defendant Myers is without the jurisdiction.

The plaintiff made application before the Registrar of this Court for security of costs from the defendant Myers, which application was refused, and this proceeding is an appeal from such refusal.

The ordinary rule is that security for costs is ordered when the person bringing an action is out of the jurisdiction, the reason being that if the application or action fails, there will be a tangible opportunity of recovering the costs of the failure. Here it is the original patentee and the present registered owner and licensee of the patents who are attacked with a view of revoking the patents, and it is said that this application does not come within the usual rule. It is the plaintiff who brings the defendant Myers into court to decide whether the patents in question are valid, and I fail utterly to see why that defendant Myers should be asked to give security for costs. He is making no application to the court whatever in connection with the patents. If he were, in any way, the rule that where a defendant is asserting a substantive right and so becomes a virtual plaintiff might be applied to him, and he might be compelled to give security for costs of any such proceeding by him. When this action comes to be heard the sole issue will be the validity of the patents, and whether or not they should be revoked. To say that sec. 48 of the Patent Act does not enable the plaintiff to raise the issue of the validity of the patent, on the proceedings before the Commissioner, has nothing to do with this action to revoke the patents, and there is no relation, proximate or remote, between the two. If sec. 48 has failed to make proper provision for one thing or another, the defendant Myers is not responsible for it. That does not necessarily force the plaintiff to bring this action, nor does it in any sense make him really a defendant in this action. Supposing that the Commissioners held that the plaintiff was a statutory licensee and liable for compensation, or that the plaintiff on moral or equitable grounds admitted liability for compensation to Myers, or that the defendant Myers withdrew his application for compensation, not one of these three grounds would be an answer to the action to revoke the patents for want of subject matter, and neither of these suppositious situations would have any relevancy whatever to the issue of the validity of the patents. The plaintiff's action is a simple one involving the validity of the patents in question, and that issue is unaffected and uninfluenced by the user of the plaintiff, or any one else,

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or by the question as to whether compensation is properly or reasonably payable for the use of such inventions, by the plaintiff. I see no reason whatever for departing here from the usual rule. I am of the opinion, therefore, that the appeal cannot be entertained, and that the decision of the Registrar was proper. The case of *Luke Miller's Patent* (1), will be found quite illuminating upon the point.

I would therefore dismiss the appeal and the application, with costs.

*Judgment accordingly.*

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Sept. 7, 8.  
Nov. 25.  
J. ARTHUR MILLER ET AL.....SUPPLIANTS;  
AND  
HIS MAJESTY THE KING.....RESPONDENT.

*Petition of Right—Expropriation—Injurious affection—Acquiescence—Equitable Rights—Building restrictions—Restrictive Covenant—Statute of Limitation.*

Suppliants owned certain land, in the city of Halifax, described on a plan of subdivision as blocks J., K., L., and M., which was further subdivided into lots, less certain lots that had been sold. In January, 1913, they sold their remaining interest, 22 lots in K., to the Crown for railway purposes, being then well aware of the proposed use, the conveyance being made to Eastern Trust Company at the instance of the Crown. In March, 1913, the whole block K. was expropriated by the Crown under the Dominion Expropriation Act. The present action was to recover for injurious affection to the adjoining blocks J. and L., by reason of the use made of the land acquired in block K. It was conceded that the suppliants were required to establish an interest in the lands taken, to succeed in an action for compensation for injurious affection of the lands not taken. It was contended that a restrictive covenant or building condition contained in the deed of one lot in block K., sold to S. gave suppliants an equitable interest in this lot, which was a benefit for all their then unsold lands, and it was also contended that by reason of certain statutory building restrictions they had an equitable right in the lots in block K. acquired from others than the suppliants. Furthermore, that the Crown took the land subject to and with notice of these covenants or conditions, expressed or implied, that the building of the railway was in breach thereof, causing damage for which the suppliants were entitled to compensation. No restrictive covenant or condition was made part of the deed from the suppliants to the

(1) [1894] 11 R.P.C. 55.

Crown, and in fact, in all the lots sold by the suppliants in the blocks mentioned, a restrictive covenant or condition was made part of one deed only, that to S.

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*Held*, that in so far as the action rested on equitable rights, it was subject to equitable defences, and that, by their participation in the acts complained of, by selling the lands to the Crown for the purpose of the railway, by their acquiescence in all that had been done, and by their laches, the suppliants were now estopped from enforcing or claiming under equitable rights based upon the restrictive covenant.

2. That statutory building restrictions, which may at any time be modified or repealed, by the legislative body creating them, are not in the nature of covenants creating an equitable interest in land (*Orpen v. Roberts*, [1925] S.C.R. 364 referred to).
3. That the claim for injurious affection falls under the provisions of sec. 2, subsec. *d* of the Statute of Limitations (Nova Scotia) requiring claims for direct injury to lands to be proceeded with within 6 years from the time when the cause of action arose, and, moreover, that if the injurious affection here alleged was not referable to direct injury to land, then it falls under another clause of the same section, "actions for all other causes which would formerly have been brought in the form of an action called trespass on the case . . . ."

PETITION OF RIGHT to recover from the Crown, for injurious affection to certain lands of the suppliants by reason of the operation of a railway on lands adjoining thereto, and which were expropriated by the Crown, and obtained from suppliants for this purpose.

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

*T. R. Robertson, K.C.*, and *Ingram Oakes* for suppliants.

*W. H. Covert, K.C.*, and *J. E. Rutledge* for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, this 25th day of November, 1926, delivered judgment (1).

This is an action for alleged injurious affection of lands of the suppliants, situated at Halifax, N.S., in consequence of the construction upon and over certain of such lands of a portion of the railway from Bedford Basin to the Ocean Terminals on Halifax Harbour, forming a part or extension of what was then known as the Canadian Government Railways. The lands here said to be injuriously affected

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

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are on both sides of the railway, as constructed, but separated from the railway in each case, by a street. The suppliants, or their predecessors in title, for a long time prior to the projection of this railway were the owners of the land in question, which came to them as interested parties in a larger area known as Miller's Fields upon partition proceedings. Since then there have been changes by death in the ownership, but I shall not attempt, nor is it necessary, to distinguish between the owners upon the partition and the suppliants. The particular tract of land which fell to the suppliants, and which is of importance here, was of substantial size, rectangular in shape, bounded on the west by Tower Road, and on the east by Young Avenue. These streets ran substantially north and south with well defined boundaries on the east and west. This area was subdivided into four blocks which on the plan of division and survey, were designated as J, K, L, and M, and these blocks in turn were subdivided into lots. Between each block were projected streets, running east and west, and at right angles to Tower Road and Young Avenue. These streets were actually conveyed to the Crown in the right of the province, it was stated at the trial, and thus the property and title of the suppliants therein became alienated. It is the lands in Blocks J and L that are said to be injuriously affected, and it was Block K, located between Blocks J and L and entirely surrounded by public streets, that was acquired or taken by the respondent.

When the construction of the railway in question was first projected and made public, G. W. Goddard, now one of the suppliants, then acting as agent of the suppliants, engaged the services of Mr. M. S. Clarke, a real estate broker of Halifax, to negotiate by private treaty, the sale to the respondent of such part of the right of way required for the railway as would likely pass through the suppliants' lands, it then being known that the projected railway must of necessity cross the suppliants' lands somewhere, and practically at right angles from Tower Road to Young Avenue. Clarke acted for Goddard throughout all the negotiations with the respondent's representatives in respect of the sale and acquisition of this portion of the right of way. Clarke apparently acted for the respond-

ent in acquiring many other portions of the right of way from other proprietors, but in this case his agency was for Goddard only. Goddard by letter informed Clarke of the lots in the entire area of the suppliants' lands already sold, and stated that they were open to sell to the respondent the balance, and expressed a desire to sell the whole of the unsold lots, or at least a large number of them. In correspondence passing between them, Clarke pointed out to Goddard that he might sell the whole of the lots if a reasonable price were named, and also pointed out that in his judgment much of the land between Tower Road and Young Avenue would become unfit for residential purposes if the railway went through it. He requested Goddard to state his selling price for the entire property, and also the price of the several blocks separately. A response came to Clarke on December 26, 1912, from one Theakston, presumably authorized by Goddard, offering to sell 22 lots in Block K, being the suppliants' remaining interest therein at the rate of \$650 each or altogether \$14,300. This offer was communicated by Mr. Clarke to Mr. T. F. Tobin, K.C., solicitor for the Department of Railways and Canals, the respondent, in the matter of acquiring the rights of way for the undertaking. On January 3, 1913, Mr. Tobin wrote Mr. Clarke accepting this offer on behalf of his client, and also informing him that the deed of conveyance would be made to the Eastern Trust Company, and would express the full consideration price. A draft conveyance it would appear, was made by a solicitor, upon the instructions of Goddard, and the conveyance from the suppliants to the Eastern Trust Company ultimately passed on January 18, 1913, and expressed the full consideration price, \$14,300. These lands, along with numerous other parcels of land were much later conveyed by the Eastern Trust Company to the respondent. It is not subject to doubt I think that the suppliants sold such lands to the respondent, and for the purposes of the railway undertaking in question, and were well aware that while the conveyance was then passing to the Eastern Trust Company, doubtless for good and sufficient reasons, that the actual purchaser was the respondent. The intervening agency or trusteeship of the Eastern Trust Com-

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pany is not I think of importance. This finding will be acceptable to the suppliants because they claim that upon this footing, their case is much stronger than if a sale in the ordinary way was made to the Eastern Trust Company, and by it to the respondent. To whom the sale was made, and the use to which the land was to be put, is here the important thing. The suppliants knew of no other person in the negotiations leading to the sale and purchase except the respondent, and they carried out the sale by making the conveyance to a corporate body designated by the respondent, and whom they probably heard of then for the first time. In any event, they knew the lands were being acquired for the purposes of the railway. The evidence is so strongly that way, that any further discussion of it is I think unnecessary.

I should perhaps here say, that the whole of Block K was expropriated in March, 1913, by the filing of a plan and description of the same, under the provisions of the Expropriation Act. It is not clear to me at the moment whether the title to lot 94 in Block K sold to one Louisa Smith, and to some seven other lots in the same block previously sold by the suppliants, and to which I shall soon refer, passed to the respondent under the proceedings under the Expropriation Act, or by conveyances from the proprietors thereof, but in any event the title to the same passed to the respondent in either one way or the other. The expropriation proceedings would, of course, put the title to the 22 lots conveyed to the Eastern Trust Company, in the respondent, but as I have already stated, these lots, together with many other lots were later conveyed to the respondent by a deed of conveyance.

It is therefore to be seen that the suppliants sold to the respondent, and conveyed to the Eastern Trust Company, 22 lots in Block K, being their entire interest therein, the block containing altogether 30 lots. Eight lots in the same block had been previously sold to other purchasers by the suppliants. The first sale in the block was lot No. 94 to one Louisa Smith, in June, 1897. The conveyance contained the following restrictive covenant or condition:—

Subject however to the provisions of chapter 28 of the Statutes of Nova Scotia passed in the year 1896 entitled "An Act relating to Young Avenue, in the city of Halifax, and any amendments thereto, and also



subject to the agreement and condition that no dwelling house or other building shall be erected or maintained nearer than thirty feet to Young Avenue.

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In April, 1899, lots 13, 17, and part of lot 18, facing on Tower Road, were conveyed to one Rent. In October, 1901, lots 93 and 95, facing on Young Avenue were conveyed to Louisa Smith. The next conveyance was in June, 1912, and comprised lots 90, 91, and 92, facing on Young Avenue. These four conveyances comprise the entire sales made by the suppliants in Block K up to the time of the conveyance to the Eastern Trust Company. In all the conveyances including the one to the Eastern Trust Company, there is no mention of any restrictive covenants or conditions, except in the case of the first conveyance to Louisa Smith. It might be convenient here to refer to the *habendum* clause in the conveyance to the Eastern Trust Company, and which is as follows:—

Together with all and singular the buildings, easements, tenements, hereditaments and appurtenances to the same belonging or in anywise appertaining, with the revision and revisions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim, property and demand both at law and in equity of the said J. R. Miller and George W. Goddard as such executors and trustees of, in to or out of the same or any part thereof. To have and to hold the said lands and premises with the appurtenances and every part thereof the said the Eastern Trust Company, its successors and assigns its and their sole use, benefit and behoof forever.

The lots in Block K, facing on Young Avenue, numbered 90 to 95 inclusive, were subject to the statutory building restrictions and conditions prescribed by chapter 28 of the Statutes of Nova Scotia, 1896, entitled "An Act relating to Young Avenue in the city of Halifax." This statute must be examined with some care in order to understand its purpose, scope and effect. The preamble of this Act fully reveals the reasons for and the purpose of the legislation. It is as follows:—

Whereas Young Avenue forms the main entrance to the Park, and said entrance extends from Inglis street to the Park gates, and large sums of money have been spent in building and grading said avenue, and it is desirable to build a sewer therein, to extend the water supply, beautify said avenue and otherwise improve the same, provided certain class and style of houses are built in order to make said avenue a residential part of said city.

Then section 1 provides that no building shall be erected abutting on Young Avenue, or within 180 feet of the same

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without first submitting for approval the plans, etc., to the City Council and declaring the object for which such building is intended; that the City Council may refuse to sanction said plans, etc., if in its opinion the building sought to be erected is not one suitable to be erected on this avenue; that any building erected contrary to this section should be deemed a public nuisance; that dwelling houses should not cost less than a stated sum. Following sections of the Act provide that any building erected in violation of sec. 1 might be removed at the instance of the City Council, and the procedure for enforcing this remedy is outlined; that no building erected shall be used or occupied as an hotel without the consent of the City Council, and a money penalty is provided for violation of the same; that any building then erected on Young Avenue but not erected in accordance with the Act, might be expropriated by the city, subject however to compensation being paid by the city to the proprietor. Sec. 6 enacts that no building shall be built on any street within a described area which comprised Blocks J, K, L, and M, costing less than \$2,000, if a single dwelling home, etc., and a money penalty is provided for infraction thereof. Then the last section enacts that no dwelling house or other building shall be erected or maintained nearer than twelve feet from Young Avenue or on any lot on the Miller property fronting on any other street nearer than ten feet to such street. Then by another Act, the "City Charter, 1907," it was enacted *inter alia*, that no building erected on Young Avenue or within 180 feet of that street should be used for any other purpose than a private dwelling, the main portion of which should not be nearer than forty feet to the side line of that street. The City Charter also provided that no building should be erected on any lot having a frontage on any street, other than Young Avenue, in Blocks J, K, L, and M, at a distance of less than ten feet from such street. These two statutes cover practically the same ground, though it would appear that the City Charter required that no building should be erected nearer than forty feet from Young Avenue, while the other Act fixed this distance at twelve feet. The first conveyance to Louisa Smith contained the condition that no dwelling house or other

building should be erected nearer than thirty feet to Young Avenue, which in that respect it is to be observed, was a departure from the requirements of the City Charter.

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It was conceded by counsel for the suppliants that where lands are injuriously affected, no part thereof being taken as in this case, the owners are not entitled to compensation. *Queen v. Barry* (1); *Sisters of Charity of Rockingham v. The King* (2). In order to meet this state of the law, the suppliants contend that the covenant or condition contained in the deed to Louisa Smith gave them an equitable interest in the land conveyed thereby which was a benefit for their unsold lands, and that also by reason of the building restrictions and conditions created by the statutes, they had an equitable right or benefit in all the lands taken. The suppliants urge that similar covenants are to be implied in all the deeds to which I have referred outside that of Louisa Smith, but I shall later refer to this. Having such equitable rights in the land taken, the suppliants contend they are within the principle of law which requires that land or an interest in land must be taken before an action for injurious affection to other lands can be sustained, and that they are in law entitled to compensation if they can shew that their remaining lands were injuriously affected. The suppliants claim that the respondents took the property in question subject to and with notice of the covenants or conditions actual or implied, and that the building of the railway and certain bridges was in breach or extinguishment of such covenants or conditions. The suppliants' claim to compensation was not put to me upon any other ground. The principal point for decision therefore is whether or not the suppliants had an equitable right or interest in the lands thus acquired by the respondent by reason of the restrictive covenant contained in the conveyance to Louisa Smith and by the provisions of the statutes referred to. The suppliants contend affirmatively and rely particularly upon the authority of *The Long Eaton Recreation Grounds v. The Midland Railway Co., Ltd.* (3).

(1) [1891] 2 Ex. C.R. 333.

(2) [1922] 2 A.C. 315.

(3) [1902] 2 K.B. 574.

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I propose first a discussion of the case on the assumption that the statutory restrictions were not in existence, and that the suppliants were relying entirely upon the covenant in the Smith deed of conveyance. Frequently, a large tract of land is divided by the owner into lots to be sold for residential purposes, and each purchaser is required to enter into covenants with the vendor, usually for the benefit of all the purchasers, restricting the uses to which such land may be put. Such restrictions create equitable rights enforceable in equity against the covenantor, or his assigns who purchase with notice. Covenants affecting the user of lands are said to be a burden on the property of the covenantor, and a benefit to the user of the unsold property within the building scheme area. They are frequently described as negative easements and run with the land in equity, but not at law. The consideration for the acceptance of the burden of the covenant by the covenantor for the benefit of the unsold lands, is that the covenantee would impose the same burden upon other purchasers in conformity with a uniform building scheme, and in respect of the unsold land would deal with the same in a manner consistent with the covenants exacted of the covenantors. It is for that reason that a negative easement in equity runs with the land. If there is no consideration of this kind, the covenantee I apprehend would not acquire an equitable interest in the land of the covenantor. The covenant might remain, but it would be, I think, merely a personal covenant between vendor and vendee, and would not run with the land. If land burdened with such a covenant is taken for a public use, which would extinguish the benefits of the covenant to the vendor or user of the other land, in some circumstances at least, the latter would be entitled to compensation. The ordinary case is where the easement is of such a nature as a right of way.

It was said by Lindley L.J., in *Knight v. Simmonds* (1), a case involving restrictive covenants, that when a court is asked to enforce a covenant by decreeing specific performance or granting an injunction, in other words when equitable as distinguished from legal relief is sought, equit-

(1) [1896] 2 Ch. 294.

able as distinguished from legal defences have to be considered. The basis of this action rests upon the existence of equitable rights, and is subject to equitable defences. The conduct of a covenantee may disentitle him to relief. His participation in the acts of which he complains, conduct inconsistent with an expected observance or intended enforcement of a covenant, acquiescence in the breach of a covenant or delay in seeking relief, may be sufficient to preclude him from enforcing equitable rights or procuring equitable remedies. Courts of equity in such cases look not only to the conditions of the covenant, but to the object to attain which it was entered into, and when that object cannot be obtained, equitable relief may be refused a covenantee. The respondent now having the legal estate in the Smith lot particularly, and generally all the lots in Block K, may I think be heard to say all this. The suppliants here conveyed and sold their entire remaining right, title and interest of every kind in Block K, being about 2 $\frac{2}{3}$ % of the whole, well knowing it was to be used for the purposes of the railway to be constructed. The deed purports to convey all the right, title, interest, property and demand, both at law and in equity, of the grantor, together with all the easements to the same belonging. No restrictive covenant of any nature is to be found in the conveyance. This was in January, 1913. The railway was in operation late in December, 1917. The suppliants remained silent until 1925, when they commenced this action, which is I think corroborative of the view that their silence had been preceded by knowledge of the exact user to which the property was to be put. Having sold the 22 lots to the respondent without exacting any restrictive covenants, and knowing what it was to be used for, I am of the opinion that they cannot now be heard to say that the sole restrictive covenant exacted of all the purchasers in this block, that entered into by Louisa Smith, gives them an enforceable equitable right in the property of that covenantor, and that they are not now entitled to compensation for injurious affection of the other lands. They cannot be heard to say, "you committed a breach of our equitable right in the Louisa Smith Lot" when they themselves were parties to it, and they cannot in equity

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be heard to say that the respondent put a "building" on the Louisa Smith lot in contravention of the covenant when they themselves furthered and acquiesced in the construction of the same "building" upon contiguous lands, knowing it was likely to extend to the Smith lot. I think by their acquiescence in all that has been done, and by their laches, they are now estopped from enforcing any equitable rights originating in such covenants or now claiming anything thereunder. The covenants were I think waived and the suppliants acquiesced in their breach, and they were no longer possible of attainment or performance. The suppliants are not now entitled to relief. See N.S. Statute of Limitations, ch. 238, sec. 30. The following authorities might usefully be referred to: *Baily v. De Crespigny* (1); *Renals v. Cowlshaw* (2); *Peek v. Matthews* (3); *Sobey v. Sainsbury* (4); *Kelsey v. Dodd* (5); *Roper v. Williams* (6); *Sayers v. Collyer* (7); *Gaskin v. Balls* (8). Much might be said in favour of the view that the covenants entered into by Louisa Smith were never enforceable as covenants running with the land against her assigns. There is not very clear evidence of the existence of what is usually deemed a building scheme, with restrictive covenants intended to be consistently exacted of all vendees by the vendor, and there is no evidence whatever that the suppliants had expressly or impliedly contracted not to deal with any part of the unsold land, in a manner inconsistent with the covenants exacted in the case of the Smith lot. Indeed it is doubtful whether upon a proper construction of the so-called covenants in the Louisa Smith Deed, they were binding or were intended to be binding upon the covenantor's assigns. This, however, I need not decide.

There remains for consideration the effect of the statutes referred to and which I have so far entirely disregarded. These statutes contain the usual building restrictions frequently enacted by legislatures or by municipal bodies with legislative authority. Statutory building restrictions

(1) [1869] L.R. 4 Q.B. 180.  
 (2) [1878] 9 Ch. D. 125.  
 (3) [1867] L.R. 3 Eq. 515.  
 (4) [1913] 2 Ch. D. 513.

(5) [1883] 52 L.J. Ch. 34.  
 (6) [1822] Turn. & R. Rep. 18.  
 (7) [1884] 28 Ch. D. 103.  
 (8) [1879] 13 Ch. D. 324.

are quite different I think from covenants passing from vendee to vendor, which usually continue to run with the land unless they have been expressly relaxed or waived, or for other causes have become unenforceable. Such covenants undoubtedly create an equitable interest in property. I do not think this can be said of statutory building restrictions, which at any time may be modified or repealed by the legislative body creating them without reference to the owners of the property affected by them. So long as they are in force they are not subject to waiver or modification on the part of the vendor or vendee, or by any owner of property subject thereto. I know of no authority or reason for holding that such legislative restrictions create an equitable interest or right of any kind in one property for the benefit of any other property owner who is affected by them, unless the statute so says. The statute might expressly give them the legal right to enforce such restrictions. The obligations to observe the restrictions apply to all property owners alike. They are statutory building restrictions nothing more and nothing less, and are not in the nature of covenants creating equitable interest in land. As to the legal rights created by statutes of this character see *Orpen v. Roberts* (1).

I must briefly refer to the case of *Long Eaton Recreation Grounds Co. v. Midland Railway Company* (*ubi supra*), upon which the suppliants rely so much. The plaintiff was owner of a large tract of land, a part of which was devoted to a recreation ground, and the remainder was laid out as building land. The building land was sold to various grantees, subject to certain restrictive covenants limiting the user by the purchasers of the land. The defendant company before obtaining statutory powers to construct a proposed line of railway, purchased the whole of the lands there acquired from the plaintiff's grantees, and took the same with notice of the restrictive covenants. The defendant subsequently obtained an Act of Parliament authorizing the construction of a railway, and incorporating the Lands Clauses Consolidation Act, 1845, and in the construction of the railway, the defendant erected an embankment for the railway on the land so bought by

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(1) [1925] S.C.R. 364 at 369-371.

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them in breach of the covenants of the vendees. It was held that the embankment was a "building" within the meaning of and in breach of the covenants contained in the plaintiff's deeds of conveyance, not to erect any building but a private dwelling, and that the land which was entitled to the benefit of these restrictive covenants was injuriously affected if that benefit was extinguished, although no part of the plaintiff's land was taken. I think this case is easily distinguishable from the one under consideration. There the covenantee was not a party to the sale of the land to the railway company, and did not expressly or impliedly waive its covenants, nor did it acquiesce in the sale of the lands by its covenantors for railway purposes. Here it was the suppliants themselves that in fact almost wholly deprived their property of the benefit of the covenant affecting the land sold to Louisa Smith. It was they who relieved that lot of land of the burden of that covenant when they sold 22 lots to the respondent for the purpose of the railway. This is not the case of a third party purchasing from the suppliants' covenantor, with or without notice. It is the case of the vendor and covenantee being one and the same person. I do not therefore think that the authority referred to is applicable here.

This case was very largely tried upon the grounds which up to this point I have discussed, and it was for that reason and also on account of the importance of such grounds that I have dealt with them at considerable length and delayed discussion of another important and formidable defence pleaded to the suppliants action, which plea if well founded is in itself a sufficient answer to the action. The respondent pleaded the Statutes of Limitations to the claim asserted in the Petition of Right, and while during the opening of the defence the respondent's counsel referred to this issue, still it was not pressed at the end of the trial. It is to be mentioned, however, that this issue was dealt with at length by Mr. Robertson of counsel for the suppliants in the course of his argument. However, this plea was not withdrawn in any formal way, and that being the case, it still stands of record as an issue between the parties, and calling I think for my determination. The suppliants



contended on the issue of limitation that their action was really and substantially an action of debt upon a statute. Upon examination of the character of their claim I am of the opinion that it is one of unliquidated damages, based upon the expropriation of land under the authority of the Dominion Expropriation Act. In order to determine the question it is necessary to examine into what the word "debt" means, in the terminology of the law. Turning to one of the ancient authorities for a definition we find that Blackstone (3 Com. 154) defines a debt as follows:—

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A sum of money due by certain and express agreement.

Turning to one of the more modern books, Byrne's Dictionary of English Law (1923) at p. 281, we find a more comprehensive definition:—

In the strict sense of the word, a debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor). Hence "debt" is properly opposed (1) to unliquidated damages; (2) to "liability," when used in the sense of an inchoate or contingent debt; and (3) to certain obligations not enforceable by ordinary process. "Debt" denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment. Debts may be created under the provisions of various statutes, as in the case of penalties imposed by penal statutes, and payable to an informer or to the party aggrieved; debts in respect of calls under the Companies Acts; debts for tolls payable under the statutes, and the like. By the provisions of the Acts creating them, some of these debts have the same effect as debts created by specialty.

It does not appear by the cases that I have been able to examine that there is any support for the view that a claim for compensation given by the Dominion Expropriation Act amounts to a debt by statute.

In the case of *Wilson v. Knuble* (1), it was held that the action of debt upon Bonds and Specialties given by 3 W. & M., c. 14, did not extend to cover a claim for damages on a covenant. It might perhaps be argued with some plausibility—although I here express no opinion upon the point—that a claim for compensation for lands taken or for injurious affection raises some sort of a contractual relation between the Crown and the owner of the property taken or injuriously affected, inasmuch as the Expropriation Act, section 22, declares that the compensa-

(1) [1806] 7 East 127.

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tion money agreed upon or adjudged stands in the stead of such land or property, and that any claim upon the land shall be converted into a claim to the compensation money. But that relationship is only an inchoate one for it will be observed that the Act says: "Compensation money so agreed upon or adjudged," so that those words would reasonably exclude a claim to compensation which has not been "agreed upon or adjudged," and therefore is not a debt upon the statute.

But there is authority in the books which negatives a contractual position of vendor and vendee arising even upon a claim for compensation for lands actually taken. It is the case of *Richardson v. Elmit* (1), in which it was held that where a notice to treat had been given by a railway company, under the Lands Clauses Consolidation Act, 1845, and nothing further had been done, that the mere notice to treat did not establish a debt between the company and the owner of the lands in respect of which the notice to treat had been given. The court held that there was no debt created under the circumstances. It has also been held that a verdict for damages until judgment obtained is not a debt, *Jones v. Thompson* (2). Salary or pension not yet payable has also been held not to be a debt upon a statute, *Booth v. Trail* (3). It is reasonable to say that the claim in question here for damages for injurious affection amounts to no more than a claim for money payable on a contingency, the contingency being judgment for or against the plaintiff. And on this point see *Howell v. Metropolitan District Railway Company* (4), and the case of *Richardson v. Elmit* above cited. Secondly, and with special reference to the contention that the Crown in the circumstances of this case has been guilty of a breach of a restrictive covenant, and therefore the claim arising is a claim on specialty and cannot be barred until the expiration of twenty years after the action arose. This contention seems to me to be negatived by the facts of the case which show that the Crown did not rely on any deed from the suppliants or their assigns, but proceeded on March 6, 1913, subsequent to the date of the deed from

(1) [1876] 2 C.P.D. 9.

(2) [1858] E.B. & E. 63.

(3) [1883] 12 Q.B.D. 8.

(4) [1881] 19 Ch. D. 508.

the suppliants to the Eastern Trust Company, to expropriate the land in respect of which this claim for injurious affection is asserted. I think that where an expropriation has been formally made as in this case, the Crown's title must be held to be referable to that; and so we come back to a consideration of the claim as one arising upon an expropriation and not as upon a breach of a restrictive covenant.

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If the claim under the Petition of Right herein is to be regarded as a claim to compensation under the Expropriation Act, it would seem to fall under the provisions of sec. 2, ss. (d), of the Nova Scotia Statute of Limitations, which requires claims for direct injury to land to be proceeded with within six years after the cause of action arose. Under the authority of such cases as *Long Eaton Recreation Ground Co. v. Midland Ry. Co.* (1), a claim for injurious affection of property expropriated is no more nor less than a claim for compensation under the statute, and the person whose land is injuriously affected may not maintain an action for damages or seek an injunction to restrain the continuance of the injury. In such case then it would seem that the damages should be assessed as of the time of the construction of the public work for the purpose of which the land was expropriated. In that view the right of action must be taken to have arisen upon the construction of the public work, and as it was an injury to land under the provisions of the Nova Scotia Statute of Limitations, sec. 2, ss. (d) an action should have been brought within six years from such date of construction. Upon the facts I must hold that this was not done, and, therefore, the suppliants' action is barred.

It may be contended that this provision of the Statute of Limitations, sec. 2, ss. (d): "all actions for direct injuries to real property," refers only to direct injuries and not to indirect injuries, and that in this case the injuries and the damages are both indirect. The only allegations of injury alleged in the case at bar is a depreciation of the value of the remaining property, and lessened demand, by reason of the construction of the railway. If this be true, it would be the proximate cause of the injury, and direct

(1) [1902] 2 K.B. p. 574.

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injury flows always from proximate causes. The general rule is that no action lies for indirect injuries, but this must not be confused with indirect or consequential damages, which may arise from direct injuries. But if the injurious affection here alleged is not referable to direct injuries to real property, then there is another clause in the same section within which it would surely fall, and which reads as follows:—

and actions for all other causes which would formerly have been brought in the form of action called trespass on the case, except as herein excepted, within six years after the cause of such action arose.

I am of the opinion that the present action clearly falls within one or the other of these clauses, and that therefore the suppliants' action is barred. For reference to the action "trespass on the case," see Bouvier's Law Dictionary, vol. 1, p. 425; vol. 3, 3319; Brown's Law Dictionary 2nd ed., 540; and Byrne's Law Dictionary 16-17.

For the reasons which I have above given the suppliants' action is dismissed, the respondent to have his costs of action.

*Judgment accordingly.*

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GEORGE S. HOLMSTEAD . . . . . APPELLANT;

AND

THE MINISTER OF CUSTOMS AND  
EXCISE . . . . . } RESPONDENT.

*Revenue—Income Tax—Exemption—B.N.A. Act—Interpretation of Statute*

By an Act of the province of Canada (12 V, c. 64, 1849), the salary of the Registrar of the Court of Chancery of Upper Canada was fixed at \$400 "free and clear from all taxes and deductions whatsoever." This exemption is repeated by section 14 of ch. 12 of the Consolidated Statutes of Upper Canada (1859), save that the word "whatsoever" is left out. In 1876, by letters patent, H. was appointed to this office "with all the rights, privileges and emoluments, fees and perquisites," appertaining thereto, and now claims exemption from the Dominion Income Tax levied under The Income War Tax Act, 1917, and amendments thereto.

*Held*, that the power and authority to raise revenue for Dominion purposes is specially given the Parliament of Canada under the B.N.A. Act, and any legislation passed by the Old Province of Canada denying the right to tax or exempting any subject in Ontario to pay such tax could not obtain and be valid after the passing of the B.N.A.

Act, and that the claim of the appellant herein to exemption should be dismissed.

2. Exemptions are matters of favour and special privilege and should be limited in their operation to the field of legislative authority in which they were created. They disappear in the event of a change in the constitution of the political community, such constitution depriving, either expressly or by implication, the pre-existing legislature of authority over any new field of taxation.

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APPEAL by the appellant herein from the decision of the Minister assessing his income as Registrar of the Supreme Court of Ontario.

This appeal was heard by the Honourable Mr. Justice Audette, at Ottawa.

*F. H. Chrysler, K.C., and P. H. Chrysler* for appellant.

*F. P. Varcoe* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 23rd day of December, 1926, delivered judgment.

This is an appeal, under the Income War Tax Act, 1917, and amendments thereto, as in force in 1922, from the assessment for the year 1921, upon that part of the appellant's income only which comprises his salary as Registrar of the Supreme Court of Ontario, and in respect of which he claims exemption from taxation by the terms of his appointment.

The appellant was appointed, on the 1st April, 1876, by letters patent (Exhibit No. 1), under the Great Seal of the province of Ontario, as

Registrar of the Court of Chancery, with all the rights, privileges and emoluments, fees and perquisites, which to the said office belong, or of right appertain.

The exemption from taxation claimed is under legislation dating as far back as 1849, which it is contended was maintained by subsequent legislation up to and inclusive of the period of taxation in question in this case.

Proceeding chronologically to the examination of the several statutes bearing upon the present controversy, it is first found that by ch. 64 of 12 Vict. (1849) intituled

An Act for the more effectual administration of justice in the Court of Chancery of the province of Upper Canada,

it was thought expedient to alter the constitution of the Court of Chancery of that province and by sec. 12 of that

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Act it was, among other things, provided that a fixed salary of £400 be paid to the Registrar of the Court instead of fees, *free and clear from all taxes and deductions whatsoever*. This exemption was obviously part of the salary paid by the province of Canada and the Act is dealing with the province of Upper Canada.

The exemption is repeated by sec. 14 of ch. 12 of the Consolidated Statutes for Upper Canada, 1859, with the exception that the word "whatsoever" is left out.

Then comes the B.N.A. Act, 1867, wherein is to be found sec. 129, reading as follows:

129. Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue, in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the respective province, according to the authority of the Parliament or of that Legislature under this Act.

The effect of this section will be hereinafter referred to.

Now it is contended at bar that the appellant was appointed under chapter 14 of the Consolidated Statutes for Upper Canada, 1859, and that he is entitled to the privileges therein mentioned with respect to the salary of Registrar of the Court of Chancery.

Proceeding in sequence of time with the review of the statutes affecting the office in question we find, in 1880, that by sec. 5 of ch. 27, an Act respecting Municipal Assessments and Exemptions, an Act passed by the province of Ontario, it is provided that:

5. The exemption to which certain officers connected with the Superior Courts were at the time of their appointment and are now entitled by statute, in respect of their salaries, is hereby abolished as respects all persons who may hereafter be appointed by the Lieutenant Governor to such offices.

And by ch. 7, sec. 19, of the Act of 1887, the following words were, by amendment, added:

And continues in respect of such officers only as were appointed before that date.

Appellant's counsel then contends that while these changes do not affect the present incumbent in office, it duly recognizes the exemption.

The obvious answer to this is that the two last mentioned acts contemplate taxation in Ontario only and that *ex proprio vigore* they cannot bind the Crown in the right of the Dominion.

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Coming to 1881, it is found that the Legislature of Ontario passed an act to consolidate the Superior Courts, etc., (ch. 5) and that by sec. 3 thereof the Court of Chancery is united and consolidated with other courts to constitute "one Supreme Court of Judicature for Ontario." And by sec. 58 of that Act it is further provided that, subject to orders of the Lieutenant-Governor in Council, all officers . . . who at the time of the commencement of the Act shall be attached to the Court of Chancery shall be attached to the Chancery Division of the High Court.

The next change took place under the Judicature Act of 1913 (ch. 19) where it is provided by sec. 3 that the Supreme Court be continued as a Superior Court of Record. The two divisions were then created. And by sec. 76 of that Act it is, *inter alia*, provided that the official names of the officers should be changed and duties assigned to them.

These two last acts are silent as to exemptions from taxation.

The appellant held office under all of such changes down to the time of his superannuation in 1923, and he is not mentioned in the enumeration of the persons exempted from paying income tax under sec. 5 of The Income War Tax Act, 1917, and amendments thereto.

The exemption from taxation under the Act of 1859 may be regarded as part of the salary which was then paid by the Old Province of Canada. Since Confederation, the salary, with its exemption from taxation, and with its increases, controlled exclusively by the province, were payable and paid from 1867 by the province of Ontario in pursuance of subsec. 4, sec. 92 (B.N.A Act), wherein it is enacted that

the province has exclusive power over The Establishment and Tenure of Provincial Offices and Appointment and Payment of Provincial Officers. The Dominion takes care of its officers pursuant to subsec. 8 of sec. 91 of the Act.

The province has availed itself of this power and has increased the appellant's salary with the result that the

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burden of taxation is doubly increased. What is now claimed is the exemption from the payment of a tax upon a fixed salary which is now different as to amount from that of 1859. At this time, of course, there was no such thing as income tax and it was not contemplated. If this exemption were still valid, it would have to be confined to the amount mentioned in 1859 and to be also confined to such taxation as the Legislature of the Old Province of Canada could validly impose.

By sec. 129 of The B.N.A. Act, 1867, it is enacted that *except as otherwise provided by this Act*, all laws in force in Canada . . . all legal commissions . . . and all officers, judicial . . . shall continue in Ontario . . . as if the Union had not been made: *subject nevertheless* . . . to be repealed, abolished or altered by the Parliament of Canada, or by the legislature of the province, according to the authority of the parliament or of the legislature under this Act.

The legislative power of the Old Province of Canada to tax or exempt from taxation cannot prevail as against the legislative power of the Dominion conferred by the B.N.A. Act. Exemptions are matters of favour and special privilege and should be limited in their operation to the field of legislative authority in which they were created. They disappear in the event of a change in the constitution of the political community, such constitution depriving either expressly or by implication, the pre-existing legislature of authority over a new field of taxation.

The power and authority to raise revenue for Dominion purposes is specially given the Parliament of Canada, under the B.N.A. Act, and any legislation passed by the Old Province of Canada denying the right to tax—or exempting any subject in Ontario to pay such tax—could not obtain and be valid after the passing of the B.N.A. Act.

The effect of sec. 129 of the B.N.A. Act has been only once construed by the court and that is in the case of *Dobie v. Temporalities Board* (1), wherein it was held that the powers conferred by that section upon the Provincial Legislatures of Ontario and Quebec to repeal or alter the statutes



of the Old Parliament of Canada, are precisely co-extensive with the powers of direct legislation with which those bodies are invested by the other clauses of the Act of 1867.

Indeed, this section enacts that "*except as otherwise provided by this Act,*" all laws in force and all legal commission are subject to be repealed, abolished or altered by the Parliament of Canada, according to its authority under the B.N.A. Act. That is, in the present instance, its authority to tax. *Leges posteriores priores contrarias abrogant.* The generality of this expression "*except as otherwise provided by this Act,*" supports the right of the Dominion to tax residents in the provinces. When the Dominion passed the Income Tax Act of 1917, it entered upon a proper field of legislation hitherto lying dormant. This legislation cannot be controlled or limited by any inconsistent or repugnant legislation enacted by a legislature whose powers were taken away *quoad hoc* by the provisions of a new Constitution.

Under the Act, by subsec. 3 of sec. 92 the Dominion has been given exclusive legislative authority for the raising of money by any mode or system of taxation. The Dominion has done so by the Act of 1917, therefore by necessary implication and intendment the enactment for exemption of that salary in Ontario has been repealed.

It has also been abolished by obsolescence. The Consolidated Statutes of Upper Canada, 1859, under which the exemption is claimed, enacted in its preamble, ch. 1, that the acts therein mentioned

apply exclusively to Upper Canada, including both these statutes passed by the Legislature of the late Province of Upper Canada and those passed by the Province of Canada.

And by sec. 6 of the Interpretation Act (ch. 2 Consolidated Statutes of Upper Canada), it is further enacted that:

The words "Upper Canada" shall mean that part of this province which formerly constituted the province of Canada.

It cannot now be contended upon this exclusive legislation, affecting only Ontario, that an exemption from taxation could arise as against the Dominion of Canada. That exemption became obsolete and void by mere operation of law, under sec. 129 of the B.N.A. Act. Perhaps this legislation should receive the interpretation that the exemption,

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under the statute of 1859 applying only to Ontario, should remain in force only in Ontario and be then controlled by sec. 92 of the B.N.A. Act, 1867. That is Ontario alone could retain or repeal the Act of 1859 with respect to taxation in the province under sec. 92 of the B.N.A. Act.

Clearly the taxing Act of 1917 comes within the authority of the Parliament of Canada under sec. 91 and was not in the mind of the legislature when it enacted the Consolidated Statutes of Upper Canada in 1859.

The power and authority of a legislature to exempt from taxation must be measured by its capacity to reconstruct that which it could destroy. The Dominion with whom such power rests, has enacted this taxation of 1917 and therefore by necessary implication, intendment and obsolescence, has, under sec. 129, B.N.A. Act, repealed and abolished the exemption. *Western Counties Ry. Co. v. Windsor and Annapolis Railway* (1).

Section 129 continues in force any legislation of the province of Canada in exactly the same manner and effect and no more than if it had been enacted by the power which could enact it in 1867. That is to say the exempting provision before 1867 has no more effect upon the Parliament of Canada than it can have if enacted by the legislature of Ontario after Confederation, which could not as said before, *proprio vigore*, pass any legislation binding upon the Dominion of Canada. And under the *Dobie* case (*ubi supra*) the power to repeal or alter is co-extensive with direct legislation. The province of Ontario since Confederation has seen fit by legislation to modify the exemption limited by statute by increasing the salary, and the appellant now relies upon such legislation to be exempted from federal taxation; but there is no such power in the Provincial Legislation to bind the Crown in the right of the Dominion. There is now no Court of Chancery in Ontario, therefore the exemption has become obsolete, the mere provincial legislation granting exemption from taxation to some judicial officer can only apply to provincial taxation.

The question of contract, as flowing from the appointment was raised at bar; but the contract, if any, which

would be thereby entered into could only be between the appellant and the province of Ontario which appointed him. Moreover, in dealing generally with the question of such exemption from taxation must it not be considered whether the subject matter involves a national undertaking or merely a private matter and in the latter case it cannot be applied to rates and taxes not in existence at the date of the Act or substituted for what was then in existence, and it is especially so when the intention of Parliament would by necessary intendment deny such exemption.

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As before pointed out a later Act which confers new rights such as the B.N.A. Act, repeals by necessary implication and intendment an earlier Act governing the same subject matter if the co-existence of the right which the latter gave would be productive of inconvenience, for the just inference from such a result would be that the legislature intended to take the earlier right away. Maxwell, On the Interpretation of Statutes, 5th ed., p. 294.

An intention to repeal an Act may be gathered from its repugnancy to the general course of subsequent legislation, as in the present case and explained above. Idem 295.

This special enactment granting exemption from taxation as far back as 1859 is absolutely repugnant and inconsistent with the B.N.A. Act, and this court has no alternative but to declare, for the reasons above mentioned, that this special enactment was repealed by the B.N.A. Act.

The appeal is dismissed with costs.

*Judgment accordingly.*

HEIDNER AND COMPANY.....PLAINTIFF;

AGAINST

THE SHIP HANNA NIELSON

*Practice—Admiralty—Interrogatories—Admissibility of evidence*

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The defence alleged "that it is the custom for vessels engaged in trading between ports on Puget Sound and Europe to touch at various ports on the west coast of the United States, etc. . . ." Thereupon plaintiffs applied for an order compelling defendant to answer the following interrogatory: "What instances of the custom alleged . . . have occurred, and when?"

Held, that, as it is not the purpose of the question to obtain the names of witnesses of the defence, nor to see the opponent's brief but is nothing more than "particulars of the specific occasions" upon which vessels deviated from their voyages, and upon which the defence relies

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to establish the existence of the custom alleged, that such evidence is material, and the application should be allowed.

2. That the testimony of witnesses giving their opinion or judgment, as to the existence of a custom, should not be received; it is the fact of a general usage or practice which must be proved. Unless witnesses can, of their own knowledge, give instances of the usage having occurred, their testimony is not entitled to much weight, before the court.

APPLICATION by plaintiffs to compel defendant to answer interrogatories.

Application heard before the Honourable Mr. Justice Martin at Vancouver.

*E. C. Mayers*, for plaintiffs.

*Martin Griffin*, for defendant.

The facts are stated in the reasons for judgment.

MARTIN L.J.A., now this 30th day of March, 1926, delivered judgment.

Martin L.J.A.: This is an application to administer interrogatories and objection is taken to one of them, viz:— what instances of the custom alleged in paragraph 7 of the defence have occurred and when?

That paragraph is as follows:

In the alternative and with further reference to paragraphs 3 and 4 of the statement of claim the defendant says that it is the custom for vessels engaged in trading between ports on Puget Sound and Europe to touch at various ports on the west coast of the United States for the purpose of loading cargo and to touch at various ports in Europe for the purpose of discharging cargo, and that the plaintiff was aware of such custom at the time of the shipment and consented and agreed that the said vessel should, if those in charge of her so desired, call at such places for such purposes.

This sets up a very wide not to say sweeping custom, and it is obvious that in order to meet it adequately at the trial in the unrestricted shape in which the defendant has chosen to put and keep it on the record, the plaintiff will be compelled to incur great expense to an extent which cannot now be foreseen or even estimated, and it is to avoid such consequences, so far as possible, that the said interrogation is proposed. The defendant, a Norwegian ship, objects to it on the ground that to allow it would be to compel the defendant to disclose the evidence of its defence and cites *Kennedy v. Dodson* (1); *Knapp v. Harvey* (2), and *The Shropshire* (3), while the plaintiffs cite

(1) [1895] 1 Ch. D. 333 at p. 341. (2) [1911] 2 K.B. 725 at p. 732.

(3) [1922] 38 T.L.R. 667.

*Tucker v. Linger* (1); *Johnson v. Earl Spencer* (2); *Hennesy v. Wright* (3); *Sea Steamship Co. v. Price Walker & Co.* (4), and *In re Chenoweth* (5), and I have consulted many others, including, e.g., those cited in Taylor on Evidence, 11th ed., vol. 2, pp. 817-8, and *Fleet v. Merton* (6), and in *Southwell v. Bowditch* (7), the result is well summed up by Taylor, *supra*:—

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In all these cases (of custom or usage of trade or business), it is the fact of a general usage or practice prevailing in the particular trade or business, and not the mere judgment and opinion of witnesses, which is admissible in evidence, and unless the witnesses can state instances of the usage as having occurred within their own knowledge, their testimony will seldom be entitled to much weight.

As Lord Justice Vaughan Williams says in *Knapp v. Harvey supra*, p. 728:

In regard to the admissibility of interrogatories there is always great difficulty in laying down any absolutely hard and fast rules and the decisions of the Court of Appeal in England are impossible, in my opinion and with all respect, to reconcile wholly, doubtless owing to the fact that the matter of the reasonableness of the interrogatory always depends upon the particular circumstances of the case and hence an Appellate Court is reluctant to interfere with the discretion exercised below, as the Lord Justice points out *supra*, and as Lord Justice Lindley says in *Kennedy v. Dodson, supra*, p. 340:

Under ordinary circumstances we should not think of interfering with the decision of the judge in the court below in a matter which is very much a matter of discretion.

As to the general purpose of interrogatories, the unanimous decision of the Court of Appeal in *Hennesy v. Wright supra*, is a safe guide to the English practice which is the same as our own, and as it has not been overruled despite later observations by certain judges, I adopt it in the language of Lord Esher M.R., with Lords Justices Lindley and Lopes concurring, at p. 447, as follows:

The objection taken by the defendant is that the answers to the interrogatories cannot disclose anything which can be fairly said to be

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| (1) [1882] 21 Ch. D. 18 and 34.       | (4) [1903] 8 Com. Cases 292, 295. |
| (2) [1885] 30 Ch. D. 581, 596.        | (5) [1902] 2 Ch. 488, 496.        |
| (3) [1888] 24 Q.B.D. 445n, at p. 447. | (6) [1871] L.R. 7 Q.B. 126.       |
| (7) [1876] 1 C.P.D. 374.              |                                   |

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material to enable the plaintiff either to maintain his own case or to destroy the case of his adversary.

It must be admitted that if the answers could be material for either of these purposes, the interrogatories ought to be answered, but I think it must equally be admitted that, if the answers could not be material for either of these purposes we ought not to order the defendant to answer. The question, therefore, is whether the answers to the interrogatories objected to could, in our view, be material for either purpose.

The *Shropshire* case, *supra*, cited by the defendant's counsel really confirms this view because the court said, inferentially, that interrogatories which "disprove the case of the defendant" were permissible.

Applying this principle in the present case, it cannot be denied that the information sought by the plaintiff is both material and calculated to destroy the defensive case set up by his adversary, and once that position is reached then the objection that the defendant's evidence is necessary in part disclosed vanishes and is reduced to other valid grounds, such as that the names of witnesses cannot be disclosed as admitted in *Knapp v. Harvey* *supra*, in which case, however, it is to be noted that an order had been made compelling the plaintiff to give particulars of the "specific occasions" upon which he relied to prove that the defendant's dog had bitten other persons before biting the plaintiff; the court refused to order interrogatories disclosing the names of the persons who had been bitten because, bearing in mind the information already obtained by the particulars, it came to this conclusion, p. 739:

Being of opinion that, having regard to the information already given by the particulars, the sole object of putting these interrogatories is to get the names of the plaintiff's witnesses, I am not disposed in the present case to depart from the rule that it is not permissible to put interrogatories asking the names of persons for the mere purpose of getting the names of the witnesses whom the other party is going to call at the trial. It is admitted that there is a limitation to the right of administering interrogatories of this kind. In my opinion where a party is asking for the names of persons who will be witnesses for his opponent, it lies on him to shew that it is necessary for him to ask their names for the purpose of establishing some material fact, not necessarily a fact directly in issue, but some fact that is material to the proof of his case.

Nothing of that kind is sought by the interrogatory before me; ships are not witnesses, and what is desired is in substance nothing more than "particulars of the specific occasions" upon which certain vessels deviated from their voyages from the neighbouring ports of Puget Sound so as

to establish the custom relied upon; nor does this infringe the further sound rule that one party cannot be permitted to "see the brief of the other side in order to know exactly what they are going to produce," in other words, discover the details of the evidence. *Benlow v. Low* (1), and also see *Osram Lamp Works Limited v. Gabriel Lamp Company* (2).

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Upon the whole circumstances of the case I am of the opinion that it is both reasonable and just that the interrogatories be allowed.

I have not overlooked the submission that it may not be easy or convenient for the defendant's owners who are said to be in Norway, to obtain the information in support of the very broad defence they have elected to set up, but that inconvenience is of their own making and cannot, from any aspect, debar the plaintiffs from their right to be put in a position to meet the said plea; and fortunately the means of communication between this port and Puget Sound are frequent and rapid so that the inconvenience may not be so great as it is at present anticipated.

*Application granted.*

DOMINION BUILDING CORP. LIMITED. CLAIMANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1927  
Jan. 27.  
Feb. 3.

*Crown—Reference by Minister—Exchequer Court—Withdrawal*

*Held*, that where a Minister of the Crown has referred a claim to the Exchequer Court under the provisions of section 38 of the Exchequer Court Act, and the same has been duly filed in the said court, the court is then seized with the matter, and the reference cannot thereafter be withdrawn by the Crown from the Court without an order of such court.

MOTION by the claimant that the allegations of its Statement of Claim be taken *pro confessis*, respondent not having filed any defence.

Motion heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

(1) [1880] 16 Ch. D. 93, 95, 98. (2) [1914] 2 Ch. D. 129.

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*G. H. Kilmer, K.C. and R. V. Sinclair K.C.* for claimant.

*Lucien Cannon K.C.*, Solicitor General, for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now, this 3rd day of February, 1927, delivered judgment:—

This is a motion for judgment on behalf of the claimant, upon the ground that the respondent is in default in filing a Statement of Defence, in a proceeding referred to this court under the provisions of sec. 38 of the Exchequer Court Act, by the Acting Minister of Railways, which was later sought to be withdrawn by Order in Council. In opposition to this motion, one important question at least has been raised which will justify I think a brief discussion of the matter. The principal point for decision is whether the Crown may by Order in Council withdraw a Reference made to this court.

The Solicitor General, appearing on the motion on behalf of the respondent, urged that an Order in Council having been passed for the purpose of withdrawing the Reference, and before the filing of the Statement of Claim, that no further proceedings could be taken under the Reference, which was now at an end; that it was improperly made, inasmuch as it was not made by the Minister of Customs and Excise, as well as by the Minister of Railways and Canals; that it was void upon the ground that the same should have been made by the Minister of Justice; and that the Reference was also void because the amount of damages claimed in a statement deposited with the Acting Minister of Railways and Canals prior to the making of the Reference, was substantially smaller than that claimed in the Statement of Claim.

It would appear from the opinions of constitutional historians and lawyers, that since the independence of the judges was secured by the Act of Settlement, 12-13 Will. III, c. 2, sec. 3 (7), no peremptory interference by the Crown or the executive with proceedings in the courts will be tolerated. It is not open to the Crown, or any of its Ministers, to remove a record from the court unless the appropriate procedure of the court for that purpose is invoked, as it would be by a subject or citizen of the coun-



try. That principle, it seems to me, was acutely recognized by the Canadian Parliament, when it thought it necessary to amend the Petition of Right Act, in 1923, (13-14 Geo. V, ch. 25), to enable the Crown to withdraw a Fiat when induced by misrepresentation or concealment on the part of the petitioner of any material fact, which should have been truly stated for the Minister's information in considering the petition.

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Very little authority is to be had on the subject, but I think what was said by Lord Langdell in the Petition of Right case of *Ryves v. Duke of Wellington* (1), at page 600, is extremely pertinent and weighty in this connection.

I am far from thinking that it is competent to the King or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a Petition of Right. The form of the application being, as it is said, to the grace and favour of the King, affords no foundation for any such suggestion.

It may also be observed that the action of Lord Holt in the celebrated case of *Ashby v. White* has some bearing on the question. In that case when the Speaker of the House of Commons came into the Court of King's Bench to order the judges of the court to refrain from inquiring into a case arising out of an election to the House of Commons, Lord Chief Justice Holt ordered the Speaker to withdraw his pretention on pain of commitment for contempt of court, and the case was proceeded with. The forceful language imputed to Lord Holt on that occasion has become historical (see Jennings Anecdotal History of the British Parliament (p. 46) ).

I am of the opinion that there was no authority for the withdrawal of the Reference by Order in Council, that the Reference is still effective, and that the Statement of Claim is properly before the court. Sec. 38 of the Exchequer Court Act recognizes the Petition of Right, and a Reference, as equivalent means of enabling a subject to prosecute a claim against the Crown; but if a Reference is made, then proceedings by way of Petition of Right are barred. I am not aware of any statute or other authority which enables the Crown of its own motion to withdraw a Reference, any more than it could withdraw a Fiat, and that cannot be done except under the terms of the statute amending the

(1) (1846) 9 Beavan 579.

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Petition of Right Act, to which I have already referred. The tendency in legislation has been to increase and broaden the avenues by which the subject may seek his remedies against the Crown, and to extend the discretionary powers of the executive in granting facilities to the subject for pursuing his claim against the Crown. It would seem rather extraordinary in view of the trend of developments in this direction, that Parliament should ever have contemplated the bestowal of an arbitrary power of withdrawing a Reference by the executive once it is made.

Regarding the other objections made to the motion on behalf of the respondent, and which I have mentioned, I have merely to observe that in my opinion the same can only be considered on a substantive application by the Crown to withdraw the Reference, or the same may be pleaded in the Statement of defence if filed, and considered upon the trial.

In the circumstances, I do order that if the respondent does not file a Statement of Defence on or before March 15 next, then at any time subsequent to that date, the claimant may move for judgment and to fix a date to proceed with the proof of his claim. I reserve for the present the question of costs.

*Judgment accordingly.*

1927  
Mar. 5.  
Mar. 14.

NIEBLO MANUFACTURING COM- }  
PANY, INC. .... } PLAINTIFF;

AND

DAVIES J. REID ET AL. .... DEFENDANTS.

*Practice—Patents—Infringement—Defense—Counter-claim—Impeachment*  
*Held:* That it is not competent to a defendant in an action in this court for infringement of a patent for invention to attempt to impeach the patent in question by counter-claim.

APPLICATION by plaintiff to strike out the counter-claim made by the defendants.

Application heard before the Registrar.

*Geo. Macdonnell* for plaintiff.

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

The facts are stated in the Memorandum filed by the Registrar.

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 REID.

THE REGISTRAR, sitting as Judge in Chambers, this 14th March, 1927, delivered judgment (1).

This is an application to strike out the counter-claim, if I may use the term, by the defendant to the Statement of Defence. I say this because there is no separate or independent pleading filed as a counter-claim in the record. The parties, represented by counsel (Mr. G. F. Macdonnell for the plaintiff and Mr. R. S. Smart, K.C., for the defendant) came before me by consent on the 5th of the present month, counsel for the plaintiff then contending that under the Patent Acts of Canada and the Practice of the Exchequer Court the defendant in an action for the infringement of a patent for invention cannot file a counter-claim seeking the impeachment of the patent relied on in the Statement of Claim. Looking at the pleadings in the action I find a document bearing the endorsement "Statement of Defence and Counter-Claim." On its face the document bears the same legend. There are 6 paragraphs purporting to deal with grounds of defence; in the 5th paragraph the defendant allege that the patent in question "is and always has been invalid, null and void for the reasons given in the Particulars of Objection delivered herewith." By the 6th paragraph the defendant would appear to be concluding his defence in the usual way by submitting "that this action should be dismissed with costs." But thereafter there is the following:—

"And by way of counter-claim:

7. The defendants impeach the said Letters Patent No. 245,444, and submit that the said Letters Patent should be adjudged to be invalid, null and void, and voided by this Court for the reasons given in the Particulars of Objection delivered herewith.

Now it is perfectly clear that in any court properly clothed under the law with jurisdiction to entertain a counter-claim in an infringement action, there could be no objection to putting the defence and counter-claim in one document so long as both matters of pleading are kept distinct in form and substance. But because the defendant

(1) No appeal was taken to the Judge of the Court.

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here continues the numbering of the paragraphs, as begun in the Statement of Defence, in the counter-claim, does not make it less a substantive pleading, nor remove the distinction between a defence and a counter-claim, so as to enable the court to take cognizance of a matter in respect of which it does not have jurisdiction under the law and practice.

On turning to the Annual Practice, 1927, page 324, the following rules as to pleading a counter-claim when the same is competent are to be found:—

A counter-claim is governed by the same rules of pleading as a statement of claim, and the reply to it by the same rules as a defence. All the facts relied on by way of counter-claim must be stated in numbered paragraphs under the heading "counter-claim," so as to distinguish them from the facts alleged by way of defence. If any of the facts on which the counter-claim is founded have been already stated in the defence, they need not be re-stated in the counter-claim.

That being so the counter-claim would be irregular in form even if it were permissible to plead it.

Looking at the prime source of jurisdiction, namely, the Canadian Patent Act, R.S., 1906, Ch. 69, I find that by sec. 34 the defendant in any action of infringement may plead

as matter of defence, any fact or default which, by this Act, or by law, renders the patent void; and the court shall take cognizance of such pleading and of the facts connected therewith, and shall decide the case accordingly.

That is an express provision in a statute as to procedure, and cannot be added to unless the court undertakes to supply a *casus omissus*. There is clearly no express or implied provision in the Act allowing the defendant to proceed to impeach the patent by way of counter-claim. That was true of the English law down to 1907 when by the Patents and Designs Amendment Act, 7 Ed. VII, Ch. 28, sec. 26, the Parliament of Great Britain enacted as follows:—

A defendant in an action for infringement of a patent, if entitled to present a petition to the court for the revocation of the patent, may, without presenting such a petition, apply in accordance with the rules of the Supreme Court by way of counter-claim in the action for the revocation of the patent.

The Canadian Parliament did not in the Consolidation Act of 13-14 Geo. V, Ch. 23 (1923) see fit to adopt this provision of the above named British Act but re-enacted in sec. 36 thereof the provisions of sec. 34 of the former Can-

adian Act, *ipsissimis verbis*. That section, as has been pointed out, enabled the defendant in an action of infringement to plead any fact or default which renders the patent void. Then, again, sec. 37 of the Canadian Patent Act of 1923 continues the special provision on behalf of anyone who desires to impeach any patent by way of a writ of *scire facias* as found in R.S., 1906, Ch. 69. The proceeding by *scire facias* to repeal a patent was abolished in England by sec. 26 of the British Act of 1883, which substituted a petition for revocation of the patent in lieu of the proceeding by *scire facias* (see Frost on Patent Law, 3rd Edition, Vol. 1, p. 291) so that in two material respects the Canadian Parliament has not seen fit to follow the lead of the British Parliament. Under these circumstances, and in view of the recognized body of doctrine laid down in the books in respect of the interpretation of statutes, the intendment of Canadian legislation down to date must be taken to exclude the authorization of proceedings by way of counter-claim to impeach a patent in an action for infringement.

Then, again, there is the further consideration inhering in the fact that by rule 18 of the Practice where it is sought to impeach a patent of invention in a substantive proceeding by Statement of Claim the plaintiff must give security for the defendant's costs in the sum of \$1,000. If the defendant were allowed to effectuate his purpose by counter-claim, he would be in the position of a party brought into court at the suit of another party and so claim exemption from providing the security required by the said rule on proceedings to impeach by Statement of Claim. A further embarrassing situation for the plaintiff also lies in the fact that with a counter-claim facing him he could not discontinue the action *quoad* the counter-claim. The defendant could insist on going on with the case which would then resolve itself into an action of impeachment pure and simple. Considerations also arise adverse to the liberty of the defendant to counter-claim in such a case under the provisions of rule 16 which provide special procedure for the impeachment of patents by information and by *scire facias* in addition to the method of proceeding by Statement of Claim filed by any person interested. Rules of Court made in pursuance of the power granted in sec. 87

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of the Exchequer Court Act, when they are *intra vires* have the same power and authority as if they were enacted in a statute, and ought to be regarded as governed by the same rules of construction. As these rules purport to deal exhaustively with the methods of procedure open to a party who desires to impeach a patent, such methods should be adhered to with exactitude and no irregular procedure allowed to creep into the practice of the court which would have the effect of nullifying the safeguards by which protection is extended to a person to whom a patent for invention has been issued.

I am therefore of the opinion that it is not competent to a defendant in an action in this court for infringement of a patent for invention to attempt to impeach the patent in question by way of counter-claim. I, therefore, order and direct that the counter-claim be stricken out of the pleadings, and that the defendant have leave to amend the Statement in Defence accordingly. At the request of counsel for both parties I further direct that the costs of and incidental to this motion be costs in the cause.

*Judgment accordingly.*

Solicitors for plaintiff: *Cassels, Brock & Kelley.*

Solicitor for defendant: *R. S. Smart, K.C.*

1927  
Feb. 18.  
Feb. 25.

LEO W. M. BAUMFELDER ET AL. . . . . PETITIONERS;

AND

THE SECRETARY OF STATE OF CAN-  
ADA, AS THE CUSTODIAN, UNDER } RESPONDENT.  
THE TREATY OF PEACE. . . . . }

*Treaty of Peace (Germany) Order, 1920—"Enemy"—Interpretation*

The petitioner Leo Baumfelder was born in Germany in February, 1897. At the age of thirteen he went to England with his father and mother, and they took up residence in London. In 1910 he was sent to school, and it was intended that he should go to Oxford University, having passed his entrance examination. At the age of 18 years, he was interned in England, with his father, as an alien enemy, until July, 1919, when they were both deported, by British authorities to Germany. He, L.B., remained there until shortly after his mother's death in 1922, when he came to America, where he has since resided. The

mother and sister remained in England, visiting him in Germany in June, 1920, returning to London in the fall, and again going to Germany in 1921, where the mother died.

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*Held:* On the above facts, that the petitioner L.B. was not a resident of Germany, in the sense intended by sec. 32, ss. 1 (a) of The Treaty of Peace (Germany) Order, 1920, and was not an "enemy" within the meaning of said section.

2. That said section 32 did not contemplate the broad inclusion of a German National who did not during the period of actual war reside or do business in Germany, unless at least, subsequent to the armistice and prior to January 10, 1920, he returned to Germany with the intention of resuming his domicile or residence therein.

PETITION under the Treaty of Peace (Germany) Order, 1920, for a declaration that the petitioner Baumfelder was not an "enemy" within the meaning of the said Treaty and that certain property, etc., vested in the Custodian belonged to petitioners.

Application heard by the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*George F. Henderson, K.C.*, for petitioner.

*G. Wilkie, K.C.*, for the custodian.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now this 25th February, 1927, delivered judgment.

The petitioners, Marion Cust Macdonald and Leo W. M. Baumfelder, under the provisions of sec. 41, Part II of the Treaty of Peace (Germany) Order, 1920, which I shall refer to as the Order, ask for a declaration that certain property, rights and interest, now vested in the Custodian, belong to the petitioners; and that the petitioner Baumfelder was not at any time an "enemy," under the terms of the Order.

The petitioners are the lawful children of one Caroline Baumfelder, who died in Germany on the 20th day of July, 1922, the wife of Willie Baumfelder, a citizen of Germany, the petitioner Marion Cust Macdonald being a child by a former marriage to one John Macdonald, a Canadian citizen, and the petitioner Leo W. M. Baumfelder being the sole issue of the marriage to Baumfelder. In July, 1894, Caroline Baumfelder, then the widow of Macdonald, in

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anticipation of her marriage to Baumfelder, executed a marriage settlement by which she settled and transferred to a trustee certain assets aggregating in value about \$70,000. The settlement provided: (a) that the income should be paid to Caroline Baumfelder during her natural life for her separate use, free from the debts or control of her husband, (b) after her death, in trust for such person or persons as she should by her last will appoint, (c) in default of such appointment, to divide the trust estate equally among all her children in equal shares. Caroline Baumfelder died without exercising her power of appointment, and leaving her surviving four children, the petitioners and two others, the latter being issue of the first marriage.

The trustee I assume with the concurrence of the Custodian has paid over to the beneficiaries other than the petitioner Baumfelder, their shares of the trust estate. The petitioner Marion Cust Macdonald advanced to the petitioner Baumfelder at various times amounts of money aggregating \$11,000 and over upon the understanding with him that such advances would be returned to her out of his share of the trust estate, which advances are still owing to her, and she claims in the petition a lien on the balance of the said trust estate for such advances. Upon the hearing of this matter, however, it was agreed by counsel that no such lien in law existed, and therefore this phase of the proceeding need not be further considered, and the petitioner Baumfelder may now be regarded as the sole petitioner.

The question therefore is whether the interest of Leo Baumfelder in the trust estate, he being a German national, now belongs to the Custodian.

The petitioner was born in Dresden, Germany, in February, 1897. At the age of thirteen he came to England with his father and mother, and with them he took up residence in London. He was sent to school in 1910, and it was intended that he should go to Oxford University, having passed the entrance examination thereto. On reaching the age of eighteen years, he was interned as an alien enemy in England until July, 1919, when he was deported by the British authorities to Germany, where he remained until shortly after his mother's death in 1922, when he came to



America and has resided there ever since. The father was also interned in England, and in 1919 was deported to Germany. The petitioner made efforts to be allowed to remain in England but his efforts were unsuccessful. His mother and sister Marion Cust Macdonald meanwhile remained in England. He found employment of various kinds in Germany until he left for America. In June, 1920, his mother and sister came to Germany to visit the petitioner, and they returned in the autumn or fall of the same year to London, but they later returned to Germany in the spring of 1921. The mother died the following year in Germany.

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Sec. 33 of the Order is to the effect that all property, rights and interest in Canada belonging on the tenth day of January, 1920, to enemies, and in the possession or control of the Custodian at the date of the Order shall belong to Canada and be vested in the Custodian. Sec. 32 defines what is an "enemy" in so far as this particular matter is concerned, and is as follows:

"Enemy" means

- (a) A German national who during the war resided or carried on business within the territory of a Power at war with His Majesty;
- (b) A German national who during the war resided or carried on business within the territory of a Power which remained continuously neutral throughout the war, and with whom trading or dealing was prohibited during the war by any Statute, Proclamation or Order in Council in force in Canada;
- (c) A German national who during the war resided or carried on business within the territory of a Power allied or associated with His Majesty, and
  - (i) whose property within such territory has been treated by that Power as enemy property, or
  - (ii) who has since the fourth day of August, 1914, been deported from the territory of that Power;
- (d) A German national who since the fourth day of August, 1914, has been deported from Canada;
- (e) Any other German national who is declared by the Governor in Council to be an enemy;
- (f) A Company controlled by any of the persons mentioned in paragraphs (a), (b), (c), (d) and (e), Etc.

The construction of sec. 32, Part II, of the Order is therefore to be considered. I think it is quite clear, in fact it was conceded on the hearing, that unless the petitioner Baumfelder falls within the definition of "enemy" under subsec. 1 (a) of sec. 32, he does not fall within any other of the provisions of that section. The question therefore

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for determination is, whether Baumfelder, during the war, "resided or carried on business within the territory of a Power at war with His Majesty."

Subject to any legislation to the contrary, or anything to the contrary contained in the treaty of peace when peace came, enemy property in this country would be restored to its owners after the war. Parker L.J. in *Daimler Company v. Continental Tyre and Rubber Company* (1). Was this common law principle modified by legislation? Article 297 (b) of the Treaty of Peace provided that the Allied or Associated Powers reserved the right to retain and liquidate all property, rights and interests belonging to German nationals at the date of the coming into force of the Treaty. It was not therefore the property, rights and interests of all German nationals that might be retained and liquidated, but only such of the same as the Allied and Associated Powers should decide to retain under the treaty reservation. Apparently, under the Order it was here decided to retain only the property of such German nationals as fell within the classes of enemy nationals described in sec. 32. That section clearly places a limitation upon the expression "enemy"; otherwise I think "enemy" would have been defined as "a German national" without further limiting or descriptive words. The common law principle being therefore departed from, and the Custodian proceeding under legislation of a penal or confiscatory nature, the same must be strictly construed.

I do not think that Baumfelder can be said to have been a resident of Germany in the sense intended by sec. 32, ss. 1 (a) of the Order. His residence was in England before and at the outbreak of the war. It came out in the evidence, that his father was unable to return to Germany, without being there subject to arrest, in consequence of some financial misfortune which overtook him while living in that country. I have no doubt the petitioner's parents had adopted England as their domicile, and the son was being educated with a view to an extended residence there. His mother resided in England "during the war," which means from August 4, 1914, up until January 10, 1920. The petitioner Baumfelder it is true was deported to Germany, in

(1) [1916] 2 A.C. 307, at p. 347.

fact he was conducted and placed under British military escort on German soil just over the boundary line between Holland and Germany. His residence in Germany was therefore an enforced and involuntary one of six or seven months prior to January 10, 1920. Owing to the difficulties in the way of German nationals obtaining passports to go to countries allied or associated with His Majesty, and owing also to his indigent circumstances, Baumfelder was unable to get out of Germany for quite a time, but I am quite sure it never was his intention to resume permanently his domicile of origin. Up to the time of the armistice at least, no one would think of saying that either the petitioner or his parents were residents of Germany, while of course they were German nationals. England was the place of their permanent home, and that was their domicile. An excellent definition of an acquired domicile is given by Kindersley V.C. in *Lord v. Colvin* (1).

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That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home.

The tests of an acquired personal domicile are, (1) the voluntariness of the residence; (2) the fact of residence; and (3) the intention to reside there either permanently or for an indefinite time. An involuntary residence in another country cannot create a domicile therein, *Bromley v. Hesselstine* (2); and therefore I think an involuntary residence of a national in his domicile of origin, does not mean an abandonment of his domicile or residence of choice, unless that as a fact is established. A man's residence is the place or country where he in fact is habitually present. Where it is that a man is ordinarily present is a matter which is determined not by legal rules, but is ascertained in the same way as any other physical fact. A man may be domiciled in one country and may be ordinarily resident in another. Dicey's Conflict of Laws, 4th ed., p. 258. Whatever distinction there is here between domicile and residence does not operate to the disadvantage of

(1) [1859] 4 Drew. 366, at p. 376. (2) [1807] 1 Camp. 75 at p.77.

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the petitioner Baumfelder. It does not appear to me that sec. 32 (b) contemplated the broad inclusion of a German national who did not during the period of actual war reside or do business in Germany, unless at least subsequent to the armistice and prior to January 10, 1920, he returned to Germany with the intention of resuming his domicile or residence there. That view would not be in harmony with the other provisions of that section. If the Order was intended to apply to the facts of this case, then it is an instance of *casus omissus*. There is a limitation to the expression "enemy," as defined by sec. 32, ss. 1, of the Order, and there is not to be found any provision covering the case of a German national resident in Great Britain, or any Dominion other than Canada, and holding "property, rights and interests" in Canada. A German national residing in Canada during the war and not deported, or declared by the Governor in Council to be an "enemy" is clearly not an enemy within the terms of Part II of the Order, and I think as a matter of public policy such was not intended. Possibly it was intended also that a German national, resident in Great Britain, or any other Dominion other than Canada, should be accorded the same treatment in respect of property in Canada.

I am of the opinion, therefore, that on construction and in fact, Baumfelder was not an "enemy" at the times material here, under the provisions of the Order, and that the property, rights and interest in question is owned by the petitioner Baumfelder, and I so declare the same to be owned by him. This petitioner will also have his costs of this proceeding.

*Judgment accordingly.*

BRITISH COLUMBIA ADMIRALTY DISTRICT

1927  
 Feb. 3.

THE PASCHENA ..... PLAINTIFF;

AGAINST

THE GRIFF

*Practice—Admiralty Rule 228—Costs—Taxation—English Tariff not applicable*

*Held*, that Rule 228 of the Admiralty Rules of the Exchequer Court of Canada is not to be so interpreted as to allow a party taxing a bill in a proceeding or action on the Admiralty side of the Court to include

in his bill items taxable under the Admiralty Tariff of the High Court of Justice in England, but which are not found in the Admiralty Tariff of the Exchequer Court of Canada.

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 THE  
 Paschena  
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APPEAL from the decision of the Deputy Registrar upon a taxation of Bill of costs.

The appeal was heard before the Honourable Mr. Justice Martin at Vancouver.

*Ghent Davis* for plaintiff;

*E. C. Mayers* for defendant.

The facts are stated in the reasons for judgment.

MARTIN L.J.A., on the same day (3rd of February, 1927), delivered judgment.

Review at the instance of both parties, of the taxation of defendant's bill of costs, pursuant to Rule 141. A point of importance was raised respecting the application of Rule 228 to the table of fees (authorized by rule 221) so as to warrant the allowance of items not to be found therein but which are in the English Tariff in Admiralty Proceedings in the High Court there.

After considering the matter carefully, I am of the opinion that the expression in the said Rule "In all cases not provided for" relate to "the practice" . . . and "Proceedings" and not to items in our Tariff, and that therefore the taxation under review has in that respect proceeded upon a proper basis, based upon our tariff alone—considering therefore the bill before me in that light, I have noted thereupon my ruling upon each of the many items in question. The costs of the review will be borne equally by the parties, both being successful to a nearly equal degree either upon principle or their application.

It is due to the learned Deputy-Registrar to add that he has well discharged his duty on the taxation of the bill which presents difficulties of an unusual nature.

*Judgment accordingly.*

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Feb. 8.  
to  
Mar. 4.

ELECTROLYTIC ZINC PROCESS COM-  
PANY ..... } PLAINTIFF;

AND

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

*Patents—Impeachment—Process patent—Vagueness and ambiguity—  
Specification—Publici juris—Patentability—Utility*

The patent is for an alleged process for the extraction of zinc from zinc ores containing manganese, by the use of electrolysis. The only novelty claimed is that, whereas prior to the patent the value of the presence of manganese in the electrolyte was not known, and the patentee disclosed its beneficial effect in the deposition of coherent, reguline zinc on the cathode; and that, by the deposit of manganese dioxide at and on the anode, corrosion was prevented and the life of the anode was prolonged. The patent had only three years to run, and had never been used commercially, but only experimentally.

*Held*, that a patented process to be valid must denote ingenuity of invention. It is not enough in order to constitute invention, to disclose something which has been but dimly seen before.

2. That there is 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.
3. That a patent which has been in existence for fifteen years, and has never been put into practice, notwithstanding that the inventor received a substantial grant of money from the Government to promote his invention, is *prima facie* bad for want of utility.
4. That a patentee must define and limit with precision what he claims to have invented, and everything not clearly claimed becomes *publici juris*.
5. That the patentee must clearly set forth the various steps in a process claimed, and if designedly or unskillfully he makes it ambiguous, vague or indefinite, the patent is bad.
6. That the specification of a patent for a process must point out clearly the method by which the process is to be performed so as to accomplish the object in view. In this case, though necessary, no purification is mentioned; no precise quantity of manganese to be used is mentioned, so that such use may be extended or restrained as occasion may arise in the interest of the patentee,—therefore the patent is bad.

ACTION to impeach a patent granted to defendant's auteur, for an alleged process to extract zinc from zinc lead ores by electrolysis.

The action was tried before the Honourable Mr. Justice Audette, at Montreal, on the 8th to 28th days of February, and 1st to 4th of March, 1927.

*W. N. Tilley, K.C., Aimé Geoffrion, K.C., R. C. Crowe,*  
and *A. W. Langmuir* for plaintiff.

*Russell S. Smart, K.C., and J. Gérin Lajoie* for defend-  
ant.

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AUDETTE J., at the conclusion of the trial, on the 4th of March, 1927, delivered judgment (1).

The trial has been long: The trial has been long, but it has been exhaustive and very ably argued from every possible angle, thus enabling me to acquaint myself with all of the several intricate and complex questions arising under the present controversy—aided as I was, by a daily copy of the evidence,—and I am at the close of the trial, as well informed as I will ever be—and I shall therefore now proceed to render judgment.

The question of avoidance of a patent as I have said in the course of the trial, is always a difficult question, but, after all, in the end, it resolves itself into a question of fact, which, however, is mixed up with the question of law upon which the tribunal is called upon to adjudicate.

The controversy involved, under the Canadian Patent No. 140,402, of the 14th May, 1912, (which has about three years more to run), consists of an alleged improvement for the treatment of zinc and manganese sulphate solutions, obtained in the hydro-metallurgical processes for the extraction of zinc from zinc lead *refractory ores containing manganese*, by the use of electrolysis.

These words must be well weighed before arriving at any conclusion. That is we are only dealing with ores containing manganese. Indeed, bearing in mind that the patent is for treating ore with manganese, it would, at first sight, appear extraordinary that a monopoly or patent could be obtained for the use of manganese in treating such ore especially when the patent does not state clearly and distinctly, as required by the Act, the quantity of manganese to be used but leaves it to the operator.

All contestation in respect of patent No. 136,341 has been abandoned.

The paramount question to be decided in this case is that of subject-matter.

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

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Under our patent law a patent is granted as a reward for invention, whereby restraint upon commercial freedom in respect of the use of the patented invention necessarily results; and a court cannot be too careful in insisting that it is only when the requirements of the law have been fully satisfied by the patentee that the public will be prevented from using common and well known articles or processes for a common purpose.

Under the Canadian Patent Act, sec. 7, a patent may be granted to any person who has invented any new and useful art, machine, manufacture, composition of matter, etc., 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 for more than one year previous to the application for the patent.

In the present case we must first inquire whether the alleged improvement implies invention and whether the result therefrom has not been anticipated. Has the present patent brought forth something new with a new result, being the result of skilful ingenuity, consistent with the prior state of the art? That is the question one shall have to inquire into. It is a narrow patent that should therefore receive a strict construction.

To constitute invention it is not enough to disclose something that has been but dimly seen before. There must be ingenuity of invention. There is not in this indefinite and uncertain patent a new clearly and well defined process or method dealing with complex zinc ore containing manganese.

The evidence which has just been most elaborately reviewed by counsel is still present in every one's mind. The facts are numerous, but what I will call the material facts come down to a very narrow compass and in no case would I think it necessary to here again set forth the several allegations and contentions of the parties. We all have in mind the prior patents and the prior art, and it would be too long a matter to review in detail all the prior patents and the prior art. Under the evidence the most the patentee



appears to have done was to adopt, without invention, old processes of substances and of similar nature and to adapt the same to a special purpose, but in the same class of process. It is quite manifest that the patent seeks to accomplish substantially the same result either as previously accomplished or highly analogous thereto. However all of that does not constitute invention. There is no subject matter where invention is wanting. Terrell on Patents, 5th ed., p. 38. The improvement claimed does not involve invention. *British United Shoe Machinery Co. v. Fussell & Sons* (1); *British United Shoe Machinery Co., Ltd. v. Standard Rotary Machine Co.* (2).

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It cannot be said that the improvement claimed lies so much out of the track of former use as to involve ingenuity of invention. Quite to the contrary.

In considering the prior art and more especially the pioneer patents of Létrange, Lake, Cowper Coles, Siemens and Halske and others who followed up to the French patent, which under some evidence, appear to be embodied in the latter in some manner or another, as explained by Dr. Ingalls, it would seem that the words of Lord Lindley, in the case of *Gadd and Mason v. The Mayor, etc., of Manchester* (3) are especially apposite when he says:

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.

If French's process, as explained in the specification, is to be found in the prior art as contended by Dr. Ingalls, it becomes not an invention but a mere aggregation.

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. *Carter v. Leyson* (4). Besides the evidence on commission on behalf of both parties, and more especially the all important testimony of the chemist Engelhardt, I have had the advantage to hear, as part of the plaintiff's

(1) [1908] 25 R.P.C. 631.

(3) [1892] 9 R.P.C. 516, at p. 524.

(2) [1917] 35 R.P.C. 33.

(4) [1902] 19 R.P.C. 473.

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case, men, I might say, the most qualified to speak upon this subject-matter in our days; some of them, however, are officers of the plaintiff company—a matter I do not overlook. The most prominent experts heard on behalf of the defense appear to me to be men who were not quite sure of the ground they were treading upon, with, however, the exception of one of them whose testimony was especially theoretical and of sweeping authority in his own estimation, mitigated by exhibit 68, his letter to Mr. Stuart. I speak of the son of the patentee who is interested in the defendant company as one of its directors. Witness Witherell's experience upon the treatment of zinc originates with the present case and his laboratory experiments filed of record were so materially criticized in rebuttal, that they are left bereft of much use to the court. Witness Mathewson has no operator's experience and is without the knowledge acquired by experiments or personal practice in electrolysing zinc; his fees, as witness, are controlled by the result of the present case to the extent of 2½ per cent on the net recovery of the patent. Some parts of his testimony, however, certainly confirm the views I entertain as to the want of novelty and invention in the patent in question.

All these eminent chemists and metallurgists were called on each side, and the two sides do not agree—therefore in this conflict of testimony I am not at liberty, but I am bound to exercise my own judgment, and that judgment agrees with the weighty evidence of the plaintiff.

Ever and anon, in the course of the trial, these witnesses have described in every detail all known metallurgic processes,—including the one in question, as well as the metallurgic art controlling the same.

Dr. Ingalls, a witness of unusual knowledge and experience in the metallurgic art, has described and considered with great competence, every substantial allegation in the defendant's patent and has demonstrated and established beyond any doubt that each and every one of them has been anticipated and belongs to the prior art. There is, according to his views, not one single element of the patent which is not found in the prior art.

At the close of the plaintiff's case, counsel for the defense in the opening of his case, changing somewhat the

controversy—has brought the issues down to a very narrow compass in stating that the question was whether (pp. 821 and 822)

at the date of the patent the use of manganese is an advantageous thing to do; and if the patentee Andrew Gordon French was the first in this art to say: Maintain manganese sulphate in the electrolyte and it is a benefit,—then this patent is good. If it is no benefit or if it is a detriment—which is a pure question of fact, then he (French) would not have contributed anything . . .

Then at p. 822 he added:

I intend to show that as a matter of fact it is a benefit and if as a fact I cannot convince your Lordship that the presence of manganese sulphate in the electrolyte is a benefit, the patent is gone because he (French) has not contributed anything.

This declaration by counsel would to that extent narrow the issues very materially, but I find that no such statement as alleged can be found in any of the 8 claims of the patent, and were it so, could it be a valid subject-matter under the circumstances of the present case?

Even if it were in the specification—a statement which I do not find—if it is not embodied in the claims it becomes *publici juris*. It has been given to the public. The patentee must define and limit with precision what he claims to have invented and I cannot find such a statement in the claims. Under the provisions of sec. 13 of the Act the patentee must set forth clearly the various steps in a process, and if designedly or unskilfully he makes it ambiguous, vague or indefinite, the patent becomes obviously bad.

No purification is mentioned in the patent and it is in the evidence that purification is necessary. Moreover no precise or definite quantity of manganese to be used is mentioned in either the specifications or the claims which are drafted in such a way that such use may be extended or restricted as occasion might arise in the interest of the patentee. And it must be noted that this is done with respect to the use of a complex ore which already contains manganese. *British Ore Concentration Syndicate Ltd. v. Minerals Separation Ltd.* (1).

Is there anywhere in the claims a statement showing that the adjusting of manganese sulphate in the solution would affect the toxic impurities—I fail to plainly see it. The patent does not show that the impurities must be taken

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1927 out, although Mr. T. French, in his letter, exhibit 68, pro-  
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 v. out clearly the method by which the process is to be per-  
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 COMPLEX not it will be a statement of principle or discovery only and  
 ORE the patent would be bad. Nicolas, page 5. It must in-  
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I find that the defendant's patent does not possess any element of invention and I can, in no sense, find any creative work of an inventive faculty which the patent laws are intended to encourage and reward.

In the case of *Yates v. Great Western R.W. Co.* (1) it was held although the patented article was a most useful contrivance it could not be the subject of a patent as it was wanting in the element of invention.

Now I cannot overlook the important fact that this patent dating back to May, 1912, has only up to date (it has only three years to run), been experimented upon in laboratories and otherwise, and that it has never been used commercially. That, coupled with the evidence above referred to, shows if such a patent were maintained any longer that an intolerable nuisance would arise, amounting to a serious impediment in the development of the art and trade in the metallurgic treatment of zinc mentioned in the case.

As was said by Jessel M.R. in *Otto v. Linford* (2); *Hinks & Sons v. Safety Lighting Co.* (3), it is *prima facie* evidence of want of utility if the patented article has never been put into practice. Utility being one of the cardinal requirements for the validity of a patent would make these findings quite apposite. See also *Charlesworth Peebles & Co. v. British Thomson-Houston Co., Ltd.* (4). This patent has been in existence for practically 15 years, has been helped by the B.C. Government by a sum of \$65,000 and has never been put into practice.

(1) [1877] 2 A.R. (Ont.) 226.

(3) [1876] 4 Ch. D. 607, at p. 616.

(2) [1882] 46 L.T. 335, at p. 41.

(4) [1925] 41 T.L.R. 259, at p. 261.

Looking to what was known and published at the date of the defendant's patent, there was no invention in the process. As most of the zinc ores contain manganese, the patentee cannot claim the right to limit to himself the use of a solution containing manganese, and the question of fixing the proportion of manganese to be used does not amount to ingenuity of invention—however valuable it may be, and it is not defined in the patent.

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Free from all the verbiage of the evidence it cannot be found there was invention in the present case. Indeed it does not follow by any means that the use of manganese claimed by the patent lay in a discovery based on a new invention. Is it not a mode of treating zinc by increased skill arising from what can be no more than improvement in the technical art of metallurgical work? The weight of the evidence answers that in the affirmative. *The Cassel Gold Extracting Company, Limited v. The Cyanide Gold Recovery Syndicate, Limited* (1).

Audette J.

The use of manganese as mentioned in the patent, I am unable to take as a patentable improvement under the circumstances.

Therefore the defendant's patent No. 140,402 is hereby adjudged and declared to be invalid, null and void for the reasons above mentioned. The whole with costs.

*Judgment accordingly.*

Solicitors for plaintiff: *Osler, Hoskin & Harcourt.*

Solicitors for defendant: *Kavanagh, Lajoie & Lacoste.*

DOMINION BUILDING CORPORATION LIMITED ..... } CLAIMANT;

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Mar. 1.  
Mar. 2.

AND

HIS MAJESTY THE KING ..... RESPONDENT.

*Constitutional Law—Reference by the Crown—Practice—Power to withdraw—Jurisdiction*

A claim was made by claimant for damages due to a breach of contract by the Crown. The Minister of Railways and Canals referred the claim to the Court, under the provisions of sec. 38 of the Exchequer

(1) [1894] 11 R.P.C. 638; 12 R.P.C. 232.

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Court Act. Later an Order in Council was passed, withdrawing said reference, and on the following day the claimant filed its statement of claim in the office of the Registrar, which was served on the respondent. The respondent now moves for an order to withdraw the reference as irregularly made and void, because it was not made by the Minister of Customs or Minister of Public Works as well as the Minister of Railways and Canals, and because the amount of the claim as referred was for an amount substantially less than prayed for by the statement of claim.

*Held:* That, as the claim for damages was primarily for the repudiation of a contract, the negotiations leading up to which had been with the Department of Railways and Canals and as the Order in Council accepting the offer leading to the contract had been approved by the Minister of that Department, the reference signed by him alone was a sufficient compliance with the statute.

2. That as there was nothing suggesting fraud or deception in the description or amount of the claim as made to the Department, the Reference was not vitiated by the fact that the amount of damages therein mentioned was less than that claimed by the pleadings.
3. That the reference of claim to the court was merely to confer on the court the jurisdiction to hear the claim, and the Crown did not in any sense initiate the claim or proceedings by giving of such jurisdiction. That the proceedings are initiated by the filing and serving of a statement of claim and the respondent cannot avail himself of Rule 109 to withdraw the Reference.

MOTION by the respondent for an order giving him leave to withdraw the Reference made to this court under section 38 of the Exchequer Court Act.

Previous to making the application herein the respondent having failed to plead to the statement of claim filed by the claimant, claimant moved for an order that his claim be taken *pro confessis*, when it was contended by the Crown that the Reference had been withdrawn and the statement of claim was improperly filed. This contention was dismissed (1).

THE MOTION was heard by the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*Lucien Cannon, K.C.* Solicitor-General, for respondent.

*R. V. Sinclair, K.C.*, for claimant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, this 2nd of March, 1927, delivered judgment (2).

(1) [1927] Ex. C.R. 79.

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

This is a motion for an order granting leave to the respondent to withdraw a Reference made to this court the 16th day of September, 1926, or, in the alternative, for an order striking out the statement of claim filed herein. It is desirable that some of the salient facts in the negotiations leading to the controversy between the parties, and antecedent to the making of the Reference, should be stated, and this will particularly assist in an understanding of some of the grounds taken in support of the motion.

One Forgie, of Toronto, offered in writing to purchase from the respondent a certain property owned by it at the corner of Yonge and King streets, Toronto, for a stated sum, and concurrently with this offer he made a deposit of \$25,000 with the respondent on account of the purchase price, in the event of the acceptance of the offer by the respondent. The offer contained the stipulation by Forgie, that upon his obtaining possession of his property on or before a certain mentioned date, that he would proceed with the erection of a twenty-six storey office building upon this property and a property immediately adjoining, and locally known as the Home Bank of Canada Head Office site, the purchase of which he had arranged for conditionally, and upon account of which he apparently paid \$60,000 at different times to the owners. The offer was subject to the provisions that the same should be accepted by Order of the Governor in Council; that such acceptance if made would constitute a binding contract of purchase and sale; and that the respondent should execute a lease for the rental of all the space of the ground floor and of three other floors of the proposed office building, for a term of years, at a rental and upon the terms and conditions set out in the offer. This offer was formally accepted and approved of by an Order of the Governor in Council upon the report and recommendation of the Minister of Railways and Canals, on July 29, 1925. Thereupon Forgie assigned to the claimant all his interest in the agreement. Apparently the negotiations leading to the agreement involved also the rental of five other floors in the proposed building for the use of the Department of Customs, though this was not mentioned in the offer referred to. Negotiations however proceeded further upon this point, and on the 1st of Febru-

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ary, 1926, an Order in Council was passed on the recommendation of the Minister of Public Works granting authority for the leasing of five other floors by the respondent for the use of the Department of Customs and Excise. On February 6 following, the respondent was notified in writing that the claimant was ready and willing to carry out the purchase of the respondent's property. On the 12th of February, the claimant was notified that the respondent had decided not to carry out the agreement. Subsequent events upon this phase of the matter are not presently material, and it is only necessary to say that the agreement was not carried out by the parties. Thereupon, the claimant pleads, it made claim for damages by reason of the failure of the respondent to carry out the agreement.

On September 16, 1926, the Acting Minister of Railways and Canals ordered a Reference of this claim for damages to the Exchequer Court of Canada. On November 24, 1926, an Order in Council was passed, upon the recommendation of the Acting Minister of Justice, withdrawing the Reference. On the 25th day of November, the day following, the claimant filed in the office of the Registrar of this court a Statement of Claim, and which was also served upon the respondent. Recently the plaintiff moved for judgment upon the ground that the respondent was in default in filing a statement of defence, which was refused, and the respondent was given further time to file his defence. Upon the hearing of that motion before me the respondent contended that the Reference had been revoked by the Order in Council referred to, and I decided against this contention.

The Solicitor General, appearing upon the present motion on behalf of the respondent, urged that the Order of Reference was irregularly made inasmuch as it was not made by the Minister of Customs, or the Minister of Public Works as well as by the Minister of Railways and Canals; that the Reference was also void because the amount of damages claimed in a statement deposited with the Acting Minister of Railways and Canals prior to the making of the Reference, was substantially smaller than that claimed in the statement of claim; and that the respond-



ent having initiated these proceedings by granting the Reference should have the right of withdrawing the same if he so desired, and he relies on rule 109 of the Exchequer Court Rules.

In respect of the first mentioned point it appears to me that the claim for damages is primarily for a repudiation of the contract to sell to the claimant, the respondent's property which I have referred to, and as the negotiations leading up to this contract were with the Department of Railways and Canals, and the offer referred to having been approved of by the Governor in Council upon the recommendation and report of the Minister of Railways and Canals, it would appear to me that there has been a sufficient compliance with the statute which states that any claim against the Crown may be prosecuted by Petition of Right, or may be referred to the court by the head of the department in connection with the administration of which the claim arises. The particulars of the plaintiff's claim make no reference to damages in connection with the contemplated lease of certain space in the projected building for the use of the Department of Customs. There is no suggestion that the Department of Customs had in mind the idea of refusing to lease space in the building, if it were built. If there was an agreement to lease there has been no repudiation of that agreement so far as I know. In fact it has not been made clear to me that any agreement was ever entered into by the Crown agreeing to lease any space in the proposed building for the use of that department. The statement of claim alleges that authority to enter into such a lease was granted by Order in Council, but that does not mean that an agreement to lease was ever entered into. I can not presently see how the plaintiff would have any right of action against the Crown in this connection, or why the Minister of Customs, or the Minister of Public Works should be a party to the Reference. The claim arises, I think, in connection with a matter entirely connected with the Department of Railways and Canals and none other. I am of the opinion therefore, that the failure of the Minister of Customs, or any other Minister of the Crown, to join with the Acting Minister of Railways and Canals in making the reference, does not void the same.

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It is also contended by the respondent that the amount claimed in the statement of claim as damages is considerably greater in amount than that mentioned in a letter, dated September 4, 1926, and addressed to the Minister of Railways and Canals by the claimant and which letter sets forth the grounds of the claimant's demand for damages, and a request for a Reference to this court of such claim for adjudication. The letter in question fully sets out the origin and nature of the claim for damages, and I do not think the respondent can fairly claim to have been surprised or misled by the fact that the statement of claim, claims greater damages than that set forth in the letter referred to. There is nothing suggesting fraud or deception in the description or amount of the claim as set forth in the letter. It was quite natural and to be expected that the letter in question would deal generally only with the nature and amount of the damages claimed, while the statement of claim when filed would deal with the matter with preciseness and particularity. Sec. 38 of the Exchequer Court Act states that a "claim" may be referred to this court, and there was no particular reason why any amount of damages should have been mentioned in the letter unless requested by the Minister. I do not think the Reference is vitiated by the fact that the amount of damages therein mentioned is less than that mentioned in the statement of claim. The nature of the claim is still the same. I am of the opinion, therefore, that this point fails also.

The remaining point urged in support of the motion is that the respondent initiated this action or proceeding by granting the Reference and is entitled to withdraw it as might any plaintiff, under rule 109. I fail to appreciate the force of this contention. The claimant is the party prosecuting the claim, and while the Crown gave this court jurisdiction to hear the claim, yet in fact it must be the respondent who will defend the claim if it is to be defended. The respondent did not in any sense initiate the claim or proceeding by giving jurisdiction to the court, the proceedings were initiated by the plaintiff by filing and serving a statement of claim. A Fiat or Reference merely gives

jurisdiction to the court, and any action or proceeding taken thereunder is similar to any other action at law commenced by a plaintiff.

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I do not think that Rule 109 is here applicable.

I therefore dismiss the motion with costs.

Judgment accordingly.

THE CANADIAN GENERAL ELECTRIC COMPANY, LIMITED . . . . . } PLAINTIFF;

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Jan. 26. Feb. 10.

AND

FADA RADIO, LIMITED . . . . . DEFENDANT; (No. 7244)

Patents—Necessity of affidavit for re-issue—Improper affidavit for issue of —Untrue statement—Commissioner of Patents—Discretion.

An application for the re-issue of a patent was made by the plaintiff company under the Patent Act (R.S.C., 1906, c. 69). In support of their application they filed an affidavit purporting to be made by the company, instead of by an officer thereof.

Held: That as both the Patent Act and Rules in force at the date of the re-issue were silent on the matter, the Commissioner might properly require an affidavit in support of the application or might dispense with such formality, if he saw fit to do so.

- 2. That inasmuch as the sufficiency or validity of such affidavit is for the Commissioner to pass upon, and is solely to satisfy himself, when a patent has been granted, stating on its face that the patentee has complied with all requirements of the Patent Act, it was not competent to a defendant, sued for infringement of such patent, to attack the same as being void, because the affidavit accompanying the application was not strictly in compliance with the statute, and the court will not consider such a defence.
3. That even if the statement in the affidavit of the patentee, filed with his application for patent, that "his invention had not been patented to him or others . . . in any country" were untrue, this would not in itself be a ground for voiding the patent, in the absence of fraud. That a party sued for infringement of a patent could not invoke such an error, to void the patent.
4. That the purpose and effect of the post war legislation (Ch. 44, sec. 7, ss. 1 of 11-12 Geo. V, Dom.) was inter alia to extend the time within which one might apply for a patent in Canada, after having patented the same invention in another country, which legislation must be read as amending sec. 8 of the Patent Act; and that in consequence an application for patent made in Canada in 1919 was properly received, notwithstanding that the same invention had already been patented in another country in 1917, more than one year previous to the Canadian application.

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ACTION for infringement of patent.

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

*Russell Smart, K.C.*, and *J. C. Macfarlane* for plaintiff.

*George F. Henderson, K.C.*, for defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now this 10th February, 1927, delivered judgment (1).

This is an action for infringement of Canadian Patent No. 244,847, granted to the plaintiff on the 25th day of November, 1924, which was a re-issue of patent No. 196,390 granted to the plaintiff on the 20th day of January, 1920, the plaintiff being assignee of Irving Langmuir, the inventor.

The defendant admits user of the "grid leak" described in the plaintiff's patent, and relies altogether on legal defences touching the issuance of both mentioned patents. The defendant claims that the patent in suit is void because it was not accompanied by a proper affidavit, the petition requesting a re-issue of the original patent under the provisions of ch. 69, sec. 24, R.S.C., 1906, being accompanied by an affidavit purporting to be made by the Canadian General Electric Co., Ltd., the plaintiffs, which affidavit the defendant claims to be void. The defendant also claims that the original patent issued to the plaintiff was void because of untrue statements contained in the affidavit of Irving Langmuir, the inventor, accompanying the application for patent. The alleged untrue statement is that the inventor, Irving Langmuir, therein declared that his invention had not been patented to him or others, with his knowledge or consent in any country, whereas in fact it had been previously patented in Germany. The defendant also contends that the application by Langmuir for patent in Canada was made more than one year after the date of issue of the German patent, and that the patent was issued contrary to the provisions of the Patent Act, and was therefore void.

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

The plaintiff substantially replied to those contentions as follows: that neither the Patent Act nor the Patent Rules require an affidavit to accompany the petition of the applicant for a new or re-issued patent, and its absence is not a ground for invalidity of the same; that any allegation in the petition or affidavit of an applicant for a patent, containing any untrue matter, is not fatal to the validity of a patent thereon granted unless the allegation was a material one; that the affidavit accompanying the petition for a new patent, purporting to be the affidavit of the plaintiff corporation, was substantially the affidavit of W. H. Nesbitt, secretary of the plaintiff company, that failure to properly describe the capacity in which the affiant made the affidavit does not void the same, that it was a sufficient compliance with the statute, if an affidavit was required at all, and that having been accepted by the Commissioner of Patents it is conclusive of the matter; that if the re-issued patent is valid, objection cannot now be taken to the original patent, which has been surrendered, and being no longer in existence, cannot therefore be the subject of attack.

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Ch. 69, sec. 24, R.S.C., 1906, is to the effect that whenever a patent is deemed defective or inoperative for one reason or another, and that it appears that the error arose from inadvertance, accident or mistake without any fraudulent or deceptive intention, the Commissioner may upon the surrender of such patent, cause a new patent, in accordance with the amended description and specification made by such patentee, to be issued to him for the same invention. Under the provisions of this section, the plaintiff petitioned the Commissioner of Patents requesting that a new patent be granted to it, as assignee of Langmuir, in accordance with the amended description and specifications of the said invention. The affidavit accompanying this petition was in part as follows:—

We the Canadian General Electric Company Limited of the city of Toronto, in the county of York, in the province of Ontario, Canada, make oath and say that the several allegations contained in our petition to the Commissioner of Patents \* \* \* are respectively true and correct.

The affidavit was signed “Canadian General Electric Company Limited, W. H. Nesbitt, Secretary,” and purported to be sworn before a notary public in the usual man-

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ner. The notary public in question, giving evidence at the trial, stated that Nesbitt, the secretary of the plaintiff company, swore to the affidavit before him, and signed the same in his presence. The affidavit was apparently accepted by the Patent Office as sufficient, and in due course a new patent issued granting to the plaintiff and its assigns the exclusive right of making, constructing, and vending in the Dominion of Canada the said invention. The patent recites the fact that the patentee had complied with all the requirements of the Patent Act.

It is not contended that a corporation may make a declaration or take an oath, but it is urged that the affidavit made by Nesbitt, an officer of the plaintiff company, is a sufficient compliance with the Act if an oath was at all required, notwithstanding the fact that Nesbitt failed to describe himself in the beginning of the affidavit as an officer of the plaintiff corporation and did not sign the affidavit as a person, but rather signed the name of the plaintiff corporation thereto. It does not appear to me that Ch. 69, section 24, R.S.C., 1906, required any affidavit or declaration to accompany a petition asking for the issuance of a new patent, neither did the rules then in force appear to require such a formality, although the prescribed forms contain a form of affidavit to be used in cases of this kind. The petition itself sets forth the grounds upon which a new patent was requested, and I am of the opinion after carefully considering the matter, that nothing more was necessary. The statute and the rules being silent on the matter, the Commissioner of Patents might very properly require an affidavit in support of the application, or he might dispense with such a formality altogether if he saw fit to do so. On the other hand if an affidavit or declaration was required by the statute, then I think the affidavit in question having been accepted by the Commissioner of Patents, and a new patent having issued, it is not now open to the defendant, to attack the patent upon such a ground. Any other state of the law would be productive of serious complications and frequently great injustice. In this connection see sec. 63 of the Exchequer Court Act.

Mr. Henderson on behalf of the defendant urged that the original patent was void because it contained matter

which was untrue upon a material point, and that this patent was therefore always void, and consequently a new patent, or a re-issued patent as it is usually called, could not therefore in law issue at any time. The particular matter challenged in the affidavit of Langmuir accompanying the original application, is, as I have already stated, the allegation that his invention had not at that time been patented to him, or to others with his knowledge or consent, in any country, whereas in fact it is claimed a patent had been issued in Germany to him along with another named Alexanderson, covering the same invention. The Canadian application in question was filed on October 9, 1919, and the German patent issued on July 5, 1917. The German patent issued jointly to Langmuir and Alexanderson, and the claims of that patent are not in fact exactly the same as in the Langmuir Canadian application of October 9, 1919, but contain further and different claims, and cannot strictly be said to be one and the same invention. I think therefore that the allegation in question cannot be said to have been untrue. Moreover there is no evidence before me that I can recall, which shows that Langmuir knew of the issuance of the German Patent. Further, I think that even if the patent issued in Germany was exactly the same as the Canadian patent granted on the application of Langmuir, it would not in itself be a ground for voiding the patent, in the absence of fraud which is not suggested, and I repeat what I have already said, that the patent having issued, I do not think any party in an infringement action can invoke an error of this kind, to void the patent.

The legal effect of failure to strictly comply with certain formalities of the statutes and rules regarding applications for patents has not apparently been the subject of discussion in reported cases in Canada or England, but it has been the subject of discussion in many American cases, and the conclusions there reached are, I think, sound.

In *Seymour v. Osborne* (1), the point was taken that the patentees did not make oath, before the patents were granted, that they believed they were the original and first inventors of the improvements for which the letters patent were solicited. Apparently there

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(1) (1870) 11 Wall. [78 U.S.] 516 at p. 538

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was no proof that the oath required had been taken before the Commissioner, but the court suggested that it might have been taken before some other person authorized to administer oaths. The letters patent contained the recital that the required oath was taken before the same was granted, and the court was of the opinion that its recital, in the absence of fraud, was conclusive evidence that the necessary oaths were taken by the applicants, before the patent was granted. Inasmuch as Mr. Henderson contended that there was no evidence of error, inadvertance or mistake, supporting the application for a new patent, it is perhaps worth while pointing out that in this case the court also decided that the fact of the granting of a re-issued patent closed all inquiry into the existence of inadvertance, accident or mistake, and left open only the question of fraud for the jury, and that where the Commissioner accepts the surrender of an original patent and grants a new patent, his decision in the premises, in a suit for infringement, is final and conclusive, unless it is apparent upon the face of the patent that he has exceeded his authority, that there is such a repugnancy between the old and new patent that it must be held, as a matter of legal construction, that the new patent is not for the same invention as that embraced and secured by the original patent. See also *The Auer Incandescent Light Manufacturing Co. v. O'Brien* (1). In *Whittemore v. Cutter* (2) objections were taken to the form of the oath of the inventor. Mr. Justice Storey there expressed the opinion that the taking of the oath was but a pre-requisite to the granting of the patent, and in no degree an essential to its validity. It might as well have been contended he said that the patent was void unless the thirty dollars required by the Patent Act had been previously paid. In *Wayne Mfg. Co. v. Coffield Motor Washer Co.* (3) the oath accompanying a reissued patent was attacked, because it was administered by the solicitor who procured the application. The patent recited that the required oath had been made by the applicant, and in the absence of fraud, it was held conclusive evidence of that

(1) [1897] 5 Ex. C.R. 245, at pp. 288, 289. (2) [1813] Gallison's R. vol. 1, p. 429.

(3) [1915] 227 Fed. Rep. 987 at p. 990.



fact. The court held that papers in the files of the patent office, purporting to be an oath in a given case, even if void for lack of a jurat or other fault was harmless. In such a case, it was held, that the law presumes the oath recited in the letters patent was made orally, or was embodied in some other patent, and that it was to be presumed that the Commissioner will never issue a patent until he is satisfied that the applicant has somehow made oath to the facts to which the statute requires him to swear. When the Commissioner is so satisfied and recites the fact in the letters patent, all inquiries on the subject are foreclosed except in a case of actual fraud. In *Crompton v. Belknap Mills* (1) where the sufficiency of the affidavit was in question, the court said:—

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We are not satisfied the oath was not taken. The letters patent recite that it was * * *. But suppose the oath was not taken. Would the patent be void on that account? It was held otherwise by Judge Storey in *Whittemore v. Cutter supra*. The taking of the oath, though it be done prior to the granting of the patent, is not a condition precedent, failing which the patent must fail. It is the evidence required to be furnished to the patent office, that the applicant verily believes he is the original and first inventor of the art, etc. If he takes this oath, and it turns out that he was not the first inventor or discoverer, his patent must fail, and is void. So, if he does not take it, and still he is the first inventor, or discoverer, the patent will be supported.

One point more remains to be considered. Assuming that the German patent and the original patent granted upon Langmuir's application, refer to the same subject matter, it is contended on behalf of the defendant, that having patented in Germany on July 5, 1917, Langmuir should have applied within one year from that date for his Canadian patent, whereas in fact the Canadian application was not made until the 6th of October, 1919. This objection would of course be fatal to the plaintiff unless there is legislation modifying the terms of the Patent Act, which requires an application for patent to be made here within one year from the date of the issue of the first foreign patent for such invention. Chapter 44, sec. 7 (1) of the Statutes of Canada, 1921, enacts as follows:—

A patent shall not be refused on an application filed between the first day of August, 1914, and the expiration of a period of six months from the coming into force of this Act, nor shall a patent granted on such application be held invalid by reason of the invention having been patented in any other country or in any other of His Majesty's Dominions

(1) (1869) 3 Fisher's Pat. Cases 536.

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or Possessions or described in any printed publication, or because it was in public use or on sale prior to the filing of the application, unless such patent or publication or such public use or sale was issued or made prior to the first day of August, 1913.

This provision clearly I think must be read in amendment of sec. 8 of the Patent Act to which I have just referred. The purpose and effect of this post war legislation was *inter alia* to extend the time within which one might apply for patent in Canada, after having patented the same invention in another country, and such application was not to be refused by reason of the invention having been previously patented in any other country unless this was done prior to August 1, 1912. This I think meets exactly this case, and I am of the opinion that the filing of the application and the patent issued thereon was within this statute, and which statute is I think conclusive upon the point. The plaintiff upon this point relies upon sec. 81 and 83 of the Treaty of Peace (Germany) Order, 1920, but I do not think any discussion of the same is now necessary.

The plaintiff's action is therefore allowed, and it is entitled to the relief claimed. The plaintiff will also have its costs of action.

Judgment accordingly.

Solicitors for plaintiff: *Macfarlane & Thompson.*

Solicitors for defendant: *Henderson & Herridge.*

BETWEEN:—

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 Dec. 13.

SHERBROOKE MACHINERY COM- } PLAINTIFF;
 PANY, LIMITED

AND

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 Feb. 17.

HYDRAULIC MACHINERY COM- } DEFENDANT.
 PANY, LIMITED

Patents—Infringement—Patentability—Invention—Improvement—Abandonment

The alleged invention involved in the patent in suit consisted in the arrangement of a number of machines known as "deckers," used for the thickening of the ground pulp fibre as it comes from the grinders, and so arranged in rows that they are conveniently related to each other. Between the rows there is a common supply trough and a

common discharge trough. At the side of each row of tanks is a drive shaft common to the whole row. The shafts of the rotatable cylinder molds are mounted in their respective tanks, in suitable bearings. There is also an auxiliary shaft in alignment with and adjacent to the cylinder mold shafts, which cylinder shafts may be connected by jaw couplings, and when so connected form one shaft. For each tank there was a sprocket wheel on the driving shaft connected thereto by hand controlled clutch so that any one of the tanks could be disconnected from the general driving shaft without stopping any others, which is claimed to be the important thing in the invention. The whole construction was of iron. Prior to this invention the machines then in use were so designed that if two cylinders, not adjoining one another, were to be put out of operation, the intermediate cylinders would also have to cease operation. Such machines were largely built from suggestions of one F. and upon his plans, and the only departure in the patent in suit from such plans was in the driving means, so arranged that any one tank could be put out of action. In 1904 machines constructed upon the plans of F. were installed by the patentee in the mills at Berlin, N.H., and in 1907 similar machines in another mill. Applications for patent were made in the United States and in Canada in 1909 and 1911 respectively by the plaintiff's inventor.

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Held, that though there might be some advantage in being able to put out of operation any one of the cylinder molds, where the economies effected were negligible, where there was no substantial increase in efficiency, and no new result was thereby obtained, the structural variations in the driving means from the prior art, necessary to do this did not denote inventive skill.

2. That public user of the patented machines in the Berlin mills, for five years before making application for patent in the United States, was an abandonment of the invention to the public.

Semble: Where a specific machine already exists producing certain effects, and where additions have been made to such machine to produce the same effect in a better manner, a patent cannot be taken for the whole machine, but for the improvement only.

ACTION for infringement of a patent for invention, in which the defendant denies infringement, and asks that the patent be declared invalid for want of subject matter.

Action tried before the Honourable Mr. Justice Maclean, President of the Court, at Montreal.

Russell S. Smart, K.C., for plaintiff.

Warwick Chipman, K.C., for defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, this 17th day of February, 1927, delivered judgment.

This is an action for infringement of a patent of a machine known as a "decker", and which is used in the paper making industry. The function of this machine is to thicken the ground pulp fibre after it comes from the grinders, and

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before it proceeds to the next machine in the process of paper making. The proportion of ground pulp in the water, upon entering the decker would be only about one half of one per cent, and upon leaving it, about five per cent, the balance of course being water, the whole being known in the industry as "stock." The machine alleged to be infringed was patented in 1911.

The decker involves a rectangular vat or tank, in which rotates a cylinder shell, called a cylinder mold, which has its periphery covered with wire. The stock enters the tank through a supply trough, flows through the wire periphery of the cylinder, thence through the cylinder and out through an opening at the side of the tank, into a discharge trough. The wood fibre adheres to the wire covered cylinder, and is carried upwardly above the level of the stock in the tank, when it comes into contact with a second and smaller roller immediately above the cylinder mold, and which is usually a felt covered roller, and known in the art as a couch roller. The couch roller picks up the fibre from the cylinder mold, then a scraper or doctor blade as it is usually called, removes the fibre from the couch roll, and it then falls into a discharge chamber which delivers it at the place where the next operation takes place in the sequence of paper making.

The invention said to be involved in the patent in suit consists in the arrangement of a battery, or a large number of these tanks, so that they will be conveniently disposed and related to each other, and to simplify the construction and operation of the machine. The drawing fig. 1, indicates a battery of ten of these tanks, two rows of five tanks each. Between the two rows of tanks, is a common supply trough into which flows the stock from the source of supply, and is placed at such a level that the stock lying within it may flow into the several tanks. Between each tank and the supply trough, is a gate, which may be lowered or raised to determine the flow from the common supply trough into each tank. Then the discharge from each tank, is into a common discharge trough, which is located directly beneath the supply trough, into which is discharged all the waste water, or as it is usually called, the "white water." In the machine as constructed under the patent, the floor of the supply trough is the top of the discharge

trough, and the inner sides of the tanks are also the side walls of the supply and discharge troughs.

Then generally as to the means for driving the various cylinders. At the side of each row of tanks is a drive shaft common to one row of tanks. The shafts of the rotatable cylinder molds are mounted in their respective tanks in suitable bearings. The specifications describe what is called an auxiliary shaft, in alignment with and adjacent to the cylinder mold shafts, and provision is made whereby the cylinder shafts may be connected by jaw couplings, and the cylinder shafts to all purposes may be regarded as one shaft, when thus connected. This, however, is not practised in the plaintiff's commercial machine, each cylinder being operated individually. By means of sprocket wheels for each tank on the driving shaft, and also on the cylinder mold shafts, and a driving chain for each cylinder mold, the cylinders are driven at the desired speed. Each sprocket wheel of the driving shaft is connected thereto by a hand controlled clutch so that it can be rendered idle without stopping the driving shaft. Without stopping the turning of the drive shaft, it is thus possible to put out of action any one or more of the cylinders in the tanks by disconnecting any sprocket wheel from the drive shaft, thus making stationary the corresponding cylinder without affecting the rotation and operation of the remaining cylinders, and this is claimed to be the important thing in the invention.

It is not necessary I think to devote much time to the infringing machine. There is to be found in the drawings of this machine, a battery of tanks, four in a row, a waste water trough and a supply trough common to all the tanks, with an inlet to the several tanks from the supply trough and a spout leading from the side of the tank into the common discharge trough; a cylinder roll and couch roll; a common drive shaft for each row of tanks, the organization being such that any tank may be put out of action without preventing the operation of the remaining tanks. Plainly, the defendant's machine is the same as the patented machine, and I am quite satisfied that the design of the former was taken from the latter with slight variations, and in the circumstances stated in the evidence. The fact that the common supply and waste troughs have their side

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walls independent of the tank, and other slight but unimportant variations in structure, do not distinguish the machines. If the patent in suit is valid, then beyond question there is infringement.

The defendant claims that the plaintiff's patentee, Parker, was not the inventor of its machine, if there was invention, but another person altogether; that it is void for want of subject matter; and that it was in public use in the United States for several years prior to the date of application for the patent in Canada. The defendant's principal witness at the trial was a Mr. Ferguson, a person experienced in designing paper making machines and paper mills, and admittedly of high reputation in that respect. In 1899 he became chief engineer of the Great Northern Paper Company at their mills in Maine, U.S.A., and so continued for many years, though still engaged in private practice as well. He described the form of deckers which were then in use in such mills, but which he had not designed himself. The deckers he states were rectangular vats or tanks each containing a cylinder covered with wire cloth with a couch roll braced on the top, and they were erected in rows. Between each row there was a spout, separate from the tanks, built of wood, through which the stock came that was supplied to the individual tanks, each tank being connected with the spout by a gate through which passed the supply of stock. At the end of each tank was an outlet through which the waste water from the tank passed away, these outlets being connected by pipes to a main pipe underneath the floor into which all the water from the several tanks flowed. Each tank had its own cylinder with shaft and pulleys connected with belts to pulleys on a shaft running centrally between each two lines of deckers, and suspended from the ceiling above. That is to say each cylinder was operated singly, there being belt connections for each cylinder, and when it was necessary to stop any one cylinder the belt was pulled off. Deckers of this type had been in use for many years prior to this time. In 1903 Ferguson was employed to design a paper mill for the Berlin Mills Company, at Berlin, New Hampshire, and he thought that a different type of decker might be designed to avoid the multiplicity of pipes and driving

belts. This mill was built upon designs prepared by Ferguson and was completed in 1904. His idea was to group the tanks and have a common supply and discharge trough. He also had in mind the idea of coupling together all the cylinders in a given row, thus making a continuous shaft from end to end with jaw couplings, that is to say the ends of the cylinder shafts in a given row were abutting one another, and they were to be connected at the abutting ends by means of clutches or couplings, thus making a continuous shaft from end to end. Any cylinder might be put out of action if it was so desired by disconnecting it from the adjacent cylinder, suitable means being provided for so doing. The cylinders in each row of tanks when coupled together could be driven from either end or both ends, by means of pulleys and belts and a driving shaft. It was only, however, adjacent cylinders in the centre of the row or anywhere between that and the two end cylinders that could be put out of action, while the remaining cylinders would be in operation, that is to say if two cylinders not adjoining one another were to be put out of operation, the intermediate cylinders would also have to cease operation. This contemplated design was based upon wooden construction.

He then prepared a drawing, showing the details of construction of one vat, according to his ideas as just outlined, and the connections to the adjoining vats. This drawing, dated August 15, 1903, was produced at the trial. A general drawing was then made showing the installation of this arrangement, and as it would appear in the building to be constructed. A blueprint of this original drawing was put in evidence also, and bore date September 12, 1903. Parker, the plaintiff's patentee, connected with the Improved Paper Machinery Company of Nashua, New Hampshire, builders of pulp and paper machinery came to Ferguson with a view of submitting proposals for the construction of the deckers of this proposed mill. Ferguson says he discussed with Parker his views about grouping the tanks and arranging them with common supply and discharge spouts, and the continuous drive through the line of deckers, and generally made him acquainted with what he wanted done. He stated that Parker suggested that the tanks and supply troughs or spouts be made of iron instead

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of wood with which view he concurred if it were not too costly. He says he gave Parker some free hand sketches of what he wanted and discussed the details of his idea with Parker, but could not remember positively if he showed to Parker the two plans referred to. He stated that Parker approved of his ideas and returned to his place of business to prepare a plan of construction embodying such ideas. In the course of time Parker submitted his drawings, and a formal proposal to the Berlin Mills Co., for the installation of the deckers, and in 1904 they were installed by the Improved Paper Machine Company. In 1907 the Great Northern Paper Company constructed a new paper mill at East Millenocket, Maine, and it purchased from the Improved Paper Machine Company deckers that embodied all the features of the deckers installed at Berlin by the same company.

Referring first to the origin and construction of the Berlin machine, I accept fully the evidence of Ferguson as to the particular construction of deckers that he suggested to Parker, and which was substantially the Berlin machine. There was no invention in suggesting that iron should be substituted for wood, and this change in material would naturally suggest some variations in construction from the deckers in use prior to that time, which were made of wood. For instance, when it was determined to construct the deckers of iron, this would suggest that the wall of the vats would also form the wall of the supply trough. There could not possibly be any invention in structural variations of this nature. I am of the opinion therefore that the decker installed by the Improved Paper Machinery Company in the Berlin mills in 1904 was not the invention of Parker, if invention there was, but was made upon a plan or design outlined and conveyed to him by Ferguson. Whether the Berlin machine required inventive skill, or whether it is a mere aggregation of parts, in my view of the case, is not now important. It is not necessary to refer to the East Millenocket installation, because that was the same installation as in the Berlin mills. Assuming, however, that the Berlin machine involved invention, I do not think that Parker or any one else would be entitled to a patent in Canada covering this machine had he or they there applied as

of the dates of Parker's American or Canadian applications for patent, August, 1909, and April, 1911, respectively, because whether or not there was invention or whoever the inventor was, the same was five years previously abandoned to the public by public user in the Berlin mills. That is the evidence before me.

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The whole question for decision here then seems to be whether the difference in construction between the Berlin combination machine and the combination machine described in the Canadian patent, required inventive skill, the distinction in the two combinations being limited to the driving means and the means of putting out of operation any one cylinder in the manner already indicated and which is peculiar to the Canadian patent. There may be some advantage in being able to put out of operation any one of the cylinder moulds, in the manner disclosed in the plaintiff's specifications, without affecting the operation of the remaining ones, and this the Berlin machine as arranged could not wholly do. But did it require invention to do this? I think not. No new result was obtained. I do not think it can be said that the Canadian Parker is substantially more efficient than the Berlin machine. The economies effected are negligible, while the additional convenience, it seems to me, does not denote inventive skill. The use of the sprocket wheel and clutch on the driving shaft to disengage any tank unit from the continuous drive shaft, was not new in the field of mechanics, and if suggested, could have been carried out by any skilled mechanic. This particular mechanical device or means, Ferguson stated, was well known in paper-making machines, to effect the very same end, and it was not I think contended that the use of the clutch for such an analogous purpose was new. Combining it with other well known elements did not require inventive skill. Altogether, I am of the opinion that the patent in suit is void for want of invention.

I do not think it is necessary to give any consideration to the United States patent granted to Parker. The Canadian patent and the American patent are different things entirely, although some of the claims may be practically the same. It cannot be said that the patents are for the same invention. In the American patent no claim was

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made for the driving means. It is to be remembered that Parker applied for his Canadian patent long before he secured his American patent, and therefore he was not relying upon sec. 8 of the Patent Act, Chap. 69, R.S.C., 1906, which permits one, patenting abroad, to apply for a patent in Canada for the same invention within one year after the patent issues in the other country. Parker obtained his Canadian patent before his American patent, and as I have said they are not the same invention. The Canadian application and patent in my opinion therefore must be considered altogether regardless of the American patent or the application for the same, and therefore sec. 8 of the Act does not I think in any way apply to this case. If the American and Canadian patents were for the same invention, and the Canadian application was made within one year after the date of issuance of the American patent, that would conceivably present a different point for determination. Another and more difficult point would arise, where it had been clearly proven in an action on the Canadian patent, involving its validity, that there had been public user of the American patent, in the United States, for a longer period than two years prior to the application for patent there.

I am also inclined to the view that if there was here invention, it was a mere improvement of an existing machine, and the claim in such a case must be for the improvement only, and must not include a claim to the whole machine which would render the patent void. I think it is well settled law that where a specific machine already exists, producing certain effects, and mere additions are made to such machine to produce the same effect in a better manner, a patent cannot be taken for the whole machine but for the improvement only. In the patent in question, it is not the improvement only that is claimed, and by improvement I have reference to the means of disconnecting the cylinder shaft of any tank from the driving shaft by means of the sprocket wheel and clutch on the main driving shaft. However, I do not rest my opinion upon this ground because this point was not discussed at the trial by counsel, and I did not myself during the argument

suggest the point, and for that reason I do not express a definite opinion upon the point, and it is not necessary to do so.

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The plaintiff's action is therefore dismissed, and the defendant will have its costs of action, together with its costs on the plaintiff's motion to amend its particulars of breaches.

Judgment accordingly.

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

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

TORONTO ADMIRALTY DISTRICT

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Jan. 4-7.
Mar. 8.

BETWEEN:—

KEYSTONE TRANSPORTS LIMITED.... PLAINTIFF;

AND

THE OTTAWA TRANSPORTATION }
CO., LTD. } DEFENDANTS.

Shipping—Collision—Absence of proper lights—Responsibility—Negligence—Barge's responsibility.

The tug *Florence* was at night coming down stream in a narrow channel, in which and in the waters below it, there was a cross current, towing a string of barges and proceeding without the proper regulation lights upon the barges, when a collision occurred, with an upgoing vessel. The weight of evidence was that the Master of the upgoing vessel was misled, by the absence of proper lights, into accepting a passing signal.

Held that the tug and barges were negligent in deliberately breaking Rule 12, and thus misleading the upgoing vessel, and in failing to keep a proper and sufficient lookout, and were liable for the damages caused by such collision, notwithstanding the acceptance of the passing signal.

2. That though the barges, each in charge of a crew, are bound to obey the orders of the Master of the tug, the crew remains responsible for the lighting and watching on their particular barge.

[Certain findings were made by the judge, in this case, in reference to the navigation of the waters just west of the Lachine Canal, which should prove useful to all vessel owners and mariners traversing these waters.]

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This was an action for damages by collision between barges in tow of the tug *Florence* and the steel-vessel *Keybell*, in the waters just west of the Lachine Canal.

The action was tried before the Honourable Mr. Justice Hodgins at Ottawa, on the 4th, 5th, 6th and 7th days of January, A.D. 1927.

Francis King, K.C., for plaintiff.

R. C. Holden, Jr., for defendant.

The facts are set out in the reasons for judgment.

HODGINS L.J.A., now (March 8, 1927), delivered judgment.

Action tried at Ottawa for damages done to the SS. *Keybell* owned by the plaintiffs, due to a collision between her and barges in tow of the tug *Florence* owned by the defendants. The collision took place at 1.15 a.m. on the 12th May, 1925.

The *Keybell* is a steel vessel of 1,254 gross tons, 250 feet long, 42 feet and 6 inches beam, and drawing 13 feet (light). The tug *Florence* of 61.53 tons gross and 23.59 net tons, 87 feet long, 19 feet and 6 inches beam, and 8 feet 10 inches draught. The tow consisted of 9 barges without power, but with rudders, seven of them being 124.5 feet long and 24.5 feet beam, and the remaining two barges being 90 feet long and 20 feet beam. Their draught ran from 7 feet 6 inches to 7 feet 10 inches, and they were arranged in 4 tiers each consisting of two or three barges connected by tow lines about 10 feet long. This gives about 580 feet of distance between the stem of the tug and the stern of the last of the tow.

The questions in this case that were thoroughly debated may be shortly stated. They were first, whether a tug towing a string of barges and coming down stream at night in this narrow channel and giving a passing signal is entitled to assume that an upbound steamer will take that signal as a warning to stay where she is and not attempt to pass till the tug and tow get to a position satisfactory to themselves, or can she add to the passing signal another signal having that recognized meaning.

Second: Whether or not such extended meaning can be given to the passing signal, was the *Keybell* in a position

when she received it to remain where she was? Are the position and responsibilities of each vessel, the tug and the steamer, governed exclusively by Rule 25 as modified by Rules 37 and 38?

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Third: If the barges being towed had not proper regulation lights on them, and if this misled the *Keybell* into going on, is the tug disabled from contending that the *Keybell* should have acted in the manner suggested, and does it in fact cast the responsibility for the collision under the circumstances of this case on the tug and tow?

It is the third question on which the case must turn, the others being really involved in it.

The collision occurred about the black stake in the ship channel, which has no visible banks and leads about north-west from the end of the piers leading out of the Lachine Canal into what is known as the cut, a narrow channel about 250 to 300 feet wide, which bends to the southwest at the black stake, and extends for over three-quarters of a mile in that direction.

The tug *Florence*, downbound with her barges in tow, when at a point in the cut shown on exhibit 3 and so marked, gave two blasts of her whistle and proceeded down the cut, intending to take her northern or port side of the channel in making the turn and straightening up for the Lachine Canal. The *Keybell*, upbound, had come through the Lachine Canal and had passed the end of the pier leading therefrom before she saw the tug's lights and heard her two-blast signal which was answered at once by two blasts. The tug was then about a mile, or somewhat less, distant and in the cut. The vessels were well within two miles of each other during the period in question.

The tug proceeded on her course at 4 miles an hour and when her barges in tow were about opposite the black stake they had angled down across the channel and into the southern half of it, where some of the barges came into collision with the *Keybell*. At this time the Master of the tug says that 110 feet would have cleared all the barges and that three-quarters of the tow was out of the cut. The black stake was seen by the *Keybell's* Mate, Hawthorne, ahead of and over the bow of the *Keybell* when it was passing the second tier, and it was then five or six feet from the

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stern of the last tier. He thought the barges had gone over the stake. In this, Harle, the wheelsman, concurs. Scullion, the second engineer, says that before the *Keybell* grounded, as it did almost immediately after the collision, he saw the black stake 15 feet away just opposite to where he was standing at the starboard gangway. The *Keybell* was in collision with the second tier of barges, having passed clear of the tug by 40 or 50 feet, and clear of the first tier by between 20 and 30 feet; the third tier also came in contact with the *Keybell*.

At the point where the collision occurred in this narrow reach of water which I have mentioned, including the cut, and the waters to the east, west and southwest of it, there is a current which comes from a northwesterly direction and sweeps across the channel, going over the shoal water to the south of it, and heading about east into the Lachine Rapids, the head of which, as shown on exhibit 3, is below the point of collision in a southeasterly direction, and not far off. The master of the *Florence* admits that the current is stronger at the black stake above mentioned.

The current is estimated at from 3 to 4 miles an hour, some of the witnesses putting it more and some less, and it is said to be more strongly felt just on leaving the piers leading to the Lachine Canal.

From the whole of the evidence I draw the following conclusions: A tug and tow, down-bound, coming through the cut, is very likely to take the port or northern side of the channel in order to make the turn, because at the turn barges are apt, owing to the force of the current, to sag downward into the other or southern half of the channel and therefore the northern side forms a safer course. To signify an intention to do this two blasts are necessary, and this, I find, is the usual signal in such a case. It was suggested that a two-blast signal given in the cut is understood by vessels coming out of the Lachine Canal to indicate that they should stop and wait till the tow had rounded the bend, and had straightened away to enter the canal, but I do not find that there is any such meaning attached to the signal required to be given by the rules, which extends or modifies it, though it is in evidence that a check signal might be, and often was, sounded immedi-

ately after the two blasts which would have that meaning. This, however, was not given.

I find, further, that up-bound steamers when meeting a tug and tow, if the tug has more than one barge or scow in tow, and they have warning in time, usually wait inside the piers.

I further find that if an up-bound vessel has left the piers with such knowledge and being aware of the tendency of barges and scows to tail down into the south half of the channel, it may, and in some cases, must, disregard the two-blast signals, and giving an alarm signal, proceed towards the range light on the Lachine wharf heading well up to the extreme north of the channel in order to let the tug and tow go safely by, leaving in such a case three-quarters of the channel for them.

I also find that if an up-bound vessel has no reason, due to the length of the tow, to fear that her southern half of the channel will be blocked or interfered with, she can count on safely navigating in answer to the accepted two-blast signal, her southern half of the channel.

I also find that it would not be safe for an up-bound vessel, having passed out beyond the piers leading from the Lachine Canal, to go at less than half speed at night. The night in question is described in the plaintiff's Preliminary Act as dark, and the weather is described, in the defendant's Preliminary Act, as clear, with a fairly strong breeze from the northwest, i.e., from the same direction as the current. See *Cayser, Irvine & Co. v. Carron Co.* (1). The danger lies in the force of the current and the shoal water immediately to the south of the channel.

I further find that scows and barges which draw less than 12 feet can, if they take the southern half of the channel, safely pass somewhat to the south of the black buoy as a sufficient depth of water exists at that point. This is agreed to by Lapine and Legault called for the defendants.

Having in view these conclusions, it is necessary to consider the exact position which confronted both the up-bound steamer and the tug and tow in this case, before the collision.

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(1) (1884) 9 A.C. 873 at p. 880.

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The tug when it gave its signal was about half way between the upper and lower end of the cut. The *Keybell* was, I find, some 500 feet past the end of the pier at the north side and about at the red fixed light off the end of the northern pier and first saw the tug's lights from that position. The evidence of the wheelsman, Harle, on the *Keybell*, fixes it somewhat further on as being after the vessel left the end of the south pier. Much of the evidence for the defence as to seeing the *Keybell* between or behind the pier is explained by noting that the south pier extends further out than the north pier, and that when past the north pier there is no protection to the north unless it be what was somewhere called a crib. What is meant by 'leaving the piers' and the distance from the 'pier' to the turn into the channel are to be read and understood, having this in mind.

Having accepted the tug's signal, the *Keybell* reduced to half speed and proceeded on her way.

The night is described as a dark one and the lights which were seen by the *Keybell* on the tug were two masthead lights and a green light, which indicated to the master that she had a tow. No other lights were seen at this time, according to the evidence given by all those on the *Keybell*, and neither the master of that vessel nor anyone else on board had any intimation that the *Florence* was towing barges which stretched out as far as did the four tiers of barges behind her on this occasion.

The *Florence* had in fact another white light lower down on the mast to which the two towing lights were attached. It was not seen by anyone on the *Keybell*. If it had been seen no great importance would have been attached to it, as the third towing light does not, above Montreal, indicate the length of the tow, and further in this case the master of the *Florence* admits that during the season of 1925, no matter what the length of his tow was, he carried these three white lights.

I cannot, in view of the fact that no one on the *Keybell* saw the third light, there being no rule giving it any special significance in the waters above Montreal, and particularly in the absence of the usual coloured lights to be carried by barges in tow, fasten upon the *Keybell* the warning

which that third light would have had in other waters, if seen, or that which, whether seen or not, would, if in conjunction with those coloured lights, have been given to her master, namely, that a long tow was following the *Florence*. The admission by the master of the *Keybell* that if he had seen the third light he would have taken it to mean a 600 foot tow, when in fact he did not see it, nor did anyone else on the *Keybell*, cannot afford a reason for a finding of negligence against him. In that respect he must be judged on what he knew and saw unless it is shown that he neglected precautions which might have warned him.

It is to be noted that Cardinal, who saw the towing lights of the *Florence* on another occasion at about $3\frac{1}{2}$ miles away, noticed only two lights, while Mainville, who saw them at 3 miles, did not at first see three lights, but the third one came into his view "quite a piece" before passing.

But it is said that these barges were lit with white lights and that they should have been seen and if so the necessary warning was in fact actually given.

This makes it of importance to consider the evidence as to the way in which the barges themselves were lit.

I find the testimony upon this point very unsatisfactory in view of the clear issue involved. It was said by the master of the tug that there were white lights on all the barges, one lamp on each, that before the accident he looked back and saw that there was one on each, placed on top of the load of lumber carried by each barge, and that they could be seen all around and that after the accident he saw these same nine lights.

The evidence of those called to support him is not very convincing.

Morinville, the engineer of the tug, says he noticed some white lights on the tow but cannot say where.

Laframboise, the wheelsman, says he noticed two lights on the first two tiers, on the right hand side.

Malette, deckhand, was not asked about the lights.

Vesina, the second engineer, says he saw several white lights on the barges, but cannot say the number, and that what he saw were on the right-hand barge of the first tier, and some going back beyond the first tier.

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Desforges, captain of the barge *Redfern*, which was in the third tier, says that there was a white light lantern on his barge at the right hand side, and that the barge *Mylot*, which was in the last tier, had a light on a mast three or four feet above the load, and it was behind the mast which stood in the middle of the last tier of barges. This description of the position of the light on the last barge seems to place it in the proper place under Rule 12, but it does not show that the direction therein that all in the tier should be similarly equipped was complied with. The lights, such as they were, were not seen by the master of the *Keybell* till he was nearing the first tier of barges.

Hawthorne, mate on the *Keybell*, was in the bow at the collision and says he only saw 1 light and that on the pole of the last tier. In this Harle, who was with him there, and the watchman, Peake, agree. Harle, when the *Keybell* was approaching the tug, saw no lights, other than what she carried.

It is singular that if these nine lights were lit and burning after the men on board the scows had gone to bed, they should not have been seen from the *Keybell*, for they are said to have been on top of the lumber piled to a height of 4, 5, 6 or 7 feet above the deck, which was itself 6 feet above the water. The importance of carrying proper lights is not to be offset by allegations that barges from the Ottawa carry white lights and that in this case there were some lights on some of the barges, nor by the fact, if it was a fact, that they all carried one white light. This last statement is all that is alleged in the preliminary act, and pleading of the defendants. The master of the tug seems to have been unacquainted with the fact that in 1925 there was any rule in force governing the lights to be carried. No one says that these lights were strung out behind the tug though many questions were asked as to what they would indicate if so placed.

As I read the rule No. 12, canal boats when towed single or tandem astern of steam vessels are obliged to carry a green light on the starboard side, a red light on the port side, and a small bright white light aft. When towed by a hawser in one or more tiers two or more abreast, the boat on the starboard side of each tier should carry a green light,

and the boat on the port side of each tier a red light, and each of the boats in the last tier should also carry a small white bright light aft. These coloured side lights are to be of such a character as to be visible on a dark night with a clear atmosphere, at a distance of about two miles, and are to show a uniform and unbroken light from an arc of the horizon of 10 points of the compass and so fixed as to throw the light from right ahead to two points abaft the beam on either side.

The minimum size of the globes is specified in figures.

The white lights, such as they were on the barges, neither complied with the rule nor were they placed on all the barges, nor did they show their light sufficiently far to be visible at the same time and distance as were the white and coloured towing lights of the tug. The master of the tug will not say that even his towing lights could be seen that night for a distance of two miles, though on other occasions there was evidence to which I have referred that two of them had been visible at a greater distance.

I think the provisions of Rule 12 are imperative, and it is important to note that practically without exception all those who were called as experts on either side to speak with regard to the action of the *Keybell*, are unanimous in emphasizing the fact that had four green lights been shown, the position and actions of the *Keybell* might and could have been radically altered, and her responsibility might have been very different.

The real question to be determined in this action, having regard to the importance of the green lights, is to determine whether their absence led, and justified, the master of the *Keybell* to take the course he did. He testified that there would have been no difficulty in passing the *Florence* with a tow, if the tow had consisted of a single barge, and that the absence of any lights behind the tow which he could see led him to pursue the course indicated by the tug's passing signal. The *Keybell* was, and kept, in her proper water, while the barges had come down well across the middle line because the tug could not hold them up in the current. The master of the tug admits that sagging is usual, due to the current, and that there is a stronger current at the black stake. The tug passed clear at 40/50

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feet, while the first tier of barges came within 20/30 feet. Barrett, an expert witness, master for 14 years, says that he would have done what the *Keybell* did under the circumstances of this case.

Had a check signal, as suggested by several witnesses as being used under conditions similar to those here, been added to the passing signal, although the tow lights were not visible, it would no doubt have acted upon the mind of the master of the *Keybell* in time to have enabled him to elect to take the course recommended by many of the experts, that is to blow an alarm and go well up to the northward toward the Lachine Wharf where he could have held up till the tug and tow had passed. But I cannot find, on the evidence, that at night it would be safe to attempt to hold up a vessel such as the *Keybell*, 250 feet long, in the way described by the defendant's expert witnesses, having regard to the position of the *Keybell* in the channel which is very narrow after passing the red gas buoy and has a shoal in it showing only 13 feet on the chart.

But it is a very different thing, to my mind, when, in obedience to the passing signal and in the absence of the green lights indicating the length of the tow, he proceeded, pursuant to the signal, to say that he was wrong in pursuing his course as he did. If he moved forward under the impression caused by the absence of lights or of the check signal, that he could safely negotiate a passage, in accordance with the passing signals exchanged, then I think he was justified in so doing. The tug master was apparently fully conscious of the fact that in taking the northern side of the channel he was doing so in order to hold up his barges as far as he could from overlapping the centre of the channel. He was, from his experience, aware of the current and the danger of passing at that particular point, and the nature of that danger. An expert witness for the defence, Lapine, says that in the case of light or sand barges (which are of light draught) an upbound steamer should be given the northern side of the channel. Obviously this is because such scows can safely pass over the ground south of the black stake.

While I am fully persuaded that it is most desirable that a vessel up-bound, when encountering a tug and tow down-

bound, which has the right of way, should wait if possible, and have given expression to my views on this point in the case of the *Poplar Bay SS. Co. v. the Charles Dick* (1), I think this case must be governed by the fact that owing to the plain neglect of Rule 12, and in the absence of any warning signal after the passing signal, the *Keybell* was misled as to the situation and came on to a point where it was apparently impossible to check or remain stationary in the current. Her grounding immediately after her change of course in trying to avoid the barges, is an indication of the danger to which she was exposed.

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The tug carried no watchman, a precaution emphasized by the evidence of one of the defendant's witnesses, Desforges, who himself got up and kept station on his barge owing to danger which he realized might occur when rounding the bend. The barges had rudders and crews on board them, but no attempt was made in any way to avoid contact, by operating the rudders. Perhaps this was impossible, although just why that is so is not evident, as the master of the tug admits that they used the barge rudders above St. Anne's on account of the current. No one on the barges seems to have been alert except Desforges. The master of the tug himself sat in the wheelhouse and did not watch the *Keybell* till after the pilot had given the passing signals, when he first became aware of the near proximity of the ship. He then got up and took the wheel. His excuse that it was not till he was approaching the last gas buoy below the cut that he realized that the *Keybell* was intending to turn into the cut indicates to my mind a singular lack of care and alert attention which was demanded of him in difficult and narrow waters.

On the best consideration I can give to the case, I must hold that both the tug and tows which came in contact with the *Keybell* were negligent in deliberately breaking Rule 12 and thus misleading the *Keybell* and in failing to keep a proper and sufficient lookout. They thus bring themselves within Rule 38, while I absolve the *Keybell* from blame. The barges were each in charge of a crew who though bound to obey the orders of the master of the *Florence*, remain responsible for the lighting and watching on their par-

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ticular barge. I may refer to the following cases: *The Mary Hounsell* (1); *The Geo. Hall Coal Co. v. SS. Maplehurst* (2); *B. W. B. Navigation Co. v. SS. Kiltush* (3); *The Hassel* (4); *Arctic Fire Ins. Co. v. Austin* (5); *Silliman v. Lewis* (6).

There will be a declaration to the above effect, and judgment in favour of the plaintiff against the defendants; the amount of the damages to be ascertained by the Local Registrar in Toronto, to whom it is referred.

The defendants must pay the costs of the action and of the reference.

Judgment accordingly.

1927
Jan. 10 to 25.
April 14.

CANADIAN GENERAL ELECTRIC } PLAINTIFF;
COMPANY, LIMITED }

AND

FADA RADIO LIMITED DEFENDANT.
(No. 7026)

Patents—Subject-matter—Anticipation—Combination—Prior art—Specification—Disclosure

Held: That there must be a substantial exercise of the inventive power, though it may in some cases be very slight, to sustain a grant for a patent for invention. Slight alterations may produce important results and may disclose great ingenuity.

2. That in a combination apparatus, if the invention required independent thought, ingenuity and skill; produced in a distinctive form a more efficient result, converting a comparatively defective apparatus into a useful and efficient one, rejected what was bad and useless in former attempts and retained what was useful, uniting them all into an apparatus which taken as a whole was novel, such denoted invention. A new combination of well known devices and the application thereof to a new or useful purpose may require invention to produce it, and may be good subject matter for patent.
3. That in order to establish that a patent has been anticipated, any information as to the alleged invention given by any prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it, in order to sustain the defence of anticipation.

(1) (1879) 4 P. 204.	(5) (1877) 69 N.Y.R. 470, (24 Sickels).
(2) (1923) Ex. C.R. 167.	(6) (1872) 49 N.Y.R. 379, (4 Sickels).
(3) (1922) 21 Ex. C.R. 398.	
(4) (1919) P. 355.	

4. Where the question is solely one of prior publication it is not enough to prove that an apparatus described in an earlier specification, could have been used to produce this or that result. It must also be shown that the specifications contain clear and unmistakable directions so to use it. It must be shown that the public have been so presented with the invention, that it is out of power of any subsequent person to claim the invention as his own.

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This was an action by plaintiff to restrain the defendant from infringing a certain patent granted to one Alexanderson and assigned to it. The patent in suit related to selective tuning systems in radio reception. The court found that the patent in suit was not to be found in the prior art, was not anticipated and disclosed invention.

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

Russel S. Smart, K.C., and J. C. Macfarlane for plaintiff.

George F. Henderson, K.C., and Wm. D. Herridge for defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, this 14th day of April, 1927, delivered judgment.

This is an action for infringement of Canadian patent no. 208,583, issued to the plaintiff in February, 1921, the plaintiff's inventor being one Alexanderson, a consulting engineer of the General Electric Company of the United States. The principal defences are lack of invention and anticipation; but the validity of the issue of the patent is attacked upon the ground that the application for patent was made subsequent to the expiration of the period fixed therefor by the Patent Act.

Alexanderson describes his invention as relating to the selection of oscillations of a given wave length from mixed oscillations, and comprises systems suitable for tuning out interferences in radio telegraphy. Interference describes what occurs when one at the radio telephone receiver, hears signals from stations other than that desired. Signals arriving at any receiving antenna have an intensity which depends upon two things: the original intensity with which they were emitted, and the distance that the receiving station is from the sending station. One station wishing

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to hear another station must be able to pick out of the confusion of currents in the receiving antenna, the particular one desired. It may perhaps come from a somewhat distant station and be relatively feeble, while an undesired signal may come from a nearby and more powerful station, producing much greater current in the receiving antenna. The problem therefore is one of selection, and one of the most difficult problems is to select a feeble signal from a more powerful signal, particularly when the separation in wave length is slight. In practise the preliminary precaution in abating interference, is the use of different frequencies or wave lengths, by the different transmitting stations.

A few words might appropriately be said here as to the chief elements in a radio receiving circuit, their functions and their operation. An electric circuit is a conducting path through which a battery or generator may send an electric current. There are two kinds of electric currents, direct and alternating currents. A direct current is that which flows in a coil of wire when a battery is connected to the terminals of the coil, and flows in one direction only. An alternating current is one which reverses, or flows first in one direction and then in the other. The number of pulsations of the current in one direction in a second of time is called the frequency of the current, and in the case of radio currents this frequency is very high as compared with the currents used in power or lighting circuits. The function of a radio transmitter is to create a high frequency alternating current in the transmitting antenna. This in turn produces a wave which travels in space and cutting across the receiving antenna sets up in it a high frequency alternating current, corresponding to that created by the transmitter and of identical frequency. In radio telephony the voice is impressed upon the transmitted wave, which carries it to the receiving apparatus, which in turn transforms it back into audible sound. At the receiving station it is necessary to be able to eliminate all waves other than the desired wave. To achieve this, use is made of what is known as a tuned circuit, and the method of selecting electric currents of any one frequency is based upon electrical resonance or tuning. A tuned circuit consists of a coil of wire across the ends of which is connected a condenser,

consisting of two sets of plates. Such a combination of coil and condenser, possesses the inherent property of responding strongly to impulses of one particular frequency. This frequency is known as the resonant frequency of the system or circuit. If this resonant frequency of the receiving circuit is made to harmonize with the frequency of the incoming wave which it is desired to receive, the receiving apparatus is made less receptive to interfering waves of other frequencies. If one set of plates is now made movable or variable with respect to the other, which means altering the capacity of the condenser, the resonant frequency may be adjusted so as to correspond to the frequency of the desired wave, and thereby that wave will be received with the maximum of effect. The resonant frequency of a circuit may also be varied by changing the number of the turns of the coil, thus regulating the inductance, and from this we have the expression, "variable inductance," which one frequently encounters. In general practice the coil of the tuned circuit is one of two coils or inductances, constituting what is known as a transformer, the coils being associated closely together, so that if an alternating current is set up in the first or primary coil, it will induce a corresponding current in the second or secondary coil of the transformer. A vacuum tube or audion consists essentially of an evacuated envelope or tube containing three elements: first, a filament which is heated by a low voltage battery and which emits electrons or minute charges of electricity; second, a metal plate or anode; and last, a grid so arranged that the electrons emitted from the filament must pass through the grid in order to reach the plate. Connected between the filament and the plate is a high voltage battery which charges the plate or anode, thereby attracting to it the electrons emitted by the filament, and thus setting up a current in the tube and the associated plate circuit. The grid acts as a valve to control the flow of electrons in the tube, and is usually connected to one side of a receiving circuit, the other side being connected to the filament. The variations of voltage due to the received wave are thereby impressed upon the grid, and cause corresponding variations in the flow of electrons through the tube to the plate, and in the current through the associated plate circuit.

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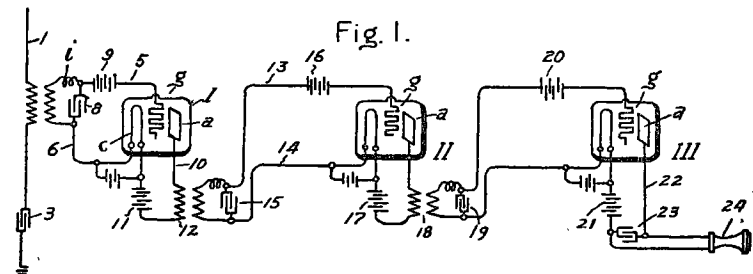
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These variations of current are identical in character to the current in the antenna, but are very much stronger, and the result is that the antenna current is reproduced in the plate circuit in a magnified or amplified form. The human ear cannot respond to the higher or radio frequencies, and in order to render the signals carried by the radio wave audible to the ear, it is necessary to separate the low frequency of the voice or signal, from the high frequency of the radio wave, and the change is one from radio frequency to audio frequency. This is the function of a detector or rectifier, and the device usually employed for the purpose is a crystal or a vacuum tube. It should be observed however that when a vacuum tube is used as a detector, the manner in which the tube is operated is different from that when the tube is used as an amplifier.

Having generally described, no doubt with some inaccuracies, the principal elements of a tuned circuit, its purpose and operation in radio reception, I shall now turn to portions of the specifications and claims of Alexanderson, and allow the inventor to describe with greater accuracy and in greater detail his invention, the problem he claims to have solved, and his particular method of selective tuning, which he claims to be secured by the plurality of resonant circuits, arranged in cascade or series, and in such a manner that the selectivity of the system, that is the ability of the system to select the desired radio signals, increases in geometric ratio with the number of circuits employed.

Fig. 1 of the plaintiff's patent here shown will illustrate the circuits of Alexanderson's invention.



The problem which claimed the inventor's attention is described as follows:—

One of the chief problems encountered in radio-telegraphy is the suppression of waves of various wave lengths interfering with the waves con-

stituting the signal to be received. The method now commonly employed for this purpose consists in using an electric circuit in which a train of waves of a given frequency acts cumulatively so that each successive impulse adds its energy to the previous impulse, while disturbing impulses of a different frequency have little effect. However, to screen out strong disturbing impulses effectively when weak signals are to be received, requires an accuracy of adjustment which imposes a definite limit upon the possible selectivity of the system.

He then proceeds to describe how he secures an improved method of selective tuning:—

In accordance with the present invention, selective tuning is secured by the use of a plurality of resonant circuits arranged in cascade in such a manner that the selectivity of the system increases in geometric ratio with the number of circuits employed. The selective circuits are respectively interlinked by a relay controlling a separate source of energy to initiate oscillations corresponding to potential oscillations impressed upon the relay. As each tuned circuit is more or less opaque to disturbing oscillations differing in frequency from the oscillations to be selected, a certain percentage of the disturbances is eliminated in each circuit of the series, so that the purity of the incoming train of oscillations progressively increases as it is successively relayed. The relay preferably used for this purpose is an electron discharge tube having an incandescent cathode, an anode and a grid.

After describing the drawings illustrative of his circuits, he gives a description of the operation of the first circuit, which will sufficiently describe for the present purposes his drawings illustrating that circuit, in fig. 1. That is as follows:—

As the incoming oscillations are received by a resonant circuit tuned to the particular frequency of the signals which are to be received, the effect of disturbing waves having a different frequency is suppressed to an extent dependent upon the tuning of the circuit. Because of its resistance and special distribution the antenna circuit cannot be closely tuned, so that the suppression of interference in this circuit may be disregarded in the present case. However, the waves of various frequencies picked up by the antenna are transferred by the transformer 2 to a resonant circuit 5, 6, the inductance and capacity of which may be closely adjusted so that the oscillations having the desired frequency have a maximum effect whereas the effect of wave impulses having a different frequency is suppressed to say, for example one-tenth their original value. The resulting voltage oscillations are superimposed upon the definite negative potential maintained upon the grid of the electron discharge tube by battery 9, and this varies the conductivity between the cathode *c* and the anode *a* in accordance with the variations of voltage. Preferably the negative terminal of the battery 9 is connected to the grid. The battery 11 sends through the plate circuit 10 a variable current, the oscillations of which are in step with the oscillations in the resonant circuit, 5, 6.

Alexanderson then proceeds to state that the oscillations are transferred by a transformer 12 to the second resonant circuit 13, 14, tuned to the desired frequency, and he states

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that if the disturbing oscillations are here suppressed one-tenth, they will have been reduced to one hundredth of their original effect when received by the antenna circuit. For the third tuned circuit he claims the same beneficial results, the disturbances being reduced to one thousandth of their original value. He states that if desired the size of the battery in this circuit may be so arranged as to magnify the effect of the oscillations, now practically free from disturbances, and so may be readily distinguished by the telephone receiver. In the same manner other tuned circuits may be added, and the disturbing impulses suppressed in the same degree.

Claims 3 and 7 are typical of the others:

3. A tuned circuit receiving system for detecting sustained oscillations of a given frequency comprising a plurality of circuits resonant to the frequency of the oscillations to be detected and arranged in cascade, relay devices joining each of said circuits to another comprising an evacuated envelope, an electron-emitting cathode, a co-operating anode, and a grid, said devices being connected to one of said circuits at the cathode and grid and to another circuit at the cathode and anode and a local source of energy in the second circuit.

7. The combination of a resonant circuit containing, an inductance and a condenser, an incandescent cathode relay having its grid circuit connected to the terminals of said condenser, a source of energy connected to the electrode circuit of said relay, and a second circuit resonant to the same frequency as the first resonant circuit supplied with current from the relay electrode circuit.

The defendant contends that Alexanderson is void for want of invention and that it has been anticipated. It might be convenient and appropriate at this stage to consider what principles are applicable, in reaching a determination upon these two defences. As to the first point, it is necessary to consider what is required in the way of invention to sustain the patent. Broadly stated the alleged invention must be new and useful, that is the statutory requirement, and it is always a question of fact if any patent fulfills those requirements. There must be a substantial exercise of the inventive power or inventive genius, though it may in cases be very slight. Slight alterations or improvements may produce important results, and may disclose great ingenuity. Sometimes it is a combination that is the invention; if the invention requires independent thought, ingenuity and skill, producing in a distinctive form a more efficient result, converting a comparatively defective

apparatus into a useful and efficient one, rejecting what is bad and useless in former attempts and retaining what is useful, and uniting them all into an apparatus which taken as a whole is novel, there is subject matter. A new combination of well known devices, and the application thereof to a new and useful purpose may require invention to produce it, and may be good subject matter for a patent. Then as to the question of anticipation. Any information as to the alleged invention given by any prior publication must be for the purpose of practical utility equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it, in order to sustain the defence of anticipation. Where the question is solely one of prior publication, it is not enough to prove that an apparatus described in an earlier specification, could have been used to produce this or that result. It must also be shown that the specifications contain clear and unmistakable direction so to use it. It must be shown that the public have been so presented with the invention, that it is out of the power of any subsequent person to claim the invention as his own. *Hills v. Evans* (1); *Otto v. Linford* (2); *Flour Oxidizing Co. v. Carr* (3); *Armstrong Whitworth Co. Ltd. v. Hardcastle* (4). It then is to be considered if the cited prior art, considered in the light of such principles, anticipated Alexanderson, and if not, whether Alexanderson itself discloses that degree of invention necessary to sustain a patent.

Several prior patents were cited by the defendant in support of its plea of anticipation. I shall first refer to the group of Marconi patents, and Stone, because they are similar in that they introduce a plurality of circuits inductively coupled. By means of a plurality of resonant circuits, inductively coupled, Marconi and Stone it is conceded may obtain a high degree of selectivity, but in practice it is said that this degree of selectivity, owing to the reaction of the circuits on one another or the transference of energy from the second circuit to the first, is obtained only at the expense of signal strength, and which signal

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(1) (1862) 31 L.J. Ch. 457.

(2) (1882) 46 L.T.R. 35.

(3) (1908) 25 R.P.C. 428 at 457.

(4) (1925) 42 R.P.C. 543 at p.
555.

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strength diminishes from circuit to circuit. This reactive effect of Marconi and Stone may be reduced in magnitude, by loosening the coupling between the coils, but as the coupling is loosened the electrical oscillations diminish in strength, in which case one may have a high degree of selectivity but with a considerable loss of signal strength; if close coupling is employed, increased signal strength is obtained, but the reaction between the circuits is increased and this impairs the degree of selectivity of the arrangement. With such circuits as Marconi and Stone, a high degree of selectivity is therefore only attained at the expense of signal strength. The evidence abundantly supports that proposition, in fact I think it is admitted. In the Marconi and Franklin multiple tuner, British patent no. 12,960 (1907) a compromise is attempted between these neutralizing factors with a view of maintaining a fair degree of selectivity, whilst retaining a workable signal strength, by taking the same cascade of resonant circuits and coupling them inductively. It might be worth while to quote from the specifications of this patent, as it will probably make more intelligible what I have just been attempting to state:

It is well known that if an instrument sensitive to the electric oscillations used in wireless telegraphy (hereinafter called a "receiver") be placed in a closed circuit inductively coupled to an aerial circuit and if both circuits be put in resonance with (that is to say be adjusted to have the same natural frequency of oscillation as) the received wave, the looser the coupling between the circuits the freer is the receiver from interference by waves of other lengths. Similarly if an aerial circuit be inductively coupled with a closed intermediate circuit and this intermediate circuit be inductively coupled with a closed circuit containing a receiver, and all three circuits be put in resonance with the received wave, the receiver is still more free from interference by waves of other lengths and this freedom is further increased by decreasing either of the couplings between the circuits. Increasing the number of circuits and decreasing the couplings between the circuits increases the freedom of the receiver from interference, but at the same time decreases the strength of the signals in the receiver; it is however found that in an instrument containing an aerial circuit, an intermediate circuit and a receiver circuit such as described above great freedom from interference without great loss in the strength of the signals is obtained by making the two couplings simultaneously and equally variable, etc.

This portion of the specifications seems to admit that even with the suggested circuit arrangement, there is still a loss of signal strength, and I think there is also the general implication therefrom, that for the purposes of obtaining

freedom from interference, the circuit proposed had inherent limitations, and that only a limited improvement in selectivity was expected from such circuit arrangement. Alexanderson, by means of a high frequency one way relay, a vacuum tube, which due to its amplifying properties not only prevents any loss of strength in the oscillations from circuit to circuit, but permits of an amplification of the same, obtains a high degree of selectivity without any appreciable loss of signal strength. Alexanderson is not limited to two or three circuits, as are Marconi and Stone by reason of the progressive loss in strength of oscillations, but he may use any number of circuits with corresponding improvement in selectivity, as the number of circuits is increased, and without loss of signal strength. It seems therefore to me that in substituting the vacuum tube as a high frequency one way relay coupling for the inductive coupling of Marconi and Stone, Alexanderson found means of transferring oscillations from one circuit to the next circuit, without any reactive effects between the circuits. In other words he found means of obtaining the highest degree of selectivity that Marconi or Stone could theoretically obtain, but without losing signal strength. It has been contended that the selectivity attainable by Marconi or Stone approached the selectivity of Alexanderson only when the signal strength of the former approached zero, and that may be so, but it is not necessary that I should express an opinion upon a point so technical. Alexanderson I think disclosed an arrangement that neither Marconi or Stone had suggested, and therefore it is my opinion that Marconi and Stone are not at all anticipations of Alexanderson.

The next prior art to be considered are three patents granted to the joint inventors, Schloemilch and Von Bronk, being German patents nos. 271,059 and 293,300, issued in 1911 and 1913 respectively, and United States patent no. 1,087,892 issued in February, 1914. These patents are much relied upon by the defendant, and I think are the most important of any of the suggested anticipations, and I understood them to be treated on that footing by Mr. Henderson, defendant's counsel. They therefore demand a careful consideration. If anticipation of Alexanderson is not to be found in this series of patents, I do not think it can be found in any other of the prior art cited by the defendant.

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First, a broad and general consideration of those patents. The chief purpose of Schloemilch and Von Bronk throughout is amplification of electrical oscillations. The inventors perceived the amplifying properties of the vacuum tube, which they say had previously been used only as a detector. They contemplated the use of the vacuum tube as an amplifier, both before and after detection, or in other words at radio frequency and at audio frequency. The first mentioned patent refers to radio amplification, the second to audio amplification, and the last one, the United States patent, to both radio and audio amplification. In fig. 3 of the drawings of the United States patent, there is shown a vacuum tube to amplify the received oscillations, a detector to rectify them, and following this a second vacuum tube to amplify the resulting audio frequency oscillations or signals. Tuning is specifically shown only in the antenna circuit, and in the intermediate circuit or the circuit *n* inductively coupled with the output of the first tube. In none of the drawings of all these patents is more tuning shown than this, in some of them less, in one of them none at all. This, however, is subject to the qualification that the antenna is in all cases shown as tuned. And it is to be observed that in neither the specifications or claims of these three patents do the inventors make any reference whatever to tuned circuits for the purpose of attaining selectivity. If selectivity was the end to be achieved it is remarkable that it was not mentioned. Their minds were not evidently directed to this problem, and as a natural consequence they are silent upon it. They were apparently thinking in terms of amplification and not selectivity. In referring to the arrangement shown in fig. 3 (U.S.A.), Schloemilch and Von Bronk express a preference that the intermediate circuit *n* between the radio frequency amplifying vacuum tube and the detector, be tuned or "syntonised" as they say, and that circuit is shown in that figure as tuned by means of a variable condenser. The antenna circuit is shown in the drawings as tuned though no reference to this is made in the specifications or claims, but no suggestion is made as to tuning the secondary of the transformer *g* which couples the antenna with the first tube. The other drawings of this patent do not suggest any tuning at this stage. It may be that the effect of the tuning of the intermediate circuit

would result in an improvement in signal strength, and a gain or improvement in selectivity, but this is not mentioned in the specifications or claims. The dominant idea heralded throughout the specifications and claims is amplification; they claim the use of the vacuum tube as an amplifying relay but they are entirely silent as to selectivity. At all times of course, in the radio art, any means of receiving electrical oscillations would in some degree be selective means, or the receiving apparatus would be of little value or perhaps none. Upon a broad construction of these patents alone, there would not appear sound reasons for concluding that the inventors intended to refer to the same subject matter as Alexanderson, or that any one of the same was an anticipation of the latter.

Now for a more critical and detailed examination of these patents. Evidence was taken in this cause under commission, in Germany, where the joint inventors Schloemilch and Von Bronk, each gave evidence, and this evidence in relation to the question of anticipation must be considered with some care. As I have already indicated, the substantial controversy upon the defence of anticipation relates I think to the question, as to whether or not Alexanderson was anticipated by the Schloemilch and Von Bronk patents, and that in turn largely revolves around the point, as to whether the circuits disclosed in Schloemilch and Von Bronk were tuned or intended to be tuned as in Alexanderson, and for the purpose of selectivity. The importance of that point will perhaps appear more clearly when I say, that it is contended by the plaintiff, that it is not possible to obtain geometric selectivity unless all circuits are tuned to the same frequency, and so far as I can see that is a correct statement of fact.

In respect of German patent no. 271,059 where the antenna only is tuned, and which was common practice, Von Bronk states definitely that this patent was developed by himself alone, and that no tuning of the grid circuit of the tube was contemplated, and the drawings themselves are conclusive upon the point. This patent may therefore be put aside as not being in anticipation of Alexanderson. Remembering now, that no tuning is shown in the input circuit of the first tube of the German patent no. 293,300,

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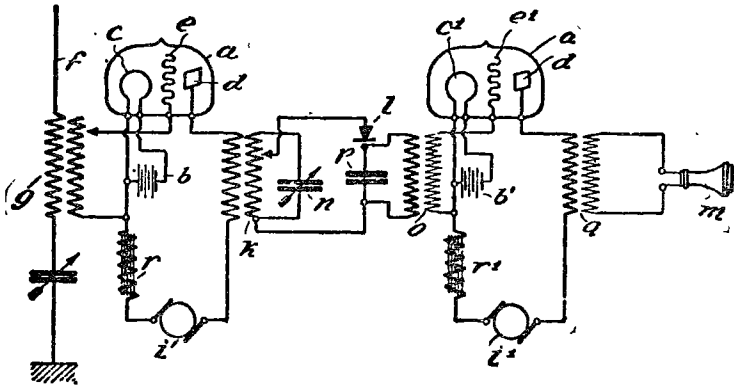
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which is declared to be an improvement of German patent no. 271,059, or in the same circuit of the United States patent, and remembering that it is contended by the defendant that tuning of this input circuit was common knowledge at the time and should be considered as expressed in the specifications of this patent, the plaintiff contesting this contention, I now proceed to a consideration of the evidence of the German inventors upon this point. It might be useful to insert here fig. 3 of the United States patent, granted to Schloemilch and Von Bronk.

Fig. 3.



In respect of German patent no. 293,300, Schloemilch states that tuning of the antenna circuit, the grid circuit, and the output circuit, was practised by him and was obvious, but he is indefinite as to time, and he only affirms that it was prior to February 9, 1913. In support of Schloemilch's evidence, a blue print was introduced in evidence bearing the date of February 8, 1913, which turns out to be the day prior to the filing of the application for this German patent. There is nothing upon the blue print particularly associating it with the patent in question. Fig. 6 shows a tuned antenna circuit and also the grid circuit tuned by a variable condenser, and it is because of this latter fact, that the blue print is said to be of importance. Von Bronk's evidence as to the blue print and to the arrangement of circuits there disclosed, is indefinite, altogether negative, and consequently of no assistance upon the point. Schloemilch seems to have done all the work on this patent, and

it is not strange that the evidence of Von Bronk, in determining what Schloemilch had in mind in respect of tuned circuits, is of little or no assistance here. Schloemilch states that he communicated his experiments in connection with this patent to one Graf Arco, but there is no precise evidence as to when this was done, and Graf Arco was not called to corroborate this testimony. Fig. 1 of the drawings accompanying German patent no. 293,300, indicates circuits giving both radio and audio amplification, although the claims of the patent only refer to audio amplification. Radio amplification having already been claimed in German patent no. 271,059, the principal patent as it is called in the later German patent, it is clear why radio amplification was not claimed in the latter. When they both are put together in the United States patent, they do bear a physical resemblance to Alexanderson, except that the grid circuit of the first tube is not tuned. Now Schloemilch states that he always tuned the grid circuit, and that it was obvious and known to the art at the time. In the evidence, there is only his own testimony in support of this contention. Let me now refer to the documentary evidence, the patents and drawings, in order to see whether evidence may be found there in support of this contention. In fig. 3 of the United States patent, the secondary of the transformer *k* forming part of the intermediate circuit *n*, which the specifications say it is preferable to have tuned, is shown with a variable condenser across its terminals for tuning purposes. In fig. 6 of the blue print the secondary of the antenna transformer is tuned by means of a variable condenser. The condenser was therefore known to Schloemilch, and he makes use of it for some purpose or other. Now it is suggested that certain arrows shown in certain of the drawings indicate their use for tuning purposes. The arrows shown in the connection of the secondary of the transformer *k* to the detector 1, in fig. 3 of the United States patent, and in fig. 1 of the later German patent, is obviously a tap to control the voltage communicated to the detecting device, there being a variable condenser shown in that circuit, and both would not be required for tuning purposes. It is reasonable to assume that the arrows shown on the secondary of the transformer *g* of the United States

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patent and of the German patent, fulfill the same function, that of providing means for the control of the voltage impressed on the grid element e of the vacuum tube a , and has nothing to do with tuning. Von Bronk said timidly that the variable coil, controlled by the tap, was used for coupling or tuning purposes, but he did not profess to know what Schloemilch had in mind in regard to it. Schloemilch referring to the circuit $k. n.$ stated, as I understand it, that the arrow indicated a coupling between the detector and the secondary of the transformer $k.$ to obtain loose coupling and thus prevent excessive damping of the circuit, which would happen he said if the detector were coupled parallel to the entire circuit. Nowhere in the specifications of any of these three mentioned patents, is there to be found any suggestion that the arrows are used to indicate tuning, in fact, their presence or purpose in the drawings is not explained in the specifications. It appears therefore that the inventors when wishing to show a tuned circuit, show a variable condenser, and when they wished to show a voltage tap, they do so by means of an arrow. It would seem quite clear therefore that the arrows shown in the drawings of the German patent no. 293,300, in fig. 3 of the United States patent, and in fig. 6 of the blue print, were intended to indicate voltage taps and not means of tuning. If it had been intended to tune the secondary circuit of the transformer g for the purposes of selectivity, I have no doubt they would have shown a variable condenser connected across it.

In respect of the evidences taken in Germany I am of the opinion that it does not support the contention, that tuning of the first grid circuit of patent no. 293,300 was contemplated. If the blue print were clearly shown to be made contemporaneously with the drawings of the patent under discussion, intended to be associated with them, and evidence of the inventors minds, omission to show tuning of the grid circuit of the first tube in the drawings of the patents themselves as already mentioned, seems to me convincing evidence that the inventors had not in mind selectivity at all, at least not of the order Alexanderson had in mind, and to attain which the tuning of every circuit was essential. It is as reasonable to say that the condenser

shown on the blue print across the secondary of the transformer in the antenna circuit, was discarded in the patent drawings because found unnecessary or useless in the arrangement or apparatus the inventors had in mind, as it is to say, that being shown on the blue print it should be assumed to be shown in the patent drawings. I am not impressed with the evidence of Schloemilch that it was omitted in order to simplify the patent drawings, if selectivity was what the inventors had in mind. I am satisfied that Schloemilch and Von Bronk were after signal strength rather than improved selectivity, and accordingly they accentuated amplification, while on the other hand Alexanderson, seeking selectivity of a high order accentuated tuning and the one way relay, the vacuum tube. Evidence given for the purpose of supporting the plea of anticipation of Alexanderson by Schloemilch and Von Bronk, should not receive much encouragement as against the former patent which has gone into general and successful use, unless it be of a much more convincing character than that presently under review I do not think it can be successfully or reasonably urged, that Schloemilch and Von Bronk describe Alexanderson, or that the former gave the latter to the public. There can be no doubt that early in 1913, Alexanderson had a clear scientific comprehension of the theory of selectivity in geometrical progression, and he then had in his mind means or instrumentalities by which he believed he could accomplish that end, and all this he communicated to others. In time, and in collaboration with others, he worked out a practical realization of his theoretical selectivity in geometrical ratio, in the production of a commercial apparatus, capable of producing the results he earlier predicted. There can be no doubt as to what he had hoped to accomplish, the means he had in mind for doing so, and that he did accomplish that end and by that means. If Schloemilch and Von Bronk had in mind an improved selectivity and the means of bringing this about, then their specifications did not communicate the idea, nor did they describe as they were bound to do, how their arrangement could be operated for purposes of selectivity if that was in their minds, and their evidence singularly lacks clarity in shewing all this. Upon that evidence and the

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patents themselves, I feel warranted in resolving every doubt against Schloemilch and Von Bronk. I am of the opinion that the Schloemilch and Von Bronk patents are not anticipations of Alexanderson. That being so it is unnecessary for me to deal with the precise dates of invention alleged by the respective inventors of these several patents, that is Alexanderson, and the three mentioned patents of Schloemilch and Von Bronk.

It now remains to consider whether Alexanderson possesses subject matter, and falls within any of the principles I have elsewhere mentioned as requisite to sustain a patent. I do not understand it to be seriously contested that Alexanderson does not possess utility, and it has not at least in my opinion been successfully attacked upon that ground. Alexanderson obtained radio frequency selectivity in geometric progression without loss of signal strength, and this was at that time I think a very substantial improvement over anything previously known. The system or arrangement of circuits there disclosed is capable of selecting a weak signal of one frequency, from stronger signals of another frequency, and at the same time amplify it. Upon the lowest ground it is a new and useful improvement over what was previously known to the art, and that is sufficient to support a patent. He disclosed a workable arrangement, and as Dr. Langmuir one of the plaintiff's witnesses put it, Alexanderson's proposal gave a new order of magnitude of selectivity, while in the prior art there was selectivity only in the sense that simple tuned circuits were used. I cannot escape the force of the fact, that the general acceptance and adoption in the art of the Alexanderson system is evidence confirmatory of novelty and utility, although of course it is not conclusive. Professor Hazeltine in his evidence discussing one of the Schloemilch and Von Bronk patents, stated that it was "the first embodiment of the arrangement which Alexanderson believed that he invented," and he stated, that was a radio frequency system having a vacuum tube type of relay, and attaining geometric selectivity by having a tuned input circuit and a tuned output circuit. If then Schloemilch and Von Bronk had not a tuned input circuit, and I think it had not, then Alexanderson, on Professor Hazeltine's own statement, was

the first inventor of the system which Professor Hazeltine described. Further, Professor Hazeltine admitted that the conditions of selectivity disclosed in the Alexanderson patent could be obtained by the circuit there shown, but he said, if one in addition wanted amplification and the full advantage of amplification, one would need to add something to it. It is not I think necessary to inquire what was in the mind of Professor Hazeltine as the requirement for a more complete amplification, for if the result claimed by Alexanderson may be obtained, then the utility claimed is admitted, and there is only the claim of novelty to be established to sustain the patent. Having reached the conclusion that this result was not disclosed in or recoverable from any of the prior art, then I am of the opinion that Alexanderson was the first to achieve the result he claims, and that his patent possesses novelty. Alexanderson claimed radio frequency selectivity in geometric progression without loss of signal strength, and he also states in his specifications that if it was desired to magnify the oscillations the battery might be so chosen so as to obtain greater amplification. It is admitted that the prior art disclosed devices by which selectivity in radio frequency could be obtained, and other devices disclosed methods for obtaining amplification of radio frequency currents, but it is claimed and correctly I think, that Alexanderson was the first to assemble the instrumentalities which furnished means for providing both selectivity, which progressively improved from circuit to circuit, and amplification at radio frequencies, in one device. As I pointed out in my discussion of the defence of anticipation, one may have a succession of tuned circuits inductively coupled giving progressive selectivity, but at such a loss of signal strength that it would not be practical for the purpose of obtaining the maximum of selectivity. It is quite true that up to a certain stage, the reduction of the signal strength may be prevented from falling below the range where it may be elevated by audio frequency amplification. It is claimed by the plaintiff however, and so far as I can see with force, that when one must stop short in obtaining selectivity to avoid loss of signal strength, the selectivity obtained is of a different magnitude from that obtainable from the Alexanderson arrangement, where

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one may proceed from two tuned circuits to any number without loss of signal strength, because the vacuum tube relay, coupling the circuits together at each stage, brings the signal up to its original strength. It is particularly the vacuum tube element which prevents the signal strength from falling and which also admits of amplification, and it is this which gives what is described as geometric selectivity by Alexanderson, and it is the feature distinguishing it from the prior art. The patent in suit is a particular arrangement of essential parts of a radio reception apparatus, which arrangement has advantages, and has been found practicable when carried out in the manner described in the specifications. Alexanderson may represent but a short forward step in the progressive radio art, but I conclude that what he did do was new and useful, produced new and important results and consequences, and required that substantial degree of inventive power, and skill in the art, which warrants me in holding that his patent possesses subject matter and should be upheld.

Granting that Alexanderson has subject matter and has not been anticipated, there is no doubt I think but that the defendant has infringed Alexanderson. In fact I do not understand that to have been seriously contested.

There now remains but one more point for consideration. Alexanderson applied for a patent in the United States on October 29, 1913, and a patent issued to him in that country on February 22, 1916. According to the provisions of the Patent Act, Alexanderson therefore should have filed his application for patent in Canada on or before February 22, 1917, or within one year after the date of the issue of his patent in the United States. It was not, however, until September 17, 1920, that he filed his application in Canada, and a patent issued on January 15 of the following year. It is therefore contended by the defendant, that the patent issued to Alexanderson in Canada is void by reason of the fact that the application for the same was not made in Canada on or before February 22, 1917, as required by the Patent Act. If this view is well founded, it is of course the end of Alexanderson so far as his Canadian patent is concerned. The plaintiff on the other hand contends that the application filed in Canada was within

the period fixed by chapter 44, sec. 7 (1) of the Statutes of Canada, 1921, post war legislation regarding patents, and which enacts as follows:—

7. (1) A patent shall not be refused on an application filed between the first day of August, 1914, and the expiration of a period of six months from the coming into force of this Act, nor shall a patent granted on such application be held invalid by reason of the invention having been patented in any other country or in any other of His Majesty's Dominions or Possessions or described in any printed publication or because it was in public use or on sale prior to the filing of the application, unless such patent or publication or such public use or sale was issued or made prior to the first day of August, 1913.

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The same point, in analogous circumstances, was raised in a cause tried before me between the parties herein, immediately following the trial of the cause now under consideration, and I there held, that the application and the patent issued thereon was valid by virtue of the provisions of the statute to which I have just referred. I do not think therefore that it is necessary for me to engage in a prolonged discussion of this point in this cause, and I would refer to my reasons for judgment given in the other cause mentioned and which is numbered 7244 in the records of this court. I am therefore of the opinion that this defence fails, and that the plaintiff's application for patent and the patent granted thereon, is in this respect, within the provisions of the statute.

The plaintiff succeeds therefore in its action for infringement and is entitled to the usual relief, and also its costs of action. The counter-claim is dismissed.

Judgment accordingly.

Solicitors for plaintiff: *MacFarlane & Thompson.*

Solicitors for defendant: *Henderson & Herridge.*

1926
 May 11.

O'BRIEN ET AL. SUPPLIANTS;

v.

HIS MAJESTY THE KING RESPONDENT.

*Crown lands—Timber limits—License—Expiration—Duration—Damages
 —Rights of holders*

Suppliants were grantees from the Crown, in the right of the province of Quebec, of a license to cut timber on certain ungranted lands of the Crown, which license expired on the 30th April, 1919. They did not receive their license for the season of 1919-20 until December, 1919. Such a license could only be granted, under the Statute, for a period of 12 months. In June, 1919, a fire took place on the limit covered by the license in question, destroying some of the timber thereon, and the present action was taken to recover from the Crown the loss alleged to have been caused to the suppliants by reason of such fire, as due to the negligence of its servants and employees, as owners of the Canadian Government Railway.

Held, on the above facts, that as such a license could only be granted for 12 months, with no absolute right of renewal, and as suppliants were not the holders of any license when the fire occurred, they had no right of action to recover from the Crown for the damages claimed.

ACTION on behalf of suppliants to recover from the Crown for damages alleged to have been caused to a timber limit, by reason of a fire which, it was alleged, was due to the negligence of its servants and employees, employed by the Canadian Government Railway.

The action herein came on for trial before the Honourable Mr. Justice Audette at Three Rivers on March 9, 10 and 11, 1926, and again on March 19, 1926, at Montreal. It again came on for final hearing at Montreal on May 11, 1926, when judgment was delivered.

George Campbell, K.C., and *M. Bigué* for suppliants.

F. Lajoie, K.C., for respondent.

AUDETTE J., after hearing the argument, on the same day, delivered judgment (1).

I have listened to the argument herein with interest, and as the facts of the case are now present in my memory I will give judgment at once. While the facts will to some

(1) This judgment was affirmed by the Supreme Court of Canada, April 20, 1927.

extent govern the conclusion I have arrived at, the case resolves itself into a narrow question of law.

I cannot get over the statute.

By section 1598 R.S.Q. (1909), it is provided that no license shall be granted for longer than twelve months from the date thereof.

Then the Court of Appeal for the province of Quebec has decided, in the case of *Edwards v. D'Halewyn* (1), que si elle (une license) est le renouvellement d'une license antérieure, (elle) ne prend effet qu'à la date qu'elle porte et n'a pas d'effet rétroactif au premier mai précédent. . . . Par suite, le concessionnaire des coupes de bois dont la license expire le 30 avril, et est renouvelée le 10 décembre, ne peut prétendre que ses droits remontent au premier mai précédent, . . .

Then there is a long chain of cases that have established it as a settled principle that these licenses cover a period of twelve months only.

There is the case of *Booth v. The King* (2). That case, above all others, establishes that these licenses to cut timber are by the statute made annual licenses, and that a license holder who has complied with the Regulations has no absolute right thereunder to a renewal, as a Regulation making perpetual renewal obligatory would be inconsistent with the statutory limitations of 12 months, and therefore a perpetual license, as mentioned by counsel, must necessarily be inoperative.

The last license that was in existence in this case was one which had expired on the 30th April, 1919. The fire took place in June, 1919, and the next license to cut timber for 1919-1920 only issued in December, 1919.

Therefore there is no other conclusion to be arrived at than that as the fire occurred in June, 1919, the suppliants had, at that time, no license whatsoever. There was no license in existence when the fire occurred and in respect of which damages are now sought, and as the timber, whilst standing belonged to the Crown, the Crown had the fee in it when there was no license in existence. Any right to cut was only during the term of the respective licenses, and there being no license the suppliants cannot recover.

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(1) [1919] Q.O.R. 18 K.B. 49

(2) [1914] 51 S.C.R. 20.

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There is also the case of *Gillies Bros. Co. v. Temiskaming and Northern Ontario Railway Commission* (1), which absolutely decides the point in question, the license for the year of the fire only issuing also in December.

Therefore there will be judgment declaring that the sup-
 pliants are not entitled to any portion of the relief sought
 by their Petition of Right. The whole is dismissed with
 costs.

Judgment accordingly.

Solicitors for suppliant: *Bureau, Bigué et Gariépy.*

Solicitors for respondent: *Lajoie et Lajoie.*

1927
 May 2.
 May 12.

ADOLPH W. EPSTEIN.....PLAINTIFF;
 AND
 O-PEE-CHEE COMPANY, LIMITED.....DEFENDANT.

Trade-Marks—Expunging—Jurisdiction—Lapsing—Purity of Register

Held, that the Exchequer Court of Canada has sole original jurisdiction to entertain proceedings for expunging a registered industrial design, and should exercise such jurisdiction without concerning itself with proceedings begun in a provincial Court for the same purpose.

2. That notwithstanding that the industrial design herein had not been renewed under the provisions of sec. 30 of the Trade-Mark and Design Act, and therefore had lapsed, nevertheless as it was found to have been registered "without sufficient cause" the Court should order it to be expunged for the purpose of maintaining the purity of the Register. (*Billings et al v. Canadian Billings Co.* (1921) 20 Ex. C.R. 405 referred to.)

ACTION to expunge an industrial design registered in the name of the defendant.

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

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

René Chenevert for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., this 12th of May, 1927, delivered judgment.

This is an action to expunge from the Register of Industrial Designs the entry of registration, made on the 7th April, 1922, of the

Industrial Design of a

CARTON

consisting of the reproduction of a satchel.

The registration was made on the application of the Maple Crispette Company Limited, under the declaration of its general manager, that the design

was not in use to our knowledge by any other person than ourselves at the time of our adoption thereof,

the whole as required by sec. 24 of The Trade-Mark and Design Act, and also by sec. 34, before its amendment in 1923.

Now it has been established by uncontroverted evidence, by the testimony of witnesses who were not even cross-examined (*Brown v. Dunn* (1)) that the Maple Crispette Company was selling the carton in question as far back as November, 1921, and that between that date and the application for registration it had sold about 600,000 of these designs.

Moreover, the evidence discloses that, besides these sales in 1921, the design itself was not new and that it had been used by others long before registration. Witness Profanti, a salesman for the Maple Crispette Company from 1918 to 1921 (down to the winding up of the company), testified that he started selling the satchel in question in November, 1921, adding that it was a very old box, which must have been 20 to 25 years old. It had been used before. He saw the package containing biscuits, candies and different articles, practically the same as exhibit No. 1, but with different content. Christie Brown Company were selling biscuits in a satchel before Crispette Company started. When the latter started using it, the Crethen Candy Company were putting out candy in a satchel. Sometime in November, 1921, the plaintiff bought, at Fraser Viger's, St. James Street, Montreal, a carton made by Christie Brown Company, exhibit No. 4, and he gave it to the Manager of the Crispette Company who then put it on the market and sold it to dealers.

Prior user or publication has been abundantly established.

Moreover the Maple Crispette Company did not protect the design, as required by sec. 34 of The Trade-Mark and

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Design Act, by placing the letters *Rd.* and the year of registration at the edge or upon any convenient part of the design.

The President of the defendant company testified that in 1925 he acquired from the Liquidators of the Maple Crispette Company Limited, all the assets of the latter company, including the design in question. The plaintiff left the employ of the Crispette Company in October, 1925, when he started business for himself. Now the plaintiff, as one of the public is a person aggrieved if the wrong registration of this design prevents him from using it. The design has been registered after publication, and was used by the public before registration; it therefore belonged to the public and cannot be appropriated by wrong registration. See on this point Law of Trade-Marks, etc., by R. Smart, pp. 60, 61 *et seq.* *Billings et al v. Canadian Billings Co.* (1). Furthermore the registration of this design was made "without sufficient cause" since the registered proprietor is not the owner thereof. (See Smart's Law of Trade-Marks, etc., p. 62).

Now it is argued, on behalf of the defendant, that the plaintiff is estopped from attacking the industrial design registered by the Maple Crispette Company, Limited, because he was a shareholder in that company. The answer to this plea is that the plaintiff and the Maple Crispette Company Limited are two separate and distinct entities which must not be confused and that the court cannot concern itself with relations existing between the plaintiff and persons or entities not before the court. Nor should the plaintiff be prejudiced by *res inter alios acta*, or the defendant allowed to invoke a *jus tertii*. *Electrolytic Zinc Company v. French's Complex Ore Reduction Co.* (2).

The case should not be disposed of without mentioning that it appeared at trial that there was an action pending in the Superior Court, at Montreal, for, among other things, expunging the industrial design in question; but as the Exchequer Court of Canada is the only court having jurisdiction, under sec. 42 of the Trade-Mark and Design Act, to entertain proceedings for expunging a registered industrial design, it should proceed to exercise such jurisdiction

(1) (1921) 20 Ex. C.R. 405.

(2) (1926) Ex. C.R. 5 at p. 7

without concerning itself with irregular proceedings begun in another tribunal.

The Industrial design registered on the 7th April, 1922, has not been renewed, as provided by sec. 30 of the Trade-Mark and Design Act, and has therefore lapsed and expired on the 7th April, 1927. However, as it should never have been registered there should be an order to expunge it, were it only for the purpose of maintaining the purity of the Register. See the *Billings* case (*ubi supra*).

Therefore, in view of the considerations to which I have adverted, I do order that the Industrial Design in question in this case, registered on the 7th April, 1922, in the Register of Industrial Design No. 24, Folio 5392, be expunged from the said Register. The whole with costs.

Judgment accordingly.

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GENERAL CIGAR COMPANY LIMITED.. PLAINTIFF;

AND

ROMEO DESLONGCHAMP ET AL. DEFENDANTS.

1927
Feb. 4.
May 2.

Trade-Marks—Expunging—Deception—General feature.

Plaintiff was the owner of a specific trade-mark to be applied to the sale of cigars, etc., consisting of a label containing a picture of General Stonewall Jackson and the words "Stonewall Jackson", the signature of "H. Jacobs & Co.," a printed impression of a five pointed star in a circle with the words "Stonewall Jackson, H. Jacobs & Co. Established 1858" in a ring around such circle, and also a second trade-mark used with respect to cigars and consisting of a ribbon inserted through the end of the cigar, at the tip, from side to side. The defendants own a trade-mark for the name "Madelon" and also an industrial design of a "cigare, traversé longitudinalement par un ruban dont les extrémités dépassent légèrement chaque bout du cigare." It is contended by plaintiff that the defendants infringe its trade-mark by the use of a ribbon in its cigars, as described in its industrial design.

Held, that as the main feature of each trade-mark was the name "Stonewall Jackson" and "Madelon" respectively, and as the use of a ribbon in the particular manner used by each could only be called a secondary feature of the trade-mark, the two marks were perfectly distinct and not liable to create deception, and the plaintiff's action was dismissed.

ACTION to restrain the defendants from infringing the plaintiff's trade-mark.

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 v.
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 CHAMP.

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

H. J. Hague, K.C., and H. M. Hague for plaintiff.

P. St. Germain, K.C., for defendants.

The facts are stated in the reasons for judgment.

AUDETTE J., this 2nd day of May, delivered judgment.

The plaintiff company is the owner, by assignment, of two Canadian Specific trade-marks.

The first one is a specific trade-mark of the 25th May, 1907, (Exhibit No. 1)

to be applied to the sale of cigars, cigarettes and tobacco; and which consists of a label containing a picture of General Stonewall Jackson, and the words: "Stonewall Jackson", the signature of "H. Jacobs & Co."; a printed impression of a five pointed star in a circle, with the words: "Stonewall Jackson, H. Jacobs & Co. Established, 1858" in a ring around such circle.

The second specific trade-mark, owned by the plaintiff, is one

to be applied to the sale of cigars; and consists of a ribbon inserted through each cigar from side to side, as shown in exhibit No. 2.

Then the defendants, on the 9th August, 1920, registered as a Specific Trade-Mark the name "Madelon" to be used in connection with the sale of cigars.

And, on the 25th July, 1926, they also registered an Industrial Design of a:

CIGARE

traversé longitudinalement par un ruban dont les extrémités dépassent légèrement chaque bout du cigare,

tel qu'il appert par le patron y attaché.

Now, the present action is to restrain the defendants from an alleged infringement, by the use of the said industrial design on the plaintiff's second trade-mark of a ribbon inserted through the end of the cigar from side to side.

Each party has a trade-mark by name: "Stonewall Jackson" and "Madelon." The former has been in existence for a great many years and is well known, commanding as it does very large sales which are on the increase. The word "Madelon" is in connection with a cigar of comparatively recent years. There is no controversy with respect to the use of these names, which as I may say are the main and paramount feature of their trade-marks; but

the conflict arises with respect to the use on the one hand of a bit of green and yellow ribbon of about half an inch in length by one fifth of an inch in width, running diametrically from side to side of the small end of the cigar;—and, on the other hand, as regards the use of a red, white and blue cotton ribbon of about the same width as the other, but running longitudinally the full length of the cigar and protruding slightly at each end, for a length of nearly five inches. The name of each party is respectively impressed upon the ribbon itself. The two cigars are somewhat different from one another—not being of quite the same length. The peg-top cigar, spoken to at trial, has a small piece of wood placed in identical position with the Stonewall Jackson.

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Both cigars bear some ribbon, but in such a different manner, that so far as that feature is concerned, they have not the most remote resemblance to one another. Is it to be said that because the plaintiff's cigar is so sold with a half inch bit of ribbon, that the door to other makers will be closed, and that no more cigars can be sold with any kind of ribbon whatsoever, however differently used or disposed? Will the plaintiff under the circumstances acquire thereby the exclusive use of ribbon or ribbons in the sale of cigars? This is an unsound proposition. Stating the contention is answering it. That is no trade-mark; it would amount to trenching on the rest of the trade.

The essential particular of the plaintiff's trade-mark has not been imitated. The two marks are quite different.

The main feature of each trade-mark is the name. In one case the well-known name of "Stonewall Jackson" and in the other case "Madelon"; and the use of the ribbon, in the particular manner by each party, can only be called a secondary feature of the trade-mark used in the trade.

We are told that the plaintiff introduced the ribbon because it had been found out that some unscrupulous dealers were placing other cigars in the Stonewall Jackson boxes, and it was thought if the cigar bore some mark of identification it would be better. Hence the introduction of the plaintiff's ribbon.

The defendants received complaints that their cigars did not draw; they were too tightly rolled. That affected

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30,000 cigars. They then devised to pass a ribbon through the whole length, thereby opening, so to speak, a flue which would overcome the difficulty, and it did.

The special and particular use and arrangement of the ribbon in each case is different and has not been copied or used to create deception.

Distinctiveness is of the very essence and is the cardinal requirement of a trade-mark, which is used to distinguish the goods of one trader from the goods of all other traders. Distinctiveness means adoption to distinguish. Sebastian 5th ed. 55. The trade-mark does not lie in each of its particular parts, but "dans son ensemble." It is the appeal to the eye which is to be considered, and which must determine the difference or similarity in the "get up" of each cigar. And in the present case the eye could not be deceived in comparing two articles so entirely different in their "get up."

I find the two marks perfectly distinct and not liable to create deception. Having so found it is unnecessary to pass upon the other questions raised in this controversy.

There will be judgment, dismissing the action and with costs.

Judgment accordingly.

Solicitors for plaintiff: *Hague & Hague.*

Solicitors for defendants: *St. Germain, Guerin & Raymond.*

1926
Dec. 16, 17.
1927
Jan. 15.

TORONTO ADMIRALTY DISTRICT

BETWEEN:—

JOHN E. RUSSELL.....PLAINTIFF;

AGAINST

THE SHIP GLORIA, HER CARGO AND }
FREIGHT } DEFENDANT.

Shipping—Towage—Duty of tug—Damages—Division of damages

Held: That it was the duty of a tug when engaged in towing to stand by in case of accident and also to return to part of the tow which is disabled or adrift, after leaving the remainder in safety.

That when supervening circumstances, stress of weather or other emergency are such as to justify the towing vessel in abandoning her contract, it is still her duty to remain by the towed vessel and its

cargo, for the purpose of rendering assistance, but this duty is subject to the condition that the safety of the tug or its crew is not thereby endangered. The Court must be satisfied that the attendant circumstances warrant such a conclusion.

2. That the Admiralty rule as to division of loss applies to cases where two colliding vessels are damaged. In a case where an innocent ship is damaged by a collision through the fault of two other ships, the innocent ship (or in this case the cargo) can recover its whole damage from either of the delinquent ships.

This was an action for salvage against the cargo of sulphur in the barge *Gloria* and a counter-claim by the owners of the cargo for damages due to the alleged failure of the tug in performing its duty under the towage contract, and failing to stand by and save the barge and its cargo.

The action was tried before the Honourable Mr. Justice Hodgins, at Osgoode Hall, Toronto.

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

G. M. Jarvis for the cargo.

The facts are stated in the reasons for judgment.

HODGINS L.J.A., now (15th January, 1927), delivered judgment (1).

In this action the barge *Gloria* is not before me. The plaintiff contracted with the Hedger Company, as shown by the two following telegrams, to tow four barges laden with sulphur from Oswego, N.Y., to Hamilton, Ont. These are the telegrams:

November 12, 1925.

W. E. HEDGER Co., Inc.

25 Beaver St., New York City.

Re towing barges Oswego to Hamilton will send tug Russell with competent crew ready for twenty-four hour service American towing machine with twelve hundred feet one and quarter-inch towing wire. Will not accept any towers liability in connection with this tow. Please acknowledge this. Russell should be Oswego late Friday. Will advise you later.

JNO. E. RUSSELL.

(1) On appeal this judgment was affirmed by the Honourable Mr. Justice Maclean, the President of the Court, on May 9, 1927.

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THE SHIP
Gloria.Hodgins,
L.J.A.

Your wire received regarding towboat *Russell*. Your arrangements and conditions satisfactory. Would appreciate having tug in Oswego soon as possible so we can get at least a Monday morning start at Hamilton account barge canal closing shortly. Kindly do your utmost.

W. E. HEDGER Co. INC.

The tug *Russell* was sent to Oswego and left there on the 22nd November, 1925, in tow of two barges, the *Foster* and the *Gloria*. After encountering some weather they put into Sodus Bay, N.Y., and remained there till November 25, at 8.30 a.m. when they started again. The weather was fine until about 1 p.m. Then it changed, the wind shifting to northwest accompanied with snow. The sea got up so much that the tug Captain determined to go into Charlotte, N.Y., and at about 6 p.m., when he was about $3\frac{1}{2}$ miles off the Charlotte breakwater, the lines holding the *Gloria* to the *Foster* parted and she went adrift. The tug and the *Foster* continued on and arrived inside Charlotte Harbour about 7.30 p.m. where they remained that night, and later.

The Master of the *Gloria*, Long, who was on her with his wife, failing to make the fact that he had gone adrift known to the tug, though he used a lantern, a fog horn and a shot gun, dropped his anchor. This held for $1\frac{1}{2}$ hours when the cable parted at the anchor shank, and the *Gloria* drifted, and grounded on the rocks about 9 p.m. at 9 Mile Point, East of Charlotte, where she injured her bottom and took in water. This injured some of the cargo.

The Master of the tug *Russell* having telephoned the plaintiff, the latter, on the following day, sent a tug (not his own), the *Salvage Prince*, to salvage the *Gloria* and bring her back to Charlotte. This could not be done without taking out some of the cargo, but eventually she was got off and towed to Charlotte. When off the pier the pump being used to keep her afloat went wrong and she was beached till it was repaired. This done, she was pumped out and got into safety. The remainder of her cargo was transhipped and all of it was towed by the plaintiff in another barge to Hamilton. The tug *Russell* which meantime had proceeded to Hamilton with the *Foster* re-

turned to Charlotte and supplied an additional pump to the *Salvage Prince* and also steam for the pump, and in doing so and in getting close in, was somewhat injured by bumping against the pier where she was exposed to the waves.

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The plaintiff claims in this action, not on his towage contract, the parties to which are not before the Court, but for the salvage of the cargo in the *Gloria*. The defendant counter-claim for the injury to the cargo by wetting. This, it is agreed, amounts to \$2,300.

It will be observed that the plaintiff's contract with Hedger to tow the barges contains the words "will not accept any tower's liability in connection with this tow."

Hedger had chartered the *Gloria* and other barges to transport the sulphur, but what his arrangements with the owners of the cargo were has not been disclosed. So far as the cargo owners are concerned they have not been shown to have had knowledge of any limitation of liability between the plaintiff and Hedger, nor does it appear that Hedger had any authority to bind them by any such contract. He agreed to forward the cargo and chartered the barges for that purpose, being thus not their agent but a contractor with the cargo owners. They are not bound by that limitation in resisting the plaintiff's claim. The services rendered were not done in the course of the towing contract but after it had been suspended owing to the breaking away and stranding of the *Gloria*. And so the exception in the contract has no bearing on the question of liability for salvage services. Nor does it, I think, form any answer to their counter-claim as the cargo owners never became bound by it. See *The Leon Blum* (1).

I need not, therefore, consider the exact import of those words in the present case, though they would become important if the *Gloria* itself or its charterer were before me.

When the tug *Russell* set out from Oswego with the two barges in tow, the *Foster* was next to her with the *Gloria* behind the *Foster*. Both are square dumb barges, without rudder or power, the *Gloria* drawing about 10 feet, with 6 feet freeboard, and being laden with 714 tons of sulphur. The coupling of the *Gloria* and *Foster*, as stated by her

(1) [1915] P. 90; 290.

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Master, was by two seven-inch hemp lines from each corner of the *Gloria* to the corresponding corner of the stern of the *Foster*, as well as by two five-inch lines running from bitts on the *Gloria* crosswise to the *Foster*. Added to this was a steel bridle and to the apex of it was attached a heavy lake hawser, supplied by Hedger, which led again to the *Gloria*.

No objection is taken by any one to the way in which the barges and the tug were secured to one another. Long appears to have been familiar with the rule in the United States, of which he is a citizen, and where he was engaged, as laid down in *The Edwin Terry* (1). In that case the Circuit Court of Appeal said, at p. 310:—

It is charged as a fault that the tug did not herself see to getting out and fastening these lines; but in *Myers v. The Lyndhurst*, 147 Fed. 110, 77 C.C.A. 336, we held that such is not the rule, where the tow has her own master aboard. It is the duty of the tug to make up the tow, that is, to select the positions to be occupied by its component vessels, to attend to the leading hawser on which they are towed, and to prescribe the distances apart of the different tiers. But the details, which are familiar to every boatman, of making fast the lines which attach his boat to those ahead, behind, or alongside of it naturally and usually are left to those on board the boat so attached.

What is contended by the defendants is that the tug Master failed to arrange with or to instruct the barge Masters as to what was to be done in rough weather, gave no signals indicating when to lengthen out the lake hawser, and kept on going at full speed though the wind and sea were increasing. This they assert made it practically impossible to let go the lines and pay out the hawser. They further say that having lost the *Gloria* the tug did not return to find and bring her in that night. The plaintiff denies these charges, and I will have to discuss his position in detail. This defence seems based on the rules laid down in the United States where towage as an occupation is well understood and is performed under many of the conditions arising in Canada as well as in that country. These rules are to be found authoritatively set out, so far as the United States is concerned in the case of *Transportation Line v. Hope* (2), at page 300:—

When the Master of a tug undertakes to transport a barge, he must apply the means for that purpose. He must not only furnish motive

(1) [1908] 162 Fed. Rep. 309.

(2) [1877] 95 U.S. 297.

power, but he must direct her location, whether on the port or the star-board side, whether she shall be the inside boat or the outside one, when and how she shall be lashed to other boats, with what fastenings she shall be secured as she is dragged through the water, whether she shall go fast or slow, when, if at all, she shall drop astern, when she shall go to harbour, how long remain there, and what shall be her course of navigation. These tows consist at times of thirty or forty boats, and they must all be under one head, and subject to one judgment, which is that of the transporter.

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I find that the Master of the tug, Willard, did have some conversation, though not of a very definite character, with the Master of the *Gloria* before beginning the tow. His version is that Long was to use his own judgment if he got into bad weather, to ease the line out more (i.e., the lake hawser). Willard says he looked the lines over before leaving Oswego and Sodus Point, but once under way he had nothing whatever to do with lengthening the lines between the barges, and had no conversation about it.

Whether or not the denial of the barge Master that any instructions were given is believed, there can be no doubt, on his own testimony, that he fully understood his business so that instructions would have been superfluous. In such a case it might well be that the omission to give directions might not be negligence, as in the *Arctic Fire Ins. Co. v. Austin* (1). His own words discussing the part played by the hawser from the *Foster* are:—

That sketch (Exhibit 5) does not indicate the lake hawser which was coiled up. The lake hawser was made fast on the *Richard Foster* and passed through the bits and coiled on the hatches of the *Gloria*.

60. Q. But that was not being used at the time you left?—A. That was in case we did want to go on a long hawser we could take the others off and it would be in place and all I would have to do was to pay it out until it got to the proper distance and make it fast.

The length of the lines between the *Gloria* and *Foster* after leaving Sodus Point was 60 feet and this distance increased to about 100 feet before the hawser broke.

As to Long's knowledge of his duties the following occurs in the evidence:—

A. I superintended making fast the one on my boat. Each Captain superintends making fast the hawser on his own boat. He may have some particular way of his own.

159. Q. In this case you superintended the making fast to the plates on the *Foster* and carried it over the bitts of the *Gloria*?—A. I handed his end over and the Captain of the *Richard* made that end fast on his boat.

(1) [1869] 54 Barb. N.Y. 559.

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160. Q. When you say the *Richard* you mean the *Foster*?—A. Yes.

161. Q. Then you passed it over the bitts on the *Gloria* and coiled the slack upon the hatches?—A. Yes.

162. Q. The intention being that if it became necessary to put out more line in the lake for towing you would use that hawser?—A. Yes, if I had to go back farther than my short lines would reach we would simply disconnect them and take them in and pay out the big hawser until we got a safe distance.

163. Q. What would make it necessary for you to go back farther?—
 A. Heavier seas.

186. Q. Then you cleared from the Sodus Point about eight o'clock in the morning, do you say, of the 25th?—A. At eight or eight-thirty, or somewhere along there.

187. Q. And all went well until about what time?—A. Approximately two o'clock in the afternoon.

188. Q. What crew were you carrying on the *Gloria*?—A. Myself and wife.

189. Q. And you were in the cabin?—A. We were in the cabin.

190. Q. Had you noticed the wind increasing?—A. As soon as it increased we did. As soon as the wind shifted and changed we noticed it immediately.

191. Q. Did you cast loose any of your short lines?—A. No.

192. Q. Did you communicate with Captain Barth (of the *Foster*)?—A. No, I may have passed a word or two back and forward with him that it was pretty rough, or something of the kind, but nothing to have any bearing on the case.

193. Q. You didn't ask him for any instructions or discuss that matter?—A. No, neither of us needed any instructions or assistance or anything of that kind.

In dealing with the crisis which arose he said:—

196. Q. Was the towing hawser fast to your bitts or just passed over them?—A. No, simply a turn taken so it wouldn't pay out too fast.

197. Q. So that you could snub it up?—A. When I wanted to. It generally takes two or three turns and I had taken one preliminary turn so it would pay out slow, so that I could check it up.

198. Q. When the gale parted one line and you went forward?—A. Yes.

199. Q. And then it parted the second line?—A. It parted all of them by the time I got up there. Well, I had only practically arrived there when they all parted.

200. Q. Then your towing hawser would be paying out over your bitts?—A. Yes.

201. Q. Did you snub it?—A. I jumped up to snub it and had just got hold of it. It was paying out and had the turn on it, of course, and some strain, and it parted.

202. Q. You must have snubbed it before it would part, don't you think, or did it jam?—A. Only what I had—the way I had drawn it in, I had drawn it along in under the cavel and taken the turn up through the bitts and around in under the cavel again.

203. Q. So there were two turns?—A. No, one complete turn, you might say. It laid from forward under from the back over and back in under again and back onto the hatches.

204. Q. It would be about what you would call about one and one half turns?—A. Yes.

205. Q. Enough at all events to put sufficient strain on it to part it?—A. To part it.

I should think it likely that whatever instructions (or whatever they may be called) were given they probably were given in such a way as to be regarded not as a command, but as intended to elicit information as to the knowledge of the barge Masters of the usages of towing. As to the contention that no signals were given and no check of speed was made, the case is not so clear. But if the Master of the *Gloria* understood as much as he says he did as to the necessity of lengthening her cable when it got rough and if he asked for no signals and gave none himself (until after the hawser parted) it is difficult to conclude that he was otherwise than entirely confident, owing to the careful arrangement of his lines, that he could easily detach one line after the other before bringing strain on the lake hawser which he always intended to let out. The fact that he stayed inside the cabin as late as 6 p.m. and made no attempt during the afternoon in a rising sea and wind to do anything renders it probable that he either did not realize the strength of the elements or thought his lines would bring him through as far as Charlotte. Willard on the tug was evidently of the latter opinion for he says that when towing barges close together "we do that a mile and a half or two miles faster, so we keep them together if at all possible." I observe that the log states that at 4 p.m. they were only a mile from land. The mate of the tug testified that he could see the light on the *Gloria* until 6 p.m. so that if Long had been waving his lantern there is every chance that it would have been seen and noted.

If he had deposed to any attempt to lengthen out or had tried to signal I would have felt inclined to hold the Master of the tug negligent if he had made no attempt to check, but in face of complete inaction on the barge such a conclusion would be, I think, unwarranted. If there was confidence in the barge in things as they were, there is some excuse for a like condition on the tug. The real *causa causans* in fact was the neglect to ease off the lake hawser and although the speed and the absence of signalling may have been contributing causes, and while in that case, the

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tug would be equally to blame, they are not shown, on the present evidence, to stand out as reasons which prevented or disabled the barge Captain from doing what he admits to be the usual and proper practice in a rising wind and heavy sea; nor does he so assert. I refrain from a definite finding as between the tug and the barge *Gloria* on this point, as the latter is not before me and the tug may be entitled to rely on the terms of the contract as an answer to any claim by the owners of the barge. The fact that the barge had, according to its Master, an anchor quite insufficient to hold it when loaded, is an additional fact which may be important as between the tug and the barge.

The last objection is to my mind the most formidable. It seems agreed that the hawser parted at between 5 and 6 p.m. or about 6 p.m. when opposite (or nearly so) 3 Mile Point. At 7.30 the tug and the *Foster* were safe in Charlotte Harbour. The *Gloria* after breaking away had anchored and the anchor held for about an hour and a half, bringing the time to somewhere around 7.30 p.m. When the anchor line parted the *Gloria* drifted until about 9 p.m. and then grounded.

The duty of the Master of a tug is to stand by in case of accident, or in this case, to return after leaving the *Foster* in safety. This is stated clearly in *The I. C. Potter* (1), (dealt with in Kennedy on Salvage 95), and in the *Maréchal Suchet* (2), where the necessity for observing the burden of proof is emphasized. In the *Potter*, Sir Robert Phillimore, p. 297, says:

It was not disputed that circumstances may supervene which engraft upon an original towage agreement the character of a salvage service; and to this proposition of law I must add another, which has an important bearing on my decision, namely, that when the supervening circumstances from stress of weather or otherwise, are such as to justify the towing vessel in abandoning her contract, it is still her duty to remain by the towed vessel for the purpose of rendering her assistance, but that for such assistance she is entitled to salvage reward.

In the *Suchet* it is stated that (p. 12 and 13):

The Court is, and ought to be, careful to scrutinize a claim for salvage by a tug engaged to tow. It is essential in the public interest, for obvious reasons, that the towage contract should not be easily set aside, and a salvage service substituted for it. A tug ought to make a clear

(1) [1870] L.R. 3 A. & E. 292. (2) [1911] P. 1.

case before she can convert herself into a salvor . . . The burden of proof is upon the plaintiffs. It is a two-fold burden. They must shew that they were not wanting in the performance of the obligations resting upon them under the towage contract; and they must also account for the stranding of the vessel by shewing something like *vis major*, or an inevitable accident. In the words of Brett L.J., in the *Robert Dixon* [(1879) 5 P. 54]: "The plaintiffs, being under a towage contract, bring this action, in which they assert that the towage service was altered into salvage; and it seems to me that the plaintiffs are in this position; that it lies on them to shew that the change occurred without any want of skill on their part, but by mere accident over which they had no control. The burden of proof on both the affirmative and the negative issues is on the plaintiffs, that is, both that there was an inevitable accident beyond their control and that they shewed no want of skill."

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See also the *Clematis* (1), Brown's Admiralty, 499; and the *Cahill* (2), where it was held that a tug which cut loose from a dredge and two scows which she had in tow, in the night, and deserted them, in disregard of her duty to use all reasonable efforts for their preservation is liable for their consequent loss or damage, in the absence of clear proof that her efforts to save them would have been ineffectual.

In the *Thalatta* (3), cited in Bucknill on Tug and Tow, 29, Gorrell Barnes J., said:

A tug is entitled to salvage if the services are outside the scope of the contract, but at the same time the fact that there is a contract cannot be left out of consideration altogether, because the vessel is entitled to have the assistance of the tug. In other words the tug cannot desert the vessel.

The tug, had she fulfilled the duty laid down in these cases, would have had the wind and sea in her favour and quite probably might have caught up with the *Gloria*, which so far as distance goes, traversed, before she grounded, only some 6 or 7 miles and took 1½ hours to do it. The speed of the *Russell* is 12 miles an hour and the drift of the *Gloria* was known, so that it is easy to surmise that a search would have been successful, or at all events, would, whether successful or not, have discharged the duty which the law casts on the tug master. He himself says the tug had plenty of power, notwithstanding the 40-mile gale. He had a search light, though he did not use it when he thought the *Gloria* had gone adrift although according

(1) [1874] 5 Fed. Cases 1009 (2) [1903] 124 Fed. Rep. 63.
 (No. 2876).

(3) Bucknill, Tug & Tow 29.

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to his wheelsman's statement (Ex. 9) the snow ceased about 4.30 and thereafter only came on in flurries.

The first mate of the tug had made a statement on December 3, 1925, (put in as Exhibit 6) that the wind was blowing a gale all the afternoon and the wheelsman on the tug estimated it at 40 to 50 miles an hour (Ex. 8). In this the Master of the *Foster* agrees.

The Master of the *Gloria* puts it much higher, but admits his ideas were drawn from newspaper accounts the day after. No independent or scientific evidence as to the force of the wind on that night was given and the tug master himself puts the extreme velocity at 40 miles and admits that he did not anticipate danger. There is, however, a qualification grafted on the statement of the duty of a tug master to stand by or to search for a lost tow which is mentioned by Duff J. in the case of *Point Anne Quarries v. SS. Whelan* (1), that the safety of the tug must not be endangered in the performance of his duty of standing by and of that the Master is generally the best judge. This, I think, is a rule recognized though often not stated. It underlies the decision in the *Potter* (*ante*) and is definitely stated in the United States case of *The Czarina* (2).

There is, however, no evidence from the Master of the tug nor from any of his crew pointing in the direction of any danger or real apprehension of it, and the onus is on the plaintiff to establish it. The tug Master, it is true, says that nothing could be done when the *Gloria* broke away, and repeats this as applying after his arrival at Charlotte. But this is too general and vague to carry any conviction. It is in the interest of the safety of navigation that there should be no relaxation of the rule laid down for maintaining a high degree of care and skill in the performance of the duty of standing by and seeking to aid a derelict vessel by those at sea in circumstances of peril to life or property. I do not feel inclined to relax it under the circumstances existing in this case.

The fact that the tug master sent off the life-savers to rescue the man and wife on the barge indicates that he realized that responsibility rested on him to endeavour to

(1) [1921] 63 S.C.R. 109, at p. 135. (2) [1901] 112 Fed. Rep. 541.

secure their safety, and it may be that he apprehended danger to the tug if he ventured out, or that he thought his contract protected him as to the barge, but in the absence of any opinion on the point given by those who were competent to speak on the subject, the circumstances do not convince me that fear for the safety of the tug, which the plaintiff had offered as one fit to tow in the month of November on the lakes was in the mind of the tug captain.

Under these circumstances the case seems to be brought within the words of Dr. Lushington in *The Minnehaha* (1), where he says:—

When a steamboat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so and will do so under all circumstances and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle and equipments, as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by a vis major, by accidents which were not contemplated, and which may render the fulfillment of her contract impossible, and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task, because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser.

In *The Julia* (2), in speaking of a towage contract, during the performance of which the tug was in collision owing to the negligence of the tow and its master and crew, who controlled the actions of the tug, Lord Kingsdown said:—

If, in the course of the performance of this contract, any inevitable accident happened to the one without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such a wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident.

In *The Robert Dixon* (3), it was held that a tug under contract to tow a ship was held not to be entitled to salvage remuneration for rescuing the ship from danger brought about by the tug's negligent performance of her

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(1) [1861] 4 L.T.R. 810 at p. 811, see also Lush. 335; 15 Moore, P.C. 133; 30 L.J. Adm. 211.

(2) [1860] 14 Moore P.C. 210, (3) [1879] L.R. 5 P. 54.
 at p. 230.

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towage contract. See also *Schloss v. Heriot* (1); *The Etrick* (2); *The Duc d'Aumale* (3).

The result is the plaintiff's claim for salvage services rendered to this cargo falls to the ground because the master failed to show that he did his full duty to prevent it being lost or damaged, in that he made no effort after the hawser broke to neutralize that accident and retrieve the barge with its cargo on board before it stranded. The towage contract was afterwards fully performed but is not before me for enforcement. But is this finding sufficient to sustain judgment on the counter-claim in the absence of the owners of the barge, who, if negligent through the inaction of their servant or on account of the insufficiency of the anchor they provided for the barge, might also become liable to the cargo owner for the consequences of the neglect of the Master of the barge. The question which was very fully fought out in the cases of the *Seacombe* and the *Devonshire* (4), was finally determined in the latter case by the House of Lords. It was there held that the Admiralty rule as to division of loss only applied to cases of collision and not to a case where an innocent ship was damaged by a collision through the fault of two other ships, but that the innocent ship could recover the whole damage from either of the delinquent ships. That was a case where the master and mate of the innocent ship were co-plaintiffs with the ship itself, claiming for the loss of their effects thereon, and their argument was that "there is a close analogy between an innocent tow in charge of a faulty tug, innocent cargo on board a faulty ship and an innocent ship damaged by two faulty ships." That put forward by the owners of the ship at fault was that the case of *The Avon and Thomas Joliffe* (5), was wrong and should be overruled. In that case Butt J., said:

It is the right of every one who has sustained damage by the joint negligence of two individuals, and who sues them in tort and obtains judgment against them, to enforce it by execution against one or the other of the defendants, or both of them. That is the right of a plaintiff in a common law action. I see no reason why there should be a different one in an Admiralty action; nor do I think that in this case I have anything to do with the Admiralty rule as to the apportionment of damages where both vessels, that of the plaintiffs and of the defendant, are to blame.

(1) [1863] 14 C.B., N.S. 59.

(3) [1904] P. 60.

(2) [1881] 6 P. 127.

(4) [1912] P. 21; 1912 A.C. 634.

(5) [1891] P. 7.

In giving judgment in the *Devonshire* (1), Lord Atkinson said in reference to that case that the principle there laid down had been acted upon in several cases after 1891 and no instance had been found where it was departed from in England.

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Lord Moulton (then L.J.), said in *The Devonshire* (2), at P. 49:

The tug is in the position of an independent contractor who performs the service of towing the barge to its destination, and who chooses for himself how he shall perform that service. I can see no reason why the misconduct of such an independent contractor should be imputed to the innocent tow, who is, in fact, no party to the wrongful act. So to impute it would be inconsistent with the general principles of our common law, and I should decline to do so unless I found a well-settled principle of admiralty jurisprudence evidenced by a course of consistent decisions which required me to do so.

In *The Seacombe*, in the same volume, and in which judgment was given at the same time he said (p. 59):

No one suggests that the barge did anything which contributed to the collision, or was herself to blame in any way. Hence the case is one in which a barge which is being towed by a tug which has complete control of the navigation suffers damage by collision from a third vessel by the joint negligence of the tug and the third vessel. It is thus identical in all respects with the case of the *Devonshire*, on which we have just given our decision.

That case was one in which the owners of the cargo on the barge damaged by the *Seacombe* were co-plaintiffs. See also the *Devonshire* and *The St. Winifred* (3); the *Ettrick* (ante); *Strang, Steel & Co. v. Scott & Co.* (4), and the observations on p. 608, and *Canadian Dredging Co. v. Northern Navigation Co. et al* (5).

These decisions dealt not merely with the tow itself but with the personal effects of the master and mate and with the cargo on board. The cargo here was innocent, and while it may be that the barge was guilty of negligence, causing the parting of the hawser, yet after that had occurred the tug had a duty, not to desert it, but to stand by and assist it to safety and as well its cargo whose delivery was part of the responsibility of the tug.

I think I am justified in applying the principle to be gathered from the foregoing authorities to the circumstances of this case. No objection is taken to the jurisdic-

(1) [1912] A.C. 634.

(3) [1912] P. 68.

(2) [1912] P. 21.

(4) [1889] 14 A.C. 601.

(5) [1923] Ex. C.R. 189.

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tion of this Court to give effect to the counter-claim of the cargo owners against the plaintiff for having by his neglect or that of his servants occasioned or permitted the stranding of and injury to the barge *Gloria*, thereby negligently damaging its cargo. If either party desires to be heard on that point I will hear them before judgment is taken out. If no application is made within one week the defendants will recover on their counter-claim against the plaintiff their full damages, which it is agreed are \$2,300, with costs, and the plaintiff's action for salvage will be dismissed with costs.

Judgment accordingly.

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QUEBEC ADMIRALTY DISTRICT

HAMILTON HARBOUR COMMISSION-ERS } PLAINTIFF;

v.

THE SHIP *WENCHITA*..... DEFENDANT.

Shipping—"Necessaries"—Wharfage dues—Charter-party.

On May 27, 1926, the defendant ship, a foreign ship, discharged her cargo at the port of Hamilton and loaded another cargo. The plaintiff's dock and warehouse were used by the defendant ship under the authority of the Master thereof. The defendant was bound to incur the charges made for the use of this dock and warehouse before he could discharge his cargo and leave the port of Hamilton.

Held, that such charges were to be considered as "necessaries" within the meaning of the Admiralty Act.

2. That where the plaintiff had no notice of the charter-party and the Master and crew remained the servants of the owners of the ship and there was no demise of the ship to the time charterers, the owners were liable for necessaries ordered and authorized by the Master and were liable for the necessaries above referred to.

ACTION *in rem* to recover the sum of \$313.14 for necessaries.

The action was tried before the Honourable Mr. Justice Archer at Montreal.

C. Russel McKenzie for plaintiff.

R. C. Holden, Jr., for defendant.

The facts are stated in the reasons for judgment.

ARCHER L.J.A., now this 29th April, 1927, delivered judgment.

This is an action *in rem* by which plaintiff claims the sum of \$313.43 for necessaries.

The plaintiff was duly incorporated by an Act of Parliament of Canada (2 Geo. V, chapter 98). By the said Act the Hamilton Harbour Commissioners have the power to make by-laws for the doing of everything necessary for the effectual execution of the duties and powers vested in the corporation.

Section 22 of the said Act enacts:—

The rates upon the cargoes of all vessels shall be paid by the master or person in charge of the vessel, saving to him such recourse as he may have by law against any other person for the recovery of the sums paid; but the Corporation may demand and recover the said rates from the owners or consignees or agents or shippers of such cargoes if it sees fit to do so.

Section 24 is as follows:—

The Corporation may, in the following cases, seize and detain any vessel at any place within the limits of the province of Ontario:—

(a) Whenever any sum is due in respect of a vessel for rates or for commutation of rates, and is unpaid;

(b) Whenever the master, owner or person in charge of the vessel, has infringed any provision of this Act, or any by-law in force under this Act, and has thereby rendered himself liable to a penalty.

Section 10 of the By-laws says:—

No vessel shall leave the harbour until the agent, consignee, shipper, master or person in charge thereof has made and delivered to the office of the Commissioners a full and correct report in writing, signed and certified by him, of her outward cargo, with the description thereof in detail, and its value, and also of her draft of water, nor until all dues on the vessel and on her cargo, and all penalties incurred in respect of the vessel or by the master or person in charge of the vessel, and all costs and charges with which the vessel or the master or the person in charge thereof is chargeable towards the Commissioners, have been fully paid.

Section 11 of the By-laws reads as follows:—

All rates, dues or penalties in respect of any vessel or cargo shall be paid or secured to the satisfaction of the Commissioners before such vessel or cargo leaves Hamilton Harbour, and in default thereof, the Secretary may cause such cargo or vessel to be seized and held therefor, and may require the Collector of Customs to refuse clearance papers to such vessel.

See Maclachlan's Law of Merchants' Shipping, (6th Ed.), p. 571.

On the 27th May, 1926, the defendant ship, the SS. *Wenchita*, a foreign ship registered at the Port of Oslo, Norway, discharged her cargo at the Port of Hamilton of one mil-

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lion and ninety thousand nine hundred and fifty-seven pounds of steel plates and loaded one hundred and sixty-two thousand eight hundred and thirty-one pounds of cargo. The plaintiff's dock and warehouse were used by the defendant ship, with the authority of the master thereof in the loading and unloading of the cargo. The rates on the cargo for said privileges amounting to \$313.43 are made as follows:—

Tonnage inward—1,090,957 lbs., at 50c. per ton.	\$272 73
Tonnage outward—162,831 lbs., at 50c. per ton.	40 70
Total	\$313 43

The plaintiff submits that these charges were charges which the defendant ship was bound to incur before she could discharge her cargo and leave the Port of Hamilton; that they were necessities within the meaning of the law.

The defendant submits that these charges cannot be considered as necessities; that the owners of the *Wenchita* had divested themselves by charter-party of the control and possession of the vessel for the time being in favour of the charterers, and that therefore there can be no claim against the ship.

I am of opinion that the charges amounting to \$313.43 are to be considered as necessities.

Roscoe, page 238, says:—

The definition of the word necessities has been judicially given as all things fit and proper for the service in which a vessel is engaged, whatever the owner of that vessel as a prudent man would order if present at the time; though primarily meaning indispensable repairs, anchors, cables, sails and provisions, the term has now, it is clear, a wider signification, and has been and is being gradually amplified by modern requirements, as is instanced by the case of *The Mecca*, where canal dues were pronounced to be within the scope of the word. No distinction can be drawn between necessities for the ship and necessities for the voyage, and all things reasonably requisite for the particular adventure on which the ship is bound are comprised in this category.

Claims for dock dues, canal dues, have been declared valid in actions for necessities.

The *St. Lawrence* (1); *The Mecca* (2); *Simpson, Spence & Young v. Azpeitia* (3); *William Fleming v. Equator* (4).

(1) (1880) P.D. 250.

(3) (1921) 8 Lloyd's List, Law Rep. 326.

(2) (1895) 8 Asp. 266.

(4) (1921) 9 Lloyd's List, Law Rep. 1.

We have now to consider the effect of the charter party.

On the 6th February, 1926, a charter-party was entered into between the owners of the *Wenchita* and Frank Lane Co. of the city of New York, whereby the vessel was chartered to the latter for a term of eighteen months.

The charter-party contained several stipulations, and I will cite the most important:—

1. That the owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the captain, officers, engineers, firemen and crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and maintain her class and keep the steamer in a thoroughly efficient state in hull, machinery and equipment for and during the service.

2. That the charterers shall provide and pay for all the coals except as otherwise agreed, port charges, pilotages, agencies, commissions, consular charges (except those pertaining to the captain, officers or crew), and all other usual expenses except those before stated, but when the vessel puts into a port for causes for which steamer is responsible, then and all such charges incurred shall be paid by owners.

Charterers are to provide necessary dunnage and shifting boards, but owners to allow them the use of the dunnage and shifting boards already aboard steamer. Charterers to have the privilege of using shifting boards for dunnage, they making good for any damage thereto.

6. That the cargo or cargoes be laden and or discharged in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide, except at such places where it is customary for similar size steamers to safely lie aground.

18. That the owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter, and the charterers to have a lien on the ship for all moneys paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once.

19. That all derelicts and salvage shall be for owners' and charters' equal benefit after deducting owners' and charterers' expenses and crew's proportion general average, if any, to be according to York-Antwerp Rules, 1890.

If the owners of the ship shall have exercised due diligence to make said ship in all respects seaworthy, and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at the time of shipment or at the beginning of the voyage, but not discoverable by due diligence, the Consignees or Owners of the cargo shall not be exempted from liability for contribution in general average, or for any special charges incurred but with the shipowner, shall contribute in general average and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defect or unseaworthiness.

25. Nothing herein stated is to be construed as a demise of the steamer to the time charterers. The owners to remain responsible for the naviga-

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tion of the steamer, insurance, crew, and all other matters, same as when trading for their own account.

The plaintiffs had no notice of the charter-party. As stated in stipulation 25 of the charter party nothing in the charter-party is to be construed as a demise of the steamer to the times charterers. The master and the crew remained the servants of the owners. (Stipulation No. 1).

It was held in the case of the barge *David Wallace v. Bain* (1):—

Where, by the charter-party, the owner transfers the possession and control of the ship to a charterer and the latter appoints the master and crew and pays their wages and other expenses, the master in incurring a debt for necessaries is not the agent or servant of the owner. In such a case the owner is not the debtor, and an action for such necessaries cannot be maintained against the ship.

In the case of *Scheibler v. Furness* (2), Lord Herschell L.C., says:—

But there may be two persons at the same time in different senses not improperly spoken of as the owners of a ship. The person who has the absolute right to the ship, who is the registered owner, the owner (to borrow an expression from real property law) in fee simple, may be properly spoken of, no doubt, as the owner, but, at the same time, he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person who, during that time, may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers, and crew of the ship, pays them, employs them, and gives them their orders, and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of the vessel, rest upon that person, who is, for those purposes during that time, in point of law, to be regarded as the owner. When that distinction is once grasped it appears to me that all the difficulties that have been raised in this case vanish. There is nothing in your Lordship's judgment, as I apprehend, which would detract in the least from any of the propositions which have been laid down with regard to the power of a master to bind an owner, or with regard to the liabilities which rest upon an owner. The whole difficulty has arisen from failing to see that there may be a person who, although not the absolute owner of the vessel, is, during a particular adventure, the owner for all those purposes.

Is there anything in the authorities which runs counter to the view which I have just expressed? I can find nothing. Not a single authority has been cited in which the owner of a vessel has ever been held liable on a bill of lading, or as for a tort in the improper navigation of or dealing with a vessel in any case in which the master of the vessel, or those who were guilty of the negligence, have not been properly described as the servants of the owner. *No doubt a vessel may be chartered, and the charterers may have, during its continuance, full power to deal with the vessel, to determine her voyage, and to direct the course that she*

(1) (1903) 8 Ex. C.R. 205, at p. (2) (1893) 1 The Reports 59, at 206. p. 64.

shall take, where, nevertheless, the master and crew remain truly the servants of the owner. In that case I apprehend it is perfectly clear that by reason of the relationship still subsisting the owner becomes bound by such a contract as a bill of lading, and by all the contracts which a master can ordinarily make, and which persons, therefore, have a right to presume he is authorized to make, binding the owner.

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In the same case Lord Watson, at page 69, says:—

No doubt when a shipowner who enters into a charter without parting with the possession and control of his ship seeks to limit the powers assigned by law to his captain, the limitation will be altogether ineffectual in any question with shippers who are ignorant of the terms of the charter. That, however, is a question as to the limitation of the powers of an actual agent who has known powers according to law. Notice of any limitations must be given to those who deal with the agent upon the footing of fact that he is the agent; there must be such notice in order to disable them from contracting with him. But where you are dealing with a person who is not an agent, I know of no authority which requires that notice shall be given when a man parts with the possession and control, even temporarily, of a ship of which he is the registered owner.

It is not necessary to refer to several other cases which were cited at Bar, as in those cases the plaintiff had notice of charter-party and its stipulations.

In the present case, the plaintiff had no notice of the charter-party, the master and crew remained the servants of the owners, and there was no demise of the ship to the time charterers.

Applying the law as I find it in the above authorities, I am of opinion that the owner is bound to pay for the necessaries, and in this case plaintiff is entitled to judgment for the sum claimed.

Judgment accordingly.

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

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

PAUL BERGEON PLAINTIFF;

AND

DE KERMOR ELECTRIC HEATING }
CO., LTD. } DEFENDANT.

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Patents—Impeachment—Reissue—Commissioner of Patents—Jurisdiction—Improvement

- 1. *Held*, That in granting a reissue the Commissioner's jurisdiction was limited to the grounds set out in sec. 24 of the Patent Act; and where the Commissioner had granted a reissue for more than what was claimed in the original patent, and where there was no inadvertence,

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- accident or mistake in respect of the issuance of the original patent, his decision to grant a reissue may be reviewed by the Court. (*Auer Incandescent Light v. O'Brien* (1897) 5 Ex. C.R. 243) distinguished.]
2. That anything disclosed in the specifications of a patent of invention and for which no claim is made becomes *publici juris*.
 3. That a patentee in a patent for an improvement on a known device, must not throw his net so wide as to omit to honestly disclose what belongs to the prior art as distinct from his new claim.
 4. That the adaptation of old contrivances or devices of a similar nature to a new or similar purpose, especially to the same class of articles, performing an old well known function, did not amount to or constitute invention.
 5. That the mere applying of well known things in a manner or to a purpose which is analogous to the manner in or to which it had been previously applied, did not amount to invention.
 6. That a patent covering generally any and every means or method for producing a given result cannot be upheld. There cannot be two patents; one to cover the method and the other the apparatus.

ACTION to impeach four patents of the defendant.

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

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

R. V. Sinclair, K.C., for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 5th day of May, 1927, delivered judgment.

This is an action to annul, cancel and set aside four Canadian patents of invention, namely:

Exhibit 17: Letters Patent No. 228,931 issued, on the 20th February, 1923, to Louis G. DeKermor, purporting to be a reissue of Patent No. 141,290, dated 18th June, 1912, to Leslie E. A. Kelso (Exhibit 21), who assigned to the said De Kermor, through assignee Matthews, the patent being "for certain new and useful improvements in Electric Heaters."

Exhibit 18: Canadian Patent No. 217,100 granted to Louis G. De Kermor, on the 21st March, 1922, for a certain new and useful improvement in "Method of Regulation of heat generated by electricity."

Exhibit 19: Canadian Patent No. 217,101 granted to Louis G. De Kermor, on the 21st March, 1922, for a "self regulating electric steam generator."

Exhibit 20: Canadian Patent No. 217,102 granted to Louis G. De Kermor, on the 21st March, 1922, for "self regulating water heaters."

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All of these patents have been assigned to the defendant company. None of them are pioneer patents; on the contrary they are all narrow patents which should receive strict construction.

The four patents, as is seen by their name or title, are all in respect of electric heaters and are very much interwoven one with another.

I shall, however, deal first with exhibit No. 17 which is the reissue of Kelso's patent (exhibit No. 21) of the 18th June, 1912. It may be stated in a general way, that this device is designed to produce steam by passing an electric current through water by means of electrodes, the water absorbing the current, and when the current passes through the water it vaporizes it into the dome, and the automatic regulation is produced by reason of the increase of the pressure of the steam above, which presses the water down the electrodes, the water rising at the sides, thus varying the amount of current by covering and uncovering the electrodes. In other words, the electric current is proportioned to the degree of immersion of the electrodes.

This reissue was not applied for by the inventor; but by the assignee of a previous assignee under the provisions of sec. 24 of The Patent Act. It was applied for entirely at the suggestion of De Kermor's solicitor, Mr. Caron, who testified as follows in this respect.

Q. Now about the application for a reissue, which resulted in exhibit No. 17, did you suggest that reissue to De Kermor?—A. Yes.

Q. Did you suggest to De Kermor that he should buy the old Kelso patent?—A. I did.

Q. In preparing your application for reissue, adding the additional claims, you were instructed solely by De Kermor?—A. No. Solely by my own suggestion, by my own examination of Kelso and the reading of the specification.

This establishes that it is not De Kermor who believed that Kelso had invented what he claims by the reissue, but it was all the idea of his solicitor, a person of more fertile brain than himself.

Be that as it may, coming to the next stop, we find that in his petition for reissue (Exhibit 40) De Kermor states that he is

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advised that the Kelso patent is deemed defective, or inoperative by means of insufficient description, or specification and the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention.

And he concludes by stating that he is desirous of obtaining a new patent in accordance with an amended description and specification of the said invention.

Then follows his affidavit that all the allegations of that petition are true: that is that he is advised that it is so.

The affidavit required by sec. 10 of the Patent Act only provides for such an affidavit in case of death when the deponent should state "he verily believes" that his assignor was the inventor. If the claim is for the same invention no oath would, it seems, be required; but when the claim is new would it not seem that a new affidavit would be required—as is required on the application of all patents establishing who is the inventor?

All of this is said to present in sequence the chain of facts leading to the granting of the reissue, which was granted under the provisions of sec. 24 of the Patent Act which reads as follows:

24. Whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, the Commissioner may, upon the surrender of such patent and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specifications made by such patentee, to be issued to him for the same invention, for any part or for the whole of the then unexpired residue of the term for which the original patent was, or might have been granted.

2. In the event of the death of the original patentee or his having assigned the patent, a like right shall vest in his assignee or his legal representatives.

3. Such new patent, and the amended description and specification, shall have the same effect in law, on the trial of any action thereafter commenced for any cause subsequently accruing, as if the same had been originally filed in such corrected form before the issue of the original patent.

4. The Commissioner may entertain separate applications, and cause patents to be issued for distinct and separate parts of the invention patented, upon payment of the fee for a reissue for each of such reissued patents.

Now, under these circumstances, a reissue was granted. Yet, when comparing the description and specification of Kelso's patent with the description and specification in the reissue, we find that they are word for word the same,—

with the exception of the last paragraph of the Kelso patent which says that "the numerous uses of the heater need not be mentioned," whereas the reissue names some such uses,—without, however, amending or making any change in the description, the specification and the diagram—and yet five new claims are added thereto.

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It is contended that the reissue was wrongly granted—because there is no amended specification or description, and moreover that the five new claims are to be entirely found in the prior art and are not for the "same invention."

Several expert witnesses were heard on both sides and, without making any disparaging observation concerning the defendant's witnesses, I may say that the qualifications to speak with authority upon questions of this kind are clearly in favour of the plaintiff's witnesses. And witnesses Ball and McRae have conclusively established that the five new claims of the reissue belong to the prior art, and Ball has produced as exhibit No. 24 a comparative analysis of the Kelso patent and the reissue claims thereby completing and illustrating his testimony by showing what parts of the reissue belong to the prior art.

It is quite manifest and self-evident that the Kelso Patent was not "defective or inoperative by reason of insufficient description or specification or by reason of the patentee claiming more than he had a right to claim." Kelso in 1912, after fully describing by his specifications his whole device, gave to the public all that was in the specifications which he had not claimed, and he could not 10 years after take it back by his new claims 1 to 5. (Keiper Pioneer Inventions and Pioneer Patents. 73, 74; *Miller v. Brass Co.* (1)). Much more so when what he thus claims by claims 1 to 5 belongs to the prior art. This reissue issued without justification, is nothing but an afterthought and a mere pretence developed by the defendant's solicitor and intended, by an expansion of claims, to sweep into one net all the appliances of the prior art necessary to monopolize a profitable business, and is obnoxious to grave inadvertence in that it had escaped the patentee or his assignee for 10 years. What was omitted in 1912 in the Kelso patent has been dedicated to the public and forms now part of

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the prior art. A most unreasonable delay has since elapsed for a reissue. As said in *Miller v. Brass, ubi supra*,

Every independent inventor, every mechanic, every citizen is affected by such delay, and by the issue of a new patent with broader and more comprehensive claim.

Ten years after the issue of the original patent, an attempt is made to cast as broadly as possible everything in the art. The statute must be read in its grammatical and ordinary meaning and there is no justification to misconstrue it in an attempt to save the patent. I fail to see how a reissue could ever have been granted, because no valuable or meritorious statutory reason has been shown for it, and Kelso had nothing to do with the reissue. There is no statutory foundation for it. While the witnesses on behalf of the plaintiff satisfactorily established that fact, I may also cite in a general way,—without reviewing every item of the claims—the admission (at p. 670 of the evidence) by witness Caron, Sr., that it was old to provide a device comprising a casing, electrodes, steam dome, and means permitting the automatic regulation of the contracting water on the electrodes in accordance with steam pressure. Devices of the kind in which steam was produced through the passage of the current between two electrodes in the casing were known prior to Kelso's patent. It was well known in that type of device to cause the steam pressure mechanically and automatically to regulate the active area of the electrodes by the pressure of the steam on the water. In other words there were devices in which when the steam pressure rose the water level automatically went down, and these devices would necessarily have a dome to accumulate the steam. Expansion tanks were a common means of supplying water pressure to any device which required water under pressure, at the time of Kelso. Witness MacRae, at pp. 210 and following, explains the history of the prior art to the time when Kelso made application for his patent.

There is nothing special in the Kelso patent for the removal of air, excepting the opening through which the water is introduced and described as such.

The steam circulating system was a matter of common knowledge, and the removal of the air by vent, or otherwise was not new at the date of the Kelso patent. The

honest disclosure of the prior art must be distinctly shewn from the new claims.

As said by Nicolas, p. 75,—

When the invention is for an improvement (as in this case) the patentee must be careful to claim only the improvement and to state clearly and distinctly of what the improvement consists. He cannot take a well-known existing machine, and, having made some small improvements, place that before the public and say: 'I have made a better machine. There is the sewing machine of so and so; I have improved upon that; that is mine; it is a much better machine than his.' He must distinctly state what is, and lay claim only to his improvement.

See also *Minter v. Mower* (1); *Foxwell v. Bostock* (2); *The King v. Else* (3); *Moore Filter Co. v. Great Boulder Proprietary Gold Mines Ltd.* (4).

The five new claims of the reissue are so comprehensive in terms that they would cover all that has been done before, and therefore do not show any invention. Revel and Gale and other prior patents cover what is claimed by claims 1 to 5, which in addition define in so many words the principle upon which the device works. *Kynoch & Co. Ltd. v. Webb* (5). The reissue cannot stand the ordeal of the prior art in claims 1 to 5.

If the patentee throws his net too wide, the patent will be bad, as said by Lindley L.J. in *Dick v. Ellam's Dupli-cator Co.* (6); per Pollock C.B. in *Crossley v. Potter* (7).

If the defendant has the right to the exclusive use of what is described in his claims 1 to 5 of the reissue, besides having a patent for a principle, he could stop the use of all the previous patents for electric heaters.

A man cannot introduce some variations or improvements, whether patentable or not, into a known apparatus or machine and then claim as his invention the whole apparatus. Roberts On Patents 425.

One cannot claim something new together with the prior art, without discriminating between what is old and what is new, even when the mechanical device is new but the principle is the same. And having regard to the produc-

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| (1) (1837) 6 Ad. ⁵ & E. 735 at p. 744, 745. | (4) (1921) 38 R.P.C. 239. |
| (2) (1864) 4 de G.J. & S. 298 at p. 313. | (5) (1899) 17 R.P.C. 100. |
| (3) (1785) 1 Webster Pat. Cases 76. | (6) (1900) 17 R.P.C. 196 at p. 202. |
| (7) (1853) Macr. P.C. 240 at pp. 245, 246. | |

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tions of the prior art, the five new claims are forestalled by Revel and others, and De Kermor lays no stress whatsoever in dividing what is old and what is new. *Moodie v. Canadian Westinghouse Co.* (1); Terrell 129.

Moreover, some of the claims of the reissue, such as claims 2 and 5, are nothing but a statement and a claim of the principle upon which all these four patents work. They clearly define the principle. Besides embodying the principle this reissue patent also embodies an assemblage of devices contained in the prior art, performing the same function as they did in the prior art, thereby becoming a mere aggregation. The adaptation of old contrivances or devices of a similar nature to a new or similar purpose, especially to the same class of article, performing an old well-known function, will not amount to or constitute invention. As was said in *Eagle Lock Co. v. Corbin Cabinet Lock Co.* (2):

There is no patentable invention when the peculiar structure necessarily resulted from the fact that the patentee wanted to combine certain old elements, and a person skilled in the art would naturally group the elements in the way this patentee adopted.

Abell v. McPherson (3); *Jordan v. Moore* (4); *Wood v. Raphael* (5); *Pope Appliance Corp. v. Spanish River Pulp & Paper Mills Ltd.* (6); *Northern Shirt Co. v. Clark* (7) abundantly confirm this view.

In the present case the *improvement* claimed consists in a combination which, considering the state of the prior art, discloses no new function or discovery which could, to my mind, amount to invention. There is no sufficient invention in merely applying well known things, in a manner or to a purpose which is analogous to the manner or to the purpose in or to which it has been previously applied. *Nicolas On Patent Law*, 23. *Pope Appliance Corp'n. v. Spanish River Pulp and Paper Mills Ltd.* (*ubi supra*).

In view of the prior art, I am of opinion that not only is there no contrivance or device that is new in the defendant's patent, but that there are no new features in the com-

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| (1) (1916) 16 Ex. C.R. 133. | (4) (1866) L.R. 1 C.P. 624. |
| (2) (1894) 64 Fed. Rep. 789. | (5) (1896) 13 R.P.C. 730. |
| (3) (1870) 17 Gr. 23; 18 Gr. 437. | (6) (1927) Ex. C.R. 28. |
| (7) (1917) 17 Ex. C.R. 273; 57 S.C.R. 607. | |

bination claimed, the same features having been previously shewn in other electric heaters.

The claims must be read and construed in no manner different from the plain import of the terms used. *White v. Dunbar* (1); *Excelsior Needle Co. v. Morse-Keefer Cycle Supply Co.* (2); *McCarty v. Leigh Valley Ry. Co.* (3); *Penfield v. Potts & Co.* (4); *Mast, Foos & Co. v. Dempster Mill Mfg. Co.* (5); *Anderson Foundry & Machine Works v. Potts et al* (6).

Now it is contended on behalf of the defence that the decision of the Commissioner of Patents in granting a re-issue is final and conclusive, resting on the decision of Burbidge J. in *Auer Incandescent Light v. O'Brien* (7). However the present case can obviously be distinguished, because in the Auer Light Case the decision is limited to a case of infringement, and the statute gives specific defences in that respect. *Mahn v. Harwood* (8). Burbidge J., says in the Auer Light Case, dealing with the finality of the Commissioner's decision:

It seems to me that it must at least (be so) in an action for infringement of the reissued patent.

The other decisions in this respect do not go any further and confine the view expressed to an action of infringement. See also *Withrow v. Malcolm* (9).

It is contended, among other things, that defendant uses the same water while the other patents do not, but that has not been claimed by De Kermor and has therefore become *publici juris*.

Commercial success has been claimed. That alone would not make a patent valid. Installations of boilers are also claimed, but the evidence has not established what these installations were, and the attempt to prove it has entirely failed. De Kermor himself testified he could not say if the boilers he referred to as being his were built under his patents. However, pecuniary success has no relation to the question of utility or invention in the Patent Law. *Nicolas On Patents* 18.

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| (1) (1886) 119 U.S. 47. | (6) (1901) 108 Fed. 379. |
| (2) (1900) 101 Fed. 448. | (7) (1897) 5 Ex. C.R. 243 at 286. |
| (3) (1895) 160 U.S. 110. | (8) (1884) 112 U.S. 354 at p. 358. |
| (4) (1903) 126 Fed. 475 at 483. | (9) (1884) 6 O.R. 12. |
| (5) (1897) 82 Fed. 327. | |

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Sec. 24 of the Act provides that a reissue can be granted when the patent is deemed defective and inoperative.

by reason of insufficient description or specification . . . or by reason of the patentee claiming more than he had a right to claim as new . . .

These terms are quite precise and definite.

The reissue was not granted because the patentee claimed more than he should,—quite the contrary, since he thought of adding five new claims thereto. It was not granted because the patent could be

deemed defective and inoperative by reason of insufficient description or specification

because it is in evidence and it appears on the face of the reissue that the original specifications and description in the patent were just the same and therefore just as operative and effective as the reissue. There could not either have been any inadvertence, accident or mistake in taking out the original Kelso patent as established by the evidence, since the only difference between the two consists in the additional claims for new invention. The reissue is not for the same invention as Kelso, since it has five more claims claiming all the prior art to date. Moreover the Act does not provide that a reissue may be granted to allow to add any new claims because it limits the reissue to the “same invention.” Therefore placing the most forced construction upon sec. 24 there can be found no intention to interfere with the jurisdiction of the court in dealing with the impeachment of a patent which is legally bad and should never have been granted, as distinguished from infringement cases as herein before mentioned. A reissue under the present circumstances of this case does not come within the ambit of the statute. There is no provision in the Act which could either authorize or justify the granting of a reissue under the circumstances of this case. It was null and void *ab initio*.

If it is contended that the reissue was granted upon the statement that the patent was deemed defective and inoperative, etc., the answer is that it is obvious there was no material upon which the discretion of the Commissioner of Patents could be exercised—since he reissued the patent with the identical specification. Walker On Patents, 3rd ed., 289. There was no actual error when issuing the original Kelso. Therefore the Commissioner did not exer-

cise his discretion, since the application for reissue did not come within the cases provided by the statute. The case, as I have said, does not come within the statute. The Commissioner had an inadequate appreciation of the circumstances of the case, and his finding is so erroneous, so contrary to law and to the provisions of the statute, that it must be considered as if there was no finding at all. *Robins v. National Trust* (1). The Commissioner of Patents was given jurisdiction to grant a reissue only in the cases provided for by the statute,—the present case does not come within the ambit of the statute,—therefore the Commissioner had no jurisdiction to grant a reissue under the circumstances of the present case. It was the result of the patent solicitor's design and an acquiescence on the part of the Commissioner of Patents. Indeed it would be outrageous to think that in such a case when the Commissioner is acting beyond the provisions of the statute, that the court would be deprived of its jurisdiction to pass upon the rights of a party aggrieved thereby and upon the validity of a patent, and allow an unlawful patent to prevail against other meritorious patents which are good and valid. This was not the intention of the legislator or of Parliament when this section 24 became the law of Canada. *Ubi jus ibi remedium.*

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When a patent fully and clearly, without ambiguity, describes and claims a specific invention, complete in itself, so that it cannot be said to be inoperative or invalid by reason of a defective or insufficient specification, a reissue cannot be had for the purpose of expanding and generalizing the claims so as to make it embrace an invention other than the one specified in the original. Rogers on Patents, vol. 2, 1083.

A reissue cannot be attended with such injurious results as would follow from the enlargement of the claim. The reissue must be for the same invention. *Idem* 1087, 1097, 1111.

The broadening of claims is to be condemned. A simple invention of a distinct device, as in *Kelso*, cannot by a reissue, be expanded into a number of all embracing claims by a wide generalization of language embodying the prior

(1) (1927) 43 T.L.R. 243.

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art, such as Revel and others. Macomber 2nd ed., 791. A reissue can only be granted for the same invention and the defendant had no legal right to insert in their reissue five new claims for five new inventions, especially as they all belonged to the prior art. *Parker & Whipple Co. v. Yale Clock Co.* (1). The case of *Manufacturing Company v. Corbin* (2) lays down that reissued letters patent are void, if they embrace a broader claim than that for which the original letters patent were issued.

The broadening of claims voids the patent. *Ives v. Sargent* (3); *Newton v. Furst & Bradley Co.* (4); *McMurray v. Mallory* (5); *Miller v. Brass Co.* (*ubi supra*); *White v. Dunbar* (*ubi supra*).

As said in the case of *Wing v. Anthony* (6),

It is quite clear that the original patent covers a mechanism to accomplish a specific result and that the reissued Patent covers the process by which the result is attained, without regard to the mechanism used to accomplish it. The reissue is, therefore, much broader than the original patent, and covers every mechanism which can be contrived to carry on the process.

The reissue being for a different invention from that described in the original patent, the reissue was declared void.

The Commissioner of Patents has no jurisdiction to grant a reissue for an invention substantially different from that embodied in the original patent. *Parker & Whipple Co. v. Yale Clock Co.* (*ubi supra*); Macomber, 2nd ed. 795; the reissue must be for the same invention. Macomber, 2nd ed. 798 and 799.

In the present case it is quite clear that the reissue is not for the same invention. The specification and claim 6 are identical with the original patent and the Commissioner of Patents in granting such reissue for a different invention—a different patent altogether,—has exceeded his statutory authority. It thus becomes a question of law wherein the Commissioner has exceeded his statutory authority, and in such cases the court cannot be bound by his decision. The statute does not provide for a reissue, in the case before the court. The Commissioner has mani-

(1) (1887) 123 U.S. 87.

(2) (1880) 103 U.S. 786.

(3) (1887) 119 U.S. 652.

(4) (1886) 119 U.S. 373

(5) (1884) 111 U.S. 97.

(6) (1882) 106 U.S. at p. 245.

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festly disregarded the rules of law by which his authority to grant a reissue in such cases is governed, and the reissue must be considered void to the extent of such illegality. It has become a question of law, not a question of fact. A reissue for the purpose of enlarging and expanding the claims of a patent is not comprised within the literal terms of sec. 24 of The Patent Act which created the power to reissue patents.

If on examination of the record it is found it discloses no evidence before the Commissioner of accident, inadvertence or mistake, such as to warrant him in reissuing the patent, or that there was record evidence of a conclusive character, showing that there could have been no accident, inadvertence or mistake, the Supreme Court has not hesitated to hold a reissue void.

Peoria Target Co. v. Cleveland Target Co. (1). See also Macomber, *The Fixed Law of Patent*, 2nd ed., at page 811, for a number of decisions to the same effect.

Therefore, the application for a reissue in this case, though made by a second assignee, is not made by the patentee nor for his benefit but for that of the assignee, who goes so far as to state in his affidavit that Kelso was the inventor of what is to be found in the new claims. The specifications are free from any complexity or ambiguity and the claim in the original is clear and explicit and the reissue was made against law as appears on its face and there is nothing on the record or in the evidence adduced which can remove this illegality. The reissue was not given for any of the reasons mentioned in sec. 24. It was given for a new invention, which, even if coming within the ambit of the original patent, was not claimed, and thereby became dedicated to the public. It was applied for after 10 years had lapsed, but, in the view I have taken of the case, it is unnecessary to pass upon the question of laches arising from such delay.

The case of *Mahn v. Harwood* (2) which is very much in point both in law and in fact, deals with and settles most of the propositions considered above.

Therefore the reissue patent No. 228,931 (exhibit No. 17) granted on the 20th February, 1923, to Louis G. De Kermor, assignee of the patent No. 141,290, of the 18th June, 1912, is hereby declared null and void and of no

(1) (1893) 58 Fed. 227.

(2) (1884) 112 U.S. 354.

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force and effect with respect to claims 1 to 5 inclusively.

However, availing myself of the provisions of sec. 33 (see also sec. 29) of the Patent Act I shall discriminate and declare the reissue good and valid in respect of claim 6 thereof, thereby maintaining the reissue for what was in the original Kelso, Exhibit No. 21.

EXHIBIT No. 18

I shall now deal with the Canadian Patent No. 217,100 granted to Louis G. De Kermor, on the 21st March, 1922, for an alleged certain new and useful Improvement in "Method of Regulation of Heat generated by electricity." Witness Ball has produced, as exhibit No. 25, a comparative analysis of this patent and the prior art as understood by him.

It is very important to state *in limine* that what is claimed by this patent is the method therein described and not the design, contrivance or device shown in the diagram, which, as stated in the specification is only there by way of an illustration of the method. The shape of the device or structure is not claimed. The patent shows a mode of operating a principle which as such is not patentable. In fact all of the four patents under consideration work under the same principle. All there is in this patent is even disclosed in Kelso which belongs to the prior art. The problem alleged to be solved by De Kermor had been solved in the prior art under the same principle, without claiming a choice for a new means. Frost, 3rd ed., 24. These patents lie within the prior art and no application of thought or study amounting to ingenuity of invention has been disclosed. The patents are merely analogous to the prior art and no new difficulty has been overcome by the defendant's patents.

Analysed by witness Caron, who was also the patent solicitor who prepared the patent (as previously referred to) he declares that this is a patent on a series of acts and that the only new thing in exhibit No. 18, over the prior art, is the removal of the air (p. 102 of evidence). And at p. 726 he further says that exhibit 18 is the method.

In exhibit 18 the machine is shown to illustrate the method of working the apparatus by means of steam generated over the column of water the same as in Kelso, and with the addition of the air removal.

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Every steam radiator has an air vent, every house heat radiating system has a vent or valve. There is certainly nothing new in the air valve. In all the old devices the air must be removed to allow operation. Bergeon's French patent, exhibit 41, of July, 1921, and applied for on 25th November, 1920, has such an air vent in the very place where De Kermor has placed his and his patent is good the world over. There was absolutely no ingenuity of invention in putting a vent in such a heater. The rest of the claims practically describe the operations of the prior art, including Kelso, which anticipated it for a number of years, because Kelso, with respect to this patent, belongs to the prior art. The Revel or Thompson or Gale patents could not be operated without carrying out the process defined in exhibit 18. The state of the art in inventions of this kind is far too advanced to allow a patent for such comprehensive claims as it could not now be possible to take a patent for the method so well known in the prior art. If any patent can be obtained it must be restricted to a machine or device. He has failed to disclaim what belongs to the prior art. This patent claims such a monopoly which would, if good, prevent any one making any of the old devices, even covering Kelso. The claims are broad enough to cover the principle and all the known methods of carrying it out. The patentee has practically included in his patent everything found in the prior art or what is common knowledge to a skilled mechanic in that class of work. It is again the case of casting the net too wide.

The method, or process of operation claimed by this patent had long been in use in electric heaters and what the assignee of the patent has done here is merely and solely to add or adapt without invention old and similar contrivances of the prior art to such heaters. Even the adaptation of an old function or contrivance to a new purpose is not invention and there is no subject-matter when no ingenuity of invention has been exercised. Terrell 38.

It would even seem that in 1921, when this patent was applied for, there was no room for a patent of this kind for a method, because the method was well known in the prior art. The state of the art, at that time, was such

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that it could not be invention to claim such a method.
The King v. Else (1); *Templeton v. MacFarlane* (2).

It was held in *Denning Wire and Fence Co. v. American Steel and Wire Co.* (3):

That the mere function or operation of a machine, or other device, as distinguished from the machine or device itself, are not the subject of a patent is well settled.

And a patent covering generally any and every means or method for producing a given result cannot be upheld.

In the present case there is the old Kelso patent on the apparatus; then we have besides to-day exhibit 18—this method patent into which the Kelso can be read—therefore there cannot be two patents, the one to cover the method and the other the apparatus—as decided *In Re Rowe* (4). In this case the patent was refused on the ground that it was a mere statement, in different words, of the invention by the applicant's prior patents. See also on this question: *Busch v. Jones* (5); *Ex parte Creveling* (6); *In re Tallmadge* (7); *Paramount Hosiery Form Drying Co. v. Moorhead Knitting Co.* (8). The patent, it will readily be seen, covers nothing more or less than the method of using vapour to displace the liquid so as to get automatic regulation which appears in all these patents.

If a process and an apparatus are described in specifications and the process is old and the apparatus new, and the process is claimed, the patent is bad because what has been claimed is what is old. Frost 3rd ed., 251 The claim must be limited to what is new. See also *Hosiers Limited v. Penmans Limited* (9). Robinson On Patents 256.

I have come to the conclusion and hereby declare that the De Kermor Canadian Patent (Exhibit 18) No. 217,100 is null and void.

EXHIBIT No. 19

Dealing now with the Canadian Patent No. 217,101 granted to Louis G. De Kermor, on the 21st March, 1922, for an alleged certain new and useful Self Regulating Electric

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| (1) (1785) 1 W.P.C. 76. | (6) (1904) 111 Pat. Off. Gaz. U.S. 2489. |
| (2) (1848) 1 H.L.C. 595. | (7) (1911) 174 Pat. Off. Gaz. U.S. 1219. |
| (3) (1909) 169 Fed. 793 at p. 795. | (8) (1918) 251 Fed. Rep. 897. |
| (4) (1913) 192 Pat. Off. Gaz. (U.S.) 519. | (9) (1925) Ex. C.R. 93 at p. 104. |
| (5) (1902) 184 U.S. 598. | |

Steam Generator, we meet the old familiar statement common to all these patents attempting to cover the whole field of the prior art as if it were a pioneer patent opening new avenues.

Mr. Caron, the expert witness for the defence, states that what is new in the patent is the steam circulating system.

Witness Ball, on behalf of the plaintiff, has produced as exhibit 26, a comparative analysis of this patent and the prior art as understood by him.

This patent is completely met with in every particular in the prior art and even in the original Kelso of 1912. Indeed, we find in this patent as in Kelso, a water container which forms a steam dome or space above the water similarly to other disclosures; we have the electrodes, and the water receptacle at the upper end to provide an hydraulic head against which the steam pressure acts as it forces the water downwardly to the container, thereby changing the area of the electrodes, as in the previous inventions.

Now the connecting of the steam produced by the device to a steam circulating system is by no means new and involving ingenuity of invention. Any skilful mechanic knew of that and could easily make the necessary connections.

It is quite significant that in comparing exhibits 44 and 19 we find almost identical mechanical construction described in similar language, having regard to the fact that these parties were in contact with each other and that their application for a patent was filed about one month after.

There is here again the characteristic broad casting of the net in the widest possible form by De Kermor. The pioneer and subsequent patents of the prior art are all taken in and the patent could not operate without infringement.

This patent is so obviously met by the prior art that it becomes unnecessary to say any more. The patentee has failed here again to disclose any vestige of scientific vistas of unanticipated reach.

This patent No. 217,101 is also declared null and void.

EXHIBIT No 20

I shall now deal with the Canadian Patent No. 217,102, granted to Louis G. De Kermor, on the 21st March, 1922, for an alleged certain new and useful Self Regulating Water Heater.

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Witness Ball, on behalf of the plaintiff, has also produced as Exhibit No. 27, a comparative analysis of this patent and the prior art.

Witness Caron, on behalf of the defence, says that the novelty of this patent, apart from the by-pass and the deflecting jacket, is the addition of a water heating tank.

However, a test of the validity of these claims is whether the first combination claimed is really new as arising from further invention clearly and separately described from the prior art which contains what has already been discovered and published. *Moore Filter Co. v. Great Boulders Proprietary Gold Mines Ltd.* (1).

This patent shows a construction very similar to that in exhibit 18 and it is a patent, drawn by the same solicitor at the same time as he conceived his idea of subdividing and multiplying the patents by such a wide casting of language that would take the prior art including the principle. The claims are not narrowed to the specific things which differentiate the device from the prior art. The claims do not define—as distinguished from the prior art—what is new, but they are cast in such broad language as to embody comprehensively both the principle and all the prior art. It is the repetition of what we have seen in respect of the previous patents and it is perhaps unnecessary to say any more than that all previous observations so far as they are relevant, must apply to this patent.

However, the characteristic feature of the patent as shewn in claims 5 and 7, besides what has just been mentioned, is the attachment of well known specific mechanical devices, such as the jacket, the by-pass and the water-tank, all well known in the prior art. The patentee has not in this patent, as well as in all others, interjected anything which is not to be found in the prior art or which is not common knowledge to skilled mechanics.

Now De Kermor went across to France in 1920 and 1921, took drawings with him in 1920, got in touch with people there interested in these electric heaters; saw Bergeon, and on his return in Canada filed, on the 23rd November, 1921, his application, about one month before Bergeon applied. Then on the 16th January, 1925, De Kermor wrote (ex-

hibit 36) to the plaintiff, in view of a settlement of the present case, offering to give plaintiff a percentage of the defendant's capital stock in exchange for the patents Bergeon may have or may obtain in the United States and in Canada. The letter ends by asking to cable, if offer acceptable, in order that a tangible offer may be made, etc. Bergeon had in the meantime filed an application in Canada on the 5th October, 1921.

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It is argued on behalf of the plaintiff, that it is not much to infer that something that DeKermor saw when in France must have put it into his head to file an application of this kind when returning to Canada—harboring the intention to forestall Bergeon's application—DeKermor had, in his application, devices absolutely similar to Bergeon's, such, for instance, as the pipe for the removal of the air, which is identical, in the same form and placed in the same position.

Furthermore, DeKermor in an attempt to anticipate all of Bergeon's patents has endeavoured to make some claims on the alleged fact that his invention dated back to 1911 or 1912, and that he had made installation of such a boiler in his house at Edmonton around that date, without however giving a description of the same. Some evidence has been adduced in this respect but I must hold that the defence has failed to establish that fact to the satisfaction of the court. Indeed, prior use, and especially under the present circumstances, has to be established by predominant evidence. It must also indeed be examined very critically when such evidence has been lying back for ten years. The evidence has failed to earmark the boiler, which might have been under the patents of either Revel, Gale or a dozen other patents, the evidence is too faint to establish any substantial fact. However, De Kermor was not the first inventor as provided by sec. 7 of the Act. *Moore Filter Co. v. Great Boulder Proprietary Gold Mines Ltd. (ubi supra)*.

The conclusion arrived at in respect of this evidence makes it unnecessary to pass upon the question as to whether such disclosure, to third persons, for more than one year previously to his application for a patent therefor, vitiated the patent. In the view I have taken of the case

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it is also unnecessary to give further consideration to the question raised by the defence under sec. 7 of the Act of 1921, amending the Patent Act.

Therefore, the De Kermor Canadian patent No. 217,102 is hereby declared null and void and of no force and effect in so far and with respect to claims Nos. 1, 2, 3, 4 and 6,— and availing myself of the provisions of sec. 33 (see also sec. 29) of the Patent Act, I shall hereby discriminate and declare the patent good and valid in respect of claims 5 and 7 thereof.

It is difficult to understand how these four patents under consideration were ever granted, as they are so much wanting in inventive conception and are so comprehensive in terms that they cover both the principle and the prior art, all of them working under the same principle. They are in the result, with slight exception, but mere aggregation, wanting in the essential requirements of a patent for invention. If there was something, in structure or otherwise, the claims of the patents have not been directed to it. *Durable Electric Appliances v. Renfrew Electric Products Ltd.* (1).

RECAPITULATION

There will be judgment as follows:—

- (a) The reissue patent No. 228,931 (exhibit No. 17) is hereby declared null and void and of no force and effect in so far and with respect to claims 1 to 5 inclusively; claim 6 thereof is, however, declared good and valid.
- (b) The De Kermor Canadian Patent No. 217,100 (Exhibit 18) is hereby declared null and void.
- (c) The De Kermor Canadian Patent No. 217,101 (Exhibit 19) is hereby declared null and void.
- (d) The De Kermor Canadian Patent No. 217,102 (Exhibit 20) is hereby declared null and void and of no force and effect in so far and with respect to claims Nos. 1, 2, 3, 4 and 6; and claims 5 and 7 thereof are hereby declared good and valid.
- (e) Substantial success being with the plaintiff, he will have his costs against the defendant.

Judgment accordingly.

HIS MAJESTY THE KING.....PLAINTIFF:

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March 22.
May 20.

NATHAN D. SEAMAN.....DEFENDANT.

Crown—Grant of land—Error—False misrepresentation—Rectification

Held that where a crown grant of land has been issued by error, but without false misrepresentation on the grantee's part, and whereby he obtains more than that to which he was entitled, the Court need not set aside the whole grant, but may declare the same void only in so far as it purported to convey such portion improvidently granted and will order the grant to be delivered up to be rectified.

ACTION by the Crown to set aside a certain grant of land.

The action was tried at Owen Sound by the Honourable Mr. Justice Maclean, President of the Court.

J. C. Moore and *W. J. Scott* for plaintiff.

J. F. P. Birnie for defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT (now this 20th day of May, 1927), delivered judgment.

In January, 1904, John Thede and Valentine Feick became the owners of two adjoining lots of land, known respectively as Sable Mill Plot, and which I shall hereafter refer to as Mill Lot, and lot No. 35, all in Concession D, in the township of Amabel in the county of Bruce in the province of Ontario, and which lots of land had been granted in 1869 to others, by the Department of Indian Affairs of His Majesty's Government. Such grants, however, reserved to His Majesty what is known as the Aux Sable River Road Allowance, one chain wide, bordering on the Aux Sable River. This Road Allowance intervened between the Aux Sable River and the two mentioned lots of land. Lot 34 was owned by one Simmie, and adjoined lot 35, and in this case also the Road Allowance intervened between the lot and the river. In 1904 Thede and Feick, sold to Seaman the defendant lot 35 and the Mill Lot, reserving however a portion of the Mill Lot of about ten acres in area and adjoining the Road Allowance, and also reserving certain privileges and rights. Thede

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subsequently acquired the interest of Feick in the lands, privileges and rights so reserved.

In November, 1908, Seaman and Simmie entered into an agreement with the Municipal Corporation of the township of Amabel in which it was agreed that the corporation should close the Road Allowance along lots Nos. 34 and 35 and the Mill Lot, as far as the Sable Falls; that the corporation should assist Seaman and Simmie in obtaining a grant from the Crown of that portion of the Road Allowance so to be closed, each of the said parties to receive that portion of the Road Allowance adjoining his own lands; that when the Road Allowance was closed and grants were made by the Crown to Seaman and Simmie of such portions of the Road Allowance, then the latter were to grant and convey to the corporation certain of their lands for the purpose of a new road or highway, through the three mentioned lots, and which proposed road would generally run parallel to the Road Allowance along the river, but at a distance further south from the river.

In 1909, the Crown granted to Seaman the Road Allowance in front of lot 35 and the Mill Lot, and to Simmie that part in front of lot No. 34. The Road Allowance thus granted to Seaman in front of the Mill Lot, abutted the land reserved by Thede and Feick in the conveyance to Seaman in 1904. Seaman is still the registered owner of this portion of the Road Allowance. Seaman and Simmie subsequently laid out the new road or highway through the three lots of land, and made a conveyance to the corporation. This conveyance however was apparently not accepted on account of some slight error in the description of the portion agreed to be conveyed by Seaman, but this is not important as Seaman has been and still is willing to give a satisfactory title to the new road to the corporation, and in any event that is a matter for adjustment entirely between the corporation and Seaman. Other points were raised by the plaintiff such as that the corporation did not close up the Road Allowance or pass any effective law to that effect; and that the new road provided by Seaman and Simmie under the agreement was a road already located under a municipal by-law passed many years previously. None of these points it seems to me are rele-

vant to the issue here, and I do not think I need engage in any discussion of them.

The plaintiff's case is that the agreement made between Seaman and Simmie, and the corporation, recited that Seaman was the owner of the Mill Lot, whereas in fact he was not the owner of the ten acre portion of that lot, which was then owned by Thede; that this recital was a misrepresentation of fact on the part of Seaman, and was a fraud upon Thede and all other parties concerned; that the agreement contemplated Seaman receiving a grant only of that portion of the Road Allowance adjoining and contiguous to his lands whereas the grant in fact conveyed a portion of the Road Allowance which was not adjoining or contiguous to lands of Seaman but immediately adjoining and contiguous to the lands of Thede; that the grant to Seaman should be declared to have been issued in fraud or in error, or improvidently, and that the same should be declared wholly null and void, and be cancelled.

The defendant does not contest the plaintiff's action in so far as cancellation of that portion of the grant conveying to Seaman the Road Allowance in front of the ten acre portion of the Mill Lot is concerned or sought, and is content that to that extent, there be decreed cancellation or reformation of the grant. The defendant in his defence pleaded as follows:—

The defendant states, and the fact is, that prior to the commencement of this action, he has always been ready and willing, and is now, subject to the payment of his costs, ready and willing to convey to the said Thede, all that portion of the said 66-foot reservation immediately adjoining the said parcel of 10 acres reserved by the said Thede in the Grant to Seaman of the Sable Mill Plot, for a nominal consideration; but the relator Thede before action never made any request or demand upon the defendant Seaman for the said portion of the 66-foot reservation.

I have no difficulty whatever in concluding that there should be what in effect would operate as a partial cancellation of the grant in question, so as to exclude therefrom that part of the Road Allowance adjoining the land of Thede. That this should be done is not I think open to question. However, I do not think a case has been made out for anything further than that, and the plaintiff accordingly succeeds only to that extent. It has not been established that Seaman acted fraudulently in securing the grant, and I am quite satisfied that the inclusion of the

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Road Allowance in front of Thede's lot was unintentional or in error. Mr. Moore for the plaintiff, however, firmly contended before me that any decree operating as a partial cancellation of the grant could not in law be made, and that the entire grant should be declared null and void, and cancelled. This is really the principal point now for decision.

Now with reference to the contention of Mr. Moore, for the plaintiff, that the Court cannot make a declaration that the grant should be revoked in part, but must declare that the whole grant is void if a portion of it has been granted through improvidence or fraud, etc. The case of *The Queen v. Eastern Archipelago Co.* (1) is most instructive. It is true that the case arose upon a *scire facias* to repeal a charter granted by the Crown under the Great Seal. But proceedings by way of *scire facias* for such a purpose is quite on all fours with a proceeding by Information by the Attorney General, on the relation of a subject aggrieved. In the Exchequer Court the usual remedy is not by *scire facias* in such cases, but by Information. On the facts in the case of *The Queen v. Eastern Archipelago Co.* the question arose as to whether a portion of the grant could be revoked and the remaining portions remain intact and legal. In the very able judgments reported will be found enlightenment on this point. In the reasons of Erle J., at page 327, we find the following:—

The provisions enabling the Crown to declare a forfeiture of a charter are in analogy with provisions for forfeitures between subjects, and are to be construed by the same rules.

In the reasons of Wightman J., at page 331 and 333, we find the following:—

* * * it was contended by the corporation that, admitting that the Crown might in its own right proceed by *scire facias* for an absolute repeal of the letters patent, it would be utterly destructive of the power of qualified and partial revocation reserved to the Crown by the proviso, if a private prosecutor could be allowed to proceed by *scire facias* in the name of the Queen * * * .

I cannot assume that the Attorney General would give his assent to the prosecution of a *scire facias* to repeal letters patent by a private prosecutor in the name of the Crown, unless he was satisfied that, if the suggestions in the *scire facias* were true, the letters patent ought to be repealed.

(1) (1853) 1 E. & B. 310.

At page 330,—

It was contended that the Crown itself could not, in the first instance, proceed by *scire facias* to repeal the letters patent, upon a suggestion of non-compliance with some of the conditions, but that there must be a previous revocation or repeal, absolute or qualified, by writing under the great seal * * * . It is difficult to believe that such an unusual and inconvenient course of proceeding could have been intended by the terms of the proviso in the charter.

The opinion of Coleridge J., seems to indicate clearly that it is possible for the court to declare a grant from the Crown revocable in part only. In Lord Campbell's judgment the following observations occur at pages 350 and 351:—

It is laid down, by all writers of authority who have treated this subject, that, if letters patent under the great seal have been granted on any false representation, by which they are void, or if, after the grant, there has been a breach of any condition subsequent whereby they are voidable, the prerogative writ of *scire facias*, to repeal them, may be sued out, either directly by the Crown, or, with the consent of the Crown, on the relation of an individual who may be injured. * * *

After a very attentive consideration of the charter, I am of the opinion that the proviso (in the charter) in no respect limits the power of proceeding by *scire facias* which would otherwise have existed, and that it only gives a cumulative or additional remedy, by enabling the Crown in a summary manner to *revoke the charter or to modify it*.

On the appeal of the *Eastern Archipelago Co. v. The Queen* (1), it is clear upon the reasons given by Martin B., that the court may decree a partial revocation. He says at page 870:

Slight deviations from the provisions of a charter would not necessarily be either an abuse or a misuser of it, and would therefore be no ground for its annulment, although it would be competent for the Crown, by apt words, to make the continuance of the charter conditional upon the strict and literal performance of them.

Parke B., at page 894, says:—

If the charter had been obtained by a false suggestion, or a fraudulent concealment, or a fraudulent representation of facts, the Crown would have been deceived, and the charter would have been void at common law; and so it would have been if it had been injurious to the vested interests of other subjects and so improvidently issued.

Pollock C.B., at page 907 says:

The public has so much interest in the correct conduct of those who enjoy any chartered rights, that it may well be contended that the power of the subject to question whether or not the charter be legal, or whether the charter has been forfeited by a breach of the condition, cannot be taken away even by the Crown * * * .

It remains to be said that a grant by the Crown of any property or right or interest is a matter of contract, and

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so far as a remedy is concerned in the way of reforming the contract it ought to be open to the subject to have his contract reformed without having it annulled. It would be difficult to find any express authority on this point, but once it is conceded that the relation between the Crown and its grantee is one of contract, then it is incumbent upon anyone asserting the rules of law are different in such a case from those appertaining to contracts between subject and subject, to establish his contention by sound authority. Mr. Moore was not able to establish in his argument that the court has no authority to revoke letters patent in part, but must revoke them either in toto or leave them as they stand. On this point the case of *The British American Fish Corporation v. The King* (1) affirmed by the Supreme Court of Canada (2) is instructive. In that case the Minister of Marine under the authority of an Order in Council, executed a lease to the suppliant of certain fishing privileges for 21 years. The lease contained a provision that upon complying with certain terms the suppliants would be entitled to have the option of renewing the lease for a further period of 21 years. Nine years after the date of the execution of the lease, the Deputy Minister notified the suppliants that the lease was *ultra vires* as not being in virtue of any statute of Canada, and as being repugnant to the common law, and that the lease was *ab initio* void. The Exchequer Court held that the provision for the renewal of the lease was void and inoperative and beyond the power of the Minister under Order in Council, but that the clause as to renewal in the lease could be severed from the remainder, and that while that clause was void, the lease itself for the term of 21 years was valid and binding. Looking upon the lease as a matter of contract, this case would seem to support the proposition that the grant in question in this case could be held good in part and invalidated in respect of the remainder.

The defendant has not established that the land in question belonged to the Provincial Government instead of to the Dominion Crown as was suggested. Since the decision of the Judicial Committee of the Privy Council in the case

(1) (1918) 18 Ex. C.R. 230.

(2) 59 S.C.R. 651.

of the *St. Catharines Milling Company v. The Queen* (1), it is settled law that the Indian lands became available to the province "as a source of revenue whenever the estate of the Crown is relieved of the Indian title." But the defendant, as pointed out, has not established that the land in question belonged to the Provincial Government by reason of a surrender of the Indian title. The burden of establishing such surrender rests upon the defendant in this action, and if he has failed to discharge that burden the Court ought not to infer that such surrender has actually taken place.

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It would seem to be a reasonable determination of the case so far as the evidence was made, to treat the property as a whole as having been in the Dominion Crown, and declare that the grant was void so far as it purported to convey the portion of land immediately in front of the ten acre lot. The grant to the defendant should I think be delivered up to be rectified.

Considering the result, and all the circumstances, I think a fair and proper disposition of the matter of costs would be to direct that each party bear their own costs.

Judgment accordingly.

DUPUIS FRERES LIMITED..... APPELLANT;

AND

THE MINISTER OF CUSTOMS AND
 EXCISE } RESPONDENT.

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 May 12.
 May 31.

*Revenue—Income Tax—Dividends—Preferred shares—"Borrowed capital"
 —Paramount right of Dominion Crown*

The appellant was incorporated by letters patent under The Quebec Companies Act to take over a running concern and to pay for the same "en stock ou obligations . . . ou autrement." The capital stock was divided into 20,000 common shares and 20,000 fixed cumulative 8 per cent redeemable shares. The preferred shares carried certain priorities, etc., over common shareholders, *inter alia*, that of being paid out of the net profits of each year. Such shares, if not redeemed in the meantime, to be paid in 1936 at a fixed price and interest. A trustee was appointed to the sinking fund for the said preferred shares, which was protected as against the company and its creditors. Under

(1) (1888) 14 A.C. 46.

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the provisions of the Companies Act no preference or priority is given to the holders of such stock over creditors of the company.

Held, that the stock in question herein was essentially part of the capital of the company, and was not "borrowed capital used in the business to earn the income" within the meaning of subsection H of section 3 of the Income War Tax Act, 1917, as amended by 13-14 Geo. V, ch. 52, sec. 2, and that the dividends declared in respect of such stock were not exempt from taxation under the said Act.

2. That no agreement, arrangement or contract between the company and its shareholders (allowed under the Provincial law) could operate in derogation of the right of the Dominion Crown to tax under the B.N.A. Act, which right is paramount.

APPEAL from the decision of the Commission of Taxation assessing the dividends of certain shares of the appellant.

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

Aimé Geoffrion K.C. for the appellant.

C. Fraser Elliott for the respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., Now this 31st day of May, 1927, delivered judgment.

This is an appeal, under the provisions of sections 15 *et seq.* of The Income War Tax Act, 1917, and amendments thereto, from the assessment for the plaintiff company's fiscal year, ending 31st January, 1923.

The controversy may be succinctly stated as follows: The appellant contends that the "dividend on the preferred shares" as provided by the letters patent hereinafter referred to, is nothing but interest on "borrowed capital" which should receive the benefit of the exemptions and deductions mentioned in subsection (h) of section 3 of the taxing act. There is no question of amount involved in the controversy that is to be adjusted by the parties when the court has decided the question of law—the question of principle.

The appellant company was incorporated, by letters patent, on the 30th July, 1921, under the provisions of the Quebec Companies Act, 1920, for the purpose of purchasing and taking over, as a running concern, the company

known as "Dupuis Frères, Limitée, and Dupuis Frères Limited," and to pay the same "en stock ou obligations, ou les deux, de cette compagnie ou autrement." Therefore these shares used to pay for the purchase and which go to make the capital authorized by the company cannot be classed as "borrowed capital."

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The company's capital is fixed, by the letters patent, at \$4,000,000, divided into 20,000 common shares, and 20,000 fixed cumulative 8 per cent redeemable shares, all of the par value of \$100 each.

These preferred shares are subject to a number of preferences, priorities, rights, privileges and restrictions mentioned in the said letters patent and among others: By par. (a) (P. 5) the shareholders of the preferred shares have a right, over the common shareholder, to be paid this 8 per cent dividend "à même les profits nets de chaque année."

A trustee (b) is appointed by the company who sees to the transfers of the preferred shares and who receives the monies forming the sinking fund for the said preferred shares, and this fund is protected by sec. (n) as against the company and its creditors.

The company has the right to redeem (c) in whole or in part these preferred shares by agreement with the shareholders, on the Exchange or otherwise, at the market price or at any other accepted price. It has also the right to force the sale of these shares and purchase them at \$110 (d).

By sec. (c) the company has the right to redeem these preferred shares before the 15th August 1936, and such of the holders of these preferred shares who, at that date, have not had their shares redeemed, will have the right to claim, at that date, at \$110 and interest.

Now these preferred shares form an essential part of the capital of the company,—both under The Quebec Companies Act, 1920, and the company's letters patent issued thereunder; and under subsection 6 of Article 5989 of the said Act

no preference or priority given to the holder of preferred stock under this article shall in any way affect the rights of creditors of any company.

In other words does it not amount to a permissive internal arrangement or contract with the company which gives

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prior rights to the preferred shares over the common shares? It is not necessary that equal rights and privileges should be attached to all shares.

It would be doing violence to the language of the Company's Act, to the letters patent, and I might add, to the custom of trade and of experience to call these preferred shares "borrowed capital," because of some alleged analogy, if any, to a bond, in that at the maturity, in 1936, the shareholder, whose share has not been in the meantime redeemed, can claim, as against the company—but after the creditors—his share at \$110 and interest. The mere existence of some feature which might in such respect make it resemble a bond or debenture is not sufficient to make this preferred share, which is an actual part of the authorized capital of the company, a bond or debenture or anything like it, and thereby transform it into "borrowed capital" for the purpose of assessment. Such dividends are paid only out of profits, a bond is quite different, it is primarily a liability. It is not the function of the court to pursue analogies which are insubstantial and incapable of defining rights and liabilities in law. The solution of the question must rest on fact rather than on the play of imagination.

The dividend paid upon these preferred shares is clearly and distinctly from the earned profits. The dividend in question was actually paid out of the profits and for all purposes remains a dividend. And notwithstanding any agreement, arrangement, or contract between the company and its shareholders—allowed under the law of the province,—it is obvious that a provincial law could not *ex proprio vigore* operate in derogation of the right of the Federal Crown to tax under the B.N.A. Act. The federal act gives the right to tax profits and that right is paramount. Sec. 3 of the taxing Act defines the taxable "income" as the net profit or gain . . . whether such gains are divided or distributed. The dividend in question has been divided or distributed, after the profits have been ascertained. And, as said in the case of *Commissioner of Taxes v. The Melbourne Trust Limited* (1), the profit was earned, for the purpose of the taxing Act, when distributed to the shareholders. *The King v. Anderson Logging Co. Ltd.* (2).

(1) (1914) A.C. 1001.

(2) (1926) 1 D.L.R. 785.

However a dividend declared out of profits must remain a dividend paid out of profits. There should not be any ambiguity. The taxes are deductions from undivided profits and should be so treated upon the financial record. *Nicholson and Rohrback On Accounting*. Profit is the remuneration of capital and you cannot redetermine it and call it borrowed capital. No dividend can impair the capital of the company. Art. 6010. According to the Oxford Dictionary, a dividend is the sum payable as the profits of a joint stock company and received as an undivided holder as his share.

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Profits denote the remuneration which those receive who supply the capital. Fawcett—Manual of Political Economy 163.

In the result, if the company did out of its sinking fund, built out of profits, pay and redeem all these shares before 1936, it would thus have disposed of profits and avoided the payment of the taxes due upon such profits, without impairing the capital of the company, as was decided in *re Dcido Pier Company* (1).

Preference shareholders are members, not creditors of the company issuing the shares. Mitchell 436.

The word "capital" (as used in the English Act says Hals. (at p. 84, vol. 1)) means share capital in contradiction to borrowed money. . . . The nominal capital does not at the outset, or necessarily at any time, represent money in the coffer of the company, or assets of any kind; but the amount limits the potentiability of the company to issue the shares into which that capital is divided.

The preferred shares form part of the authorized capital of the company as distinguished from borrowed capital. *The Attorney General v. The Milford Docks Company* (2); *W. M. G. Singer v. A. W. Williams* (3).

These preferred shares are entirely different from a bond. The dividend thereon is only payable out of profits and may be passed, while the bond has always its privilege. And as said in *Butler v. Fairhall* (4) accumulated undeclared and unpaid dividends on the preferred shares are not a liability of the company; it is only a matter of material importance as between the common and preferred shareholder. The capital is not a debt of the company.

- (1) (1891) 2 Ch. D. 354, at pp. 355-357.
- (2) (1893) 69 L.T.R. 453.
- (3) (1919) 7 Tax Cases 419 at 426.
- (4) (1927) 32 Ont. W.N. 191 at p. 192.

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Lee v. Neuchatel Asphalte Co. (1). In the case of the company making default in paying dividend, the preferred shareholders may take control in the management of the company, as provided by the letters patent; but they cannot wind up the company without the common shareholders joining in such resolution; while in the case of a bond, the bondholders have the power to take possession, run the company and wind it up and realize by privilege on the assets.

And as said by Orde J. in *Re Patricia Appliance Shops* (2) a claim capable of proof must be for a debt and not merely for a share in the ultimate distribution of the assets (*if any*) available for the shareholders.

It is admitted that the capital of these preferred shares was payable in four instalments. In the course of a winding up of the company, if any portion of this subscribed capital composed of these preferred shares remained unpaid, the shareholders would have to pay the balance to satisfy the debts of the company—far from having a right to claim as in the case of a bondholder.

Therefore, in view of the consideration to which I have just adverted I find that the preferred shares in question and the dividends paid thereunder are part of the subscribed capital and cannot in any manner or means be logically and legally considered as “borrowed capital.” They are not what is contemplated by subsection (*h*) of sec. 3 of the taxing Act. These dividends paid out of profits are liable to taxation and the appeal is dismissed with costs.

Judgment accordingly.

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April 29.

QUEBEC ADMIRALTY DISTRICT

GEORGE J. MADDEN.....PLAINTIFF;

v.

THE STEAMER *VINMOUNT*.....DEFENDANT.

Shipping—Collision—Canal Navigation—Speed—Rules 17, 25, 29, 37 and 38 of the Rules of the Road for the Great Lakes

A collision occurred between the plaintiff's ship, the *Simpson*, and the *Vinmount*, between locks 10 and 11 on the Welland Canal at 8 a.m. in August. This stretch is crossed by a foot bridge, 600 feet from lock

(1) (1889) 41 Ch. D. 1, at p. 23. (2) (1921-2) 2 Can. Bk. R. 468.

11 with two draws of 45 feet each, and a railway construction bridge 1,050 feet lower down. The distance between lock No. 10 and lock No. 11 is 3,500 feet and there is there a current of one mile an hour. The *S.* left lock No. 11 before the *V.* got under way to leave lock 10. The *S.* proceeded down, with the current, at a low speed, of about two and a half miles. Leaving lock 11 she had only 600 feet to the foot bridge where she passed in the port draw; then proceeded down towards the other bridge. The master of the *V.* stated he proposed to meet the *S.* at the foot bridge, but the *S.* had only 600 feet to cover whilst the *V.* had 2,900 feet. The *V.*'s preliminary act stated she intended to meet the *S.* between the two bridges, which was contrary to custom. Both captains saw the ships in the lock. The *V.* saw the *S.* was at an equal distance from the railway construction bridge and he maintained a speed of at least four and half miles, up to the time when he heard the alarm signal and then reversed and dropped anchor, and the collision occurred.

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Held, on the facts that the determining cause of the accident was the bad seamanship of the *V.* in maintaining the speed she did, and in not slowing up earlier, and in endeavouring to pass the *S.* where she did.

2. That, as the *S.* had the right of way, being with the current, and as the *V.* knew that by going ahead she was bound to meet the *S.* in a stretch between the bridges, contrary to custom, she was required by the ordinary practice of seaman and of good seamanship to have held back and waited below the railway construction bridge until the *S.* had passed clear.

ACTION *in rem* to recover for damages due to collision between the steamship *Jos. W. Simpson* and the *Vinmount*.

The action was tried before the Honourable Mr. Justice Archer, at Montreal.

R. C. Holden for plaintiff.

Francis King for defendant.

The facts are stated in the reasons for judgment.

ARCHER L.J.A., now this 29th day of April, 1927, delivered judgment.

This is an action *in rem*, and counter-claim for damages resulting from a collision between the plaintiff's steamship *Joseph W. Simpson* and the steamer *Vinmount*, which occurred in the Welland Canal at about 8 o'clock a.m., August 9, 1925.

The plaintiff alleges in his Statement of Claim:

[His Lordship here gives the allegations of the plaintiff.]

The defendant, by Statement of Defence and Counter-claim, alleges:

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[His Lordship here gives the allegations of the Defense, etc.]

The *Simpson* is a steamer 250 feet 8 inches long, and her beam is 42 feet. She was carrying a cargo of 56,000 bushels of wheat, and was drawing 13 feet 4 inches forward and 13 feet 8 inches aft.

The *Vinmount* is 246 feet 8 inches long, and 38 feet beam. She was light, and was drawing 2 feet 6 inches forward and 12 feet aft.

The distance between lock 10 and lock 11 on the Welland Canal is 3,500 feet. There are two bridges crossing the canal between locks 10 and 11. Both these bridges are nearer to lock 11 than to lock 10. The nearer to lock 11 is the footbridge (also known as bridge No. 8, or the Homer Road Bridge)—the distance being 600 feet. Then there is the railway construction bridge, 1,050 feet lower down. This construction bridge is 50 feet wide, and was erected solely for the construction work of the new canal which is to cross the old canal between said bridge and lock 11. From the railway construction bridge to lock 10 is a distance of 1,800 feet. At the footbridge there are two draws, of 45 feet each. At the railway construction bridge there is only one draw, 53 feet wide. Between the footbridge and the railway construction bridge there was a coffer dam on the port side of the *Simpson*. Below the construction bridge there are posts on each side to tie up if necessary.

Between the railway construction bridge and the foot bridge ships can only manoeuvre between the ends of the abutments of the bridges, that is to say on a length of about 850 feet.

It is proven there is a current of one mile an hour down the canal.

The *Simpson* was in lock No. 11 when the *Vinmount* was in lock No. 10. Both captains saw the ships in the locks.

I may say at the outset that the evidence in this case is very contradictory, but, on the whole, I was more favourably impressed by the evidence produced by the plaintiff. I may say also that some of the evidence on both sides is to be disregarded entirely.

To reach the conclusion I have reached it is not necessary for me to analyze the evidence, as I have reached my

conclusion on the admissions made by Captain Ferguson of the *Vinmount*.

It is proven to my satisfaction that the *Simpson* left lock 11 before the *Vinmount* got under way to leave lock 10. The *Simpson* proceeded down the canal at a slow speed, about $2\frac{1}{2}$ miles an hour. Leaving lock 11 she had only 600 feet to the foot-bridge, where she passed in the port draw; then proceeding down towards the railway construction bridge she had only 1,050 feet to cover. On her way there was a coffer dam on her port side. Moreover, she was drawing 13 feet 4 inches forward and 13 feet 8 inches aft, and she had to pass through a draw of the railway construction bridge which is only 53 feet. It seems obvious she should proceed at slow speed.

My assessors, Captains L. A. Demers, Wreck Commissioner, and Captain J. O. Grey, Shipping Master of the port of Montreal, advise me that in the circumstances it was good seamanship to proceed as the *Simpson* did.

The captain of the *Vinmount* states in his evidence that he proposed to meet the *Simpson* at the foot-bridge. As I say, the *Simpson* had left lock 11 before the *Vinmount* left lock 10. The *Simpson* had only to cover 600 feet, whereas the *Vinmount* had to cover 2,900 feet, to reach the foot-bridge. It does not seem reasonable the captain of the *Simpson* would think of meeting the *Vinmount* at the foot-bridge.

In the counter-claim it is alleged that the *Vinmount* intended to meet the *Simpson* between the two bridges. The same treatment is made in defendant's Preliminary Act (No. 12).

The evidence shows it was not customary for ships to meet between the two bridges, although some witnesses say it had been done on a few occasions, but we do not know the size or tonnage of the ships which met on those occasions.

The distance between the two bridges is 1,050 feet, and from the abutments about 850 feet. My assessors advise me (and I am strongly of the opinion) that it would not have been good and prudent seamanship, but on the contrary it would have been bad seamanship, to try to effect a passing of the ships between the two bridges.

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The only two places the ships could meet were at the foot-bridge, and below the railway construction bridge. The idea of meeting at the footbridge must be discarded entirely. Captain Ferguson admits he abandoned the idea of meeting at the foot-bridge.

[His Lordship here cites Rules 17, 25, 29, 37, and 38 of the Rules of the Road for the Great Lakes, and proceeds.]

It is in evidence there was a current of one mile an hour down the canal. The *Simpson*, as the ship descending with the current, had the right of way, and this is admitted by Captain Ferguson at page 18 of his evidence;

See the case of *George Hall Corporation v. SS. Fifetown*.

In this case of *George Hall Corporation v. SS. Fifetown* (1), MacLennan L.J.A., at p. 14, says:

The *Fifetown* was coming down the canal with the current, and, under rule 25 of the Rules of the Road for the Great Lakes, had the right of way

See also *Bonham v. The Ship Honoreva* (2), judgment of Anglin J. and *George Hall Coal and Shipping Corporation v. SS. Beechbay* (3).

Good seamanship required the *Vinmount* to hold back and wait below the railway bridge. Rule 38 of the Rules of the Road for the Great Lakes. In *The George Hall Coal and Shipping Corporation v. SS. Beechbay, ubi supra*, MacLennan L.J.A., held

(2) where if two steamers kept their speed they would meet at a bend in a narrow channel, 300 feet wide, it would be bad seamanship for the one navigating against the stream not to wait until the other had passed clear.

Tucker v. The Tecumseh (4); *The Ezardian* (5) (Bargrave Deane J.); *The Talabot* (6); *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* (7) (Lord Atkinson, at p, 417).

There is no bend between lock No. 10 and lock No. 11 which would oblige the *Vinmount* to hold back under canal Rule 17, but there was a railway bridge which had a draw of only 53 feet, where it was impossible to meet.

My assessors agree with me that the special circumstances of this case should have induced the captain of

(1) (1924) Ex. C.R. 12.

(4) (1905) 10 Ex. C.R. 44.

(2) (1916) 54 S.C.R. 51.

(5) (1911) P. 92 at p. 98.

(3) (1925) Ex. C.R. 23, at p. 25.

(6) (1890) 6 Asp. 602.

(7) (1924) A.C. 406.

the *Vinmount* to slow down before he did, to hold back, and to tie up if necessary, before reaching the railway construction bridge.

Captain Ferguson of the *Vinmount* states in his evidence (page 28) that half way between lock No. 10 and the railway construction bridge he increased the speed of his vessel for a short distance.

[His Lordship cites from the evidence.]

When the captain of the *Vinmount* saw the *Simpson* was at an equal distance from the railway bridge he maintained a speed of at least $4\frac{1}{2}$ miles an hour, up to the time he says he heard the alarm signal, when he reversed and dropped an anchor. In these circumstances the speed was not moderate. Instead of keeping up the speed he should have reduced it; in fact he should have stopped, and tied up if necessary, to allow the *Simpson* to pass through the draw of the railway construction bridge.

The sole and determining cause of the accident was the bad seamanship of the *Vinmount*. The *Simpson* was coming down at a speed of about $2\frac{1}{2}$ miles an hour, and had a right to assume the *Vinmount* would slow up, or tie up, so as to allow her to go through the draw of the railway construction bridge. As soon as the captain of the *Simpson* realized the *Vinmount* intended to attempt passing through the draw, he gave the alarm signal and reversed his engines; but the ships were too close together and collided; the starboard bow of each ship coming together.

It is contended the master of the *Simpson* was to blame for not complying with Rule 25 of the Rules of the Road for the Great Lakes, which requires a vessel descending a narrow channel where there is a current to give a signal indicating which side of the channel he elects to take. No such signal was given, but it does not seem to me this fact contributed in any way to the accident. Moreover, I doubt very much if such a signal should have been given, seeing the positions of the ships and the short distance between them. I may say my assessors are of opinion it was not necessary in the circumstances to give such a signal.

Captain Ferguson's statement is (p. 44):

Q. Do you mean to tell me when you exchange passing signals it is not an invitation to come on, that everything is all right to pass?

A. It is.

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And at page 45:

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Q. Supposing he had blown one blast at the time you saw him coming out of the footbridge, just canting over?

A. If he had blown one blast then I would have gone on just the same.

Q. Just the same as you did?

A. Yes.

* * * * *

Q. In any event, you say if he had blown you a passing signal as he was just canting around out of the footbridge you would have answered it, and done what you did?

A. Yes. If he had been straight in the level coming down, I would have waited. If he had the footbridge at his stern, and was coming down, I would have waited below.

Other questions have been submitted in argument, but having reached the conclusion that there was no fault on the part of the *Simpson* which could have contributed to the collision, which was entirely due to the bad seamanship of the *Vinmount*, I do not think it is necessary to discuss those questions.

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

The counter-claim is dismissed with costs.

Judgment accordingly.

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

Solicitors for defendant: *King & Smythe.*



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SEMET-SOLVAY COMPANY APPELLANT;

AND

THE COMMISSIONER OF PATENTS RESPONDENT.

April 13.
May 18.

Patents—Appeal from decision of Commissioner—"On sale"—Specification—Claims

In December, 1922, appellants offered to construct a coking oven at Hamilton in accordance with certain specifications and drawings, which clearly disclosed the invention for which the patent is now asked. On February 21, 1923, a contract was entered into for the building of this oven, the construction commenced shortly thereafter and the plant was operating in January, 1925. The application for patent herein was made on June 19, 1925.

Held, that the assignees of the invention by agreeing to construct and constructing a plant at Hamilton incorporating the said invention were putting this method of construction "on sale" in Canada within the meaning of the Patent Act.

2. Where in the specification in his patent for a coking oven the patentee states that a certain device or addition is advisable or preferable, but does not claim it as a necessary element of the invention, any oven so constructed as to represent the invention patented, but without such additional device would nevertheless be an infringement of the patent. Nor would anyone be entitled to a patent for leaving out the suggested addition or device out of the construction.

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APPEAL by the appellant against the decision of the Commissioner of Patents refusing to grant a patent.

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

R. S. Smart K.C. for the appellant.

O. M. Biggar K.C. for the respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now this 18th May, 1927, delivered judgment.

This is an appeal from the decision of the Commissioner of Patents, refusing an application for patent made by one Hughes, the appellant's assignor, and filed on July, 19, 1925. The alleged invention relates to improvements in coke ovens. The appeal was heard by me upon the documents transmitted by the Commissioner of Patents, and upon further oral and documentary evidence, adduced before me upon the hearing of the appeal.

It might be as well at this stage to refer to the inventor's specifications, in order to ascertain what it is that he claims as his invention. He states:—

This invention relates to coke ovens, particularly of the horizontal flue type with regenerators individual to, and parallel with, each oven of the block or battery. In ovens of this character as constructed hitherto, it has been considered necessary to interpose so-called sole flues directly beneath the floors of the several oven chambers. These sole flues form a connection between the heating flues, located in the side walls or division walls of the oven chambers, and the regenerators in which the air is heated before it is mixed with fuel to support combustion.

The object of the present invention is to improve structures of the class indicated above, in such a way that by establishing a direct connection between the regenerators and the heating flues and thus dispensing with and obviating the necessity for the customary sole flues, certain important advantages are obtained as will be set forth in detail hereinafter.

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It is to be noted that the connection between the regenerators and the heating flues is entirely a direct connection. By a direct connection I mean one by which all of the effective heat given off by the entire flue system connecting the ports of the respective regenerators is imparted wholly through the division walls of the oven laterally of the coking material in the oven and not in part through a sole flue. The connections of the heating flue C and of the risers F¹, F² with the regenerators E¹ and E⁴ respectively, are made at the outer upper corners of these regenerators. At the opposite corners (that is, the inner lower corners) these regenerators are connected with channels G¹ G² respectively, the upper ends of which are in turn connected with the upper portions of inner regenerators E², E³ respectively, the bottom of which has openings to communicate with the upper portions of passages H² H³ respectively, said passages H² and H³ extending transversely of the coking chambers, under the regenerators. By having the lower ends of the channels G¹ G² connected with the regenerators E¹, E⁴ at the corners diagonally opposite to those at which said regenerators are connected with the heating flues C, I secure a proper and effective flow of the combustion gases or of the air through said regenerators.

* * * *

The advantages of my invention are important, both from the structural point of view and in the operation of the oven. Owing to the omission of the sole flues generally employed heretofore, the construction is simplified, and its cost reduced. The space formerly occupied by the sole flues is utilized for the upper portion of the regenerators, and in actual practice, it has been found that the bottom of the oven can in this way be maintained at the required temperature, notwithstanding the absence of sole flues, etc.

The application for patent was first allowed, but upon a reconsideration, the same was refused. The grounds upon which the application was refused were: That the application disclosed no invention; that there was anticipation by United States patent No. 970,720 issued to one King in 1910, and later assigned to the appellant; that by-product coke ovens according to the specifications disclosed in the Hughes application, were erected in Hamilton, Ontario by the appellant, for the Hamilton By-Products Coke Ovens Limited, the date of commencement of the installation being March 15, 1923, more than two years prior to the filing of the application for patent in Canada; that ovens of the Hughes type were installed at Ashland, Kentucky, U.S.A., prior to the installation of the Hamilton plant; and that the invention had been described in printed publications more than two years prior to the inventor's application for patent in Canada. Thereupon the applicant, through his solicitor sought amendment of his specifications and claims, in order to bring out, as was stated, more clearly the scope and nature of the invention, and

requested a reconsideration of the application. In the letter or memorandum addressed to the Commissioner of Patents, the applicant's solicitor states:—

The claims have been somewhat revised in order to bring out more clearly the scope and nature of the invention. Heretofore by-product coke ovens of the horizontal flue type have always been regarded as requiring, as one of the essentials of construction, a sole flue running from one end of the oven chamber to the other immediately beneath the floor of the coking chamber between the coking chamber and the regenerators. The applicant is the first to have constructed a coke oven of the horizontal flue type in which there was no sole flue, but in which the air from the regenerators passes directly and without sole flue conduits into the heating flues while the hot products of combustion flow directly and without sole flue conduits into the regenerators. This is an entirely new type of construction, etc.

The memorandum further stated:—

This leaves only the United States King patent No. 970,720. With references to that patent Mr. King, the patentee of the said patent, makes an affidavit in which he points to the merits of the present application, and says that the construction shown in his own patent "is not as simple as the Hughes construction and does not provide the economies of the new oven." He presents photographs of a model of his, King's construction which show very clearly that the King oven was a sole flue type of oven, the very thing which the applicant has overcome, and superseded. Figure 1 of the King patent also shows that the spaces marked "S" and "S²" are located immediately below the floor of the coking oven, and that they are consequently sole flues. This is further shown by Figure 2, where the regenerators R and R² are shown as connecting with two branch flues leading to the right and to the left and those flues are not a part of the regenerators, but are sole flues just as indicated in Fig. 1. The King patent differs from prior patents in making a division of the sole flue into two branches, but the King oven is a sole flue oven, nevertheless. The applicant's oven is the first which dispenses with all sole flues. So long as the public constructs coke ovens with sole flues of any type, it will not encroach on the present invention, but when anyone departs from the previous sole flue practice and erects an oven which has no sole flue at all, he appropriates that which was first invented by Mr. Hughes and for which Mr. Hughes is clearly entitled to his patent in view of the great advantages of his invention and the fact that the novelty of his procedure cannot be challenged upon tangible grounds.

The application to reconsider the application for patent was refused by the Patent Office, and then followed this appeal.

Inasmuch as the King patent has already been referred to, and as it is the patent chiefly relied upon as an anticipation of Hughes, it might now be convenient to quote certain portions of the specifications of King, and which are as follows:—

My invention relates particularly to retort coke ovens provided with horizontally disposed heating flues connected in series. Such an arrange-

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ment of flues presents certain advantages, since it enables a very complete utilization of the heat developed in the flues, and such a regulation thereof as to secure a uniform coking of the coal charge. Heretofore with such an arrangement of flues the preheating of the air required for the combustion of the gas has usually been effected by means of recuperators, so called, in which the incoming air to be pre-heated and the outgoing gases of combustion flow continuously always in the same direction, through adjacent passages, the heat of the gases passing through the separating walls and being absorbed by the incoming air. Regenerators in which the gases of combustion and the air to be pre-heated flow alternately in opposite directions through a checkered brick construction, which becomes highly heated by the gases, and then imparts its heat to the air, are also employed to preheat the air, but while they are highly advantageous where their employment is feasible because of the extremely high temperature imparted to the air thereby, they are not readily applicable to the series, arrangement of flues.

The object of my improvement is to provide a simple and easily operated arrangement which shall enable the combination of regenerators with a series flue system, and thus unite the advantageous features of both constructions, and also to obtain certain incidental advantages of operation.

* * * *

Referring to the drawings 1, 2, 3, 4, 5, indicate the heating flues connected in series on one side of an oven. A similar set of flues is provided on each side of each oven throughout the block of ovens. Below each of the ovens are located two regenerators, R, R² built of checkered brick work in any usual manner. The regenerators R, R², are connected by passages P, P², with flues F, F², which are connected at one end through reversing valves V, V¹ with an outlet passage, G, for the waste gases of combustion, leading to a stack not shown in the drawings, and at the other end through reversing the valves V² V³ with an air inlet passage, H. The passages P, P² are controlled by dampers W, W² by means of which the effective orifice of the passages may be controlled, or if desired, closed entirely. From each of the regenerators of one set, as R, a passage O, formed in the division wall between two adjacent sets of heating flues, leads upward and is connected with the uppermost flues 1, of the adjacent sets of heating flues. From each of the other set of regenerators, as R² openings, O² connect with the lowermost heating flues, 5.

Preferably a shelf or partition S, S² is constructed above each regenerator, whereby the air and gases passing to and from the heating flues are caused to traverse the entire length of the regenerators R, R², instead of taking the shortest course to and from the passage, O, and opening O².

Before proceeding to a consideration of the actual issues for determination, it is perhaps desirable to refer briefly to the construction of coking ovens. A coking oven, as a unit in a battery or block of ovens, is a long, high, and narrow or thin chamber of brick construction, wherein is placed the coal from which the coke and by-products are to be recovered. This result is produced by the application of heat to the ovens. Uniformity in the heating of

the coal in the ovens, in the process of coking coal, is essential, and it is the practice to apply heat of a high temperature to the ovens, through heating flues or spaces arranged vertically or horizontally in the side walls of the ovens. In the application in question the heating flues are of the horizontal type. Directly beneath the ovens are what is known as regenerators. A regenerator is a checker work structure of fire-brick, through which the air and waste gases may circulate to and fro, and its function is primarily to heat air which is introduced into it through air channels at or near its base, and to so heat it that it attains an approach to uniformity of temperature before it is delivered to the heating flues surrounding the ovens, where at desired points in the heating flues it is mixed with combustible gases. Connections are provided for, between the regenerators and the heating flues on the side walls of the coking ovens. I do not think it is necessary for the purposes of this case, to enter into precise details of the construction and operation of the combined regenerators and coking ovens, or the specific function and manner of operation of one regenerator as compared with another.

The principal issue for determination seems to be, whether or not King has what is known as a "sole flue," which when employed, is interposed immediately beneath the floor of the oven and above the top of the regenerator. It is simply a flue space underneath the bottom of the ovens, forming a connection between the heating flues located in the side walls of the ovens and the regenerators, and it is as well, the means through which the bottoms of the coking ovens are heated. Hughes claims invention for establishing direct connection between the regenerators and the bottom of the ovens and the heating flues, and dispensing with the sole flue. It is claimed on behalf of the Commissioner of Patents that King had previously dispensed with the sole flue. From the specifications of King, from which I have at length already quoted, it will be seen that this patent relates to horizontally disposed heating flues connected in series. From the drawings and specifications it is to be seen that nothing intervenes between the top of the regenerator and the bottom of the floor of the coking chamber, except that King states, that "preferably, a shelf

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or partition S. 32 is constructed above each regenerator," for the purpose of causing the air and gases passing to and from the heating flues, to traverse through the entire length of the regenerators, instead of taking the shortest or direct course to and from the passages or ports leading into and out of the regenerators, the purpose being to ensure that the air and waste gases would traverse as much as possible of the brick work of the regenerator. However, King does not claim the use of the shelf as a necessary element in his invention, or, as it was put by one of the respondent's counsel, King would be infringed by another construction if the shelf were left out and it otherwise were King, because King says you can put the shelf in or leave it out, and no one is entitled to a patent for leaving out what King said you might leave out. The shelf it is observed does not extend the full length of the regenerator, but leaves a space at one end to allow the air and waste gases to move to and from the heating flues. Whether King would efficiently operate without the shelf I am unable to say, because no evidence was given upon that point, but I think it is quite clear that King did not intend it as a sole flue but only to accomplish the end mentioned in his specifications. Even upon the statement in the Hughes' specifications, that a sole flue is a connection between the heating flues in the side walls of the coking chambers and the regenerators, King shelf cannot be said to be a sole flue, because that connection is otherwise provided for. I think Hughes is tied to the elimination of the sole flue as his improvement representing invention. King also I think clearly dispenses with the sole flue with which he was doubtless acquainted, but which he does not mention. The shelf was not intended as the equivalent of a sole flue, but for an entirely different purpose, and then even its use was made optional. He makes no claim for the shelf and consequently did not regard it of importance. He had abandoned the idea of a sole flue entirely, and was concerned with the question of means for ensuring the proper flow of air and waste gases through the regenerators. Whether or not King would successfully operate without the shelf, I do not think the shelf can be said to be a sole flue, or intended as such.

There would not seem to be any invention in placing the regenerator in direct connection with the bottom of the coking chamber, that is in eliminating the sole flue, if provision is made for the proper circulation of the air and gases to and from the regenerators to the heating flues, and under the bottom of the coking chamber. The space immediately above King's regenerator is not part of a flue system as generally understood, the shelf relates to a means of ensuring successful operation of the regenerator for its intended purposes. I do not think there is room for a claim to invention in Hughes, whatever be the features of construction distinguishing it from King. Every change or improvement in the construction of a patented article, well-known and in wide and general use, and particularly where the principle of operation is not changed, is not invention. This seems like a belated effort to extend the monopoly granted to King, without improvements calling for invention.

Further I should say, it is claimed by respondent's counsel, that Hughes retains the shelf or partition of King, but he places it or its equivalent elsewhere, and under another name. It is urged that the appellants used King for several years in a modified form, that is, it put into King a sole flue which King did not suggest, and it uses this for twelve years, and now it says through Hughes, that it finds the sole flue was unnecessary, and it claims a patent for the elimination of an element which King did not include or suggest. But the respondent says that Hughes did not omit the shelf or partition, but kept it and put it or its equivalent in a different place, and the respondent says you cannot call it a sole flue in one place, and something else in another place, because in each case it performs the function of facilitating the circulation of air and gases in the regenerators, and in any event, King was the first to suggest it, but did not claim it. Now it is said, that Hughes in his construction of the regenerators uses the shelf or its equivalent, vertically instead of horizontally, in the centre of his regenerator, in order to cause the air and the waste gases as the case may be, to flow through the brick work of the regenerators. In his specifications, what Hughes calls "channels," separating vertically what he calls his inner

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and outer regenerators, were designed and intended to secure a proper flow of air and waste gases through the regenerators, and which was made possible by having the lower ends of the channels connected with the outer regenerators through a port at the corner diagonally opposite to that port in the same regenerators, and which connected them with the heating flue C. Thus by means of these channels and a division of his regenerators by such channels, he accomplished that with which he was concerned, namely, means of securing an effective flow of air and gases through his regenerator, just as King did with his shelf or partition, but in a slightly different way, and at a different point. It is not I think necessary to decide whether or not there is any material distinction between the "shelf" and the "channels." The "channel" has to do with the operation of the regenerators, and is not what is described by Hughes in his specifications as his invention, and cannot therefore be claimed.

Altogether I am of the opinion that the application of Hughes was properly refused for want of invention.

It is also contended on behalf of the Commissioner of Patents, that the invention in suit was "on sale in this country" for more than two years prior to the application for patent therefor, and that therefore under the provisions of section 7 of the Patent Act, Hughes has forfeited his right to a patent for his alleged invention.

The date of the application for patent was June 19, 1925. In December, 1922, a proposal in writing was made by Semet-Solvay Company to Hamilton By-Products Coke Co. Ltd., to construct a by-product coke oven plant at Hamilton. Accompanying the proposal were specifications and drawings, and the latter very clearly show Hughes to be present in the proposed construction. On the 21st of February, 1923, a contract in writing was entered into between these parties, the outcome I presume of negotiations following the written proposals made by Semet-Solvay Company. The specifications forming a part of the contract, clearly disclose the Hughes method of construction, and as disclosed in his application for patent. Construction commenced shortly afterwards, and the plant was in due course completed and went into operation in Janu-

ary, 1924. There is a provision in the contract to the following effect:

Solvay hereby gives and grants to Hamilton the right and license to use any apparatus and processes, whether or not patented, which comprise a part of the plant constructed hereunder, or are necessary for its operation but only for and in the operation thereof, and Solvay agrees to indemnify Hamilton for and save it harmless from all claims, demands, suits or causes of action which may be made or brought against Hamilton for infringement of patents on account of the use by Hamilton in the operation of said plant of any apparatus, equipment or process installed therein by Solvay.

The question then is, if, under the facts disclosed, the invention of Hughes was "on sale" in Canada more than two years previous to the application for patent. It does seem to me, that when Semet-Solvay Company offered to construct, or agreed to construct, a plant at Hamilton, involving the incorporation of Hughes, there must have been a time when the Hughes method of construction was "on sale" in Canada. It was put on sale as a suggested method of construction, of a portion of the plant mentioned in the proposals of Semet-Solvay Company, and this suggestion was accepted and there then followed the contract referred to. The contract contains I think a license to the Hamilton Company to use the Hughes method of construction, as is to be found in the clause which I have already quoted from the contract. There was nothing experimental about the proposed construction in my opinion, which indeed would be entirely unlikely, where the projected plant involved an expenditure about one and three-quarter millions of dollars.

The point is perhaps a little confusing, but it appears to me that it would be against the spirit of the Patent Act to hold that the alleged invention was not "on sale" more than two years prior to the application. That would not appear to be the common sense view. There was also in my opinion a licensing of the invention, at about the same time, although this point was not urged upon me. I think what was done constitutes a licensing where the alleged invention is not for a manufactured product, but for a method of construction. Here, the invention could not be manufactured, and in that form sold or put on sale. It could only be sold or put on sale by a disclosure of the method of construction, such as by drawings or specifica-

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tions. The license here was perpetual as to time, but limited to the Hamilton plant. If Hughes possessed invention, and he had only applied for a patent in time, the licensing clause in the contract would not be an answer to infringement by any unlicensed person. Whether there was a licensing or not, certainly the invention was "on sale" immediately prior to the time of the making of the contract. I think the point is well taken, and upon that ground also, I am of the opinion that the application for patent cannot be granted.

It is hardly necessary that I should deal with any of the other points urged against the granting of the application for patent.

The appeal is dismissed with costs to the respondent.

Judgment accordingly.

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 Feb. 23-25.
 Feb. 28.

TORONTO ADMIRALTY DISTRICT

BETWEEN:—

THE EASTERN STEAMSHIP COMPANY } PLAINTIFF;

AND

THE STEAMER ALICE DEFENDANT.

AND BETWEEN:—

J. P. PORTER & SONS LTD..... PLAINTIFFS;

AND

THE STEAMER WM. C. WARREN..... DEFENDANTS.

Shipping—Collision—Negligence—Duty of Masters—Narrow channel

Held, that when two vessels are meeting in a narrow channel, careful watch must be kept by the Masters of each vessel over the movement of the other vessel and they must be prompt to signal in case of emergency resulting from their manoeuvres. Carelessness or neglect to so act, if damage results therefrom, is negligence for which each vessel offending is liable. Neglect when practicable to slow down or to wait when conscious that the other vessel is in difficulties is likewise negligence in navigation.

The action of the Master of a ship in altering the entries in his Scrap Log Book in reference to a collision after it has taken place is strongly condemned by the court.

These actions,, tried together, arose out of a collision in the Welland Canal between the SS. *Warren* and *Scow No. 11* in tow of the tug *Alice*.

The trial took place before the Honourable Mr. Justice Hodgins on the 23rd, 24th and 25th days of February, 1927, at Toronto.

The facts are stated in the reasons for judgment.

G. M. Jarvis for plaintiffs in No. 1 and for defendants in No. 2.

R. I. Towers, K.C., for defendant ship in No. 1, and for plaintiffs in No. 2.

HODGINS L.J.A., now (28th February, 1927), delivered judgment.

Actions tried together arising out of a collision between the SS. *Warren* and *Scow No. 11* in tow of the tug *Alice*, in the Welland Canal. Each plaintiff claims against the defendant ship and in the second action the defendants counter-claim in personam against the plaintiffs therein as owners of the *Scow No. 11*.

These two cases are a good example of the problem frequently set before an Admiralty Judge, where each party places his vessel close to one side of a narrow channel and opposite the other and keeps it there at the time of collision, so that it is impossible to reconcile the stories, and the evidence on one hand or the other, possibly on both, must be largely discounted.

On the best consideration I can give to the evidence in this case, I have come to a definite conclusion of fact as to the causes of the accident. The SS. *Warren* was passing through the railway bridge lock at Port Colborne bound northwest and having the current in the canal (at 1½ to 2 miles) with her. The tug *Alice*, with a steel scow in tow, was coming south and against the current, and was at the same time south of the Humberstone bridge and from 1,500 to 1,700 feet distant from the *Warren*. At this point the *Warren* just as she was in the draw of the railway bridge, blew one blast signal to the tug which answered with a one blast signal. Apparently no difficulty in passing safely was then anticipated.

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The *Warren* came ahead at a speed of about $2\frac{1}{2}$ to 3 miles an hour, her engines assisting the current in moving her, and when clear of the abutment of the draw, according to her 1st Mate, Harpin, altered her course to port to get the ship into the centre of the channel. Harpin, who is not now in the plaintiff's employ, says this was the time when the whistles were exchanged, but nothing turns upon that. Before this the Master says he had noticed the scow pointing to the east bank with its corner. The *Warren* proceeded towards the centre of the canal, went up to the centre of the canal, and continued in the centre for from two to four minutes, traversing two or two and a half boat lengths or from five to six hundred feet. She then altered her course to starboard to meet the *Alice*, and when her starboard bow was about ten feet from the eastern bank of the canal the collision occurred between the forward port corner of the scow and the bow of the *Warren* about fifteen to eighteen feet from her stem. The evidence given by the Master of the *Warren* is to the effect that he went half astern on clearing the abutment so as to throw the stern to port and away from the east wall, to which it was drawn, and to stop his bow which tended, in coming out of the draw, to go towards the middle of the canal. He states his forward movement after his stern was clear of the abutment to be only about 147 feet. He was going, according to his account, dead slow ahead till his stern was clear, and then went $\frac{1}{2}$ speed astern. In this way he got his ship parallel to the east bank, about ten feet away, and kept her there until the collision. The difference between the accounts given by the Master and the first Mate of the *Warren* in regard to the distance travelled is that the former puts her position at the collision as 147 feet plus her length, $253=400$ feet, while the Mate says two or two and a half boat lengths—632 feet, plus 150 feet or part of it when turned to starboard to meet the *Alice*—in all say about 700 feet. The Mate says the bow of the *Warren* was 10 feet from the east bank at the collision, the Master puts the whole of his ship parallel to the bank at about the same distance. The course of the tug and tow appears to have been as follows: after the exchange of signals the tug proceeded a little to starboard from the centre of the channel, making, as her Master says, two miles over the ground against the current.

The *Warren* was then righting herself to starboard, and according to the tug Master, was within forty to fifty feet from the West wall of the canal; she had come out of the draw. The tug checked to half speed when she and the *Warren* were about seven or eight hundred feet apart, in order to give the *Warren* lots of time, as that vessel was well over in the tug's water, that is, well over the centre of the channel. . . . The tug proceeded as if to pass between the west wall and the *Warren* through what was a very narrow opening, and no signals were exchanged. Whether the slowing of the tug's speed and the weight and momentum of the scow disturbed the proper alignment of the tug and tow is not shown except by the results. Those who saw both vessels just prior to the collision are united on three facts: that when about 40 or 50 feet apart, the scow appeared to be sheering over towards the *Warren*: that the port line was taut, and that the tug was close to the west bank (five to six feet according to one and fifteen feet according to another), and pulling hard on the port line. Apparently what she was doing did not pull the scow out of danger and its corner struck the port bow of the *Warren*, not scraping along the side, but rebounding and getting clear. In order to understand how this situation came about, it is necessary to remember that the channel is a narrow one only 145 feet in width, and that each side has a batter which reduces the navigable width at the bottom by several feet. The size of the vessels are as follows:

Warren, length 253 feet, beam 43 feet, loaded depth bow 13 feet 9 inches and as stern 13 feet 11 inches.

Tug, length 70 feet, beam 17 feet 5 inches.

Scow, 30 feet wide by 147 feet long, loaded with mud and attached to the tug by two ropes, one from each forward corner to two bitts on the tug, situated amidships; the distance between the stern of the tug and the bow of the tow was about 20 to 25 feet.

To manoeuvre as long a vessel as the *Warren* in such a narrow channel is a difficult task.

If the *Warren* was over the centre of the canal, as her first mate testifies, then she occupied 105 feet which left only 40 feet for the tug and tow; and if she went to starboard, as he says she did, after running five or six hundred

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feet from the end of the abutment in the centre of the canal, she would still, having a beam of 43 feet, project over the centre line of the channel for some time while going 150 feet. Even when tied up at the bank, as her Master professes she was, at the time of the collision, she would be at least 12 feet out from it (given variously from 10 to 15 feet) and with her beam would occupy 55 feet, leaving some 90 feet for the tug and tow. If the tug was six feet from the west wall and was pulling the scow, as is stated, in the direction of the west wall, they would, measured in a slanting direction across the channel, stretch out some 243 feet. This is the six feet between tug and the wall, her own length, 70 feet, 20 or 25 feet of line and 147 feet the length of the scow. This would, in my judgment, take up at any reasonable angle possible on such a movement rather more than her fair half of the channel, so that it is quite easy to see how, if the tow took a sheer and the *Warren* was only going from mid channel slowly to starboard, a collision in this narrow channel might very well occur or, if the account of the Master of the *Warren* is taken, is possible. It now remains to determine whether or not the navigation of either or both of these vessels are faulty.

I am unable to accept the version of the Master of the *Warren* or of those who support him as to her movements, and think that of Harpin the 1st Mate is more correct. The *Warren* was moving at dead slow and with the current, at a speed of two and one half to three miles per hour, as her Master admits. Her Master was in difficulty with the stern which was drawn by suction to the east bank and had to throw it out, bringing his bow back from where it had gone towards or over the centre of the channel. He could not well do this until clear of the draw 65 feet in width. He was busied with steering himself and says he did not watch the tug *Alice* always and I have no doubt that he got further out than he intended. He has no recollection whether he gave any orders to the engine room after the collision. All the evidence seems to agree that the collision took place slightly to the south of the little dock office on the Camp Valley Coal Dock, which is 640 feet south of the railway line or abutment, so that the Mate's figures as to the distance covered by the *Warren* seem to be well verified and

not those of the Master. As no suggestion is made that the *Warren* was in any difficulty, except the very usual one with a heavily laden vessel in a narrow draw, of finding her stern drawn to the east bank the handling of the *Warren* must have been at fault to bring her so far down and in the centre of the canal, in face of a tug and tow approaching at a good speed. The Master's description of his vessel's movements and his signals put her close to the bank and nearer the end of the draw by several hundred feet than the place where the collision took place, and indicate what he was no doubt intending to do and what he would have accomplished if he had not let the current draw him down too far. He gave no alarm and was not watching the *Alice* closely, while Harpin says that at 200 feet distance the tow was coming about in the centre of the channel and 60 feet from the east bank. The scow had been seen by the Master coming up with her port corner pointing to the east bank and at a speed estimated by him at four miles per hour.

As to the tug, her Master says that he went to starboard from midchannel on the exchange of signals. He saw the *Warren* getting over to the west wall till she was only 40 or 50 feet away from it and says she was well over in his water. He checked to half speed when they were 700 to 800 feet apart. He could he says have stopped and tied up but that it was not "customary." He proceeded to within 400 feet and then went at slow speed when he thought there was room to pass through pretty close. He gave no signal. His bow he says was then within three or four feet of the west wall, and the scow went out suddenly owing to suction from the *Warren*. In that position, with his bow right up against the wall, he could have had little lateral effect on the tug, though he had a "tight line on the corner." He contends that her way was off and she was merely held in the current. The admissions by the tug Master that the *Warren* should have been able to straighten up in the canal 800 or 1,000 feet from the bridge, coupled with the fact that the collision was only about 600 feet from it, and that he knew the *Warren* was drifting down and had not steerage way enabling her Master to handle his ship, but thought the tug and tow could pass if he held where he was, are most significant. I cannot understand how under these conditions I can hold the tug blameless in not waiting and either

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tying up till the *Warren* had straightened up, or standing still lower down in the current as the Master professed he was quite able to do. *City of Puebla* (1); *Hall v. SS. Fife-town* (2); *Hall v. SS. Beachbay* (3).

In my judgment both vessels were to blame. The *Warren* I find guilty of negligent navigation after giving a passing signal, in getting well out into the channel so far down in face of an approaching tug and tow, for inattention by her Master to their movements and for his failure to signal again when the lateral movement of the tow was first seen by him or when he realized or should have realized that he was unable to get his vessel close in so as to avoid a collision. *The Glencova* (4); *Hamonic v. Fryer* (5). As to the tug I find her negligent in not waiting for the *Warren* to get straightened up, in proceeding on realizing the difficulties on the *Warren* which he says was not under control, and for letting the scow get so far over as to strike the *Warren*. *Poplar Bay SS. Co. v. SS. Charles Dick* (6). There will be a reference to the Local Registrar in Toronto to ascertain the damages in both actions and to report.

In view of the fact that there is a counterclaim in personam against the plaintiffs, J. P. Porter and Sons Ltd., in the second action and that it is contended that it is not competent in such an action as this for the court to entertain a counterclaim in personam nor to give judgment thereon, I will reserve further directions, and judgment upon or in regard to such counterclaim, till the Registrar has made his report. The parties will each pay their own costs of the actions and of the reference.

I feel obliged to comment upon the action of the Master of the ss. *Warren* in erasing entries in the scrap log dealing with the critical point of time and in writing in their place other words; in short destroying the whole value of the log with regard to the collision. He professed himself at a loss to explain what had been originally entered in the log or why he altered it. Such an action ought to meet with the strongest reprehension by shipowners and should be severely condemned by the court.

Judgment accordingly.

- (1) (1891) 3 Ex. C.R. 26.
- (2) (1924) Ex. C.R. 12.
- (3) (1925) Ex. C.R. 23.

- (4) (1925) Ex. C.R. 217.
- (5) (1924) Ex. C.R. 102.
- (6) (1926) Ex. C.R. 46.

ENERGINE REFINING AND MANUFACTURING COMPANY } PETITIONER;
 AND
 DAVID IRVING RESPONDENT;
 AND
 THE ENERGINE MANUFACTURING COMPANY LTD. } OBJECTING PARTY.

1927
 June 27.

Practice—Security for costs—Application to register trade-mark—Objecting Party

Held, that a petitioner in a proceeding before this Court for an order entitling him to register a trade-mark, is a plaintiff, and when residing abroad may be compelled to give security for costs. That security may be demanded by an "objecting party" contesting petitioner's right to the registration aforesaid.

Application by objecting party for an order compelling the petitioner to give security for its costs.

The application was heard before the Registrar of the Court.

R. S. Smart, K.C., for objecting party.

J. Genest for petitioner.

THE REGISTRAR, this 29th June, 1927, delivered judgment.

This was an application for an order for security for costs by the objecting party herein, an order for security having already been granted to the respondent herein.

That the granting of an order for security for costs is a matter of discretion vested in the court is apparent from the books of practice. In the case of *Denier v. Marks* (1), Meredith C.J., refers to it in these words:

The large discretion which is vested in the Court in the making or withholding of an order for security for costs.

One of the salient grounds for granting an order for security is the fact that the plaintiff is resident abroad without assets here.

In re *Percy & Kelly Nickel, Cobalt, and Chrome Iron Mining Company* (2), Jessel M.R., said:

The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be

(1) (1899) 18 Ont. P.R. 465, at p. 468. (2) (1876) 2 Ch. D. 531.

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effectually made against him if unsuccessful, is by the rules of court compelled to give security for costs. That is a perfectly well established and perfectly reasonable principle.

In The Annual Practice, 1927, at page 1367, it is stated:

The ordinary ground on which security is ordered is residence abroad; and subject to the exceptions hereinafter mentioned, the rule is inflexible.

It is established by the affidavit of Mr. Gordon, read on this application, and it further appears by the petition filed in this case that the petitioner is a foreign corporation. It is objected on behalf of the petitioner first, that the objecting party comes into court in the character of a plaintiff, and that therefore he should not be allowed to obtain an order for security against the ostensible plaintiff here. I cannot see my way to accede to this contention. The petitioner is undoubtedly a plaintiff seeking to assert a right against the rest of the world; and if his right can only be maintained by subordinating the rights of third parties in the subject matter of the petition, and such third parties are invited by him by means of a notice published as required by the rules of court to dispute his right to register the trade-mark in question in these proceedings, such third parties are undoubtedly entitled to become objecting parties. Secondly, the petitioner objects to the order going on the ground that there may be many other persons to come in as objecting parties in this one proceeding, and that the plaintiff would be embarrassed in his right if he had to respond repeated applications for security by objecting parties. I find a sufficient answer to this contention in Morgan & Wurtzburg on Costs (Second Edition 1882), at page 22. It is there stated in the marginal caption to one of the paragraphs that: "Each defendant is entitled to separate security." In the text the case of *Ogborne v. Bartlett* (Beames on Costs, App. IX) is referred to where the assignees of a bankrupt, on being made defendants, were allowed security though the defendant (the bankrupt) had previously obtained it. The present case before me is closely in line with *Ogborne v. Bartlett* (*supra*) because I have already granted an order for security for costs on behalf of the respondent, David Irving.

My view of the second contention by the petitioner's solicitor is further supported by the remarks of Jessel M.R., *In re Percy & Kelly Nickel, Cobalt, and Chrome Iron Min-*

ing Company (supra) at page 532. The learned Master of the Rolls said:—

The petitioner who presents a petition of this kind knows that by the Act of Parliament any shareholders may appear to oppose it.

It will be observed that in the case last cited the proceedings were instituted by a petition under an Act of Parliament. In the case before me the proceedings were instituted by a petition under the Trade-Marks Act and the Rules of Court. So that the remarks of the learned Master of the Rolls are peculiarly applicable here. There is another of his observations on page 532 that re-enforces the applicability of the case before him in respect of the facts of the case before me. He says:—

Nor does it make any difference if, as is the case here, the party who appears is not named as a respondent or served.

In the case before me David Irving was named by the petitioner as a respondent; and the objecting party comes in only in response to the notice published as required by the rules of the Court in case of an application to register a trade-mark. (See Annual Practice, 1927, at p. 1369).

The case of *In re Hurters Trade Mark* (1) before North J., seems to be conclusive of the right of the objecting party in the case before me to obtain an order for security. There, Hurter, a foreigner, resident out of the jurisdiction, had taken out a summons under the Trade-Mark Act for the registration of a mark. This summons was opposed by the Appollinaris Company, a company within the jurisdiction. The Appollinaris Company applied to North J., in Chambers, for an order that Hurter should give security for the company's costs of the opposition, and that until the security be given, Hurter should not be allowed to take any further proceeding in the matter. The order for security was made against Hurter.

The application of *The Energine Manufacturing Company*, the objecting party herein, for an order for security for costs to be furnished by the petitioner is granted. The security must be furnished within thirty days from the service of this order upon the petitioner's solicitors. All proceedings in the matter will be stayed until such security is furnished.

Costs of and incidental to this application to be costs in the cause.

Judgment accordingly.

(1) (1887) W.N. 71.

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No. 7809.

Aug. 10.
Sept. 14.

J. LAURENT MORENCYSUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Petition of Right—Practice—Amendment—Fiat—Substitution of parties
—Costs.*

The Crown expropriated certain lands, and in the plan and description deposited in the Registry Office, named M. as the owner of a part. M. then, having obtained a Fiat from the Crown, filed a Petition of Right in this court claiming the value of the land expropriated. M. later discovered that his wife and not himself was the owner of the land expropriated, and a motion was made for leave to amend the Petition of Right by substituting the wife's name for that of M. as suppliant.

Held, that as no action can be taken against the Crown without first obtaining its Fiat which gives the Court jurisdiction, such an amendment could not be allowed and the motion was, under the circumstances, dismissed without costs.

MOTION to amend Petition of Right by substituting the name of the suppliant's wife for the suppliant.

Motion heard before the Honourable Mr. Justice Audette, at Quebec.

R. Langlais K.C. and *A. Rivard* for the motion.

L. G. Demers and *O. Mayrand*, contra.

The facts are as stated in the reasons for judgment.

AUDETTE J. this 14th day of September, 1927, delivered judgment.

This is a motion, on behalf of the suppliant, for leave to amend the petition of right herein by substituting his wife to himself as suppliant, since his wife is the owner of the land in question and should have been made suppliant from the beginning.

An admission, signed by both parties, has been filed of record in support of the motion and it is thereby, *inter alia*, admitted by paragraph 3 that—

The error arises from the fact that the Department of Railways, by its officers, has, on the 1st October, 1923, and on the 20th November, 1923,

deposited in the hands of the Registrar of the registry office for the county of Portneuf, the plan and description of the land to be expropriated in the said county on lot no. 250, in the name of J. Laurent Morency, the suppliant; * * *

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Par. 4.—The error, started by the respondent and its officers, continued on, and the railway has always corresponded with the present suppliant, considering him the proprietor, as it appears by the letter produced with the present Petition and containing the offers made by the respondent.

Par. 5.—A scheme of settlement has been made and Notary Chali-four, representing the respondent, prepared a contract which is also produced with the present Petition and which is of record, which contract is in the name of J. Laurent Morency.

The crown shows cause *contra* and opposes the amendment.

Now, the *fiat* is evidently the basis of the Court's jurisdiction, and a Court has no jurisdiction to entertain a petition of right until the *fiat* of His Majesty is obtained therefor. In the present case, it has jurisdiction to deal only with the case as formulated and for which a *fiat* was given. In *re Mitchell* (1); Clode, *Petition of Right*, pp. 165 and 167; *Tobin v. The Queen* (2).

Therefore this amendment would in effect present a new case between different parties and in such case a *fiat* is needed to allow this new party to sue the Crown. It may be termed a question of considerable constitutional importance and the application must be refused. The prerogative is recognized and must be maintained.

A *fiat* was granted to the present suppliant and it is obviously not within the Court's competence to amend the Petition in such a manner as would allow a new person to sue the Crown. See Robertson, *On Civil Proceedings*, 390. It is a matter of strict law since it is a law of exception.

Coming to the question of costs, after having stated what steps were taken by the Crown on the assumption by its officers that the suppliant was either the owner of the property or the proper person to deal with in respect to the expropriation, it is only fair to say that these facts go a long way to justify the inference by the suppliant that he was the proper party the Crown had chosen to deal with.

(1) (1896) 12 T.L.R. 324.

(2) (1863) 14 C.B. N.S. 505, at p. 521.

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There is not a tittle of evidence to establish against the suppliant a charge of attempting to mislead the officers of the Crown. The respondent has suffered no inconvenience and no prejudice thereby. The suppliant has been guilty at the worst of a *bona fide* mistake and the mistake was largely, if not wholly, attributable to what was done by the Crown. In such circumstances it would not be fair and just as between the parties to award the costs against the suppliant. *Martin v. Benson* (1).

The motion to amend is dismissed but without costs, each party paying his own costs.

Judgment accordingly.

(1) (1927) 1 K.B. 771.

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CONSTITUTIONAL LAW — *Constitutional Law—Reference by the Crown—Practice—Power to withdraw—Jurisdiction.*] A claim was made by claimant for damages due to a breach of contract by the Crown. The Minister of Railways and Canals referred the claim to the Court, under the provisions of sec. 38 of the Exchequer Court Act. Later an Order in Council was passed, withdrawing said reference, and on the following day the claimant filed its statement of claim in the office of the Registrar, which was served on the respondent. The respondent now moves for an order to withdraw the reference as irregularly made and void, because it was not made by the Minister of Customs or Minister of Public Works as well as the Minister of Railways and Canals, and because the amount of the claim as referred was for an amount substantially less than prayed for by the statement of claim.—*Held:* That, as the claim for damages was primarily for the repudiation of a contract, the negotiations leading up to which had been with the Department of Railways and Canals and as the Order

CONSTITUTIONAL LAW—*Concluded.*

in Council accepting the offer leading to the contract had been approved by the Minister of that Department, the reference signed by him alone was a sufficient compliance with the statute. 2. That as there was nothing suggesting fraud or deception in the description or amount of the claim as made to the Department, the Reference was not vitiated by the fact that the amount of damages therein mentioned was less than that claimed by the pleadings. 3. That the reference of claim to the court was merely to confer on the court the jurisdiction to hear the claim, and the Crown did not in any sense initiate the claim or proceedings by giving of such jurisdiction. That the proceedings are initiated by the filing and serving of a statement of claim and the respondent cannot avail himself of Rule 109 to withdraw the Reference. DOMINION BUILDING CORPORATION v. THE KING..... 101

2 — *Reference by Minister—Exchequer Court—Withdrawal.*]—*Held,* that where a Minister of the Crown has referred a claim to the Exchequer Court under the provisions of section 38 of the Exchequer Court Act, and the same has been duly filed in the said court, the court is then seized with the matter, and the reference cannot thereafter be withdrawn by the Crown from the Court without an order of such court. DOMINION BUILDING CORPORATION v. THE KING..... 79

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CROWN — *Petition of Right—Expropriation—Injurious affection—Acquiescence—Equitable Rights—Building restrictions—Restrictive Covenant—Statute of Limitation.*] Suppliants owned certain land, in the city of Halifax, described on a plan of subdivision as blocks J, K, L, and M., which was further subdivided into lots, less certain lots that had been sold. In January, 1913, they sold their remaining interest, 22 lots in K, to the Crown for railway purposes, being then well aware of the proposed use, the conveyance being made to Eastern Trust Company at the instance of the Crown. In March, 1913, the whole block K. was expropriated by the Crown under the Dominion Expropriation Act. The present action was to recover for injurious

CROWN—Continued

affection to the adjoining blocks J. and L., by reason of the use made of the land acquired in block K. It was conceded that the suppliants were required to establish an interest in the lands taken, to succeed in an action for compensation for injurious affection of the lands not taken. It was contended that a restrictive covenant or building condition contained in the deed of one lot in block K., sold to S., gave suppliants an equitable interest in this lot, which was a benefit for all their then unsold lands, and it was also contended that by reason of certain statutory building restrictions they had an equitable right in the lots in block K. acquired from others than the suppliants. Furthermore, that the Crown took the land subject to and with notice of these covenants or conditions, expressed or implied, that the building of the railway was in breach thereof, causing damage for which the suppliants were entitled to compensation. No restrictive covenant or condition was made part of the deed from the suppliants to the Crown, and in fact, in all the lots sold by the suppliants in the blocks mentioned, a restrictive covenant or condition was made part of one deed only, that to S.—*Held*, that in so far as the action rested on equitable rights, it was subject to equitable defences, and that, by their participation in the acts complained of, by selling the lands to the Crown for the purpose of the railway, by their acquiescence in all that had been done, and by their laches, the suppliants were now estopped from enforcing or claiming under equitable rights based upon the restrictive covenant.

2. That statutory building restrictions, which may at any time be modified or repealed, by the legislative body creating them, are not in the nature of covenants creating an equitable interest in land (*Orpen v. Roberts*, [1925] S.C.R. 364 referred to).

3. That the claim for injurious affection falls under the provisions of sec. 2, subsec. d of the Statute of Limitations (Nova Scotia) requiring claims for direct injury to lands to be proceeded with within 6 years from the time when the cause of action arose, and, moreover, that if the injurious affection here alleged was not referable to direct injury to land, then it falls under another clause of the same section, "actions for all other causes which would formerly have been brought in the form of an action called trespass on the case . . ."

MILLER v. THE KING. 52

2 — *Crown lands — Timber limits — License — Expiration — Duration — Damages—Rights of holders.*] Suppliants were grantees from the Crown, in the right of the province of Quebec, of a license to cut timber on certain ungranted

CROWN—Concluded

lands of the Crown, which license expired on the 30th April, 1919. They did not receive their license for the season of 1919-20 until December, 1919. Such a license could only be granted, under the Statute, for a period of 12 months. In June, 1919, a fire took place on the limit covered by the license in question, destroying some of the timber thereon, and the present action was taken to recover from the Crown the loss alleged to have been caused to the suppliants by reason of such fire, as due to the negligence of its servants and employees, as owners of the Canadian Government Railway.—*Held*, on the above facts, that as such a license could only be granted for 12 months, with no absolute right of renewal, and as suppliants were not the holders of any license when the fire occurred, they had no right of action to recover from the Crown for the damages claimed. O'BRIEN *et al v. THE KING*. 154

3 — *Grant of land — Error — False misrepresentation — Rectification.*] — *Held* that where a crown grant of land has been issued by error, but without false misrepresentation on the grantee's part, and whereby he obtains more than that to which he was entitled, the Court need not set aside the whole grant, but may declare the same void only in so far as it purported to convey such portion improvidently granted and will order the grant to be delivered up to be rectified. THE KING *v. SEAMAN*. 201

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MASTER AND SERVANT—*Dismissal—Notice — Wrongful dismissal — Summary dismissal*.—*Held*, that when under Rules and Regulations in force on the Canadian Government Railways relating to the conduct and discipline of its employees, it is provided that "employees will . . . be subject to *summary dismissal* for insubordination, drunkenness," etc., any employee guilty of a breach thereof may be forthwith legally dismissed without notice. 2. *Held* further, that in any event, where the dismissal of an employee is for cause, he is not entitled to any notice. (*Levesque v. C.N.R.* Q.R. 39, K.B. 165, referred to and distinguished). *VAILLANCOURT v. THE KING*. 21

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PATENTS FOR INVENTION—*Infringement — Commercial use — Patentability—Treaty of Peace, Germany, Order 1920, 11-12 Geo. V, c. 44.*] Pope applied for a patent in April, 1919, which was granted in September, 1919. He did not make application therefor under the provisions of the Treaty of Peace (Germany) Order, 1920, or under chapter 44, 11-12 Geo. V, but under the Patent Act.—*Held*, that

PATENTS FOR INVENTION—Con.

where a patent was not validated by any of the post war validating legislation, respecting patents, but the patentee elected to exercise his rights under the Patent Act, a party sued for infringement thereof cannot invoke such legislation, and the fact that they commenced to use the infringing device prior to the enactment of chapter 44 aforesaid, did not confer upon them any right to continue such use regardless of the validity of the said patent. 2. That the commercial use of an invention in a plant, from which the public is usually excluded, is a "use" within the terms of the Patent Act. 3. Where a patent is but the adaptation to a new purpose of an old method of appliance which is analogous to the purpose to which it has already been applied, and that the mode of application is also analogous, and where the patent appears to be an effort to limit the use of inventions already given to the public, by patenting, not improvements or freshly invented means, but only alterations in the form or size of well known methods and appliances, they fall within the field of the mechanic rather than that of the inventor, and are not patentable. *POPE APPLIANCES CORPORATION v. THE SPANISH RIVER PULP & PAPER MILLS, LTD.* 28

2 — *Impeachment — Process patent — Vagueness and ambiguity — Specification — Publici juris — Patentability — Utility.*] The patent is for an alleged process for the extraction of zinc from zinc ores containing manganese, by the use of electrolysis. The only novelty claimed is that, whereas prior to the patent the value of the presence of manganese in the electrolyte was not known, and the patentee disclosed its beneficial effect in the deposition of coherent, reguline zinc on the cathode; and that, by the deposit of manganese dioxide at and on the anode, corrosion was prevented and the life of the anode was prolonged. The patent had only three years to run, and had never been used commercially, but only experimentally.—*Held*, that a patented process to be valid must denote ingenuity of invention. It is not enough in order to constitute invention, to disclose something which has been but dimly seen before. 2. That there is 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. 3. That a patent which has been in existence for fifteen years, and has never been put into practice, notwithstanding that the inventor received a substantial grant of money from the Government to promote his invention, is *prima facie* bad for want of utility. 4. That a

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patentee must define and limit with precision what he claims to have invented, and everything not clearly claimed becomes *publici juris*. 5. That the patentee must clearly set forth the various steps in a process claimed, and if designedly or unskilfully he makes it ambiguous, vague or indefinite, the patent is bad. 6. That the specification of a patent for a process must point out clearly the method by which the process is to be performed so as to accomplish the object in view. In this case, though necessary, no purification is mentioned; no precise quantity of manganese to be used is mentioned, so that such use may be extended or restrained as occasion may arise in the interest of the patentee, — therefore the patent is bad. ELECTROLYTIC ZINC PROCESS CO. v. FRENCH'S COMPLEX ORE REDUCTION CO. OF CANADA LTD. 94

3—*Necessity of affidavit for re-issue—Improper affidavit for issue of—Untrue statement—Commissioner of Patents—Discretion.*] An application for the re-issue of a patent was made by the plaintiff company under the Patent Act (R.S.C., 1906, c. 69). In support of their application they filed an affidavit purporting to be made by the company, instead of by an officer thereof.—*Held:* That as both the Patent Act and Rules in force at the date of the re-issue were silent on the matter, the Commissioner might properly require an affidavit in support of the application or might dispense with such formality, if he saw fit to do so. 2. That inasmuch as the sufficiency or validity of such affidavit is for the Commissioner to pass upon, and is solely to satisfy himself, when a patent has been granted, stating on its face that the patentee has complied with all requirements of the Patent Act, it was not competent to a defendant, sued for infringement of such patent, to attack the same as being void, because the affidavit accompanying the application was not strictly in compliance with the statute, and the court will not consider such a defence. 3. That even if the statement in the affidavit of the patentee, filed with his application for patent, that "his invention had not been patented to him or others . . . in any country" were untrue, this would not in itself be a ground for voiding the patent, in the absence of fraud. That a party sued for infringement of a patent could not invoke such an error, to void the patent. 4. That the purpose and effect of the post war legislation (Ch. 44, sec. 7, ss. 1 of 11-12 Geo. V, Dom.), was *inter alia* to extend the time within which one might apply for a patent in Canada, after having patented the same invention in another country, which legislation must

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be read as amending sec. 8 of the Patent Act; and that in consequence an application for patent made in Canada in 1919 was properly received, notwithstanding that the same invention had already been patented in another country in 1917, more than one year previous to the Canadian application. CANADIAN GENERAL ELECTRIC COMPANY LTD. v. FADA RADIO LIMITED. 107

4 — *Infringement — Patentability — Invention — Improvement — Abandonment.*] The alleged invention involved in the patent in suit consisted in the arrangement of a number of machines known as "deckers," used for the thickening of the ground pulp fibre as it comes from the grinders, and so arranged in rows that they are conveniently related to each other. Between the rows there is a common supply trough and a common discharge trough. At the side of each row of tanks is a drive shaft common to the whole row. The shafts of the rotatable cylinder molds are mounted in their respective tanks, in suitable bearings. There is also an auxiliary shaft in alignment with and adjacent to the cylinder mold shafts, which cylinder shafts may be connected by jaw couplings, and when so connected form one shaft. For each tank there was a sprocket wheel on the driving shaft connected thereto by hand controlled clutch so that any one of the tanks could be disconnected from the general driving shaft without stopping any others, which is claimed to be the important thing in the invention. The whole construction was of iron. Prior to this invention the machines then in use were so designed that if two cylinders, not adjoining one another, were to be put out of operation, the intermediate cylinders would also have to cease operation. Such machines were largely built from suggestions of one F. and upon his plans, and the only departure in the patent in suit from such plans was in the driving means, so arranged that any one tank could be put out of action. In 1904 machines constructed upon the plans of F. were installed by the patentee in the mills at Berlin, N.H., and in 1907 similar machines in another mill. Applications for patent were made in the United States and in Canada in 1909 and 1911 respectively by the plaintiff's inventor.—*Held,* that though there might be some advantage in being able to put out of operation any one of the cylinder molds, where the economies effected were negligible, where there was no substantial increase in efficiency, and no new result was thereby obtained, the structural variations in the driving means from the prior art, necessary to do this did not denote inventive skill. 2. That public

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user of the patented machines in the Berlin mills, for five years before making application for patent in the United States, was an abandonment of the invention to the public. *Semble*: Where a specific machine already exists producing certain effects, and where additions have been made to such machine to produce the same effect in a better manner, a patent cannot be taken for the whole machine, but for the improvement only. *THE SHERBROOKE MACHINERY CO. LTD. v. THE HYDRAULIC MACHINERY CO. LTD.*..... 114

5 — *Subject-matter — Anticipation — Combination — Prior art — Specification — Disclosure.*—*Held*: That there must be a substantial exercise of the inventive power, though it may in some cases be very slight, to sustain a grant for a patent for invention. Slight alterations may produce important results and may disclose great ingenuity. 2. That in a combination apparatus, if the invention required independent thought, ingenuity and skill; produced in a distinctive form a more efficient result, converting a comparatively defective apparatus into a useful and efficient one, rejected what was bad and useless in former attempts and retained what was useful, uniting them all into an apparatus which taken as a whole was novel, such denoted invention. A new combination of well known devices and the application thereof to a new or useful purpose may require invention to produce it, and may be good subject matter for patent. 3. That in order to establish that a patent has been anticipated, any information as to the alleged invention given by any prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it, in order to sustain the defence of anticipation. 4. Where the question is solely one of prior publication it is not enough to prove that an apparatus described in an earlier specification, could have been used to produce this or that result. It must also be shown that the specifications contain clear and unmistakable directions so to use it. It must be shown that the public have been so presented with the invention, that it is out of power of any subsequent person to claim the invention as his own. *CANADIAN GENERAL ELECTRIC CO. LTD. v. FADA RADIO LIMITED* 134

6^a — *Impeachment — Reissue — Commissioner of Patents—Jurisdiction — Improvement.*—1. *Held*, That in granting a reissue the Commissioner's jurisdiction was limited to the grounds set out in sec. 24 of the Patent Act; and where the

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Commissioner had granted a reissue for more than what was claimed in the original patent, and where there was no inadvertence, accident or mistake in respect of the issuance of the original patent, his decision to grant a reissue may be reviewed by the Court. (*Auer Incandescent Light v. O'Brien* (1897) 5 Ex. C.R. 243) distinguished. 2. That anything disclosed in the specifications of a patent of invention and for which no claim is made becomes *publici juris*. 3. That a patentee in a patent for an improvement on a known device, must not throw his net so wide as to omit to honestly disclose what belongs to the prior art as distinct from his new claim. 4. That the adaptation of old contrivances or devices of a similar nature to a new or similar purpose, especially to the same class of articles, performing an old well known function, did not amount to or constitute invention. 5. That the mere applying of well known things in a manner or to a purpose which is analogous to the manner in or to which it had been previously applied, did not amount to invention. 6. That a patent covering generally any and every means or method for producing a given result cannot be upheld. There cannot be two patents; one to cover the method and the other the apparatus. *BERGEON v. THE DE KER-MOR ELECTRIC HEATING CO. LTD.*... 181

7 — *Appeal from decision of Commissioner — "On sale" — Specification — Claims.* In December, 1922, appellants offered to construct a coking oven at Hamilton in accordance with certain specifications and drawings, which clearly disclosed the invention for which the patent is now asked. On February 21, 1923, a contract was entered into for the building of this oven, the construction commenced shortly thereafter and the plant was operating in January, 1925. The application for patent herein was made on June 19, 1925.—*Held*, that the assignees of the invention by agreeing to construct and constructing a plant at Hamilton incorporating the said invention were putting this method of construction "on sale" in Canada within the meaning of the Patent Act. 2. Where in the specification in his patent for a coking oven the patentee states that a certain device or addition is advisable or preferable, but does not claim it as a necessary element of the invention, any oven so constructed as to represent the invention patented, but without such additional device would nevertheless be an infringement of the patent. Nor would anyone be entitled to a patent for leaving out the suggested addition or device out of the construction. *SEMET-SOLVAY COMPANY v. COMMISSIONER OF PATENTS.*..... 218

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Re Security for Costs in Patent Actions.

See PRACTICE No. 1.

In Trademark Actions.

See PRACTICE No. 3.

Re Counter Claim in Patent Actions.

See PRACTICE No. 2.

PATENTABILITY

See PATENT FOR INVENTION.

PETITION OF RIGHT—*Practice—*

Amendment — Fiat — Substitution of parties—Costs.] The Crown expropriated certain lands, and in the plan and description deposited in the Registry Office, named M. as the owner of a part. M. then, having obtained a Fiat from the Crown, filed a Petition of Right in this court claiming the value of the land expropriated. M. later discovered that his wife and not himself was the owner of the land expropriated, and a motion was made for leave to amend the Petition of Right by substituting the wife's name for that of M. as suppliant.—*Held*, that as no action can be taken against the Crown without first obtaining its Fiat which gives the Court jurisdiction, such an amendment could not be allowed and the motion was, under the circumstances, dismissed without costs. MORENCY *v.* THE KING..... 238

See CROWN No. 1.

PRACTICE — *Security for costs—Virtual plaintiff—Proceedings before Commissioner of Patents.*] Plaintiff alleged that the defendant Myers had applied to the Commissioner of Patents, under section 48 of the Patent Act, to determine what should be reasonable compensation to him for the use of his invention by the plaintiff. That on such application plaintiff could not raise the validity of the patents involved and was forced to take the present action to impeach the same. That his action was in the nature of a defence to defendant's claim, that the said defendant was really a plaintiff and should give security for costs of the present action. By the defense Myers only sought to maintain his patents, and no more.—*Held* (affirming the decision of the Registrar), on the facts disclosed, that there was no relation proximate or remote between the proceedings before the Commissioner and the present action and, as the defendant herein did not assert any substantive right whereby he would become a virtual plaintiff, he should not be compelled to give security for costs. THE KING *v.* MYER'S CANADIAN AIRCRAFT CO. LTD. ET AL..... 49

2 — *Patents — Infringement — Defense—Counter-claim—Impeachment.*—*Held*: That it is not competent to a defendant in an action in this court for infringement of

PRACTICE—*Concluded*

a patent for invention to attempt to impeach the patent in question by counter-claim. NIEBLO MANUFACTURING COMPANY LTD. *v.* REID ET AL.... 82

3 — *Security for costs—Application to register trade-mark—Objecting Party.*—*Held*, that a petitioner in a proceeding before this Court for an order entitling him to register a trade-mark, is a plaintiff, and when residing abroad may be compelled to give security for costs. That security may be demanded by an "objecting party" contesting petitioner's right to the registration aforesaid. ENERGINE REFINING & MANUFACTURING CO. *v.* IRVING & THE ENERGINE MFG. CO.. 235
See CONSTITUTIONAL LAW.
See PETITION OF RIGHT.
See SHIPPING AND SEAMEN No. 3.

PRESCRIPTION

See CROWN No. 1.

PROCESS PATENT

See PATENTS FOR INVENTION No. 2.

PUBLICI JURIS

See PATENTS FOR INVENTION No. 2.

REFERENCE BY CROWN

See CONSTITUTIONAL LAW.

RE-ISSUE

See PATENTS FOR INVENTION No. 3 & 6.

RESPONSIBILITY

See SHIPPING AND SEAMEN No. 5.

REVENUE — *Income Tax Act, 1917, and Amendments—Non-resident person — Royalties from licensees under patent—Return of capital—"Income."* The appellant was a foreign corporation with its head office in the United States of America, having no office or place of business in Canada. It was the owner of certain inventions for paper machines for which letters patent had been issued by the Dominion of Canada. It did not manufacture or sell the patented machines, but granted licenses to persons in Canada to use the inventions aforesaid, for which it received royalties.—*Held*, that the use of these patents in Canada under the licenses was a use of a "thing" in Canada as contemplated by section 3 of chapter 46, 14-15 Geo. V (1924). 2. That, as there was a "thing" sold or used in Canada for which a royalty was paid, the appellant was carrying on a business in Canada, within the meaning of the Income War Tax Act, 1917, and amendments thereto, and the payment made under the licenses was not the return of capital, but "income" within the meaning of the statutes and was properly assessed as such. POPE APPLIANCES CORPORATION LTD. *v.* THE MINISTER CUSTOMS & EXCISE..... 17

REVENUE—Continued

2 — *Income Tax — Exemption — B.N.A. Act — Interpretation of Statute.*] By an Act of the province of Canada (12 V, c. 64, 1849), the salary of the Registrar of the Court of Chancery of Upper Canada was fixed at £400 "free and clear from all taxes and deductions whatsoever." This exemption is repeated by section 14 of ch. 12 of the Consolidated Statutes of Upper Canada (1859), save that the word "whatsoever" is left out. In 1876, by letters patent, H. was appointed to this office "with all the rights, privileges and emoluments, fees and perquisites," appertaining thereto, and now claims exemption from the Dominion Income Tax levied under The Income War Tax Act, 1917, and amendments thereto.—*Held*, that the power and authority to raise revenue for Dominion purposes is specially given the Parliament of Canada under the B.N.A. Act, and any legislation passed by the Old Province of Canada denying the right to tax or exempting any subject in Ontario to pay such tax could not obtain and be valid after the passing of the B.N.A. Act, and that the claim of the appellant herein to exemption should be dismissed. 2. Exemptions are matters of favour and special privilege and should be limited in their operation to the field of legislative authority in which they were created. They disappear in the event of a change in the constitution of the political community, such constitution depriving, either expressly or by implication, the pre-existing legislature of authority over any new field of taxation. *HOLMSTEAD v. THE MINISTER OF CUSTOMS AND EXCISE. . . 68*

3 — *Income Tax — Dividends — Preferred shares — "Borrowed capital" — Paramount right of Dominion Crown.*] The appellant was incorporated by letters patent under The Quebec Companies Act to take over a running concern and to pay for the same "en stock ou obligations . . . ou autrement." The capital stock was divided into 20,000 common shares and 20,000 fixed cumulative 8 per cent redeemable shares. The preferred shares carried certain priorities, etc., over common shareholders, *inter alia*, that of being paid out of the net profits of each year. Such shares, if not redeemed in the meantime, to be paid in 1936 at a fixed price and interest. A trustee was appointed to the sinking fund for the said preferred shares, which was protected as against the company and its creditors. Under the provisions of the Companies Act no preference or priority is given to the holders of such stock over creditors of the company.—*Held*, that the stock in question herein was essentially part of the capital of the company, and was not "borrowed capital used in the business to

REVENUE—Concluded

earn the income" within the meaning of subsection H of section 3 of the Income War Tax Act, 1917, as amended by 13-14 Geo. V, ch. 52, sec. 2, and that the dividends declared in respect of such stock were not exempt from taxation under the said Act. 2. That no agreement, arrangement or contract between the company and its shareholders (allowed under the Provincial law) could operate in derogation of the right of the Dominion Crown to tax under the B.N.A. Act, which right is paramount. *DUPUIS FRERES v. MINISTER OF CUSTOMS & EXCISE. 207*

RESTRICTIVE COVENANT

See CROWN No. 1.

SECURITY FOR COSTS

See PRACTICE Nos. 1 & 3.

SHIPPING AND SEAMEN

Action *in rem* No. 1.
Admiralty Act, 1891, No. 1.
Admiralty Courts, Nos. 1, 3.
Charter-Party, Nos. 1, 7.
Collision Nos. 5, 8, 9.
Colonial Courts of Adm. Act, 1890, Nos. 1, 2.
Costs, No. 4.
Damages, Division of: No. 6.
English Tariff of costs, No. 4.
Evidence, No. 3.
Exchequer Court, No. 2.
Interrogatories, No. 3.
Jurisdiction, Nos. 1, 2.
Narrow Channel, No. 9.
"Necessaries," No. 7.
Negligence, Nos. 5, 9.
Practice, Nos. 3, 4.
Responsibility, No. 5.
Taxation, No. 4.
Tug and tow, No. 6.
Wharfage dues, No. 7.

1 — *Admiralty Courts — Jurisdiction — Action in rem—Breach of charter-party—Colonial Courts of Admiralty Act, 1890 (53-54 Vict., c. 27 Imp.) and Admiralty Act, 1891, (54-55 Vict., c. 29, Can.)—Interpretation.*] This was an action *in rem* against the SS. *Woron* for breach of charter-party. Upon motion to set aside the writ and warrant of arrest for want of jurisdiction it was conceded that if the jurisdiction of this court was limited by the Colonial Courts of Admiralty Act of 1890 and the Admiralty Act of 1891, this court had no jurisdiction *in rem* in the premises.—*Held*, (reversing the judgment appealed from), that it is the policy of the law that jurisdiction cannot be extended except by clear and unambiguous legislation, and as the Act of 1925 (15-16 Geo. V, ch. 49 Imp.) was not made applicable to Canada, either by express words or by necessary intendment, the Admiralty jurisdiction thereby

SHIPPING AND SEAMEN—Continued

conferred on the High Court of Justice (England) did not extend to Canada, and that this court had no jurisdiction to entertain this action. 2. The word "existing" in subsection 2 of section 2 of the Colonial Courts of Admiralty Act, 1890, controlled as it is by the words "subject to the provisions of this Act" in subsection 3 of section 2, and the words "under this Act" and "by this Act" in section 3 and the proviso thereto, must be taken to relate to the Jurisdiction existing at the date of the Act, and that only; and that the plain reading of this Act ties the jurisdiction of the Canadian Admiralty Court to that of the English High Court as it existed at the time of the passing of the said Act, and no more. 3. Held further that the Parliament of Canada has only a limited power of legislation in respect of admiralty jurisdiction. It cannot confer upon the Exchequer Court any jurisdiction which was not conferred by the Colonial Courts of Admiralty Act, 1890, upon a Colonial Court of Admiralty. *THE SS. Woron AND CANADIAN AMERICAN SHIPPING Co. LTD.* 1

2 — *Exchequer Court — Jurisdiction — Colonial Court of Admiralty Act, 1890 (Imp.) — R.S.C., 1906, c. 141, sections 3 and 4.* Plaintiff company was owner, or licensee and bailee, of a submarine trans-pacific (Honolulu) cable, and in sole control and operation thereof. Defendant wilfully anchored to said cable, off Montara point, near San Francisco, on the high seas, using it as a deep sea anchor, contrary to all rules of good seamanship, and with the object of keeping herself in a favourable position off the coast, for smuggling liquor into the United States, and thereby damaged the said cable. Hence this action. The ship was arrested within the jurisdiction of this court to answer the claim for such damages, and it was contended that the court had no jurisdiction to entertain such action.—*Held*, that the words "subject to the provisions of this Act" in section 2 (2) of the Colonial Courts of Admiralty Act, 1890, did not reduce the jurisdiction of this court below that of the High Court of Justice in England. 2. That furthermore the words "within Canada" and "throughout Canada and the waters thereof" in sections 3 and 4 of the Admiralty Act of 1891, (R.S.C., 1906, c. 141), did not limit this court's jurisdiction to those merely domestic matters which, with all their attendant circumstances, arise within Canada's borders, and that this court had jurisdiction in the present action. *COMMERCIAL PACIFIC CABLE Co. v. THE Prince Albert.* 44

SHIPPING AND SEAMEN—Continued

3 — *Practice — Admiralty — Interrogatories — Admissibility of evidence.* The defence alleged "that it is the custom for vessels engaged in trading between ports on Puget Sound and Europe to touch at various ports on the west coast of the United States, etc. . . ." Thereupon plaintiffs applied for an order compelling defendant to answer the following interrogatory: "What instances of the custom alleged . . . have occurred, and when?"—*Held*, that, as it is not the purpose of the question to obtain the names of witnesses of the defence; nor to see the opponent's brief but is nothing more than "particulars of the specific occasions" upon which vessels deviated from their voyages, and upon which the defence relies to establish the existence of the custom alleged, that such evidence is material, and the application should be allowed. 2. That the testimony of witnesses giving their opinion or judgment, as to the existence of a custom, should not be received; it is the fact of a general usage or practice which must be proved. Unless witnesses can, of their own knowledge, give instances of the usage having occurred, their testimony is not entitled to much weight, before the court. *HEIDNER AND COMPANY v. THE Hanna Neilson* 75

4 — *Practice — Admiralty Rule 228 — Costs — Taxation — English Tariff not applicable.*—*Held*, that Rule 228 of the Admiralty Rules of the Exchequer Court of Canada is not to be so interpreted as to allow a party taxing a bill in a proceeding or action on the Admiralty side of the Court to include in his bill items taxable under the Admiralty Tariff of the High Court of Justice in England, but which are not found in the Admiralty Tariff of the Exchequer Court of Canada. *The Paschena v. The Griff.* 92

5 — *Collision — Absence of proper lights — Responsibility — Negligence — Barge's responsibility.* The tug *Florence* was at night coming down stream in a narrow channel, in which and in the waters below it, there was a cross current, towing a string of barges and proceeding without the proper regulation lights upon the barges, when a collision occurred, with an upgoing vessel. The weight of evidence was that the Master of the upgoing vessel was misled, by the absence of proper lights, into accepting a passing signal.—*Held* that the tug and barges were negligent in deliberately breaking Rule 12, and thus misleading the upgoing vessel, and in failing to keep a proper and sufficient lookout, and were liable for the damages caused by such collision, notwithstanding the acceptance of the

SHIPPING AND SEAMEN—Continued

passing signal. 2. That though the barges, each in charge of a crew, are bound to obey the orders of the Master of the tug, the crew remains responsible for the lighting and watching on their particular barge. [Certain findings were made by the judge, in this case, in reference to the navigation of the waters just west of the Lachine Canal, which should prove useful to all vessel owners and mariners traversing these waters.] *KEYSTONE TRANSPORTS LTD. v. THE OTTAWA TRANSPORTATION Co. LTD.*..... 123

6 — *Towage—Duty of tug—Damages—Division of damages.*—*Held:* That it was the duty of a tug when engaged in towing to stand by in case of accident and also to return to part of the tow which is disabled or adrift, after leaving the remainder in safety. That when supervening circumstances, stress of weather or other emergency are such as to justify the towing vessel in abandoning her contract, it is still her duty to remain by the towed vessel and its cargo, for the purpose of rendering assistance, but this duty is subject to the condition that the safety of the tug or its crew is not thereby endangered. The Court must be satisfied that the attendant circumstances warrant such a conclusion. 2. That the Admiralty rule as to division of loss applies to cases where two colliding vessels are damaged. In a case where an innocent ship is damaged by a collision through the fault of two other ships, the innocent ship (or in this case the cargo) can recover its whole damage from either of the delinquent ships. *RUSSELL v. The Gloria*..... 162

7 — “Necessaries” — *Wharfage dues—Charter-party.* On May 27, 1926, the defendant ship, a foreign ship, discharged her cargo at the port of Hamilton and loaded another cargo. The plaintiff's dock and warehouse were used by the defendant ship under the authority of the Master thereof. The defendant was bound to incur the charges made for the use of this dock and warehouse before he could discharge his cargo and leave the port of Hamilton.—*Held,* that such charges were to be considered as “necessaries” within the meaning of the Admiralty Act. 2. That where the plaintiff had no notice of the charter-party and the Master and crew remained the servants of the owners of the ship and there was no demise of the ship to the time charterers, the owners were liable for necessaries ordered and authorized by the Master and were liable for the necessaries above referred to. *HAMILTON HARBOUR COMMISSIONERS v. THE SHIP Whechita*..... 176

SHIPPING AND SEAMEN—Continued

8 — *Collision — Canal Navigation — Speed—Rules 17, 25, 29, 37 and 38 of the Rules of the Road for the Great Lakes.* A collision occurred between the plaintiff's ship, the *Simpson*, and the *Vinmount*, between locks 10 and 11 on the Welland Canal at 8 a.m. in August. This stretch is crossed by a foot bridge, 600 feet from lock 11 with two draws of 45 feet each, and a railway construction bridge 1,050 feet lower down. The distance between lock No. 10 and lock No. 11, is 3,500 feet and there is there a current of one mile an hour. The *S.* left lock No. 11 before the *V.* got under way to leave lock 10. The *S.* proceeded down, with the current, at a low speed, of about two and a half miles. Leaving lock 11 she had only 600 feet to the foot bridge where she passed in the port draw; then proceeded down towards the other bridge. The master of the *V.* stated he proposed to meet the *S.* at the foot bridge, but the *S.* had only 600 feet to cover whilst the *V.* had 2,900 feet. The *V.*'s preliminary act stated she intended to meet the *S.* between the two bridges, which was contrary to custom. Both captains saw the ships in the lock. The *V.* saw the *S.* was at an equal distance from the railway construction bridge and he maintained a speed of at least four and half miles, up to the time when he heard the alarm signal and then reversed and dropped anchor, and the collision occurred.—*Held,* on the facts that the determining cause of the accident was the bad seamanship of the *V.* in maintaining the speed she did, and in not slowing up earlier, and in endeavouring to pass the *S.* where she did. 2. That, as the *S.* had the right of way, being with the current, and as the *V.* knew that by going ahead she was bound to meet the *S.* in a stretch between the bridges, contrary to custom, she was required by the ordinary practice of seaman and of good seamanship to have held back and waited below the railway construction bridge until the *S.* had passed clear. *MADDEN v. THE STEAMER Vinmount*..... 212

9 — *Collision — Negligence — Duty of Masters—Narrow channel.*—*Held,* that when two vessels are meeting in a narrow channel, careful watch must be kept by the Masters of each vessel over the movement of the other vessel and they must be prompt to signal in case of emergency resulting from their manoeuvres. Carelessness or neglect to so act, if damage results therefrom, is negligence for which each vessel offending is liable. Neglect when practicable to slow down or to wait when conscious that the other vessel is in difficulties is likewise negligence in navigation.—The action of the Master of a ship in altering the entries

SHIPPING AND SEAMEN—*Concluded*

in his Scrap Log Book in reference to a collision after it had taken place was strongly condemned by the court. *THE EASTERN STEAMSHIP COY. v. SS. Alice AND J. P. PORTER & SONS LTD. v. THE SS. Wm. C. Warren*..... 228

SPECIFICATION

See PATENT FOR INVENTION No^s. 2, 5 & 7.

STATUTES OF LIMITATION

See CROWN No. 1.

TAXATION OF COSTS

In Admiralty.

See SHIPPING AND SEAMEN No. 4.

TIMBER LIMITS

See CROWN No. 3.

TOWAGE

See SHIPPING AND SEAMEN No. 6.

TRADE-MARKS — *Expunging—Jurisdiction — Lapsing—Purity of Register.*—*Held*, that the Exchequer Court of Canada has sole original jurisdiction to entertain proceedings for expunging a registered industrial design, and should exercise such jurisdiction without concerning itself with proceedings begun in a provincial Court for the same purpose. 2. That notwithstanding that the industrial design herein had not been renewed under the provisions of sec. 30 of the Trade-Mark and Design Act, and therefore had lapsed, nevertheless as it was found to have been registered "without sufficient cause" the Court should order it to be expunged for the purpose of maintaining the purity of the Register. (*Billings et al v. Canadian Billings Co. (1921)* 20 Ex. C.R. 405 referred to.) *EPSTEIN v. O-FRE-CHEE, LTD.*..... 156

2 — *Expunging — Deception — General feature.*] Plaintiff was the owner of a specific trade-mark to be applied to the sale of cigars, etc., consisting of a label containing a picture of General Stonewall Jackson and the words "Stonewall Jackson," the signature of "H. Jacobs & Co.," a printed impression of a five pointed star in a circle with the words "Stonewall Jackson, H. Jacobs & Co. Established 1858" in a ring around such circle, and also a second trade-mark used with respect to cigars and consisting of a ribbon inserted through the end of the cigar, at the tip, from side to side. The defendants own a trade-mark for the name "Madelon" and also an industrial design of a "cigare, traversé longitudinalement par un ruban dont les extrémités dépassent légèrement chaque bout du cigare." It is contended by plaintiff that the defendants infringe its trade-mark by the use of a ribbon in its cigars, as described in its industrial design.—*Held*, that as the main feature of each trade-mark was the name "Stonewall Jackson" and "Madelon" respectively, and as the

TRADE-MARKS—*Concluded*

use of a ribbon in the particular manner used by each could only be called a secondary feature of the trade-mark, the two marks were perfectly distinct and not liable to create deception, and the plaintiff's action was dismissed. *GENERAL CIGARS COMPANY LTD. v. DESLONG-CHAMP*..... 159

See PRACTICE No. 3.

TREATY OF PEACE—(*Germany*) *Order, 1920 — "Enemy" — Interpretation.*] The petitioner Leo Baumfelder was born in Germany in February, 1897. At the age of thirteen he went to England with his father and mother, and they took up residence in London. In 1910 he was sent to school, and it was intended that he should go to Oxford University, having passed his entrance examination. At the age of 18 years, he was interned in England, with his father, as an alien enemy, until July, 1919, when they were both deported, by British authorities to Germany. He, L.B., remained there until shortly after his mother's death in 1922, when he came to America, where he has since resided. The mother and sister remained in England, visiting him in Germany in June, 1920, returning to London in the fall, and again going to Germany in 1921, where the mother died.

Held: On the above facts, that the petitioner L.B. was not a resident of Germany, in the sense intended by sec. 32, ss. 1 (a) of The Treaty of Peace (Germany) Order, 1920, and was not an "enemy" within the meaning of said section. 2. That said section 32 did not contemplate the broad inclusion of a German National who did not during the period of actual war reside or do business in Germany, unless at least, subsequent to the armistice and prior to January 10, 1920, he returned to Germany with the intention of resuming his domicile or residence therein. *BAUMFELDER v. THE CUSTODIAN*..... 86

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