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LAW REPORTS

Exchequer Court of Canada

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1937



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 EUGENE REAL ANGERS
(Appointed 1st February, 1932)

DISTRICT 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 LOUIS PHILIP DEMERS, Quebec Admiralty District—appointed 3rd
November, 1928.

His Honour FRANK M. FIELD, Ontario Admiralty District—appointed 7th December,
1932.

do DONALD MCKINNON, Prince Edward Island Admiralty District—appoint-
ed 20th July, 1935.

do LEONARD PERCIVAL DE WOLFE TILLEY, New Brunswick Admiralty District—
appointed 14th August, 1935.

The Honourable WILLIAM F. CARROLL, Nova Scotia Admiralty District—appointed 23rd
April, 1937.

DEPUTY LOCAL JUDGE:

The Honourable Sir JOSEPH A. CHISHOLM—Nova Scotia Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Honourable ERNEST LAPOINTE, K.C.

The Honourable HUMPHREY MELLISH, District Judge in Admiralty for the Nova Scotia Admiralty District, died during the current year.

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2. *King, The v. Southern Canada Power Co. Ltd.* (1934) Ex. C.R. 142. Appeal to the Supreme Court of Canada allowed in part. Leave to appeal to the Privy Council granted. Appeal allowed. Cross-appeal dismissed.

B. To the Supreme Court of Canada:

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3. *Imperial Tobacco Co. of Canada Ltd. et al. v. Rock City Tobacco Co. Ltd.* (1936) Ex. C.R. 229. 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

BETWEEN:

HIS MAJESTY THE KING, on the Information of the Attorney-General of Canada	}	PLAINTIFF;
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1936
 Mar. 16
 Nov. 18

AND

BILTRITE TIRE COMPANY DEFENDANT.

Revenue—Sales Tax—Excise Tax—Special War Revenue Act, R.S.C. 1927, c. 179, secs. 80, 81, 86, 95—“Manufacturer.”

The defendant purchased in bulk lots, by the pound, old motor vehicle tires which could no longer be used as such, paying for them at so much per ton. These worn-out tires were treated and retreaded by defendant, the number and name of the manufacturer of the original tire remaining apparent on the side walls along with the serial number marked thereon by the defendant. These rebuilt tires were sold under the name Biltrite Tires to casual purchasers or wholesale dealers; the defendant also carried on a mail order business in such tires.

Held: That defendant is a manufacturer within the scope of the Special War Revenue Act, R.S.C. 1927, c. 179 and amendments thereto, and liable to pay the sales and excise taxes and licence fees provided in such Act.

ACTION by the Crown to recover from defendant certain money alleged due for sales tax, excise tax and licence fees on motor vehicle tires manufactured and sold by it.

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

F. B. Matthews for plaintiff.

Wilfrid Heighington, K.C., for defendant.

The facts are stated in the reasons for judgment.

ANGERS J., now (November 18, 1936) delivered the following judgment:

This is an action brought by His Majesty the King, on the information of the Attorney-General of Canada,

<p>1936 <u>THE KING</u> v. BILTRITE TIRE COMPANY. <u>Angers J.</u></p>	<p>against Biltrite Tire Company for the recovery of sales tax, excise tax and licence fees totalling \$5,547.05 as follows:</p> <p>Sales tax \$2,674 55 Licence fees 6 00</p> <hr/> <p>Excise tax 2,860 50 Licence fees 6 00</p> <hr/> <p style="text-align: right;">2,866 50</p> <hr/> <p style="text-align: right;">\$5,547 05</p>
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[The learned Judge here referred to the pleadings.]

A statement of facts was filed to obviate the necessity of producing witnesses; it seems to me apposite to quote it verbatim:

1. Biltrite Tire Company is the trade name under which John J. Weston carried on in the City of Toronto during the years 1933, 1934 and 1935 a business of which he was the sole proprietor. The headquarters and main establishment were at 121 DeGrassi street in the said city and consisted of a series of connected frame buildings (one of them being plaster over lath). The firm employs at the present time in this building some nine men but, when business conditions were better, some twice that number were employed. There was also one other establishment, in the nature of a retail store, to which reference is made later. This store was located at 279 Queen Street East.

2. The company purchased, in bulk lots, by the pound, old and worn-out motor vehicle tires. The source of purchase was generally junk dealers or storage yards both in this country and in the United States. The system of purchase was simply to order the goods in carload lots and to pay for them at so much a ton. Any duty that was exacted upon the articles when brought into Canada was paid on entry. On receipt, the worn-out and old motor vehicle tires were placed in part of the buildings set aside for that purpose.

3. The company then took the tires and put them in a heater. Here, in sustained heat, all dampness was taken from the tires, both inside and out. This is an essential preparation for the subsequent steps that were taken.

4. The tire was next placed upon a rack where the holes or "blow-outs" in it were buffed and cleaned. Next, the tire was placed in a frame against which a sharp dented wheel revolved to cut off the old tread. The tire was then cemented on the inside and the holes patched with cord material. The tire was then cemented on the outside. Through-out this and all subsequent steps the sidewall of the tire was not dismantled or destroyed. The tire was then taken to another machine where "callendered-tread stock," a plastic rubber preparation, was applied to the top of the tire. The tire was then taken to what was termed the "cure-room," where it was placed first in an iron mould which was firmly clamped about it. The mould was in the shape of a wheel and the mould,

complete with its encased tire was placed flat on a press inside a large boiler. A number of tires, each in a clamp as stated, were piled one on top of the other until the boiler was filled with twenty tires or so. A lid was then placed upon the boiler and firmly sealed. Hydraulic pressure was then applied for an hour or an hour and a half. This had a squeezing effect upon the clamped tires, they were firmly held and cooked into a state in which the repairs to the holes and blow-outs, the cementing inside and without, and the new tread, were firmly and permanently affixed to the carcass, i.e. the fabric and side walls of the original tire. In no part of these steps, including the final one, was the numerical identification of the original tire destroyed. The name of the manufacturer of the original tire was still clearly marked upon its side walls upon which the defendant company also marked a serial number.

5. The tire was then ready for sale and laid in a rack as such. The tires were sometimes sold in quantities and sometimes as a single sale to casual purchasers. The retail store, heretofore mentioned, stocked these tires and sold them to such persons as applied to the store for that purpose. Attached hereto is some of the advertising literature of the company, and a dealer's discount sheet, all part of the company's ordinary advertising and business literature. The sale of accessories and parts is sufficiently covered in these documents.

Attached to this statement of facts and filed with it are three documents: (a) a dealers' discount sheet; (b) an order form; (c) a handbill advertising the defendant's wares.

The front page of the handbill is entirely devoted to tires and tubes; the other pages have reference to automobile parts and accessories.

On the front page we find, among others, the following statements, which offer some assistance in determining the nature of the defendant's business:

Bilrite Tires Have Made Tire History

Thousands of our newly treaded tires as listed here at these unusually low prices have withstood the test on all makes of cars and trucks, in all climates, over all kinds of roads, and under the most gruelling conditions and abuse. They surpass some of the best-known tires on the market and pile up mileage records never thought possible.

Every tire has been newly treaded with a heavy, strong, high tempered, deep, wide tread to give resistance to violent shocks, where the greatest resistance is needed. In such well-known makes as Goodyear, Firestone, Goodrich, etc. Scientifically designed with the most improved features that give these Super Safe High Speed Treaded Tires unsurpassed strength and endurance. Our low selling cost enables us to offer our many customers guaranteed tires of quality and outstanding appearance, never offered before.

On the same page appears what is called a "Guarantee Bond" of which it is perhaps expedient to quote the following extract:

Every tire sold by us, bearing our serial number, and listed under column "B," is guaranteed for the period of eight (8) months, and under

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 v.
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 TIRE
 COMPANY.
 Angers J.

column "C" and "CH" for twelve (12) months from date of purchase (except commercial or truck tires listed under "C," which are guaranteed for six (6) months).

The front page of the handbill further contains a list of prices of the different classes of "Biltrite" tires and tubes and certain observations concerning the terms of payment.

At the bottom of the page, next to the name of the company, are indicated the following addresses: Store, 279 Queen East; Mail Order Dept., 121 DeGrassi St., both in Toronto.

The "dealers' discount sheet" mentions the discounts allowed to dealers on tires and tubes and on accessories. The discounts on tires and tubes vary according to the quantity.

Under the heading "Dealers' Prepayment Plan" we find on this sheet the following conditions:

When discounts are deducted or when tires and tubes are purchased in quantities for resale purposes the prepayment plan appearing on the list and on reverse of the order form does not apply and is hereby cancelled. The following is substituted:—

All tire and tube orders of \$50 and over are prepaid to any point in Ontario, Quebec, and the Maritime provinces. Orders to Manitoba, Saskatchewan are also prepaid if same exceed \$100. Orders from Alberta and British Columbia are not prepaid, but customers in these provinces may deduct an extra 10 per cent from their order in lieu of transportation charges.

Immediately after this clause appears the name of the company followed by the words "Toronto, Ontario" and these addresses:

Mail Order Dept.

121 DeGrassi Street.

City Sales and Service

279 Queen St. East.

The order form proper offers no particular interest; on the back are printed the conditions relating to the "prepayment plan" (referred to in the clause of the "dealers' discount sheet" hereinabove quoted), the terms of payment, a notice dealing with the return of goods, etc., all of which have no relevance in the issue herein.

The facts, as we see, are simple. Perhaps it will be convenient to summarize them briefly.

The defendant purchases old tires, which can no longer be used as such, in carload lots, paying for them at so much per ton. These worn-out tires are treated and re-treaded in the manner set forth in the statement of facts. The tire is first put in a heater to remove all dampness.

Following this operation, the holes in it are buffed and cleaned. The old tread is entirely cut off. The carcass or fabric of the tire is then cemented on the inside and on the outside. A new tread, consisting of a plastic rubber preparation, is applied and moulded on the top of the tire. The number and the name of the manufacturer of the original tire are not destroyed but remain apparent on its side walls along with the serial number marked thereon by the defendant.

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The new or rebuilt tires were sold under the name Biltrite Tires either to casual purchasers or to wholesale dealers, as shown by the statement of facts and the documents attached thereto; the evidence also discloses that the defendant carried on a mail order department.

The period with which we are concerned is from the 23rd of October, 1933, to the end of July, 1935. The reason for using the 23rd of October, 1933, as starting point, according to a statement by counsel for plaintiff, is that a ruling was issued on that date by the Department of National Revenue, embodied in a circular, a copy whereof was filed as exhibit 1. The only relevant clause of this circular (No. 741-C), bearing date the 23rd of October, 1933, and addressed to Collectors of National Revenue, reads as follows:

Persons who import or purchase in Canada, used tires which they retread and sell, are required to operate under sales and excise tax licences and the special excise tax would apply only on importation. Persons operating in this manner are required to account for the Excise Tax of 2 cents per pound on the finished tires produced, together with the Sales Tax of 6 per cent on the sale price.

A copy of a letter from the Commissioner of Excise to the defendant, dated November 27, 1934, was filed as exhibit 2; it is worded as follows:

The Department has given the question of the retreading of tires further consideration and has now decided as follows in so far as the application of the tax to the retreading is concerned, the new ruling taking effect as from date of receipt of this notice:

Circular No. 741-C of October 23, 1933, remains in effect.

When a customer supplies worn tires to a retreader for retreading purposes, the following rulings apply:

If the retreader is a small manufacturer such as those contemplated by Section 95, Subsection 2, of the Special War Revenue Act, it would not be necessary for him to be licensed nor to account to the Crown for either sales or excise taxes on the operation, though his purchase of supplies would be taxable. If his business is solely confined to the retreading of customers' tires but his status is not that of a small manufacturer

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within the meaning of Section 95, Subsection 2, of the Act, the excise tax would not apply, but he would be liable for the sales tax and would, of course, be required to hold a sales tax licence.

I do not think that this letter has any bearing on the present case.

The plaintiff's claim is based:

(a) with respect to the sum of \$2,674.55 for sales tax, on section 86 of the Special War Revenue Act, R.S.C. 1927, chap. 179, and amendments;

(b) with respect to the sum of \$6 for licence fees under Part XIII of the Act (consumption or sales tax), on section 95;

(c) with respect to the sum of \$2,860.50 for excise tax, on section 80;

(d) with respect to the sum of \$6 for licence fees under Part XI of the Act (Excise taxes), on section 81.

The material provisions of sections 86, 95, 80 and 81 read thus:

86. (1) There shall be imposed, levied and collected a consumption or sales tax of six per cent on the sale price of all goods,—

(a) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

95. (1) Every manufacturer or producer shall take out an annual licence, for the purpose of this Part, and the Minister may prescribe a fee therefor, not exceeding two dollars.

80. (1) Whenever goods mentioned in Schedules I and II of this Act are imported into Canada or taken out of warehouse, or manufactured or produced in Canada and sold, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other statute or law, an excise tax in respect of goods mentioned.

(a)
 (b) in Schedule II, at the rate set opposite to each item in the said schedule.

Schedule II to which section 80 refers contains (*inter alia*) the following item:

3. Tires and Tubes—

(iii) Tires in whole or in part of rubber for automotive vehicles of all kinds, including trailers or other wheeled attachments used in connection with any of the said vehicles—...two cents per pound;

Inner tubes for use in any such tires.....three cents per pound.

81. The Minister may require every manufacturer or producer to take out an annual licence for the purpose of this Part, and may prescribe a fee therefor, not exceeding two dollars, and the penalty for neglect or refusal to obtain a licence shall be a sum not exceeding one thousand dollars.

At the trial counsel for plaintiff stated that a figure of \$4,620.29 (in lieu of \$5,547.05) had been agreed upon, the said amount including sales and excise taxes and licence

fees but no penalties; that, in order to avoid any possibility of double taxation, the Department had given credit for all taxes paid by the defendant on importations or purchases in Canada of any of its raw materials. In the circumstances the only question remaining for determination is whether the defendant was, during the period from the 23rd of October, 1933, to the end of July, 1935, a manufacturer or producer within the meaning of the Special War Revenue Act.

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The defendant claims that he is merely a repairman; he denies being a manufacturer or producer.

The success or failure of the action rests on the interpretation to be given to the words "manufacturer" or "producer."

The word "producer" is defined:

In the *Oxford Dictionary*—

- (1) One who or that which produces.
- (2) One who produces (grows, digs, or manufactures) an article of consumption. Opposed to consumer.

In the *Imperial Dictionary*—

One who or that which produces or generates.

In the *Webster's New International Dictionary*—

- (1) One who produces, brings forth, or generates.
- (2) One who grows agricultural products, or manufactures crude materials into articles of use.

The word "manufacturer" is defined:

In the *Oxford Dictionary*—

- (1) An artificer, an operative in a manufactory.
- (2) One who employs workmen for manufacturing; the owner of a manufactory.

In the *Imperial Dictionary*—

One who manufactures; one who employs workmen for manufacturing; the owner of the manufactory.

In the *Webster's New International Dictionary*—

One who manufactures; specif.: (a) a factory operative. Obs. (b) an employer of operatives in manufacturing; the owner of a manufactory.

The word "manufacture" (as a verb) is defined:

In the *Oxford Dictionary*—

- (1) To work up (material) into forms suitable for use.
- (2) To make or fabricate from material; to produce by labour (now esp. on a large scale).

In the *Imperial Dictionary*—

- (1) To make or fabricate from raw materials, and work into forms convenient for use, especially by more or less complicated processes; . . .
- (2) To work up into suitable forms for use; . . .

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In the *Webster's New International Dictionary*—

- (1) To make (wares or other products) by hand, by machinery, or by other agency; . . . to produce by labour esp., now, according to an organized plan and with division of labour, and usually with machinery.
- (2) To work, as raw or partly wrought materials, into suitable forms for use; . . .

In the *Encyclopaedic Dictionary*

- (1) To make or fabricate by art and labour from raw materials; to form by workmanship.

The word "manufacture" (as a noun) is defined:

In the *Oxford Dictionary*—

- (1):(a) The action or process of making by hand.
- (b) The action or process of making articles or material (in modern use, on a large scale) by the application of physical labour or mechanical power.

In the *Imperial Dictionary*—

- (1) The operation of making wares of any kind, as cloth, paper, books, and whatever is used by man; the operation of reducing raw materials of any kind into a form suitable for use, by more or less complicated operations.

In the *Webster's International Dictionary*—

- (1) A making by hand. Obs.
- (2) The process or operation of making wares of any material products by hand, by machinery, or by other agency.

In the *Encyclopaedic Dictionary*—

- (1) The act, process, or operation of manufacturing or making wares of any kind; the process of reducing raw materials to a form suitable for use, by operations more or less complicated.

The word "produce" (as a verb) is defined as follows:

In the *Oxford Dictionary*—

- (3) To bring forth, bring into being or existence. (a) generally. To bring (a thing) into existence from its raw materials or elements, or as the result of a process. (d) To work up from raw material, fabricate, make, manufacture (material objects).

In the *Imperial Dictionary*—

To make; to bring into being or form; . . .

In the *Webster's International Dictionary*—

- (3) To make economically valuable; to make, or to create so as to be, available for satisfaction of human wants.
- (5) To give being or form to; to manufacture; make; . . .

In Words and Phrases Judicially Defined, Vol. 5, pages 4346 and 4347, we find, among others, the following definitions:

A manufacturer is one who is engaged in the business of working raw materials into wares suitable for use. *People v. New York Floating Dry Dock Co.* (N.Y.), 11 Abb. N.C. 40, 42; *Consumers' Brewing Co. v. City of Norfolk* (Va.), 43 S.E. 336.

A "manufacturer" is defined to be one who is engaged in the business of working raw materials into wares suitable for use; who gives new

shapes, new qualities, new combinations, to matter which has already gone through some artificial process. A manufacturer prepares the original substance for use in different forms. He makes to sell, and stands between the original producer and the dealer and first consumer, depending for his profit on the labour which he bestows on the raw materials. *State v. Dupre*, 7 South. 727, 42 La. Ann. 561 (quoting *City of New Orleans v. La Blanc*, 34 La. Ann. 596, 597; *City of New Orleans v. Ernst*, 35 La. Ann. 746, 747); *State v. American Sugar Refining Co.*, 32 South. 965, 973, 108 La. 603.

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Reference was made by counsel to certain decisions in which the words "manufacturer" and "producer" have been interpreted; it is, I think, apposite to note briefly those which, although not exactly in point, appear to be the most pertinent.

In the case of *The Minister of National Revenue v. Dominion Shuttle Co.* (1), in which the Crown was seeking to recover sales tax on "cross arms" made from lengths of lumber bought from a saw-mill and sold to a railway company, it was held:

Where goods are shipped from British Columbia as raw material, or prepared raw material, to a place in this province, the consignee who has to perform certain work to make them a finished product before they can be delivered to the consumer, is a manufacturer, and as such, is liable for the payment of the sales tax on the sale price, including costs of transportation.

The work performed by the defendant is described in the judgment as follows (p. 17):

The work on these lengths by defendant was: first, to cut them in lengths of 10 feet, or 8 feet; second, to creosote them, or dip them in creosoting oils to preserve them against the elements of the weather (for which defendants have a special plant); third, to round them or mill or dress the lumber to the rounded shape; fourth, to bore holes in them in order to insert the pin on which the insulator is placed; and after this work was done, they were sold to the Canadian Pacific Railway at the price, not based on so much a thousand feet, but based on so much per hundred "cross arms."

Defining the manufacturer, Archambault J. said (p. 18):

First, what is a manufacturer? There is no definition of the word "manufacturer" in the Act and it is practically impossible to find a definition which will be absolutely accurate, but from all the definitions contained in leading dictionaries, Corpus Juris, Encyclopedias, etc., the Court gathers that to manufacture is to fabricate; it is the act or process of making articles for use; it is the operation of making goods or wares of any kind; it is the production of articles for use from raw or prepared material by giving to these materials new forms, qualities and properties or combinations whether by hand or machinery.

This is exactly what the defendant company did. They received the raw material or prepared raw material, or lengths of lumber, and put

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them through the processes already mentioned to make "cross arms" and sold them to the consumer.

The next case to which I shall refer is that of *His Majesty The King v. Vandeweghe Ltd.* (1). The respondents, Vandeweghe Ltd., were engaged in the business of wholesale dealers in, and dyers and dressers of, raw furs. They purchased raw furs or skins from trappers and other persons; they dressed and dyed these skins and sold them to furriers. The respondents urged that they did not cut nor trim the furs but that they confined their work to dressing and dyeing them.

The judgment of the Court was delivered by Duff, C.J. (now Sir Lyman Duff), who said (p. 248):

We are not able to agree with the view advanced by the respondents that these articles sold by them are not within the contemplation of s. 86. The words "produced" and "manufactured" are not words of any very precise meaning and, consequently, we must look to the context for the purpose of ascertaining their meaning and application in the provisions we have to construe. S. 19BBB (1) gives us some assistance. Goods which are to be used in, or wrought into, or attached to, articles to be manufactured or produced for sale may still be "goods produced or manufactured" in Canada within the meaning of the section. And the matter is further elucidated by reference to ss. 4, which enumerates many exceptions.

In the case of *Versailles Sweets, Limited* and *The Attorney-General of Canada* (2), the head-note reads as follows:

By the Special War Revenue Act of 1915 as amended in 1921 and 1922, a tax is imposed on sales by manufacturers to consumers, the purchaser in each case to be given an invoice.

Held, that notwithstanding the difficulty of furnishing invoices of sales for very small amounts, and that in such cases the exact amount of the tax cannot be collected from the purchaser, the manufacturer of candy for sale over the counter at 30 cents and 40 cents per pound is liable for the amount of the prescribed tax on each such sale.

The appellant, Versailles Sweets, Limited, carried on a business which included a restaurant, an ice cream parlour and a candy shop; in the latter were sold, at retail, sweets purchased from manufacturers and others made in the appellant's own kitchen. The question which arose was whether the appellant was subject to sales tax under section 19BBB of the Special War Revenue Act of 1915. After quoting the relevant provision of section 19BBB, Duff, J. (now Sir Lyman Duff), (p. 467) states:

It is argued that "manufacturers" in this context does not include manufacturers who sell exclusively to consumers, within which description

(1) (1934) S.C.R., 244.

(2) (1924) S.C.R., 466.

the appellant company admittedly would be included. It is pointed out that retailers—persons who sell by retail to consumers, who are neither wholesalers (that is to say, who do not sell to retailers) nor manufacturers—do not fall within the incidence of the section. Sales by them are not within the scheme of taxation established. It is argued that such a scheme naturally excludes all sales by persons, whether manufacturers or not, who sell exclusively to consumers; and in support of the contention that the scheme of the Act excludes them, the appellant calls attention to the circumstance that, in case of sales coming within the ambit of the section, the seller is obliged to furnish the purchaser with what is called an “invoice”; and moreover, that, having regard to the scale of the tax, it would be impossible, in the case of sales of sweets in small quantities to consumers, to collect the exact amount payable; and consequently that, in order to carry out the provisions of the Act, the seller in each case, if the Act applied to such sales, would be obliged to collect a sum greater than the tax.

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Without denying the force of much of this argument, it does not, in my judgment, carry one to the point at which one is entitled to ascribe to the word “manufacturer” a less limited meaning than that which it naturally and ordinarily bears. The rule for the construction of a taxing statute is most satisfactorily stated, I think, by Lord Cairns in *Partington v. Attorney General* (L.R. 4 H.L. 100, at page 122):—

I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

Lord Cairns, of course, does not mean to say that in ascertaining “the letter of the law,” you can ignore the context in which the words to be construed stand. What is meant is, that you are to give effect to the meaning of the language; you are not to assume:

any governing purpose in the Act except to take such tax as the statute imposes

as Lord Halsbury said in *Tennant v. Smith* (1892, A.C. 154).

Among other Canadian cases in which the meaning of the words “manufacturer” and “producer” has been considered are the following: *The Minister of Customs and Excise v. The Dominion Press Ltd.* (1); *His Majesty the King v. Fraser Companies Limited* (2); *His Majesty the King v. Karson* (3); *His Majesty the King v. Pedrick et al.* (4); *In re McGaghan* (5); *Rex. v. Woodhouse* (6); *His Majesty*

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| (1) (1927) S.C.R. 583; | (3) (1922) 21 Ex. C.R. 257. |
| A.C. 340. | (4) (1921) 21 Ex. C.R. 14. |
| (2) (1931) S.C.R. 490. | (5) (1931) 40 O.W.N. 122. |
| (6) (1926) 31 O.W.N. 263. | |

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the King v. Irwin Printing Co. Ltd. (1); *Bank of Nova Scotia v. His Majesty the King* (2).

The definition of the words "manufacturer" and "manufacture" has been given some consideration in the courts of the United States; reference may be had with some benefit, to, among others, the following cases: *In re I. Rhein-strom & Sons Co.* (3); *State v. American Sugar Refining Company* (4); *State v. Hennessy Co.* (5). The three cases are interesting, but, seeing that these notes are already extensive, I will content myself with citing a passage from the judgment in *State v. American Sugar Refining Company* (*supra*) at p. 973:—

So with sugar refining. It is as impossible to produce the refined product from the raw sugar, without the latter being liquefied, purified in the liquid state, and recrystallized into the final product, as it is to make steel from crude pig iron without liquefying the iron and subjecting it in that state to the processes necessary to produce the steel. And the sugar refiner who produces the refined product from the liquefied raw sugar, whether that raw material had ever before been crystallized or not, is as logically and as certainly a manufacturer as the producer of steel from the crude molten iron, whether that iron had ever before been crystallized into pigs or not. If one should import for remanufacture india-rubber shoes of crude manufacture, as was done by the importer in *Lawrence v. Allen*, 7 How. 785, 12 L. Ed. 914, and should melt them down and manufacture out of this material other and different india-rubber shoes, the latter would without question be manufactured articles, notwithstanding the material from which they were made had been at some prior time otherwise manufactured. So where a sugar refiner takes the raw product, of crude manufacture, melts it down, and makes out of it a new product, this new product is as much a manufactured article, made by the refiner's process, as was the original crude article. The raw material in such case completely loses its identity in the process of remanufacture, and an absolutely new and different article is formed.

Then follows a series of definitions of the word "manufacture" gathered from various decisions, all of which offer some interest and are to a large extent illustrative.

See also *Chattanooga Plow Company v. Hays* (6); *State v. J. J. Newman Lumber Company* (7).

Another case to which I wish to refer briefly is that of *The Mayor, etc., of Guildford v. Brown* (8). At page 258 of the report, Ridley J. says:—

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| (1) (1926) Ex. C.R. 104. | (5) (1924) 230 Pacific Rep. 64. |
| (2) (1930) S.C.R. 174. | (6) (1911) 140 Southwestern
Rep. 1068. |
| (3) (1913) 207 Fed. Rep. 119;
(1915) 221 Fed. Rep. 829
at 833. | (7) (1912) 59 Southern Rep. 923 |
| (4) (1902) 32 Southern Rep. 965
at 973. | (8) (1915) 1 K.B. 256. |

In *Gamble v. Jordan* (1913), 3 K.B. 149, it appeared that the flock was taken out of a cover and was to be put back in the same cover, and the Court held that it was impossible to say that, if you take out the contents of a mattress and put them back again, that amounts to the manufacture of a mattress. I think, however, that it is manufacturing a mattress if you take flock out of an old and put it into a new cover. The facts in *Gamble v. Jordan* (1913), 3 K.B. 149, are clearly distinguishable from those in the present case.

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In the same case, Avory J., referring to *Gamble v. Jordan*, states:—

Phillimore J. at the end of his judgment said this: "The appellant was not making, and did not have flock in his possession for the purpose of making, bedding. I desire to confine myself to the case where a man takes flock out of a mattress and then simply replaces it without any addition whatever. If he were to add anything it would be quite another matter." Bankes J. said that the word "manufactured" meant bringing something into being and that the appellant in that case was not bringing a mattress into being by simply shaking up the contents and putting them back again. In my judgment in the same case I said this: "In one sense a new mattress may be made out of a secondhand one; new covering may be put upon old stuffing, or an old cover may be stuffed with new flock. Those are not the operations in question. In my opinion the answer to the question asked by the magistrate is that re-making or re-stuffing as described in this special case is not making any article of upholstery, cushions, or bedding within the meaning of the Act." Therefore I clearly indicated that if a man made a new mattress by putting old stuffing into a new cover that would be within the Act.

A case which is very similar to, not to say almost identical with, the present one was relied upon by counsel for defendant, namely *Skinner v. United States* (1). This was an action by which Skinner was seeking the refund of a manufacturer's excise tax paid on retreaded tires. The tax in question had been imposed and paid under section 602 of the Revenue Act, 1932, which is worded as follows:—

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

(1) Tires wholly or in part of rubber, 2½ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

(2) Inner tubes (for tires) wholly or in part of rubber, 4 cents a pound on total weight, to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

The District Court, Southern District of Ohio, Western Division, before whom the case was heard, held (*inter alia*) that a person retreading tires by the addition of rubber to old carcasses was not a manufacturer or producer within the meaning of the statute imposing a tax upon articles

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sold by a manufacturer, producer or importer, but was a repair-man. I think I had better quote from the decision of Nevin, D.J., the following passage (p. 1003):

The court is of the opinion that section 602 of the Revenue Act of 1932 was meant to apply only to newly manufactured tires and that it does not include retreaded tires, such as are involved in the instant case, and that, in holding that it does include such retreaded tires, the Commissioner of Internal Revenue has exceeded the authority granted him under the act, and that such an interpretation is not a proper interpretation of the act. The fact that retreaded tires were known in the automobile industry for a great many years preceding the Revenue Act of 1932 (a fact which is sworn to positively in this case and not in any way controverted or contradicted by the defendant) would certainly tend strongly to indicate that, if Congress had intended to include retreaded tires within the provision of this section, it would have plainly so stated. It appears that, in order to retread the tires, plaintiff has to add rubber to the old carcasses and thereby increase their weight, as hereinbefore indicated. With this weight added, a tax on the basis of the total weight (Regulation 46, Revenue Act 1932, c. II, art. 20) of the retreaded tire, places a larger tax burden on the plaintiff than on the manufacturer of the new tire, and yet the record shows without contradiction that the retreaded tire is in effect a secondhand tire or, as stated, "a makeshift" and must of necessity be sold for very much less on the market than a new tire would bring. The court is of the opinion that plaintiff is not a manufacturer or producer within the meaning of the statutes and regulations. He is, as stated by the witness Roper in the record (page 9), "a repairman," and should be classified, and by the court is classified, as such.

All of the facts in this case, in the opinion of the court, tend strongly to show beyond any question that the language of section 602 with reference to tax on tires has reference wholly and solely to new tires and not such as are under consideration in the instant case.

After giving the matter careful thought and consideration, I must say with all due respect that I feel unable to agree with this decision of the District Court of the Southern District of the State of Ohio. I have reached the conclusion that the defendant, Biltrite Tire Company, is a manufacturer within the scope of the Special War Revenue Act and that it is liable to pay the sales and excise taxes and the licence fees above mentioned. The defendant has a factory, it makes tires and it sells them; this is all that is needed to bring the defendant within the ambit of the Act.

The essential elements of manufacture exist. I do not think that it is necessary that a manufactured article be made wholly or even in part of new material. Neither is it necessary, in my opinion, that it be made entirely of raw material.

The fact that the name of the manufacturer of the original tire is not destroyed seems to me totally immaterial.

There will be judgment in favour of plaintiff against defendant for \$4,620.29 and penalties as provided by section 106 of the Act.

The plaintiff will also be entitled to his costs against the defendant.

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Judgment accordingly.

BETWEEN:

UNDERWRITERS' SURVEY BUREAU } PLAINTIFFS;
LIMITED ET AL..... }

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Feb. 25.
Aug. 19.

AND

MASSIE & RENWICK LIMITED..... DEFENDANT.

Copyright—Infringement—Conspiracy—Combine—Defence—Combines Investigation Act, R.S.C. 1927, c. 26—Criminal Code s. 498.

The action is one for infringement and conversion of copyright which the plaintiffs claim in fire insurance plans. The defendant pleaded *inter alia* that the plaintiffs combined and conspired together to prevent defendant from obtaining copies of the plans in question. Plaintiffs applied to have struck out those paragraphs of the statement of defence relating to the alleged combine and conspiracy.

Held: That since copyright is something within the exclusive control of the owner, subject to the provisions of the *Copyright Act*, it cannot form subject-matter of a combine or conspiracy.

HEARING on questions of law referred to and set forth in the reasons for judgment hereinafter reported.

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

J. A. Mann, K.C., and Charles Morse, K.C., for plaintiffs.

O. M. Biggar, K.C., and H. Cassels, K.C., for defendant.

THE PRESIDENT, now (August 19, 1936) delivered the following judgment:

This is an action for infringement and conversion of published and unpublished copyrights which the plaintiffs, members of the Canadian Fire Underwriters' Association, claim in what is known as fire insurance plans. Upon application of the parties hereto it was ordered that the following questions of law be stated for determination in advance of the trial of the action: (1) Whether the plaintiffs would

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be disentitled to succeed in this action if the defendants established the allegations in paragraphs 7, 8, 10, 11, 12, 13, 14, 15, 18, 19, 22 and 23 of the statement of defence which relate to acts done by the plaintiffs or some of them in combination, and (2) Whether any of the statutory provisions set up in paragraph 20 of the statement of defence constitute a bar to the plaintiffs' action in respect of any of the documents referred to in the schedules to the statement of defence, and, if any of them constitute such a bar, which of them do so, and to which of the remedies prayed by the plaintiffs do they respectively apply.

I shall consider the question first stated for determination. It is pleaded in the statement of defence that certain acts of the plaintiffs, some of which I shall presently mention, constitute a combine or conspiracy under the provisions of the *Combines Investigation Act*, chapter 26, R.S.C. 1927, and sec. 498 of the Criminal Code, which acts, it is claimed, operate to the detriment or against the interest of the public, and afford a defence to the plaintiffs' action.

It is perhaps desirable to refer at once to the relevant provisions of the *Combines Investigation Act*, hereinafter to be referred to as the "Combines Act," and the Criminal Code. Sec. 2, subsection 1, of the Combines Act, as amended by 25-26 Geo. V, c. 54, defines a "combine" in the following language:

2. (1) "Combine" means a combination having relation to any commodity which may be the subject of trade or commerce, of two or more persons by way of actual or tacit contract, agreement or arrangement having or designed to have the effect of

(a) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing, or

(b) preventing, limiting or lessening manufacture or production, or

(c) fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation, or

(d) enhancing the price, rental or cost of article, rental, storage or transportation, or

(e) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply, or

(f) otherwise restraining or injuring trade or commerce, or a merger, trust or monopoly, which combination, merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others.

The concluding words of this section would indicate that a "a merger, trust or monopoly" falls within the defini-

tion of a "combine" and "merger, trust or monopoly" is defined by s. 2, ss. 4, as follows:

(4) "merger, trust or monopoly" means one or more persons,

(a) who has or have purchased, leased or otherwise acquired any control over or interest in the whole or part of the business of another; or

(b) who either substantially or completely control, throughout any particular area or district in Canada or throughout Canada the class or species of business in which he is or they are engaged;

and extends and applies only to the business of manufacturing, producing, transporting, purchasing, supplying, storing or dealing in commodities which may be the subject of trade or commerce: Provided that this subsection shall not be construed or applied so as to limit or impair any right or interest derived under *The Patent Act*, 1935, or under any other statute of Canada.

In passing I might observe that the concluding words of subsection 4 provide that this subsection shall not apply to any right or interest derived under the *Patent Act*, or any other statute of Canada, which would include the *Copyright Act*. There is another section in the *Combines Act*, sec. 30, which refers to the *Patent Act*, and conceivably in certain circumstances difficulties might arise in reconciling that section with certain provisions of the *Patent Act*, but that need not, I think, concern us here.

Sec. 498 of the Criminal Code is as follows:

498. Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company,

(a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

(b) to restrain or injure trade or commerce in relation to any such article or commodity; or

(c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

(d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity or in the price of insurance upon person or property.

In this action, and others of a similar nature, on a motion for an interlocutory injunction, I endeavoured to describe the nature, history and development of the business of the plaintiffs as fire underwriters and the grounds of their claims to copyright by reason of the production, reproduction and acquisition of fire insurance plans, and I would refer to my judgment on that motion. *Underwriters'*

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Survey Bureau Ltd. et al. v. Willis Faber & Co. of Canada Ltd. et al. (1). From this judgment there may be gathered the acts of the plaintiffs which the defendant alleges constitute a combine or conspiracy in restraint of trade and commerce, contrary to the provisions of the statutes mentioned.

Briefly stated, in so far as the immediate question is concerned, the defendant contends that the plaintiffs first entered into an agreement in 1911 with the Goad Company whereby the latter agreed to compile and revise fire insurance plans for the plaintiffs only; that some six years later they acquired by purchase all the right, title and interest in the Goad plans, and any copyright therein, with the intention of impeding or preventing the non-board fire insurance companies from having access to copies of such plans and thus from carrying on their business of fire insurance, or successfully competing with the plaintiff members of the association. This end it is claimed, was and is sought to be effected by the plaintiffs by restricting the use of their fire insurance plans to the plaintiff members of the association only, and by requiring any agent of such plaintiffs to whom plans are loaned to return the same to the association when such agent ceases to represent one of the plaintiff members of the association, or when the agent undertakes to underwrite fire insurance for non-board companies, thus rendering it difficult or impossible for non-board fire insurance companies to acquire fire insurance plans of any particular locality. Now the defendant claims that all this, together with the taking of this action and the restraining of the Commercial Reproducing Company Ltd. from making, reproducing or selling copies of such plans, in fact and law spells a combine or conspiracy in restraint of trade and commerce and having for its object the prevention or lessening of the competition of non-board fire insurance companies. This combine or conspiracy the defendant claims affords a defence to the action of the plaintiffs.

Mr. Biggar argued that the Court should not give assistance to a plaintiff who seeks to take advantage of his own wrong, and that to combine or conspire with others for the

purpose and with the intention of causing injury to anyone else is a wrong; that the plaintiffs combined with the intention of injuring the non-board fire insurance companies, that is fire insurance companies which are not members of the Canadian Fire Insurance Underwriters' Association, including the defendant here, by withholding or attempting to withhold from them copies of the fire insurance plans in question; that the bringing of this action was the culminating act in a series of acts done to carry out this intention; and that the successful realization of the intention of injuring the non-board fire insurance companies would be detrimental to the public by limiting competition in the business of fire insurance and would constitute a combine or conspiracy within the meaning of sec. 498 of the Criminal Code and the *Combines Act*.

The plaintiffs claim that the defendant has infringed their copyrights by taking possession of or acquiring (1) certain unpublished plans belonging to the plaintiffs and which particularly relate to copies of plans issued solely to the members of the Canadian Fire Underwriters' Association as distinguished from any plans published and sold at any time to the public, (2) plans made since 1918, by the plaintiffs' Plan Department from original surveys, (3) reprints and revisions of original plans which are claimed to be independent works and the subject of independent copyrights, the revisions in some cases being greater in degree than in others, the degree being indicated by different schedules accompanying the plaintiffs' statement of claim. All these plans the plaintiffs claim are unpublished copyrights and it is contended that no one could compel them to license others in respect thereto, either under the statute or at common law, and that the plaintiffs might publish them when and as they saw fit. For the purpose of this proceeding I am, I think, to assume that the works mentioned in the schedules as unpublished works were in fact never published, though that is a question of fact and law to be determined at the trial. Then there is set out in schedule D to the statement of claim a list of plans originally prepared by G. E. Goad, or the G. E. Goad Company, in which the plaintiffs now claim copyright, and which they claim have been infringed by the defendant, but these plans it is conceded were in fact published or sold to the

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public by the Goads; these plans were subsequently acquired by the plaintiffs by assignment, in 1931. It is conceded that the public are entitled to copies of such plans, even if copyright subsists. But say the plaintiffs: If after publication and within the duration of the copyrights we fail to supply the reasonable requirements of the public, including non-board fire insurance companies, the proper remedy is for the interested party to apply under sec. 14 of the *Copyright Act*, to the designated authority, to compel us to publish and supply such plans, and failing that the applicant is entitled to a licence to publish the same upon the terms provided by the Act.

It is the contention of the plaintiffs that in their published or unpublished works they have a right, a property incorporeal. Copyright has no corporeal existence; it is really the right to multiply copies of a published work, or the right to make the work public and still retain the beneficial interest therein. The plaintiffs say that they organized their Plan Department for their own members and they frankly state that even if they combined or conspired to prevent the defendant from obtaining the use of copies of such plans that would not be an unlawful act because the same was done in protection of their own property, which in law is not a wrong. The plaintiffs further contend that neither the public nor the defendant ever had any right in their plans or copyrights and consequently the defendant has not suffered any damage by the alleged wrongful acts of the plaintiffs.

A literary production or work being the author's property he may exercise full dominion over it at common law or under the statute and it is exclusively for him to determine whether it shall be published at all, or if published, when, by whom, and in what form. The public has no greater right to it than it would have in any other part of the author's personal property, no matter how useful it might be. But if the work has once been published the public have a right to obtain copies of the same, as in the plans published by the Goads, and if copyright subsists by statute, the owner of the copyright must supply the needs of the public and if not, then any member of the public may have recourse to sec. 14 of the *Copyright Act* as already explained.

In order to constitute a combine or conspiracy there first must be proper subject-matter to which the alleged combine or conspiracy relates, and next there must be an intention acted upon by the parties to combine or conspire to prevent the public from obtaining the use and benefit of that which is the subject-matter of the combine or conspiracy. Counsel on behalf of the plaintiffs contended that in order to furnish ground for proceeding against a party for a combine or conspiracy that the subject-matter must be a commodity of trade and commerce. Mr. Morse referred to many dictionary definitions of "commodity." The dictionaries would appear to define a commodity as something produced for use or sale, all things which have prices and are offered for sale, everything movable which is bought and sold, anything movable that is the subject of trade and commerce, and so on. It is impressed on the subject-matter of "commodity" that it is something the public have a right to have access to because it is a matter of trade and commerce. I find it rather difficult to place within the definition of commodity, or any article of trade and commerce, published or unpublished copyright, in which the author has a right in the nature of a monopoly.

As copyright is something within the exclusive control of the owner, subject to the provisions of sec. 14 of the *Copyright Act*, it cannot in my opinion form subject-matter of a combine or conspiracy. Whether or not the plaintiffs have combined or conspired to prevent the defendant from obtaining copies of the plans in question is not, I think, a proper defence in this action. It seems to me therefore that the paragraphs of the defence mentioned, relating to combine and conspiracy, should be struck out because they do not appear relevant to the real dispute between the parties, namely, whether the plaintiffs have a subsisting copyright in the works in question and if so whether their rights therein have been infringed or converted.

The second question for determination is indeed a perplexing one and it is difficult to understand why the provisions of the *Copyright Act* under the head of Civil Remedies, that is sections 20, 21, 22, 23 and 24, should so long have been left in doubt. The Courts and text writers

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seem to have avoided any definite expression of opinion in respect of the construction of some of those sections of the Act. Those sections of the *Copyright Act* correspond with sections 6, 7, 8, 9 and 10 respectively of the English *Copyright Act* of 1911.

The principal question raised was whether the limitation of action expressed in sec. 24 applies only to infringement of a right in copyright under sec. 20 (1), or whether it applies to actions of detinue or conversion under sec. 21. And there also arises the question as to whether the protection afforded by sec. 22, applies to actions of detinue or conversion under sec. 21. Failing the application of sec. 24 to actions of detinue or conversion under sec. 21 the further question is raised as to whether articles 2261 and 2268 of the Civil Code of Quebec, and the Statute of Limitations (R.S.O. 1927, c. 106, s. 48) of Ontario, or either of them, are applicable in this case. The plaintiffs, I understand, contend that sec. 22 and sec. 24 are not applicable in actions of detinue or conversion under sec. 21.

I have reached the conclusion that this question had better be continued to the trial. I do not think any injustice will be done the defendant by so doing, or that it will unduly prolong the trial. Any evidence which the plaintiffs may desire to produce relating to this issue, may be received subject to objection, and may later be admitted or rejected; and that evidence need not, I think, be voluminous.

Mr. Biggar's contention was that sec. 24 applied to the case of an action for damages for detinue or conversion, as well as in an action for injunction, damages or account, under sec. 20, which must be brought within three years after the infringement. Mr. Biggar referred to certain comments to be found in the 6th Edition of Coppinger on Copyright and which he found to be in conflict or inconclusive. He contended that the editor of Coppinger, at page 169, in discussing sections 6 and 7 of the English Act (20 and 21 here) was of the opinion that the action for infringement and the action for detinue or conversion were alternative actions, and that a plaintiff could avail himself only of one or the other of them, and with this view Mr. Biggar agreed. I am not at all sure that these comments of the editor of Coppinger are open to that construction, but if so, then I

should think the editor was in error. I need only refer to the recent cases of *Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd.* (1); and *Lane et al. v. Associated Newspapers Ltd.* (2), and reported, I think, since the argument in this proceeding. In these cases it was held that the remedies granted by sections 6 and 7 of the English *Copy-right Act* were cumulative and not alternative, and with such conclusion I agree. However, I am uncertain how the submissions made by Mr. Biggar and Mr. Cassels upon this question were affected by the contention that the remedies under sections 20 and 21 were alternative and not cumulative. I should like to hear counsel for the defendant further in view of the decisions which I have mentioned.

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For the present the matter of cost upon both questions will be reserved.

Judgment accordingly.

BETWEEN:

LUDDGER MARCOUX.....SUPPLIANT;

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AND

HIS MAJESTY THE KING.....RESPONDENT.

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Petition of Right—"Public Work"—Responsibility of the Crown—Contributory Negligence.

About 9 a.m. on the 23rd January, 1934, M. when going to the Post Office in the Town of St. Laurent on business and while walking on the sidewalk leading to the Post Office fell and broke his wrist. It had been raining during the night and the sidewalk was covered with ice. At the place where M. fell there was a depression in the cement walk which held the water on the ice. The caretaker had spread sawdust on the walk instead of the sand provided for the purpose, and this did not adhere to the ice but floated on the water.

Held: That a Post Office is a public work within the meaning of the statute. (*Leprohon v. The King*, 4 Ex. C.R. 100, and *Johnson v. The King* (1931), Ex. C.R. 163, followed).

2. That the act of the caretaker in spreading sawdust where water was lying when instructions had been given to put sand, was negligence on his part which bound the Crown and rendered It liable in damages.

(1) (1936) 1 Ch. 323.

(2) (1936) 1 K.B. 715.

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3. That M. having admitted that on approaching the place in question he saw the floating sawdust he should have realized the danger, and, in view of the dangerous condition of the roads generally, his act in persisting in passing at this place instead of turning back or going by another entrance constituted an act of negligence on his part which contributed to the accident, and M. under the law of Quebec had to bear a part of the damages which was fixed by the Court at one-third the total damages.

PETITION OF RIGHT seeking to recover damages for personal injuries received at the entrance to the Post Office in the Town of St. Laurent, P.Q.

The action was tried before the Honourable Mr. Justice Angers, at Montreal.

Gaston Archambault, K.C., for the suppliant.

J. Bruno Nantel, K.C., for the respondent.

The facts are stated in the reasons for judgment.

ANGERS J., now (March 27, 1936) delivered the following judgment:

Le pétitionnaire, par sa pétition de droit, réclame de Sa Majesté le Roi la somme de \$1,540.35 avec intérêt et dépens, ladite somme représentant les dommages qu'il aurait subis à la suite d'un accident survenu dans les circonstances suivantes.

Le 23 janvier 1934, vers 9 h. du matin, le pétitionnaire se rendait au bureau de poste de la ville de St-Laurent, province de Québec; en passant sur le trottoir qui conduit à l'entrée principale de l'édifice, trottoir situé sur la propriété de l'intimé, le pétitionnaire a fait une chute sur la glace et s'est fracturé le poignet gauche.

Il avait plu durant la nuit et le matin du 23 le trottoir en question était recouvert de glace.

Ce trottoir, qui est en ciment, a une légère pente du perron à la rue pour permettre l'écoulement de l'eau.

Entre le bloc de ciment adjacent au perron du bureau de poste et le bloc suivant il y avait alors une dépression, due à la déclivité l'un vers l'autre de ces deux blocs, où l'eau stationnait. Le matin de l'accident il y avait une couche d'eau dans cette dépression sur une distance de quelques pieds.

Le matin, entre 6 h. et 6 h. 30, le concierge du bureau de poste avait répandu du bran de scie sur le trottoir; le concierge déclare qu'il n'avait pas autre chose à sa dis-

position. Là où il n'y avait pas d'eau le bran de scie adhérait à la glace, mais à l'endroit près du perron où l'eau s'était accumulée le bran de scie flottait.

Le pétitionnaire prétend que l'accident est dû à la négligence du préposé de l'intimé. Celui-ci, de son côté, soutient que le préposé du ministère en charge du bureau de poste " n'a en aucune façon omis ou négligé de remplir un devoir ou d'exécuter un ordre qui ait pu causer l'accident."

Le recours du pétitionnaire est régi par les dispositions du paragraphe (c) de l'article 19 de la Loi de la Cour de l'Echiquier (S.R.C. 1927, chap. 34):

19. La cour de l'Echiquier a aussi juridiction exclusive en première instance pour entendre et juger les matières suivantes:

- a) * * *
b) * * *

c) Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public;

Il incombait donc au pétitionnaire d'établir que les blessures qu'il a subies résultaient de la négligence d'un employé ou serviteur de la Couronne agissant dans l'exercice de ses fonctions ou de son emploi sur un chantier public—ou " public work ", selon le terme de la version anglaise du statut, qui me paraît plus compréhensif.

Il a été décidé à deux reprises qu'un bureau de poste est, au sens de la loi, un chantier public: *Leprohon v. The King* (1); *Johnson v. The King* (2). Ces décisions, sur ce point, me paraissent bien fondées.

Il me reste à déterminer si l'accident est attribuable à la négligence d'un employé ou serviteur de la Couronne agissant dans l'exercice de ses fonctions ou de son emploi.

Le pétitionnaire devait démontrer qu'il y avait un employé ou serviteur de la Couronne dont les fonctions ou l'emploi consistaient à entretenir le trottoir en question en bon état et particulièrement à le rendre praticable aux personnes ayant affaire au bureau de poste et que l'accident dont le pétitionnaire a été la victime a été causé par la négligence de tel employé ou serviteur: *Howard v. The King* (3); *Sincennes McNaughton Lines Ltd. v. The King* (4); *Joubert v. The King* (5).

(1) (1894) 4 Ex. C.R. 100.

(3) (1924) Ex. C.R. 143.

(2) (1931) Ex. C.R. 163.

(4) (1926) Ex. C.R. 150.

(5) (1931) Ex. C.R. 113

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Rien dans la preuve du pétitionnaire ne justifie la prétention que l'accident dont il s'agit est imputable à la négligence d'un serviteur ou employé de la Couronne dont les fonctions ou l'emploi comprenaient l'entretien en bon état du trottoir en question, si ce n'est peut-être la déduction que l'on peut tirer du fait que le concierge a, le matin du 23 janvier, répandu du bran de scie sur le trottoir. Cela n'est pas suffisant pour entraîner la responsabilité de la Couronne. L'on semble prendre pour acquis—et ceci est d'occurrence assez fréquente—que la responsabilité de la Couronne pour la négligence de ses serviteurs et employés en vertu du paragraphe (c) de l'article 19 de la Loi de la Cour de l'Echiquier est la même que celle des maîtres et commettants pour la faute de leurs domestiques et ouvriers aux termes de l'article 1054 du Code Civil, alors qu'elle diffère notablement dans son étendue.

Heureusement pour le pétitionnaire il se rencontre dans la preuve de l'intimé des éléments qui me paraissent suppléer à ce qui manque dans celle du pétitionnaire.

Je trouve d'abord dans le témoignage de l'assistant-maître de poste, P. Arthur Viau, la déclaration suivante (p. 7):

Q. Est-ce que le fond était sur le ciment? Est-ce qu'il y avait autre chose entre le ciment et la surface?

R. Oui, un peu de glace. Vous ne devez pas oublier que le concierge mettait de la cendre ou du bran de scie.

Q. Et ce matin-là?

R. Il y avait du bran de scie.

Passant ensuite au témoignage du concierge du bureau de poste, Joseph-Louis Rousseau, j'y relève les questions et réponses suivantes (p. 12):

R. L'état du trottoir, le matin, à bonne heure, était très glissant, seulement, vers les six heures, six heures et trente, j'ai mis ce que j'avais, c'est-à-dire du bran de scie.

* * * * *

Q. Est-ce que c'était ce qu'on vous avait dit de mettre sur le trottoir, quand il était glissant?

R. Oui, certainement.

Q. Est-ce que ce bran de scie était de nature à empêcher d'offrir une surface aussi glissante?

R. Le bran de scie, du moment qu'il gèle, est de nature à arrêter une surface glissante, mais lorsqu'il ne gèle pas, suivant moi, elle est aussi glissante.

Et plus loin (p. 13):

Q. Pourquoi aviez-vous mis du bran de scie?

R. Parce que c'était tout ce que j'avais dans le moment.

Voyons maintenant la déposition du témoin Robert Simpson, finisseur de ciment à l'emploi du Département des Travaux Publics; elle contient, entre autres, les déclarations suivantes qui offrent un intérêt particulier (pp. 4 et 5):

Somebody said there was no sand there: well, we always send sand to those buildings, where there are any steps—Outremont, the Post Office, or anywhere else. I remember being asked for some sand, but, you know,, St. Laurent is a good way out, and it is quite possible it was not delivered. I am generally there to see the sand is delivered, because if it is not delivered I am the man who gets the blame for it.

Q. You are not an Inspector of Public Works?

A. No.

Q. There is an inspector who is supposed to see if sand or other material is needed?

A. We generally use sand. We have sand all the time.

By the Court:

Q. You have sand all the time, for the purpose of putting on the sidewalks?

A. Yes.

La preuve démontre que, durant le cours de l'été 1934, le trottoir en question a été réparé et que la dépression causée par la déclivité des deux blocs de ciment susdits a été corrigée (dép. Simpson, p. 2; Viau, p. 8).

Je crois qu'il y a lieu de conclure de la preuve au dossier que le concierge du bureau de poste avait instruction d'entretenir le trottoir en question en bon état et particulièrement d'y répandre au besoin du sable de façon à le rendre praticable pour les personnes ayant affaire au bureau de poste. La preuve n'est peut-être pas aussi convaincante qu'elle aurait pu l'être, mais je l'estime suffisante pour en tirer la conclusion énoncée ci-dessus.

Le concierge admet que, peu de temps après l'accident, il a déposé de la cendre sur le trottoir (p. 16, *in fine*, et p. 17). Evidemment il aurait mieux valu qu'il eût, avant l'accident, déposé cette cendre au lieu du bran de scie qui, comme il l'admet (p. 19), "ne pouvait protéger parce qu'il flottait sur l'eau".

Je suis d'opinion que, dans les circonstances, l'intimé doit être tenu responsable—partiellement du moins car, comme je le dirai à l'instant, je crois que le pétitionnaire a aussi sa part de responsabilité—de l'accident dont le pétitionnaire a été la victime.

Le pétitionnaire admet qu'il a vu le bran de scie qui flottait sur l'eau. Ceci aurait dû être pour lui un avertisse-

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ment. Vu l'état dans lequel se trouvait la partie du trottoir qui n'était pas submergée et qu'il venait de franchir, il aurait dû s'imaginer que sous l'eau il y avait de la glace et que cette glace était vive. Il aurait dû prendre plus de précaution, contourner cette flaqué d'eau si c'était possible; sinon retourner sur ses pas et prendre l'une des deux autres entrées. Le pétitionnaire me paraît avoir manqué de prudence; pour cette raison, je crois qu'il y a lieu de le tenir partiellement responsable de l'accident qui lui est arrivé.

Il s'agit de répartir la responsabilité, ce qui est toujours une tâche plus ou moins arbitraire; je crois que je ferai justice en en imputant deux tiers à l'intimé et un tiers au pétitionnaire.

Reste la question des dommages.

La preuve établit que le pétitionnaire a dû déboursier les montants suivants comme conséquence de l'accident:

pour frais d'hôpital suivant comptes produits comme	
pièces 4 et 5.....	\$27 35
pour frais de médecin suivant comptes produits comme	
pièces 2 et 3.....	59 00

Lors de l'accident le pétitionnaire ne travaillait pas depuis environ un an. Il avait cependant la promesse d'une position à la manufacture de Needlecraft Mills Limited, à Saint-Hyacinthe, P.Q., à compter du 12 février 1934, tel qu'en font foi la lettre de la compagnie au pétitionnaire en date du 30 janvier, produite comme pièce 6, et le témoignage de l'assistant-comptable de la compagnie, René Sicotte, le signataire de la lettre susdite.

Sicotte déclare que sa compagnie a employé le pétitionnaire comme coupeur de février à juin 1933. Apparemment satisfaite de l'ouvrage du pétitionnaire, la compagnie avait décidé de l'engager de nouveau en 1934. Son salaire, au dire de Sicotte, devait être de \$25 à \$26 par semaine. Comme résultat de l'accident, le pétitionnaire a dû refuser la position; il a perdu de ce chef \$425, soit 17 semaines de salaire à \$25 par semaine.

Le pétitionnaire a réussi à se procurer une position le 13 juin 1934. La preuve révèle que depuis cette date il a gagné, comme coupeur et comme contremaître, un salaire de \$28 par semaine, ce qui représente \$2 ou \$3 par semaine de plus que ce qu'il aurait reçu de Needlecraft Mills Limited, eût-il accepté l'offre contenue dans la lettre exhibit

6. Sous ce rapport le pétitionnaire n'a rien perdu; il ne fait d'ailleurs aucune réclamation pour cette période.

Le pétitionnaire prétend qu'il souffre d'une incapacité permanente partielle, qu'il évalue à 15 pour cent, et qu'il ne peut plus exercer son métier de coureur.

Je ne pense pas que l'incapacité permanente du pétitionnaire soit considérable; 15 pour cent me paraît exagéré. Tout de même je suis porté à croire que le bras gauche du pétitionnaire restera un peu plus faible. En outre, au dire de son médecin, il pourrait bien y ressentir périodiquement quelque douleur, ce qui, va sans dire, l'incommodera dans l'usage qu'il aura à en faire dans l'exercice de son métier. J'estime qu'une somme de \$200 sera une compensation suffisante pour cette incapacité permanente.

Les dommages subis par le pétitionnaire à la suite de son accident s'élèvent donc à la somme de \$711.35. Si l'on retranche de ce montant un tiers, proportion de la responsabilité du pétitionnaire en rapport avec l'accident dont il a été victime, soit \$237.12, il reste une balance de \$474.23, laquelle le pétitionnaire est bien fondé à réclamer de l'intimé.

Il y aura jugement en faveur du pétitionnaire contre l'intimé pour la somme de \$474.23, avec dépens.

Judgment accordingly.

J. COUGHLAN & SON LIMITED.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Ship-building contract—Arbitration—Boiler water not included in deadweight—Waiver of arbitration clauses by pleading—"Base steel" "Base Price"—Custom of steel trade—Custom of ship-building yards.

By two contracts in writing Suppliant agreed with Respondent, represented by the Minister of Marine and Fisheries, to construct six steel cargo steamers; the first contract covered four ships, and the second contract, two ships.

Both contracts provided that any dispute or difference arising between the parties thereto, during the term of the agreements or within six months after the termination thereof, in relation to the various matters therein set forth, should be referred to three arbitrators to be chosen as therein provided and whose decision should be final and binding. Suppliant claimed that it required certain disputes be sub-

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mitted to arbitration but that the Respondent refused to do so. Respondent denied that such request was made or refused, or that any dispute was referred to or settled by arbitration, and contended that the arbitration clause in such contracts was a bar to the various claims set forth in the petition.

Suppliant claimed that in ascertaining the "deadweight" of the ships an allowance should be made for the weight of water in the boilers of the ships.

A term of the second contract reads as follows:

It is hereby mutually agreed upon between the Minister and the contractors that the contractors shall purchase the steel plates entering into the construction of the hulls of the said vessels from the Minister at a base price f.o.b. Mills Sydney that shall be equal to the base price f.o.b. Pittsburgh, U.S.A., of plates manufactured in the United States of similar specifications at the time the specifications are deposited with the Minister, the said price not to be less than \$2.75 per 100 pounds base f.o.b. Mills Sydney.

Suppliant claimed that it had been overcharged for steel supplied for the ships covered by the second contract and also that an excess of steel had been delivered from the United States Mills in connection with the first contract and claimed payment therefor from the Minister.

Held: That since Respondent had granted Suppliant a fiat and also had pleaded a defence, the arbitration claims had been waived and another forum substituted.

2. That an objection to the right to bring an action should be taken by interlocutory motion, and if that course is not followed, the Court should not entertain at trial an application to dismiss the action.
3. That boiler water was not "fresh water" referred to in the first contract, and that it was not the custom or usage in Canada to make an allowance for boiler water in computing the deadweight of ships.
4. That "base" in the steel trade refers to steel of certain standard dimensions and shapes, and "base price" means the price for steel within certain standards of size and shape; in the contract entered into therefore the term "base price" means the price of "base" steel products, those ship plates of standard shapes and sizes, and steel other than that of standard dimensions and shapes is liable to an extra charge over "base" steel.
5. That it is a usage of ship-building yards to order slightly more than the precise amount of steel that would enter into the construction of a ship, in order to provide against the contingency of injury to, or destruction of, a plate or plates, and that on a consideration of the evidence it was not shown that the amount of steel delivered to Suppliant was unreasonably excessive.

PETITION OF RIGHT by Suppliant herein to recover from His Majesty the King certain sums of money alleged due it as a result of claims arising from the construction of six steel cargo steamers for Respondent. The case is reported on four points only.

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

W. Martin Griffin, K.C. and *A. C. Desbrisay* for Suppliant.

J. A. Clark, K.C. and *E. Miall, K.C.* for Respondent.

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

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The PRESIDENT, now (December 28, 1936) delivered the following judgment:

The suppliant in this petition of right is J. Coughlan & Son Ltd., of Vancouver, B.C. The matters in controversy derive from two contracts entered into between His Majesty the King, represented by the Minister of Marine and Fisheries, hereinafter called the "Minister," and J. Coughlan & Sons, and J. Coughlan & Son Ltd., respectively. By several assignments the first contract became vested in the suppliant, J. Coughlan & Son Ltd. It will be convenient hereafter to refer to the suppliant as "Coughlan."

The first contract was entered into on November 22, 1918, and provided for the construction of four steel cargo steamers, the designated yard numbers being 11, 12, 13 and 14. The second contract was entered into on April 7, 1920, and provided for the construction of two steel cargo steamers, the designated yard numbers being 20 and 21. It was contemplated that each of the first four steamers to be constructed under the first contract was to have a total deadweight capacity of 8,100 long tons, and they were to be classed 100 A 1 at Lloyds and to be built under special survey and Government inspection, and to the British Board of Trade and Canadian Steamship Inspection Rules for the survey and inspection of cargo steamers; the contract price to be paid Coughlan was \$198 per ton deadweight, amounting to \$1,603,800 for each steamer. It was contemplated that each of the two steamers to be constructed under the second contract would have a total deadweight capacity of 8,350 long tons, and they were to be classed B. S. British Corporation, and to be built under the survey and inspection rules prescribed in the first contract; the price to be paid Coughlan was \$167.50 per long ton deadweight, amounting to \$1,398,525 for each steamer. The contract price for the six steamers would therefore exceed nine million dollars. The contracts provided that

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if the total deadweight capacity of each steamer, as ultimately ascertained, varied above or below the deadweight capacity contemplated, the total price to be paid for each would be modified accordingly.

The hearing of this petition occupied many days, and the evidence is very voluminous. In addition, a vast amount of evidence was taken on discovery, much of which, I think, was hardly permissible on discovery. However, the discovery evidence had, in the end, the apparent effect of reducing Coughlan's total claim as originally set forth in its petition, from about \$750,000 to somewhere in the vicinity of \$250,000. It would not be possible to review fully the evidence pertaining to the individual claims made by Coughlan without extending this judgment to an intolerable length. Coughlan's claims conveniently fall under several distinct heads, as set forth in its petition as amended, and that is true also of the set-offs and counterclaims pleaded on behalf of the Minister. I propose discussing the several amounts claimed by Coughlan, and the several set-offs and items of counterclaim claimed on behalf of the Minister, without regard to the order in which they are pleaded or were introduced in evidence, or in the order of their importance, and consequently no useful purpose would be served by enumerating them at this stage. Before proceeding to a discussion of the several claims of Coughlan, and that of the Minister, a few observations of an introductory nature might usefully be made.

In 1917, the Minister embarked upon the policy of constructing steel cargo ships, which eventually turned out to be sixty-four in number, in order to meet Canadian shipping requirements for which there was then believed to be a great shortage, owing I assume, to the loss of British tonnage during the war. About the same time the Government of the United States also embarked upon an extensive ship-building program, with the consequence that there was an abnormal demand for ship-building materials in that country, and ship-builders in Canada who had entered into contracts to construct ships for the Minister found it practically impossible to obtain such materials, ship plates particularly, from the United States, where normally they would obtain the same. The Minister was able, however, to arrange with the United States Government that a

specified tonnage of ship-building material, some 80,000 tons I believe, would be made available to the Minister, which in turn would be made available to the contractors engaged in building ships for the Minister. At that time steel mills in the United States were under Government control, and while later the United States Government abandoned such control yet such steel mills were permitted to supply, under licence from the Government as I understand it, any steel required in the carrying out of the Minister's ship-building program in Canada. In the first contract the Minister undertook to supply Coughlan with all plates, sections and boiler plates, necessary for the construction of the four ships therein mentioned, at a base mill price of three and one-quarter ($3\frac{1}{4}$ c.) cents per pound, or \$3.25 per hundred pounds, it being agreed that in the event of the said price of steel being increased or decreased the price of the ships as defined in the contract would be modified accordingly. The material required for the building of these four ships would therefore come from United States mills to the yards of Coughlan at Vancouver, on the requisition of the Minister. Later, the Minister induced the Dominion Steel Corporation, of Sydney, N.S., to erect a plate mill, the Minister himself contracting to purchase a minimum tonnage of ship plates, at a price of \$3.75 per hundred pounds. That price it will be observed was slightly in excess of the price at which Coughlan was to be supplied steel by the Minister under the first contract. When the second contract was entered into the Minister was in a position to supply Coughlan with ship plates from the Sydney mill, upon the terms as to price stipulated in that contract.

There is but one point in dispute in connection with the ship plates supplied Coughlan from the Sydney mill and that relates to the price to be paid therefor by Coughlan to the Minister. It is claimed by Coughlan that an excess of steel was delivered it by United States mills in connection with the first contract, and for this alleged excess delivery of steel payment is claimed from the Minister.

There was frequent reference throughout this case to terms peculiar to ship construction contracts, and particularly to certain measurements of ships and the method of ascertaining the same, and it may be convenient to define

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briefly some of such terms. The "lightweight" or "light displacement" of a ship is the weight of the hull and machinery all ready for sea, with boilers at working level, but without stores, fresh or salt water, fuel or cargo, on board. "Deadweight" means the quantity of cargo, expressed in tons, a ship will take on board without sinking below her proper load line, and usually is expressed in the specification to comprise cargo, fuel, fresh and salt water, reserve water, provisions and stores, and officers' and crews' effects, and is the difference between the light displacement of a ship when ready for sea with boiler water at working level, and the same ship when ready for sea with cargo and the other necessary supplies and equipment on board. The "load displacement" of a ship is made up of the ship's "lightweight," plus the "deadweight" as defined in the specification; in other words it means the total weight of the equipped ship ready for sea together with her cargo. The "moulded depth" of a ship is the measurement taken amidships from the base line, or top of the keel, to the line of the top of the upper deck beams, at the side. "Freeboard" is the measurement from the top of the deck line to the top of the load line mark. Frequent reference was also made to taking the "condition" of a particular ship and this, I might add, is for the purpose of ascertaining the "lightweight" of that ship.

A point raised by both parties, and which is of general application, might conveniently be disposed of at this stage. Both contracts provided that, in the event of any dispute or difference arising between the parties thereto, during the agreement or within six months thereof, in relation to the various matters therein set forth, every such dispute, as the same arose, should be referred to three arbitrators to be chosen as therein provided and whose decision should be final and binding. Coughlan, in its petition, alleges that disputes did arise between it and the Minister and that it required that the said disputes be submitted to arbitration but that the Minister refused to submit or permit the same to be submitted to arbitration. In the statement of defence it is denied that the Minister refused to submit or permit such disputes to be submitted to arbitration, or that Coughlan requested submission of such disputes to arbitration within the prescribed period,

or that any dispute or difference was referred to or settled by arbitration, and it is pleaded that the Minister would object that such a reference within the prescribed period was a condition precedent to any payment or allowance.

Mr. Clarke contended that the arbitration clause in each contract was a bar to the various claims set forth in the petition, on the grounds set forth in the statement of defence. I think that view is an erroneous one in the situation here. If an action is brought by a plaintiff, one of the parties to a contract, and a clause in the contract provides for the settlement of disputes by arbitration, and the defendant, the other party to the contract, relies upon the form mentioned in the arbitration clause, he should move for a stay of proceedings, before delivering any pleading. The principles to be derived from the authorities are that an objection to a right to sue as is here taken, should be taken not at the trial but by introductory motion; and that if such procedure is not adopted the court need not, and ordinarily should not, entertain such an objection at the trial: *Bristol Corporation v. John Aird & Co.* (1); *Metropolitan Tunnel and Public Works Ltd. v. London Electric Railway Co.* (2); and *John Shaw & Sons Ltd. v. Shaw* (3). That procedure could not well have been adopted in this case because the Crown, the Minister, had granted a fiat and, I think, thereby submitted himself to another forum. Not only was a fiat granted, but the Crown has pleaded a defence. Logically, this seems to me to constitute a waiver of the arbitration clauses and the substitution of another forum. When "Let right be done" is affixed to the petition of right, that means, I think, that the matters in issue are to be tried out regardless of the arbitration clause in the contracts and that the same no longer affords a ground of defence in this proceeding. It is, I think, however, possible that inferences may properly be drawn from the fact that the arbitration clauses were not resorted to by either party within the prescribed period. Whatever be the facts, it is my opinion that the failure to require or to submit to arbitration, any of the disputes between the parties, is no longer of importance in this proceeding.

(1) (1913) A.C. 241.

(2) (1926) Ch. D. 371.

(3) (1935) 2 K.B.D. 118.

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The first claim I shall discuss raises the issue as to what comprises "deadweight" under the two contracts in question, and the precise question is whether an allowance for deadweight should be made to Coughlan on account of the weight of water in the boilers of the ships. As I have already explained, a ship's "deadweight" capacity means the quantity of cargo, expressed in tons, she will take on board without sinking below her proper load-line. The provision in the specification of the first contract in respect of deadweight appears under the caption "Draft and Deadweight," and is as follows:

The mean draft of the vessel with complete deadweight on board comprising as follows:—

Coal,
 Fresh Water,
 Cargo,
 Provisions and Stores,

Or, about 8,100 tons is not to exceed 25 feet 1 inch.

The corresponding provision in the specification of the second contract is slightly different and is as follows:

The mean draft of the vessel with about 8,350 tons deadweight to be about 25 feet 3 inches Lloyd's Summer Free Board Mark in Salt Water. The deadweight comprises:—

Cargo,
 Fresh and Salt Water,
 Coal,
 Spare Gear,
 Crew and Effects,
 Stores and Provisions.

From this it will be seen that in all cases "fresh water" was to be allowed as deadweight, and Coughlan was to be paid for the same at the rate stipulated in the contracts, and the point for decision is whether the water in the boilers is to be treated as "fresh water," and therefore as deadweight.

It was contended on behalf of Coughlan that the water carried in the boilers should, by virtue of the terms of the contracts, be held to fall within the definition of "fresh water," and that the weight of such boiler water to steaming level, should be allowed as deadweight in the case of each ship, and that Coughlan should be paid for that deadweight at the rate stipulated in the respective contracts. The weight of water carried in the boilers in each of the six ships was calculated to be 81 tons. If this claim is a valid one Coughlan would be entitled to a substantial sum thereunder.

It seems to me that the contention that "fresh water" includes boiler water is untenable. The evidence of several very competent men of wide experience, naval architects, ship-builders, representatives of Lloyds, called on behalf of the Minister, was all to the effect that in their experience it was the universal custom or usage not to compute boiler water as deadweight. I was referred to several text books on Naval Architecture and they all support the view that boiler water is not to be treated as deadweight. My recollection is that not one witness was called who had ever heard of boiler water being allowed as deadweight in Canada, or elsewhere. It might be contended that the contracts in question having been entered into and executed in Canada we can only look to custom or usage in Canada in construing the specifications relevant to this point. If that view be thought the proper one, then upon the evidence, I must hold that it was not the custom or usage in Canada to allow boiler water as deadweight. The Minister in carrying out his ship-building program had constructed, in Canada, by various contractors, altogether sixty-four ships, and Coughlan was the only contractor who claimed that boiler water should be allowed as deadweight. The designated yard numbers of the ships constructed by Coughlan for the Minister, under the two contracts in question, would indicate that at least ships numbered from 1 to 10 inclusive, and 15 to 19 inclusive, had been constructed for others in the yards of Coughlan, and possibly further ships were constructed after the Minister's ship no. 21. If in such cases boiler water had been allowed as deadweight we no doubt would have heard of that custom or usage from Coughlan. As the ships 11 to 14 were constructed Coughlan rendered its accounts to the Minister free of any suggestion or claim that boiler water was to be calculated as deadweight, and it was not till a dispute arose over the light displacement of ship no. 20, that such a claim was for the first time advanced. The acts of parties to a contract afford some basis of interpreting the same. Mr. Leitch, Vice-President and General Manager of Collingwood Shipyards Ltd., of Collingwood, Ontario, which company had constructed nine ships for the Minister, gave what seems to me a very sound and practical reason why boiler water is calculated as part of the lightweight

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of a ship, and not as deadweight. He stated that boiler water "is one of the first requisites of the ship. An owner cannot take it out and carry cargo in its stead. It is necessary to the operation of the vessel." That reason alone would seem to me conclusive of the controversy.

Paragraph 51 of the specification relating to the first contract, under the head of "Fresh Water Tanks," required two fresh water tanks, with a capacity of 2,500 gallons each, and this, I think, is the "fresh water" that was to be allowed as deadweight under the contract, and Coughlan claimed and was allowed 22 tons as deadweight for such fresh water in the case of each of the first four ships. In the case of ships 20 and 21, the specification under the head of "Fresh Water and Sanitary Tank" states that about 5,500 gallons of fresh water was to be carried in a tank in the double bottom. This fresh water was also allowed and paid for as deadweight. I have no doubt that it was this "fresh water" that was to be allowed as deadweight, and not the boiler water.

Boiler water is not, I think, fresh water in the practical sense, and is not water intended for what is usually called "ship's use." In my opinion, a true construction of the specifications, as well as custom and usage, excludes the calculation of boiler water as deadweight; boiler water was a part of the equipped weight of the ships in question, which were to be delivered at Vancouver ready for ocean service. It would hardly seem necessary to continue further the discussion in respect of this claim which, I think, is entirely without foundation or merit. With such a finding made in respect of boiler water, it was agreed by counsel that this would dispose also of the claims for an allowance of 82.75 and 90 tons as deadweight in connection with ships 20 and 21 respectively, as set forth in the petition.

* * * * *

The next claim to be considered relates to the price to be charged Coughlan for the hull plates supplied it by the Minister, for ships 20 and 21, from the Sydney Mills. Coughlan, as will later appear, was ultimately charged \$3.50 per hundred pounds, and, in addition, the premium on New York funds prevailing at the time. The contention advanced on behalf of Coughlan was that the Sydney price should not exceed \$2.75 per hundred pounds, the

minimum price mentioned in the contract, which, it is claimed, was the "base price f.o.b. Pittsburgh, U.S.A." for ship plates, at the material date. This claim is substantial in amount and presents a point difficult of determination, more so perhaps than any other item of the claims set forth in the petition. At the conclusion of the trial I had formed the opinion that the price charged Coughlan was a proper one; since then I have given this claim a most anxious consideration and in the end I find myself unable to depart from that view.

It will later be seen that Coughlan obligated itself to purchase from the Minister the steel plates required for the construction of the hulls of ships 20 and 21, at a price "equal to the base price f.o.b. Pittsburgh, U.S.A., of plates manufactured in the United States of similar specifications at the time the specifications are deposited with the Minister," but in any event that price was "not to be less than \$2.75 per hundred pounds base f.o.b. Mills," and by "Mills" I assume it was the Sydney Mills that was meant. There is some dispute as to the exact date when Coughlan's specifications were deposited with the Minister but it transpires that this is not of material importance; it may be assumed that the specifications were deposited with the Minister in July, 1920. As earlier stated, the Minister induced the Dominion Steel Corporation to construct a plate mill at Sydney, N.S., and the Minister agreed to purchase from that corporation a certain tonnage of steel plates over a certain period, at the price of \$3.75 per hundred pounds, but it would seem clear in view of the terms of the contract here that this price was not to control the price to be charged Coughlan, except as to the minimum price.

It was Mr. Clark's submission that "base price," under the contract, was the going market price quoted at Pittsburgh, which Coughlan would have had to pay United States mills, in July, 1920, for ship plates deliverable at such times and in such quantities as would enable it to construct and deliver the two ships in question within the contract period; and that the word "base" in the steel trade relates to recognized standards of dimensions, shapes and qualities, of steel products, and not to price. Mr. Griffin relied upon a strict interpretation of the contract

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and he contended that the Pittsburgh "base price" was the price quoted to the trade as "base price," by Pittsburgh mills, for standard steel plates, ship plates, in this case, to be manufactured conformable to order and deliverable within the time or times and in the order and quantities normally usual in the practice of steel mills; and that such quoted "base price" had at the material time no reference to any price quoted for guaranteed deliveries in advance of normal deliveries, that is, deliveries to be made at the convenience of any producing mill.

I shall attempt now to state, at some length, I fear, the material facts relative to this claim. Paragraph 11 of the contract is the one referable to this claim and it is as follows:

It is hereby mutually agreed upon between the Minister and the Contractors that the Contractors shall purchase the steel plates entering into the construction of the hulls of the said vessels from the Minister at a base price f.o.b. Mills Sydney that shall be equal to the base price f.o.b. Pittsburgh, U.S.A., of plates manufactured in the United States of similar specifications at the time the specifications are deposited with the Minister the said price not to be less than \$2.75 per 100 pounds base f.o.b. Mills Sydney.

As the ship plates went forward from Sydney, N.S., to Coughlan, at Vancouver, it was billed for the same at the minimum base price mentioned in the contract. In December, 1920, Mr. Tibbits, Acting Assistant Deputy Minister, at that time in charge of this branch of the Minister's ship-building program, directed a letter to Coughlan on the subject of the price of Sydney steel plates, and also to Collingwood Shipbuilding Co. Ltd., Nova Scotia Steel & Coal Co. Ltd., Port Arthur Shipbuilding & Repairing Co. Ltd., Davie Shipbuilding & Repairing Co. Ltd., Tidewater Shipbuilders Ltd., and Wallace Shipbuilding & Dry Dock Co. Ltd., all of which concerns were then building ships for the Minister. That letter had better be quoted in full, because it explains why the Minister's contractors were billed originally for Sydney steel plates at the rate of \$2.75 per hundred pounds, and later at \$3.25 per hundred pounds. That letter is as follows:

We have been billing you as steel shipments have come along from the Sydney mills, for the last ships contracted for by you, at the minimum base price mentioned in that clause of your contract for the construction of these ships which specifies that steel plates required for same were to be ordered by you from this Department. This was to obviate delay while we were ascertaining, by enquiries from producers in the

United States, the actual market value of this plate at the time your specifications were placed with us, based on the Pittsburgh base price plus the current premium demanded for equivalent delivery. We have now ascertained this, and have fixed the ultimate price of \$3.25 per hundred pounds; this is made up of the Pittsburgh base of \$2.75, plus a premium based on the price obtained by United States mills for actual sales made with such deliveries as you have obtained, plus the premium on New York exchange. We have made sales of this plate to general commercial consumers, and for shipment to Europe, at a much higher price than that now fixed for shipbuilding, but the Department has felt that it was best not to take advantage of the conditions of the market, by demanding the full premium from shipbuilders that has been demanded by United States mills during the period deliveries were being made to you, and, as a consequence, has fixed the price of \$3.25 as a fair average under the circumstances—with which on consideration, we feel satisfied you will agree. Kindly note, therefore, that we are now debiting your account with the difference between the base of \$2.75 at which this steel was originally billed to you, and the price as now fixed at \$3.25 on the total tonnage delivered to date, and you will be forwarded a debit memorandum by our Accounting Department to this effect. Payment of the amount will be deducted when the next instalment payment is made you, while from this date steel yet to be delivered on your orders will be billed at the price, as now fixed, of \$3.25 per hundred pounds.

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It is to be observed that Mr. Tibbits states that the price of \$3.25 per hundred pounds “is made up of the Pittsburgh base of \$2.75, plus a premium based on the price obtained by United States mills for actual sales made with such deliveries as you have obtained, plus the premium on New York exchange.” But apparently the price thus fixed by Mr. Tibbits was not to be final. On June 14, 1922, after ships 20 and 21 had been delivered, Mr. Tibbits wrote Coughlan in part as follows:

Referring to the correspondence exchanged regarding the price of \$3.25 charged your firm for steel supplied in connection with the construction of the ss. *Transporter* and ss. *Freighter*, I have to point out that the clause of the contract relating to price to be charged for steel plates supplied by the Department reads as follows:

* * * * *

The Department has since ascertained from the United States Steel Products Co. that on the date your specifications were deposited with the Honourable the Minister, in July, 1920, the base price for steel plates f.o.b. mills Pittsburgh, U.S.A., was \$3.50 instead of \$3.25 per 100 pounds as charged you; further, the Department of Justice advises that the American exchange should have been added to the base price f.o.b. mills, \$3.50.

I therefore enclose herewith accounts for balance due the Department, and will request you to be good enough to forward cheques for \$24,998.62 and \$20,432.25.

While it is not clear, one, I think, may assume a similar letter was forwarded to each of the other contractors already mentioned.

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On April 19, 1922, Mr. Duguid inquired of the United States Steel Products Company, the exporting organization of the United States Steel Corporation, the variations in base prices of steel plates f.o.b. Pittsburgh mills, from July, 1919, to July, 1921. I had better quote the reply to Mr. Duguid's inquiry, signed by Mr. Maxson, one of the officers of the United States Steel Products Company, and which is as follows:

Receipt is acknowledged of your telegram of the 19th instant which was received too late to answer last night, asking us to give you all variations in base prices of steel plates f.o.b. Mills Pittsburgh with dates of change in price since July, 1919, to July, 1921.

It is rather difficult to compile such a report with absolute accuracy as the market conditions varied considerably during the period mentioned as each purchase had to be considered on its merits but we can outline a general Pittsburgh list which is probably accurate enough for your needs and take pleasure in detailing it below.

	1919	1920	1921
January .....	....	\$3 10	\$2 65
February .....	....	3 70	2 30
March .....	....	3 75	2 00
April .....	....	3 65	2 15
May .....	....	3 50	2 20
June .....	....	3 50	2 00
July	\$2 65	3 50	1 85
August	2 65	3 50	1 75
September	2 60	3 50	1 65
October	2 65	3 20	1 60
November	2 65	3 00	1 55
December	2 70	2 65	1 50

Maxson gave evidence in this case and he stated that the United States Steel Corporation never exacted during the material period a premium over its quoted Pittsburgh base price, that is, the price was constant, and he stated that "base" related entirely to dimensions. The United States Steel Corporation would quote its base price in response to customers' inquiries or orders but the latter would have to accept the former's terms as to the date or dates of delivery, or cancel the order if one were made; apparently this was the practice with many other steel mills in the United States but if prompt deliveries and in commercial quantities were required it was at a higher price. Maxson stated that the base price per hundred pounds quoted by the United States Steel Corporation for the first six months of 1920 was \$2.65 per hundred pounds, and \$2.75 for the last six months, but in that period orders would be filled

only after eight or nine months of their receipt whereas ordinarily deliveries would commence within two or three weeks. It would appear, as in fact stated by Maxson, that by December, 1920, or January, 1921, the "backlog" of steel orders filed with the United States Steel Corporation was being caught up with, and that company was getting into a position to make early deliveries and its prices then began to fall, and other mills then dropped their prices to meet that of the United States Steel Corporation. It will be observed from the prices quoted in Maxson's letter that for almost every month during 1920, the market prices for steel in the United States, accompanied, I assume, by reasonably prompt deliveries, substantially exceeded those of 1919 and 1921, which lends weight to the contention that, in 1920, steel plates were not manufactured by United States mills for prompt deliveries except at a price over the quoted Pittsburgh base price. There is no doubt, I think, that in 1920 it was practically impossible to obtain prompt deliveries of ship plates in substantial quantities from United States mills, except at a price higher than that quoted by the United States Steel Corporation, generally referred to as the Pittsburgh base price.

Under the contract in question ship 20 was to have been delivered on or before December 1, 1920, and ship 21 on or before December 15, 1920. The keel plates for these ships, which Coughlan was to purchase itself, and which it ordered from the United States Steel Corporation, were not delivered to Coughlan until after the contract date of delivery of both ships to the Minister had expired; and for a time and for this reason, the Minister treated the contract as at an end. In fact ships 20 and 21 were respectively delivered to the Minister only in October and in November, 1921. Coughlan was purchasing steel, other than ship plates, from United States mills and in a letter to the Minister, as late as January 14, 1921, accounting for certain delays, it mentions the fact that it was experiencing difficulty in getting delivery of such steel. Apparently the price of \$3.50 per hundred pounds charged Coughlan for ship plates, as stated in the second letter of Tibbits, was founded upon the information supplied by Maxson, of the United States Steel Products Company, to Duguid. The prices mentioned in Maxson's letter were extracted from a

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responsible trade journal published in the United States, the *Iron Trade Review*, and not from the records of the United States Steel Products Company itself, but it may be accepted that these figures represent the average market price charged for ship plates manufactured by United States mills in 1920, and accompanied with reasonably prompt deliveries. Another equally reliable trade journal, the *Iron Age*, quoted practically the same figures for the same period.

Mr. Paxton, manager of the heavy steel department of Drummond, McColl & Co., of Montreal, testified that the price of steel plates advanced considerably in 1920 and that there was great difficulty in that year in obtaining supplies of steel plates, and other steel products, accompanied by prompt deliveries, and that United States steel mills in a position to furnish reasonably prompt service demanded their own prices. He stated that in December, 1919, he signed a contract with the United States Steel Products Company for 5,000 tons of plates, shapes and bars, to be specified during the first half of 1920; the price of the portion which was to be taken out in steel plates was to be \$2.65 base per hundred pounds f.o.b. Pittsburgh. Orders against this contract were placed only on account of customers who could await postponed or indefinite shipments, as the United States Steel Corporation declined to commit themselves to any specific date of shipment, and the terms of the contract only required them to make shipment at their convenience; some orders against this contract were delivered only after a lapse of eight or more months. On June 2, 1920, an order for steel plates, angles and beams was placed with the United States Steel Products Company and shipments of this material were not made till January 24, February 16, March 18, and April 22, respectively, in 1921. Other orders, in the first half of 1920, met with the same result. Paxton gave orders for steel in 1920, to some six or seven other well-known United States mills, some of which were cancelled owing to non-delivery, and in other cases the steel was delivered as much as ten to twelve months after the order was placed. From June to September, 1920, he paid such companies, for such deliveries as were made, prices ranging from \$3.50 to \$4 per hundred pounds f.o.b. mills. He paid the Worth Steel Company, a

Delaware mill, \$3.75 for a substantial tonnage of ship plates, for two ships being built for the Minister by Canadian Vickers Company at Montreal, and a similar price for ships being built by the Davie Shipbuilding and Repairing Company, at Levis, Quebec. The Jones, Laughlin Steel Corporation, of Pittsburgh, during the same period, charged a similar price for ship plates for a balance of an order which the Worth Steel Company were unable to deliver. Evidence much to the same effect was given by Mr. Gordon, sales manager of Luken Steel Company, an old and large steel concern operating in the State of Pennsylvania. Gordon stated that the base price of one mill might vary from that of another; that in January, 1920, the base price of Luken Steel Company was \$3.50 per hundred pounds base f.o.b. Pittsburgh, and that price moved to \$4 where it remained fairly steady from February to September when it fell to \$3.50. He also stated that during the period in question it was difficult to obtain prompt deliveries of steel; that mills making deliveries at a distant date might quote lower prices, but that mills in the United States which undertook to make reasonably early deliveries would quote about the same prices as the Luken Steel Company. Mr. Leitch, vice-president and general manager of the Collingwood Shipbuilding Company, of Collingwood, Ont., testified that in the early part of 1920 his company was unable to purchase a certain quantity of urgently required steel plates from the United States Steel Corporation, even though his company had been an old customer of that corporation, and notwithstanding that a vice-president of his company had made a personal appeal to the president of the United States Steel Corporation; later in that year, I should point out, the Collingwood Shipbuilding Company did succeed in making a purchase of some steel from this corporation.

I do not think it necessary to make further reference to the evidence upon this point. I think it may be accepted as a fact that quotations for steel plates, in July, 1920, and earlier and later, might be obtained from the United States Steel Corporation, and probably from other steel mills, at a price of not more than \$2.75 per hundred pounds, but there could not be any assurance of prompt delivery, in any substantial quantities. It may also be accepted as a

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fact that many United States mills in that period were demanding and receiving as much as \$3.50 per ton, and sometimes more, if undertaking to make early deliveries to suit the requirements of customers. I think also that it must be conceded that Coughlan could not, in July, 1920, have secured a contract with any United States mill for the supply of its steel requirements with an undertaking of reasonably early deliveries, without paying a price above the United States Steel Corporation's quoted Pittsburgh base price. And the United States Steel Corporation at that time would not accept orders for ship plates except on the understanding that the same were to be delivered at its convenience though there may have been some exceptions to this.

It does not appear to be in dispute but that the word "base," in the steel trade, is understood to refer to steel products of certain standard dimensions and shapes; "base price" means the price for steel within certain standards of size and shape, and, I think, quality as well. It also indicates to the trade, according to the evidence, that steel, other than that of standard dimensions and shapes, was liable to an extra charge over base steel, and such extra charges are usually classified and periodically published to the trade by mills. In the contract therefore, the "base price" means the price of base steel products, and that is made rather clear by the last sentence of para. 11 of the contract which states that the price is not to be less than "\$2.75 per hundred pounds base," and there "base" undoubtedly refers to ship plates of standard sizes and shapes and not to price. The price might vary but "base" had a constant meaning in the trade.

The price Coughlan was to pay the Minister was the price it would have had to pay United States mills for plates to be manufactured, as of the date when it filed its steel specifications with the United States mills. Ship plates would not be carried in stock by United States mills and would have to be manufactured in conformity with the requirements of the customer, and the deliveries would have to meet the requirements of the customer, otherwise we may assume the plates would never be manufactured. In normal periods in the steel trade, ship plates would be manufactured and forwarded by instalments and in the

order in which the plates would enter into the construction of a ship, and ordinarily deliveries would commence within two or three weeks after the manufacture was begun. The words "manufactured in the United States at the time the specifications were deposited with the Minister" in the contract are of special significance. The word "specifications" here, I think, must refer not to the contract specification which formed a part of the contract, but to the specifications of the ship plates required of the Minister, and which of course would have to be filed or deposited with any United States mill had Coughlan been purchasing its steel requirements there, and not from the Minister. The words just quoted from the contract also imply, I think, that the price of the plates "manufactured in the United States" would be the price charged for the equivalent deliveries which Coughlan would require of the Minister, in order to enable it to proceed by successive steps to the completion of the ships and their delivery at the specified dates. Coughlan was to be paid by instalments on the basis of the work done as set forth in para. 11 of the contract.

The only real difficulty in this controversy arises from the fact that, during 1920, the United States Steel Corporation did not increase its price for steel products, as did other United States mills, and during that period it declined to accept steel orders for deliveries which did not suit its convenience, unless possibly where small quantities only were involved. It was its policy to lay down one constant price for its customers, applicable at all times. The enhanced price charged by other mills over the normal price for prompt deliveries was referred to frequently during the trial as a "premium," and such mills as "premium mills," but whether these are correct terms matters little; such prices were quoted by steel trade journals in the United States as the going market price; and corresponding or even higher prices were exacted by the Minister for Sydney steel sold to others than Coughlan. That the Pittsburgh market price of ship plates at the material date was uncertain is indicated by the fact that the parties to the contract fixed only a minimum price, which at that date was slightly in excess of the price then quoted by the United States Steel Corporation. If the United States Steel Corporation price

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were to be the price to Coughlan, it might have been so stated in the contract because that was then known, and it apparently was not a fluctuating price.

I am of the opinion that the Pittsburgh price for ship plates manufactured in or about July, 1920, and accompanied by reasonably prompt deliveries, was at least \$3.50 per hundredweight base. The lowest price quotations would not satisfy the needs of Coughlan which required ship plates for the construction of ships to be completed at a definite date. Palgraves Dictionary of Political Economy states that present goods are valued higher than future goods, and I have no doubt that this not unusual fact accounts for the disparity in the steel quotations of the United States Steel Corporation and other United States mills, at the time in question. I am of the opinion therefore that the Minister was justified in charging Coughlan the price of \$3.50 per hundredweight base for the ship plates delivered at Sydney. It may be inferred from the evidence that all other contractors of the Minister, at the material time, paid that price, otherwise I am sure I should have heard of it. If there had been no Sydney mill, and Coughlan had to purchase ship plates from United States mills, I have no doubt it would have been obliged to pay that mill price. Coughlan therefore fails in this claim and the Minister must succeed in his claim for the balance claimed to be due him in the same connection and for which he counterclaims.

Adverting now to the question of the premium on United States funds which prevailed at the time material here. I am unable to see any reason whatever for this charge against Coughlan and it seems to me that there is nothing in the contract to justify it. The contract makes no reference to the matter of exchange, and there is no reason why it should. The Pittsburgh price was to set the price of the Minister's ship plates to Coughlan, f.o.b. at Sydney. That was a mill price and not a delivery price. The cost of remitting funds to the United States could not arise because the Minister was being paid in Canadian funds by debiting the selling price of the ship plates against the contract price, which would mean payment in Canadian funds. The reference to Pittsburgh prices in the contract was merely for the purpose of ascertaining the price which the Minister

should charge Coughlan, for ship plates delivered f.o.b. Sydney, and the cost of purchasing American funds could not have been within the contemplation of either party to the contract. I think therefore that Coughlan is entitled to a credit for any deduction or charge made on this account.

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Next, there is a claim for a substantial amount on account of an alleged excess of steel said to be supplied Coughlan, for the construction of the four ships under the first contract, the supply of which steel was arranged for in the United States through the agency of the Minister and as already mentioned; no claim on account of excess steel supplied arises under the second contract. The contract provided that "all plates, sections and boiler plates used in the construction of the vessels will be supplied by the Minister," and the word "used" is emphasized on behalf of Coughlan in connection with this claim. The seventh paragraph of the contract as originally drafted required Coughlan to submit in duplicate to the Minister for approval "all detail working drawings on blue prints of the hulls, machinery, auxiliary boilers and fittings." By reason of the facts which I am about to narrate that paragraph of the contract was eliminated before the execution thereof. In November, 1918, Mr. J. J. Coughlan, representing J. Coughlan & Sons, came to Ottawa seeking a contract or contracts for the construction of ships for the Minister, and ultimately he secured for his firm, a contract for the construction of the four ships under discussion and the contract was executed on November 22, 1918. These four ships would be sister ships of one or more already constructed on account of the Minister by Canadian Vickers Company Ltd., of Montreal. Instead of preparing new plans and drawings, and in order to avoid delays, some one suggested, possibly the Minister's chief naval architect, Duguid, that Mr. Coughlan might be able to purchase from Vickers its plans and drawings of the 8,100-ton ships just as other contractors had done. Thereupon Mr. Coughlan at once purchased from Vickers such plans and drawings, which I have no doubt included copies of what is known as the steel order sheets, for the sum of \$10,000, and it was in consequence of this arrangement that paragraph seven of the contract was eliminated. For some

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unaccountable reason Mr. Coughlan for a time persistently denied, in his evidence on discovery in this case, that he had any responsibility whatever regarding the acquisition of these plans and drawings from Vickers and that the same were acquired by the Minister for his use and benefit and not that of Coughlan. The steel order sheets, I might say, specified, in detail on sheets, the quantities, sizes and shapes of all the steel required in the construction of any one of the ships in question, and would be abstracted and compiled from the plans and drawings.

The plans and drawings, and, I think, the steel order sheets, were forwarded in due course to the Minister by Vickers for transmission to Coughlan; they were forwarded first to the Minister because Duguid proposed making minor structural alterations in these four ships. The war by this time having ended, certain war-time structural requirements in the sister ships built by Vickers might now be eliminated, and Duguid was interested in seeing that such structural alterations appeared on the acquired plans and drawings and thus avoid possible errors and confusion in the ordering of steel, and otherwise. Coughlan apparently takes the position that the Minister was responsible for not only ordering the steel described in the steel order sheets but for the accuracy of the orders as well, and also for the currency of the steel shipments made by the mills in response to such orders.

The Minister's officers either had copies of the steel order sheets which came from Vickers, on account of Coughlan, or, there were already on hand in the Minister's department copies of the Vickers' steel order sheets, there deposited by Vickers in connection with the contract for the sister ships already constructed, and, in any event, a complete set of such steel order sheets was, I believe, handed to Mr. J. J. Coughlan about the time of the execution of the contract, or, they were forwarded early thereafter to J. Coughlan & Sons at Vancouver. That the necessary steel order sheets were to be forwarded through the Minister to United States steel mills was agreed upon between Coughlan and Duguid when the contract was signed, but some were to be held back in order to make some alterations or corrections therein; there was some delay in forwarding some of the steel order sheets to the United States

mills but that is not now of importance. The ships were to be built according to Coughlan's plans and drawings acquired from Vickers, and the steel was to be ordered by the Minister according to the steel order sheets which Coughlan had acquired through Vickers, or according to the steel order sheets already in the possession of the Minister, and, I think, it matters not which. In my opinion the plans, drawings and steel order sheets were, for our purposes here, those of Coughlan, just as if they all had been prepared originally by it, and, in my opinion, it was the duty of Coughlan to inform itself fully of the same, and if necessary from time to time advise the Minister as to any departure from the same, or as to any discovered errors in the same. The common sense of the situation was precisely the same as if the plans, drawings and steel order sheets had been originally prepared by Coughlan and approved by the Minister, and as if the steel order sheets were being forwarded by Coughlan to the steel mills designated by the Minister, from time to time as required, in which case Coughlan would be responsible for errors of any kind deriving therefrom. In reality the obligation to supply Coughlan with steel was largely one to provide a source of supply.

Coughlan now contends that the steel order sheets specified more steel than was necessary, or that the Minister caused to be forwarded to Coughlan more steel than was necessary, and that it should be repaid the amounts it paid or was charged for such excess of steel. On the other hand it is contended on behalf of the Minister that no steel was ordered except that specified by Coughlan, or that specified in Coughlan's steel order sheets, and it is even contended that the steel order sheets called for very many tons less steel than was actually used in the construction of the four ships.

Several reasons were advanced, on behalf of the Minister, for doubting the accuracy of the claim that there was an excess of steel supplied, and there are inferences to be drawn from certain facts. Several things seem to have occurred in this connection to create confusion. The Vickers' plans called for plates 29 feet in length, plates to be shaped, but Coughlan's mill facilities could roll only plates not exceeding 26 feet, which fact, of course, would be unknown to the

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Minister. These plates, with the exception of a small tonnage, had been ordered and rolled, and, I think, shipped to Coughlan, before the Minister was requested by Coughlan to ask the mills to cease rolling such plates, and a corresponding quantity of plates, 26 feet in length, had to be ordered. For this reason there were added some 328 tons of steel to the original order. Coughlan accepts the blame for this. Then, Coughlan was, or had been, building ships for the Imperial Munitions Board and it discovered nearly five months after signing the first contract with the Minister, that it had in stock a large tonnage, 333 long tons, left over from the Imperial Munitions Board contracts, all to Lloyds requirements, and which might be used in the construction of the four ships under discussion. Coughlan requested leave to use this tonnage and to cancel the corresponding tonnage already ordered, and, as I understood it, the Minister only succeeded in cancelling 44 tons. Then, in January, 1919, Coughlan informed Duguid that no material had been ordered for the L strakes on the bridge sides. Apparently this material was not included in the Vickers' steel order sheets. Duguid requested Coughlan to forward six copies of a list showing the material required for the L strake, and any other items of material found lacking in Vickers' steel order sheets. The Minister supplied Coughlan with the steel requested for the L strake, and it transpires that out of the alleged excess of steel supplied, amounting to some 400,000 pounds, some 120,679 pounds of that quantity related to the L strakes. Coughlan also forwarded to Duguid sheets 94 to 99 and requested that the quantity of steel therein mentioned, 13.5 tons, be ordered from the mills in addition to that already specified. All this amounted to nearly 700 tons of steel above that specified in the steel order sheets, and, it is said, this not only caused confusion but explains why Coughlan possibly had steel left over in connection with the construction of these four ships. During the progress of the construction of the four ships in question Coughlan apparently never complained to the Minister, or his officers, of any over-shipment of steel, or of any error in the steel order sheets; and it was only when the contract was completed that Coughlan filed a claim of \$25,000 for the excess steel said to have been supplied by the Minister.

The Minister apparently was always willing to credit Coughlan for any excess of steel supplied it, if it could be satisfactorily shown that any unreasonable excess of steel had, in fact, been ordered and shipped to Coughlan. At the conclusion of the Minister's ship-building program, Mr. Willsher, Assistant Naval Architect, was directed by the Deputy Minister of Marine to proceed to Vancouver to inquire into various matters relative to the ship-building contracts of Coughlan and others at Vancouver, one of which was to ascertain what excess of steel Coughlan had on hand, in connection with the four ships in question. After, I think, fifteen or more visits to Coughlan's ship-yards, all Willsher could find or be shown in the way of excess steel was a total of 109 plates, or 31 tons, and this he reported to Duguid, giving the character, the size, and the marks on each plate; ship plates always bear the mill mark. Duguid's analysis of Willsher's report was that 62 of the 109 plates, or 24.81 tons, were plates actually rolled and designated for certain positions in the ships, which means, that not having been put into the ships, their places must have been supplied by other plates which Coughlan somehow had in stock; this would leave an excess of steel on hand of 47 plates, or 6.9 tons. Then, Willsher testified that when he inquired of Coughlan why the alleged excess of steel was not produced or shown the answer was: "It probably had been used in the construction of their other ships," that would be ships 20 and 21, or other ships, and this evidence of Willsher I accept. The plates for ships nos. 20 and 21 were of the same size and number as for ships nos. 11 to 14, owing to the fact, as I understand it, that the latter ships turned out on completion to be approximately of 8,350 tons deadweight carrying capacity. Furthermore, very convincing evidence was given that if Coughlan had ordered steel for ships nos. 20 and 21, according to the requirements mentioned in the steel order sheets for such ships, it should have ordered some 228 additional tons of steel, and the contention advanced on behalf of the Minister is that this 228 tons was in stock at the time in Coughlan's yards. It is claimed therefore on behalf of the Minister that any excess of steel plates in connection with the first contract was due either to unnecessary orders for steel made by Coughlan, or that

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it had in stock the corresponding quantities from other ship-building contracts, which it used.

I think Coughlan must accept the responsibility for any reasonable excess of steel, if excess there were. According to the evidence it was and is a usage of ship-building yards to order slightly more than the precise quantity of steel that would enter into the construction of a ship, in order to provide against the contingency of injury to or destruction of a plate or plates, for example, in the rolling or shaping of the same. The surplusage of some six tons, which I accept as the correct tonnage, was not an unreasonable one considering the total tonnage involved in the construction of four ships, but in any event the steel order sheets were those of Coughlan, and I am not satisfied that the Minister in ordering steel exceeded the quantities designated on the steel order sheets. Furthermore, upon the evidence, I doubt if the alleged excess of plates ever reached Coughlan's yards, but if so, and they were never used or otherwise disposed of by Coughlan, then it would have been possible to have shown most of them to Willsher, the alleged excess being about 275 tons. Coughlan has failed to convince me that this claim is one which should be allowed. The Minister apparently was always quite willing to repay Coughlan for any unreasonable quantity of excess steel if the fact could be satisfactorily established, but the Minister was not so convinced and neither am I convinced. If the Minister, in law or equity, were liable to Coughlan as claimed, then he was entitled to delivery back of the excess of steel, but this could not have been done. This claim is therefore dismissed.

[The learned Judge here dealt with other claims of Suppliant and Respondent.]

Judgment accordingly.

BETWEEN:

COLIN JOHN GRASSET MOLSON }
 AND THE NATIONAL TRUST }
 COMPANY LIMITED, EXECUTORS } APPELLANTS;
 OF THE WILL OF KENNETH MOLSON, }
 DECEASED

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 Jan. 9.
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AND

THE MINISTER OF NATIONAL }
 REVENUE } RESPONDENT.

Revenue—Income tax—Quebec Civil Code—Transfer of property in fulfilment of marriage contract is not a transfer to evade taxation—Income War Tax Act.

By his marriage contract entered into on March 28, 1913, wherein separation as to property was stipulated, Kenneth Molson, resident in Montreal, P.Q., made to his future wife a donation *inter vivos* of the sum of \$20,000. By a deed made on March 23, 1925, the said Kenneth Molson in fulfilment of the conditions of his marriage contract with respect to the said donation, transferred and conveyed to his wife certain shares of the capital stock of various corporations, the wife accepting such shares in full payment of the sum of \$20,000. The returns of income he made for the years 1925 to 1931 inclusive omitted the income derived from these shares. He died on April 9, 1932.

On April 11, 1933, the Commissioner of Income Tax sent notices of assessment to one of the executors of the will of the said Kenneth Molson, assessing the dividends paid on such shares between March 23, 1925, and December 31, 1931.

Held: That the conveyance made by Kenneth Molson to his wife was not a transfer to evade taxation; it was made in fulfilment of his marriage contract and from the date of transfer he had no further interest in the shares transferred to his wife and was no longer liable to taxation on the income derived therefrom.

APPEAL under the provisions of the Income War Tax Act from the decision of the Minister of National Revenue.

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

H. G. Lafleur for appellant.

W. S. Fisher for respondent.

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

ANGERS J., now (January 9, 1937) delivered the following judgment:

This is an appeal by the executors of the will of the late Kenneth Molson, in his lifetime of the city of Montreal, Province of Quebec, against the assessments bearing date

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the 11th of April, 1933, whereby additional taxes were levied against the said estate for the years ending the 31st of December, 1925, 1926, 1927, 1928, 1929, 1930 and 1931, the said assessments having been affirmed by the Minister of National Revenue, represented and acting by the Commissioner of Income Tax, on February 12, 1934.

By his marriage contract with Isabel Graves Meredith, passed before Charles Delagrave, N.P., at the city of Quebec, Province of Quebec, on March 28, 1913, a copy whereof was registered in the registry office for the registration division of Montreal West on May 28, 1913, under No. 155,397, wherein separation as to property was stipulated, Kenneth Molson made to his future wife a donation *inter vivos* of the sum of \$20,000; the part of the seventh clause of the contract relating thereto reads as follows:

In view of there being no Community and no Dower and of the love and affection of said future husband for his said future wife, he the said future husband, doth by these presents give and grant by way of Donation *inter vivos* and irrevocably unto his said future wife, thereof accepting:

1. The sum of Twenty Thousand Dollars, which the said future husband promises and obliges himself to pay to the said future wife at any time he may elect after the solemnization of said intended marriage, either in one sum or by instalments or by investments or investment in the name of the said future wife, and in such securities as he may see fit. Any investment so made shall operate as payment, however, only in so far as the same may be accepted by the future wife,—and any payment made by the said future husband to the said future wife on account of the said sum of Twenty Thousand Dollars, or any investment made by the said future husband in the name of the said future wife on account of the said sum of Twenty Thousand Dollars, shall be evidenced by a Declaration to that effect made and signed by the said future husband and the said future wife before a Notary Public and recorded in the office of such Notary. Should the death of the future husband occur before said sum has been fully paid, the unpaid balance shall become due and exigible at his death, should the said future wife be then living, and it is also further agreed between the parties that should the said future husband during the existence of said intended marriage become Insolvent, without having first paid the said sum of Twenty Thousand Dollars, in its entirety, then in such case the said future wife shall have the right to claim and demand the same or any part thereof then unpaid.

To have and to hold the said sum of Twenty Thousand Dollars unto the said future wife as her absolute property, but it is specially stipulated and agreed that in the event of her predeceasing her said future husband without having received payment in full of the said sum, the balance of the said sum of Twenty Thousand Dollars which shall not have been paid by the said future husband to the said future wife during her lifetime shall belong to the child or children issue of the said intended marriage, and in default of such child or children the said unpaid balance of the said sum of Twenty Thousand shall revert to the said future husband or his heirs.

By a deed made before L. A. Marchessault, N.P., on March 23, 1925, Kenneth Molson, desirous of fulfilling the conditions of his marriage contract with respect to the donation of the sum of \$20,000, transferred and conveyed to his wife, the said Isabel Graves Meredith, shares of the capital stock of various corporations, as follows:

Twenty-five shares of the capital stock of the Bank of Montreal, of the par value of one hundred dollars each but of the present market value of approximately two hundred and forty-eight dollars per share.

Fifty shares of the preferred capital stock of Ontario Steel Products, of the par value of one hundred dollars each but of the present market value of approximately ninety-three dollars and fifty cents per share.

Twenty-five shares of the capital stock of Shawinigan Water & Power Company, of the par value of one hundred dollars each but of the present market value of approximately one hundred and thirty-six dollars per share.

Twenty-five shares of the capital stock of The Bell Telephone Company of Canada Limited, of the par value of one hundred dollars each but of the present market value of approximately one hundred and thirty-six dollars per share.

Twenty-five shares of the preferred stock of Canadian Car & Foundry Company Limited, of the par value of one hundred dollars each but of the present market value of approximately ninety dollars per share.

The wife, Isabel Graves Meredith, who was a party to the deed, accepted the shares in full payment of the sum of \$20,000.

The said Kenneth Molson did not include in the returns of income he made for the years 1925 to 1931 inclusive the income derived from these shares but paid in due course the tax on the income disclosed in his said returns. He died on April 9, 1932.

On April 11, 1933, the Commissioner of Income Tax sent notices of assessment to National Trust Company, one of the executors of the will of the late Kenneth Molson, assessing the dividends paid on the said shares between the 23rd of March, 1925, and the 31st of December, 1931.

On or about May 5, 1933, viz., within the delay fixed by section 58 of the Income War Tax Act, the executors of the will of the late Kenneth Molson served a notice of appeal upon the Minister. The notice contains a statement of the additional taxes assessed in respect of income for the years 1925 to 1931 inclusive and then states:

The additional taxes which have been assessed against the above decedent or his estate are in respect of income received between the 23rd day of March, 1925, and the 31st day of December, 1931, by Mrs. Isabel Graves Molson on the following stocks which she received on or before the 23rd day of March, 1925, and accepted in settlement of a Donation *inter vivos* of \$20,000 which the deceased made to her, as

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his future wife, by their Ante-Nuptial Contract of Marriage made before Mtre. Charles Delagrave, Notary, of the City of Quebec, on the 28th day of March, 1913, a certified copy whereof is hereto attached and marked "A."

There follows a list of the stocks mentioned in the deed of conveyance by Kenneth Molson to his wife which I need not repeat, and the notice then sets out the reasons for appeal as follows:

The executors of the estate of the late Kenneth Molson hereby appeal from the above additional assessments and interest thereon for the following reasons:—

- (a) The gift of \$20,000 made by the deceased to his future wife in the said Ante-Nuptial Contract of Marriage, was a valid gift under the Law of the Province of Quebec and was irrevocable.
- (b) It was made before the Income War Tax Act came into force.
- (c) The delivery of the above stocks to Mrs. Molson by the deceased on or before the 23rd day of March, 1925, was in payment and in satisfaction of the obligation he had undertaken in his Ante-Nuptial Contract of Marriage, and the acceptance of the said stocks by Mrs. Molson in satisfaction of the said gift was not a "transfer of property" to evade taxation within the meaning of the Income War Tax Act of 1917 and amendments thereto.

On February 12, 1934, as previously noted, the Minister affirmed the assessment and notified the National Trust Company accordingly.

On or about March 8, 1934, a notice of dissatisfaction, with a statement of the facts and reasons which the taxpayer intended to submit in support of the appeal, was sent to the Minister in compliance with section 60 of the Act.

After referring to the contract of marriage and the deed of conveyance aforesaid and repeating in substance the facts and reasons alleged in the notice of appeal, the notice of dissatisfaction adds (*inter alia*):

(10) The Act to amend The Income War Tax Act, 1917, was assented to on the 15th of June, 1926,—(16-17 George V, Cap. 10) and Section 32 of the said Amending Act is in the following terms:—(R.S.C., 1927, Cap. 97).

"TRANSFERS TO EVADE TAXATION"

"32. Where a person transfers property to his children such person shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made, unless the Minister is satisfied that such transfer was not made for the purpose of evading the taxes imposed under this Act.

2. Where a husband transfers property to his wife, or vice versa, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made."

(11) The transfer or payment made by the said Molson to his said wife, as evidenced by the Deed of the 23rd of March, 1925, was not intended to be and was not in fact considered as a transfer to evade taxation within the contemplation of the Amending Statutes passed over fifteen months later. On the contrary, the transfer was a legal and proper fulfilment by the said Molson of the contractual obligations undertaken by him in the Marriage Contract of the 28th of March, 1913, and was in all respects legal and proper.

(12) The donation of Twenty thousand dollars (\$20,000) made by the said Molson to his future wife in the Contract of the 28th of March, 1913, was a donation entirely in accordance with the laws of the Province of Quebec. The said donation was accepted by the future wife as being in lieu of her community and dower rights and the agreements in regard thereto were not in fact and could not in any way be affected by The Income War Tax Act, 1917, or any of the amendments thereto.

(13) In like manner, the fulfilment of the contractual obligations assumed by Molson in the said Contract of Marriage, as evidenced by the Deed of Conveyance of the 23rd of March, 1925, was also legal and cannot be considered as, and in fact was not, a transfer to evade taxation within the meaning of the Amending Statutes of June, 1926 (R.S.C., 1927, Cap. 97, Section 32), and the appellant is entitled to have it so declared.

On March 2, 1935, the Minister replied denying the allegations of the notice of dissatisfaction and confirming the assessments.

Pleadings were filed. The statement of claim deals only with the assessment for the year 1930, but contains a declaration that it was agreed between the parties that the decision of the Court with reference to said assessment would apply to the assessments for the years 1925, 1926, 1927, 1928, 1929 and 1931.

Apart from the marriage contract and deed of conveyance, no evidence was adduced at the trial.

The late Kenneth Molson and his wife, Isabel Graves Meredith, were separate as to property in virtue of their marriage contract. The wife separate as to property has the full ownership of her property, retains the entire administration thereof and has the free enjoyment of her revenues: article 1422 C.C. (Quebec).

The donation *inter vivos* of the sum of \$20,000 made by the late Kenneth Molson to his future wife by their marriage contract is legal and valid: see articles 1257 and 819 C.C.:

1257. All kinds of agreements may be lawfully made in contracts of marriage, even those which, in any other act *inter vivos*, would be void; such as the renunciation of successions which have not yet devolved, the gift of future property, the conventional appointment of an heir, and other dispositions in contemplation of death.

819. Subject to the same rules (i.e., the rules concerning gifts *inter vivos*), when particular exceptions do not apply, future consorts may like-

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wise by their contract of marriage give to each other, or one to the other, or to the children to be born of their marriage, property either present or future.

See also articles 755, 757, 777, 778, 788, 804, 807, 821 and 822.

The marriage contract, as previously noted, was duly registered.

The donation with which we are concerned was unquestionably made in good faith, having been made prior to the coming into force of the Income War Tax Act, 1917 (7-8 Geo. V, chap. 28) on September 20, 1917.

The claim of the Crown is based upon subsection 2 of section 32 of the Income War Tax Act (R.S.C., 1927, chap. 97). This subsection 2 was, prior to the revision of the statutes in 1927, paragraph (b) of subsection 4 of section 4, as enacted by 16-17 Geo. V, chap. 10, s. 7.

Subsection 2 of section 32 is literally the same as paragraph (b) of subsection 4 of section 4; both read as follows:

Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

Subsection 1 of section 32, prior to its repeal and the substitution of another one therefor by 24-25 Geo. V, chap. 55, s. 16, was word for word the same as paragraph (a) of subsection 4 of section 4; it reads thus:

Where a person transfers property to his children such person shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made, unless the Minister is satisfied that such transfer was not made for the purpose of evading the taxes imposed under this Act.

Section 32 in chapter 97 of the Revised Statutes of Canada, 1927, appears under the heading "Transfer to Evade Taxation."

In 16-17 Geo. V, chap. 10, s. 7, opposite paragraph (a) of subsection 4, in the margin, are the words "Transfer of property."

The marginal note opposite subsection 4 of section 4 of the Income War Tax Act, 1917 (7-8 Geo. V, chap. 28) is "Transfer of property to evade taxation." This subsection 4 which was repealed and replaced as previously noted by 16-17 Geo. V, chap. 10, s. 7, reads as follows:

A person who, after the first day of August, 1917, has reduced his income by the transfer or assignment of any real or personal, movable or immovable property, to such person's wife or husband, as the case may

be, or to any member of the family of such person, shall, nevertheless, be liable to be taxed as if such transfer or assignment had not been made, unless the Minister is satisfied that such transfer or assignment was not made for the purpose of evading the taxes imposed under this Act or any part thereof.

It seems to me obvious that the object of section 32 is, as, prior to the revision of the statutes in 1927, the object of subsection 4 of section 4 was, to tax in the hands of the transferor property transferred for the purpose of evading taxation.

The conveyance made by Kenneth Molson to his wife was not a transfer to evade taxation; it is not, in my opinion, subject to the provisions of section 32 of the Income War Tax Act. This conveyance was effected by said Molson in fulfilment of the donation of \$20,000 which he had made and which he had the right to make to his wife by his marriage contract.

From and after March 23, 1925, date of the deed, exhibit 2, the late Kenneth Molson had no further interest in the shares conveyed to his wife and he was no longer liable to be taxed on the income derived therefrom. From that time Isabel Graves Meredith, his wife, became the sole and absolute owner of the said shares.

For the above reasons I believe that the appeal must be allowed and the assessments in question set aside.

The appellants will be entitled to their costs against the respondent.

Judgment accordingly.

<p>GOOD HUMOR CORPORATION OF } AMERICA }</p>		PLAINTIFF;
AND		
<p>GOOD HUMOR FOOD PRODUCTS } LIMITED AND HERBERT E. BRAD- } LEY }</p>		DEFENDANTS.

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"Trade-mark—General trade-mark—Associated companies under one management using same trade-mark—Validity of trade-mark—Limitation of trade-mark—Unfair Competition Act—Constitutional law—British North America Act—" Good Humor."

Plaintiff, a company incorporated in 1928 in the State of Ohio, one of the United States of America, deals in candy, food products and ice cream and ice cream confections, under the trade mark "Good Humor" which had been adopted originally by one, Burt, in 1919, and

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registered in Canada as a general trade-mark on February 9, 1924, plaintiff having acquired it together with the good will and business of Burt. Plaintiff had never used in Canada the trade-mark "Good Humor" and such trade-mark had been made known in Canada since 1930 only, and only in connection with ice cream and ice cream confections.

Plaintiff carries on business by means of a number of operating companies, incorporated in various States of the Union, licensing them to manufacture and sell ice cream and ice cream confections, the operations of all companies being identical; the stock of plaintiff and the operating companies is owned wholly by a Delaware company called Good Humor Corporation, and all companies are managed and governed by a committee of five members, the same committee for each company.

Defendant company was incorporated in the Province of Ontario, defendant Bradley being its President. Bradley had developed and marketed a cereal known as "Good Humor Frumenty," having adopted the trade-mark "Good Humor" in September, 1934, which trade-mark was registered in Canada, February 1, 1935, and later assigned to defendant company which had acquired the assets and good will of the business carried on by Bradley.

In this action plaintiff asked, *inter alia*, an injunction restraining defendant company from using the trade-mark "Good Humor" either for food products or as part of its corporate name; a declaration that defendant Bradley's application for registration of the words "Good Humor" as a trade-mark for cereal meals should not be granted.

By counter claim defendants asked for an order expunging plaintiff's trade-mark or in the alternative that it be limited to ice cream and ice cream confections.

Held: That although the operating companies of plaintiff's organization are separate entities, distinct from the plaintiff company and Good Humor Corporation, the holding company, they all constitute one organization with the plaintiff company under its direction and control, and consequently the several trade-marks registered in plaintiff's name are valid and may properly be held by plaintiff.

2. That plaintiff's Canadian trade-mark should be limited to ice cream and ice cream confections.
3. That defendants' trade-mark in connection with cereal meal is valid.
4. That the Parliament of Canada under par. 2 of s. 91 of the British North America Act has the necessary competence to legislate in connection with trade names and that secs. 3, 7 and 11 of the Unfair Competition Act, 22-23 Geo. V, c. 38, are *intra vires* of the Canadian Parliament.

ACTION by the plaintiff asking for an injunction restraining defendants from infringing plaintiff's trade-mark rights.

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

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

G. E. Maybee for defendants.

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

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ANGERS J., now (August 28, 1936) delivered the following judgment:

The plaintiff is a company incorporated under the laws of the State of Ohio and having its principal office in the City of Brooklyn, in the State of New York.

Angers J.

The defendant Good Humor Food Products Limited is a corporation organized under the laws of the Province of Ontario and has its principal place of business in the City of Toronto. The defendant Herbert E. Bradley, who resides in the City of Toronto, is the president of the defendant company.

The plaintiff, by its action, claims:

an injunction restraining the defendant company, its servants, agents and workmen from continuing to infringe the plaintiff's trade-mark (no. 155/34886) consisting of the words "Good Humor" and from using as a trade-mark for food products the said words or any words likely to cause confusion;

an injunction restraining the said defendant from using the words "Good Humor" as part of its corporate name;

a declaration that the application of the defendant Bradley (serial no. 165,698) for the registration of the words "Good Humor" as a trade-mark for cereal meals should not be granted and an injunction restraining him from prosecuting the same;

damages in the sum of \$2,000 or such larger sum as may be awarded;

costs.

Plaintiff, at the opening of the case, presented a motion asking for an order expunging the registration by the defendant Bradley of the trade-mark "Good Humor" in connection with cereal meals, registered on the 1st of February, 1935, under no. N.S. 4233.

The statement of claim alleges *inter alia* that in or about 1919 the plaintiff's predecessor, one Harry B. Burt, adopted the words "Good Humor" as a trade-mark for candy and later extended the use of the said words to other products, including particularly ice cream and ice cream confections, and caused the words "Good Humor" to be registered as

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a general trade-mark on February 9, 1924, as no. 155/34886; that in or about 1928 the plaintiff company was incorporated under the name of "The Midlands Food Products Company" and acquired the goodwill and business of said Burt, including all trade-marks used in connection therewith and particularly the trade-mark "Good Humor"; that the name of the plaintiff company was changed to "Good Humor Corporation of America" later in the same year; that the sale of the plaintiff's products, particularly ice cream and ice cream confections under the trade-mark "Good Humor" increased and extended throughout the United States so that, at least in 1931, the name of the plaintiff company became generally known to the public in connection with the sale of food products and its products under the trade-mark "Good Humor" became familiar to the public; that the name of the plaintiff and its products in association with the said trade-mark were from the year 1931 onwards advertised in publications largely circulated in Canada so that they became known therein; that the defendant Bradley, being aware of the name and reputation of the plaintiff company and of its use of the words "Good Humor" as a trade-mark and being also aware of the plaintiff's registration of its said trade-mark, filed an application (serial no. 165,678) to register the words "Good Humor" as a trade-mark for cereal foods (later amended to refer to cereal meals) and promoted the defendant company with the intention that the said trade-mark registration should be assigned to it and be used by it in connection with the sale of cereals, including particularly a cereal known as "Good Humor Frumenty"; that the defendant company has sold cereals under the said trade-mark; that the effect of the defendant company continuing to carry on business under the present corporate name and selling cereals under the trade-mark "Good Humor" will be to create confusion and mislead the public into thinking that the plaintiff assumes responsibility for the character and quality of the products sold by the defendant company; that the use by the defendant company of its corporate name as a name under which food products are sold and the sale by it of food products under the trade-mark "Good Humor" are contrary to the provisions of sections 3, 7 and 11 of the Unfair Competition Act, 1932, and the

registration by the defendant Bradley of the words "Good Humor" would be contrary to the provisions of section 28 of the said Act.

In its motion to expunge the defendant's trade-mark from the register, plaintiff sets forth that the said trade-mark had, long before its adoption by the predecessor in title of the defendant, been in use by the plaintiff in the United States as a trade-mark for similar wares and was known in Canada in association with such wares by reason of their advertisement in printed publications circulating among potential users thereof in Canada.

The defendants, in their statement of defence, admit the allegations concerning the status of the parties; they further admit the registration by the said Harry B. Burt of the words "Good Humor" as a general trade-mark but deny that the said trade-mark was adopted or used by him in connection with any wares; they deny the other allegations of the statement of claim; and they plead specifically as follows:

the plaintiff has no right of action and this Court has no jurisdiction with respect to alleged violations of the provisions of sections 3, 7 and 11 of the Unfair Competition Act, 1932;

sections 3, 7 and 11 and other provisions of the said Act are *ultra vires* of the Dominion of Canada in so far as they directly or impliedly create or purport to create proprietary rights in trade-marks and trade names not used in Canada and in so far as they create or purport to create or take away the right of any person or corporation to use any trade-mark or trade name or to carry on business in any province of Canada;

the defendant Bradley, in the latter part of 1934, adopted the trade-mark "Good Humor" for a cereal meal developed by him and on or about September 29, 1934, applied it to the sale of a cereal meal and since that date he and his successor in title, Good Humor Food Products Limited, have continuously and extensively used the said trade-mark in connection with the sale of cereal meals throughout Canada;

on or about February 8, 1935, Good Humor Food Products Limited was incorporated by letters patent of the Province of Ontario for the purpose of acquiring the assets and good-

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will of the business of the defendant Bradley, including the trade-mark "Good Humor" and by instrument dated February 8, 1935, the defendant Bradley transferred the said business, goodwill and trade-mark to the said company;

the defendant Bradley registered the said trade-mark "Good Humor" as no. N.S. 4233 under date of February 1, 1935, and by confirmatory assignment dated December 11, 1935, registered the following day as no. 1470, the defendant Bradley assigned the said trade-mark and registration to Good Humor Food Products Limited;

on or about June 25, 1935, the plaintiff filed in the Patent Office a statement dated March 20, 1935, alleging that the trade-mark "Good Humor" was not and had never been used in Canada by it in connection with the sale of any goods and that it had been made known in Canada only in connection with ice cream and ice cream confections since 1930, and further alleging that the words "Good Humor" have been registered in the United States in connection with the following wares: candy, ice cream suckers, ice cream, frozen confections, chocolate and chocolate coatings, non-alcoholic maltless beverages, canned and bottled fruits and vegetables, tomato juice, pickles, soups, potato chips, coffee beans and ground coffee, bakery products, dairy products, nuts, dates, layer figs and dried fruits, tea in bulk, packaged tea and tea in the form of tea balls;

as a result of the filing of the said statement, the certificate of registration of the plaintiff was limited by the Registrar of trade-marks to the above-mentioned wares;

the plaintiff has no right, title or interest in or to the trade-mark "Good Humor" in Canada or, if it has, its interest is limited to ice cream and ice cream confections.

The defendants filed a counter-claim, in which after repeating the allegations of their defence, they say as follows:

the plaintiff's trade-mark is and was at the date the defendant Bradley adopted and applied for registration of the trade-mark "Good Humor" for cereal meals and always has been null and void;

if plaintiff's trade-mark registration was originally valid, which is denied, it has been abandoned and the words "Good Humor" were *publici juris* at the date the defend-

ant Bradley adopted them as a trade-mark and applied for their registration;

if plaintiff's registration is valid, which is denied, it should be limited to ice cream and ice cream confections;

the defendants therefore claim *inter alia*:

an order directing that the plaintiff's trade-mark be expunged; or, in the alternative,

an order that the said trade-mark be limited to ice cream and ice cream confections.

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Before dealing with the questions of law it is, I believe, convenient to make a brief review of the facts disclosed by the evidence.

A certificate from the United States Patent Office, a photostatic copy whereof was filed as exhibit 2, shows that a trade-mark consisting of the words "Good Humor" for candy was registered on October 14, 1919, in the name of Harry B. Burt (no. 126,923), pursuant to an application filed on March 8, 1919.

A certificate from the United States Patent Office, a photostatic copy whereof was filed as exhibit 5, establishes that a trade-mark also consisting of the words "Good Humor" for ice cream suckers was registered on October 21, 1924, in the name of Harry B. Burt (no. 190,701), pursuant to an application filed on November 19, 1923.

A certificate of appointment from the Probate Court of the State of Ohio, a photostatic copy whereof was filed as exhibit 3, bearing date the 29th of July, 1926, discloses that Cora W. Burt and The Dollar Savings and Trust Company were, on the 17th of May, 1926, appointed executors of the last will and testament of Harry B. Burt deceased and that letters of authority were issued to them as such.

By an instrument in writing dated the 28th of July, 1926, and recorded in the United States Patent Office on the 18th of August, 1926, a photostatic copy whereof was filed as exhibit 4, Cora W. Burt and The Dollar Savings and Trust Company, as executors of the last will and testament of the late Harry B. Burt, assigned and transferred unto the said Cora W. Burt the entire right, title and interest in the trade-mark registrations nos. 126,923 and 190,701, together with the good-will of the business in connection with which the said trade-marks were used.

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It may be noted incidentally that no copy of the last will and testament of Harry B. Burt was filed and that consequently there is a link missing in the chain of title of the plaintiff company to the trade-marks in question. However, the deed of assignment from Cora W. Burt and The Dollar Savings and Trust Company, in their quality of executors of the will of the late Harry B. Burt, to Cora W. Burt, and the deeds of assignment from the latter to Midland Food Products Company were recorded in the United States Patent Office and the said trade-marks appear to be registered in the name of the plaintiff company, formerly Midland Food Products Company, which, in my opinion, is sufficient for the purposes of the present suit seeing that the title of the plaintiff company to the said trade-marks is not challenged.

The Midland Food Products Company was incorporated under the laws of the State of Ohio for the purpose *inter alia* of buying, selling, producing and manufacturing food products and confections of all kinds, by virtue of Articles of Incorporation dated the 23rd of February, 1928, and filed in the Office of the Secretary of State of the State of Ohio the following day, a photostatic copy whereof was filed as exhibit 1. Annexed to these Articles of Incorporation and forming part of exhibit 1 is a certificate of amendment dated April 21, 1928, filed in the office of the said Secretary of State on April 26, 1928, establishing that the name The Midland Food Products Company is changed to Good Humor Corporation of America.

By two instruments in writing, both dated April 23, 1928, photostatic copies whereof form part respectively of exhibits 2 and 5, Cora W. Burt sold, assigned and transferred unto The Midland Food Products Company her right, title and interest in and to the trade marks nos. 126,923 (for candy) and 190,701 (for ice cream suckers), together with the goodwill of the business therewith connected.

A general trade-mark consisting of the words "Good Humor" was registered in the Patent Office of the Dominion of Canada in the name of Harry B. Burt on February 9, 1924, under no. 34,886 pursuant to an application dated December 1, 1923, as appears from the certificate of the Commissioner of Patents filed as exhibit 6.

Annexed to this certificate are:

a document establishing that an assignment of the trade-mark no. 34,886 by Cora W. Burt and The Dollar Savings and Trust Company, executors of the will of Harry B. Burt, deceased, to Cora W. Burt, dated July 29, 1926, was registered in the Canadian Patent Office on August 11, 1926;

a document establishing that an assignment of the said trade-mark by Cora W. Burt to The Midland Food Products Company, dated April 23, 1928, was registered in the Canadian Patent Office on May 28, 1931.

Also attached to the certificate exhibit 6 is a document relating to the change of name of The Midland Food Products Company to Good Humor Corporation of America, by an amendment filed on April 26, 1928, with the Secretary of State for the State of Ohio and recorded in the Canadian Patent Office on July 14, 1931.

Finally forming part of the certificate exhibit 6 is the following memorandum:

Wares defined in reply to Notice under Section 23 of the Unfair Competition Act, 1932.

Candy, Ice Cream Suckers, Ice Cream, Frozen Confections, Chocolate and Chocolate Coatings, Non-alcoholic Maltless Beverages, Canned and Bottled Fruits and Vegetables, Tomato Juice, Pickles, Soups, Potato Chips, Coffee Beans and Ground Coffee, Bakery Products, Dairy Products, Nuts, Dates, Layer Figs and Dried Fruits, Tea in Bulk, Packaged Tea, and Tea in the form of Tea Balls.

March 21st, 1935.

(Signed) J. T. MITCHELL,
Acting Commissioner of Patents.

Serial No. 165678.

This memorandum appears to have been entered on March 21, 1935.

Other trade-marks issued by the United States Patent Office to the plaintiff company were filed as exhibits 9 to 19; although they have little, if any, materiality in the present case, it seems fair to mention them; they are, in chronological order, the following:

Wares	Date of issue	Date of filing of application	Number
Ice cream and ice cream suckers	April 8, 1930	July 12, 1929	269425
Ice cream and frozen confections	May 23, 1933	June 29, 1932	303459
Chocolate, chocolate coatings, and other chocolate and chocolate coatings for ice cream and other confections	January 30, 1934	Sept. 7, 1932	309740

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<p>1936</p> <p>GOOD HUMOR CORPORATION OF AMERICA v. GOOD HUMOR FOOD PRODUCTS LTD. AND HERBERT E. BRADLEY.</p> <p>Angers J.</p>	<p>Non-alcoholic maltless beverages</p> <p>Canned and bottled fruits and vegetables, tomato juice, pickles and soups..</p> <p>Potato chips</p> <p>Coffee beans and ground coffee..</p> <p>Bakery products—namely, pies, cakes, cookies, dough-nuts and rolls.. . . .</p> <p>Dairy products—namely, cheese, butter and eggs..</p> <p>Nuts, dates, layer figs, and dried and partially dried fruits, such as apricots and prunes..</p> <p>Tea in bulk, packaged tea, and tea in the form of tea balls..</p>	<p>October 30, 1934</p> <p>November 6, 1934</p> <p>November 6, 1934</p> <p>November 6, 1934</p> <p>November 27, 1934</p> <p>November 27, 1934</p> <p>November 27, 1934</p> <p>November 27, 1934</p> <p>March 5, 1935</p>	<p>June 30, 1934</p> <p>June 30, 1934</p> <p>June 30, 1934</p> <p>June 30, 1934</p> <p>June 30, 1934</p> <p>June 30, 1934</p> <p>June 30, 1934</p> <p>June 30, 1934</p> <p>Oct. 3, 1934</p>	<p>318612</p> <p>318780</p> <p>318781</p> <p>318782</p> <p>319423</p> <p>319424</p> <p>319425</p> <p>322310</p>
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This completes the list of trade-marks relied upon by the plaintiff.

A copy of the defendants' trade-mark (no. N.S. 4233) was filed as exhibit 20. This trade-mark appears to have been registered on February 1, 1935, in the name of the defendant Bradley pursuant to an application dated January 31, 1935. The date of first use is mentioned in the application as being September 29, 1934. The trade-mark is for cereal meals. An assignment of this trade-mark from Bradley to Good Humor Food Products Limited, dated December 11, 1935, was recorded in the Patent Office the following day.

Before dealing with the validity of the trade-marks, the question of infringement and the right of the defendant Good Humor Food Products Limited to use the words "Good Humor" in its corporate name, I must dispose of two preliminary objections raised by the defendants.

In the first place the defendants contend that the plaintiff has no goodwill in the United States trade-marks exhibits 2, 5 and 9 to 19 inclusive nor in the Canadian trade-mark exhibit 6, inasmuch as it does not manufacture or sell any wares, and that consequently it cannot succeed in its action.

The plaintiff, Good Humor Corporation of America, is one of a group of companies using in their corporate names the words "Good Humor." Its position has been defined by Jerome F. Glasser, its secretary-treasurer, heard as wit-

ness on behalf of plaintiff; I think it is expedient to quote the witness' deposition in this connection:

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Q. I understand the Good Humor Corporation of America, the plaintiff company, is associated with, on the one hand, a company called the Good Humor Corporation, and, on the other hand, with a number of companies called "Chicago Good Humor Incorporated," "New York Good Humor Incorporated," "New Jersey Good Humor Incorporated," "Michigan," "Connecticut" and "Massachusetts Good Humor Incorporated"?

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A. That is right.

Q. Now, how are those companies managed, or what have you to do with the management of all that group of companies?

A. The whole group of companies is managed by one management committee of which I am a member. There are five members and all the business, except the regular routine business, is managed by a manager of these various corporations. They are really in our line branches only.

Q. Has the Good Humor Corporation of America, the plaintiff company, a special manager?

A. No, sir, it is directed by a committee of five.

Q. What of the Good Humor Corporation not of America?

A. It is managed by a committee of five.

Q. And each of the others have a manager?

A. Yes, that is right.

Q. What is the relation between Good Humor Corporation of America and Good Humor Corporation?

A. The Delaware Corporation owns 100 per cent of the Good Humor Corporation of America.

Q. It has no active commercial functions?

A. No, it has not.

Q. Then what is the relation of the Good Humor Corporation to the other companies, each of which has a territory?

A. The Good Humor Corporation owns 100 per cent of the stock of each of those companies I mentioned.

Q. What do those companies do?

A. They manufacture and sell ice cream confections and ice cream at retail to the consuming public.

Q. What is the relation of Good Humor Corporation of America, the plaintiff company, to those six companies with territorial designations?

A. The Good Humor Corporation of America licenses the other manufacturing and selling corporations in the manufacture of ice cream confections.

Q. Does it furnish these operating companies, I may call them, with anything in the way of supplies?

A. Yes, it furnishes these various companies with the sticks, the wrapper or glassing bag and the chocolate toasted almond used for the covering of the ice cream and cocoanut.

Q. Are these sticks, which you refer to as being supplied to the operating company, distinguished in any way?

A. Yes, they all have the name "Good Humor" printed on them and as far as the glassing wrapper is concerned and the cartons containing the materials they are specifically printed with the name "Good Humor."

(I may note that a card of sticks was filed as exhibit A and a glassing bag as exhibit B.)

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Q. How do the operating companies carry on? What have they in the way of plant and equipment and how do they do business?

A. They have a manufacturing plant and they manufacture the ice cream and they have what they call sales cars, a light refrigerated body truck and tricycles and these are sent out on the streets and highways within the territory of these various companies and they sell direct to the people.

Q. Do the trucks sell ice cream direct to the people?

A. Yes, each sales car or truck has a salesman and he sells direct to the people.

The witness then goes on to say that all the trucks are similar and have a white refrigeration body bearing the words "Good Humor Ice Cream" and "Good Humor Confections"; and he adds that all the salesmen are dressed alike. According to him, there are approximately 400 sales cars in operation; the cars operate within a radius of between 50 and 100 miles of the various plants.

Further in his deposition Glasser is asked what is the relation between the trucks to the hand containers and tricycles and states:

A. They really are a supplemental or additional unit of our sales department.

Q. What are?

A. The containers which are boxes 10 inches wide by 13 inches high, some of them 20 inches wide, and these containers are also handled by our salesmen dressed in the same kind of uniform as the sales car salesmen and these containers are taken to the various territories by the sales car men and left off there and at night they pick them up and draw them back to the plant.

Asked about the selection of the locations, the witness gives the following information:

A. For every 20 salesmen we have a district manager who is supervised by the manager, that is, the manager of the branch controls all locations and assigns them to each man. We have direct supervision of where a man is to sell.

Q. How is the selection of the locations made; what kind of places are they actually placed at?

A. It is pretty hard to generalize but I would say—any good spot where the traffic is heavy or where the population is fairly thick.

Q. But, at all events, on the streets?

A. Yes, or on roads in areas surrounding these centres.

Referring to the tricycles Glasser says:

They operate from a central location. Their territories are not as extensive in distance as are the territories of the cars. They may be operated within a radius of 6 to 10 miles from the plant and they operate like the cars except that they operate closer to the plant.

Q. How many hand container salesmen have you got?

A. Possibly 200.

Q. And how many tricycle salesmen?

A. About 300 or maybe more.

His Lordship: These figures apply to the Plaintiff Company only.

The Witness: To all operating companies under this Managing Committee.

Q. (Mr. Biggar) The Plaintiff company do not operate any tricycles, trucks or hand containers?

A. That is right.

Turning next to the manner in which the plaintiff's goods are presented, Glasser testifies as follows:

Q. How is what is sold put up?

A. It is put up either as ice cream confection on a stick and placed in a glassing bag or cups or other containers in quantities of one-half pint and one pint and 4-ounce sundaes.

Q. Is there any bulk selling done?

A. No, we only sell packaged ice cream which is packaged at the plant.

Q. These sticks that you speak of, with the words "Good Humor" upon them, are they used for ice cream confections?

A. Yes.

Q. And have the glassing bags and cups the words "Good Humor" upon them?

A. The glassing bags, as well as the cups, have the name "Good Humor" upon them.

I have made copious citations from Glasser's deposition for the purpose of showing the nature of the plaintiff's organization and the relation between Good Humor Corporation, Good Humor Corporation of America and the divers operating companies.

It was urged on behalf of defendants that, inasmuch as the plaintiff, in whose name the trade-marks are registered, does not manufacture or sell any wares and consequently does not itself use the trade-marks but licenses the operating companies, which produce and distribute the wares, to use the trade-marks thereon, the trade-marks have become null and void. This contention would, as I think, be well founded if the licence had been given to an independent company or a stranger to use the trade-marks on goods other than the goods of the owner of the marks. Strictly speaking the operating companies are separate entities, distinct from the plaintiff company and Good Humor Corporation, the holding company. These various corporations, however, constitute one organization. All the shares of the plaintiff company and of the operating companies are held by Good Humor Corporation. The various corporations are governed by a committee of five members, the same for each and every one of them. The goods manufactured and distributed by the several

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operating companies are identical and are manufactured and distributed under the control and supervision of the plaintiff.

The trucks used for the delivery of the products of the several operating companies are, as we have seen, similar; the bodies are lined with a sign bearing the words "Good Humor Ice Cream" and "Good Humor Confections." The sticks used with the ice cream confections, the glassing bags, the cups, the other containers have upon them the words "Good Humor." All the salesmen are dressed in a similar uniform. It seems obvious to me that the various operating companies, although organized in different states under distinct charters, form with the plaintiff company a single organization under the latter's direction and control. The operating companies are in fact branches of the plaintiff company, although legally speaking they constitute separate entities. A somewhat similar case occurred in England and the decision of the Commissioner of Patents, though not binding on me as suggested by counsel for defendants, is in point and I must say that I agree with the Commissioner's remarks. The case in question is *In the matter of a Trade-Mark "Radiation"* (1). The observations of the Commissioner touching upon the question in issue appear on pages 42 (*in fine*) and 43 of the report and are thus worded:

On behalf of the opponents it was argued that there is here no user of the word "Radiation" as a trade-mark by the Applicants, that for the present purpose the Applicants and each of the associated companies are separate entities, the Applicants merely holding the shares in and receiving the dividends earned by the associated companies which have their own individual trade-marks, and that the Applicants have merely licensed the associated companies to use the mark "Radiation" and in so doing have destroyed the mark as a trade-mark as in *Bowden Wire Limited v. Bowden Brake Company Limited*. 1914, 31 R.P.C. 385.

I think, in the first place that the present case is distinguished from that dealt with in *Bowden Wire Limited v. Bowden Brake Company Limited*. In that case each of the companies was independent of the other in so far as the manufacture and marketing of its goods were concerned. Here the Applicants control not only the general policy of the associated companies but the design and quality of their goods. Further, the mark "Radiation" has been identified by the trade with the whole group of companies which includes and is controlled by the Applicants. This is clear from the declarations filed covering the answers to the questionnaire to which I have already referred. The declarants give their impressions in different terms, but reading their answers as a whole I

(1) (1930) 47 R.P.C., 37.

think they come to this, that in the trade the mark "Radiation" indicates the connection of the articles bearing it with the "Radiation" group of companies as a whole—whether or not the declarant knows the exact relationship between these companies is, I think, for this purpose immaterial. Moreover, there is no evidence that the use of the mark in the way I have already described has ever led to any material confusion or deception.

Now I think that I ought to treat this question as a practical one, just as I must so treat the question of distinctiveness of a trade-mark—See *In re Reddaway's Application*. (1927) 44 R.P.C. 27 at page 36. If the associated companies here concerned, although trading separately, had been branches of a single company or firm, the head office of which controlled the branches in the same way as the Applicants control their associated companies, there is, I think, no doubt that a trade-mark could properly be held by the company or firm as a whole, and I think that, treating the question as a practical one, I ought not to say that the form or constitution of the "Radiation" group of companies is such as to prevent the Applicants from holding a trade-mark which indicates the connection of the whole group of companies with the goods to which it is applied. The mark "Radiation" in this case becomes in effect the house mark of the whole group, in addition to which each associated company (or branch) may properly use its own individual mark.

This disposes of the first of the two preliminary objections raised by the defendants. The other one is that sections 3, 7 and 11 of the Unfair Competition Act, 1932, are *ultra vires* of the Dominion of Canada and that this Court has no jurisdiction to entertain the present action. I must say that, after giving the matter careful thought and study, I cannot agree with this contention.

Section 3 of the Act deals with trade-marks, section 7 with trade names; section 11 applies to acts of unfair competition and, in my opinion, has no relevance to the present case.

The material part of section 3 reads as follows:

No person shall knowingly adopt for use in Canada in connection with any wares any trade-mark or any distinguishing guise which

(a)

(b) is already in use by any other person in any country of the Union other than Canada as a trade-mark or distinguishing guise for the same or similar wares, and is known in Canada in association with such wares by reason either of the distribution of the wares in Canada or of their advertisement therein in any printed publication circulated in the ordinary course among potential dealers in and/or users of such wares in Canada; or

(c) is similar to any trade-mark or distinguishing guise in use, or in use and known as aforesaid.

I think that trade-marks come within the jurisdiction of the Dominion of Canada under the 2nd head of Section 91

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of the British North America Act dealing with "The Regulation of Trade and Commerce."

Reference was made to Article 6bis of the International Convention for the Protection of Industrial Property signed at the Hague on November 6, 1925, to which Canada was a party. This convention was ratified by the Dominion of Canada by an Act deposited in the archives of the Netherlands Government on May 1, 1928.

Article 6bis reads in part as follows:

The contracting countries undertake to refuse or to cancel, either administratively if their legislation so permits, or at the request of an interested party, the registration of any trade-mark which is a reproduction of or an imitation capable of creating confusion with a mark considered by the competent authority of the country of registration to be well-known in that country as being already the mark of a person within the jurisdiction of another contracting country, and utilized for the same or similar classes of goods.

It was submitted by counsel for plaintiff that subsection (b) of section 3 of the Unfair Competition Act carries out article 6bis of the convention aforesaid. I believe it does, but I cannot see that the fact of the Dominion of Canada being a party to the convention in question could vest the Parliament of Canada with jurisdiction in matters of trade-marks or in fact any other matters stipulated in the said convention, if the Parliament of Canada had no such jurisdiction otherwise. The competence of the Parliament of Canada to deal with trade marks must be found, if it exists, in the British North America Act; as already stated, I think that under the 2nd head of Section 91 of the said Act the Canadian Parliament has jurisdiction in matters relating to trade-marks.

Counsel for defendants has also referred to section 7 of the Unfair Competition Act as being unconstitutional and *ultra vires* of the Dominion of Canada; it reads thus:

No person shall knowingly adopt for use as the name under which he carries on business, or knowingly adopt for use in connection with any business, any trade name which at the time of his adoption thereof is the name, or is similar to the name, in use by any other person as the trade name of a business of the same general character carried on in Canada, or of such a business carried on elsewhere if its name is known in Canada by reason of the distribution therein of wares manufactured or handled by such person under such trade name, or of the advertisement of such wares in Canada in association with such trade name, in any printed publication circulated in the ordinary course among potential dealers in and/or users of similar wares in Canada.

It was argued on behalf of plaintiff that any possible question of lack of jurisdiction of the Parliament of Canada to legislate in connection with trade names disappears by a reference to article 8 of the International Convention for the Protection of Industrial Property; article 8 is in the following terms:

A trade name shall be protected in all the countries of the Union without necessity of deposit or registration, whether or not it forms part of a trade-mark.

What I said with regard to trade-marks applies equally to trade names: the fact that Canada was a party to the convention in question cannot vest its Parliament with jurisdiction with respect to trade names, if it has no jurisdiction under the British North America Act. I am inclined to believe, however, that the Parliament of Canada, under paragraph 2 of section 91 of the British North America Act, has the necessary competence to legislate in connection with trade names and that section 7 of the Unfair Competition Act is *intra vires* of the said Parliament. Be that as it may, I do not think that the name of the defendant company is so similar to the plaintiff's name as to be objectionable.

The preliminary objections raised by the defendants being disposed of, I shall now consider the question of the validity of the trade-marks involved and the alleged infringement by the defendants of the plaintiff's trade-mark.

The evidence discloses that the several operating companies associated with the plaintiff company have sold ice cream and ice cream suckers in the United States under the name "Good Humor," particularly in the States of New York, New Jersey, Connecticut, Massachusetts, Michigan and Illinois.

The sales for the years 1929 to 1935 amounted, according to Glasser, to the following figures:

1929	\$ 161,200
1930	1,002,100
1931	1,721,100
1932	1,441,500
1933	1,405,900
1934	1,583,100
1935	2,078,400

No sales were made in Canada.

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The operating companies, with the authorization of the management committee, advertised their ice cream and ice cream confections in newspapers published in Chicago, New York and Detroit. It may be noted that the name of the plaintiff company does not appear in these advertisements. Some of these newspapers, it was said, circulated in Canada; to what extent is not satisfactorily disclosed.

According to Glasser, advertisements were also made by radio, by folders delivered from house to house, by streamers put on the trucks and by balloons and other such small items given away. The proof in this connection is rather scant.

The plaintiff company spent in radio advertising in the years 1931 to 1935 the following sums:

1931	\$18,854 16
1932	36,282 38
1933	10,049 74
1934	65,647 45
1935	40,000 00 (approx- imately)

Formal sales were also made in the United States of the plaintiff's other products (non-alcoholic maltless beverages, canned and bottled fruits and vegetables, tomato juice, pickles, soups, potato chips, coffee, bakery products, cheese, butter, eggs, nuts, dates, figs, dried fruits and tea). These products, however, were never put on the market and there is no proof that they were in any way advertised in the United States or in Canada.

As previously indicated, the first trade-mark which Harry B. Burt obtained in Canada was a general trade-mark; it consisted of the words "Good Humor"; this trade-mark was issued on February 9, 1924. In reply to a notice from the Registrar under section 23 of the Act the plaintiff company, assignee of Harry B. Burt, declared that the trade-mark applied to the wares enumerated in the memorandum forming part of exhibit 6 hereinabove reproduced.

The evidence establishes that of the wares defined in the memorandum aforesaid ice cream and ice cream confections alone were sold to the public and that alone they were advertised in papers circulating in Canada. For this reason I believe that the plaintiff's Canadian trade-mark bearing no. 34,886 ought to be limited to ice cream and ice

cream confections. See section 49 of the Patent Act; In re *Ralph's Trade-Mark* (1); *Pink v. J. A. Sharwood and Co. Ltd.* (2); *Continental Oil Co. v. Commissioner of Patents* (3).

Let us now turn our attention for a moment to the defendant's trade-mark.

Bradley, the president of the defendant company, states that the trade-mark "Good Humor" was suggested to him in September, 1934. He saw his patent attorneys and asked them to have it registered. The latter intimated that the first step to be taken was to make a search; this was done and it was found that, as the witness puts it, "there had been a general coverage of the mark under the terms of the old Act of 1924."

Asked what further steps he had taken, Bradley says:

Then I started an investigation to find out what products this company produced and sold and we found from all the material we could get from them that it only applied to ice cream in certain sections of that country and no products were sold in Canada, to our knowledge, under the name of "Good Humor," and that the name was not in use in Canada.

The witness then adds that he first heard of the plaintiff and its trade-mark when he got the report on the search above mentioned. He never heard of any advertisements or radio broadcasts by the plaintiff.

After he had obtained the above information concerning the plaintiff and its products, Bradley instructed his patent attorneys to proceed with the registration of the mark. The defendant company thereupon started to deal with the marketing of the product. The first sale was made towards the latter part of September or the early part of October, 1934. The witness says that subsequently he received other orders. He was at that time doing business alone under the firm name of Good Humor Food Products. On February 8, 1935, Good Humor Food Products Limited was incorporated and took over the assets of Good Humor Food Products, including the goodwill and trade-mark "Good Humor." From the date he began using the mark "Good Humor" on his cereal meals and the date of the incorporation of the defendant company Bradley says that he continued to use the mark constantly and that his use was quite extensive. Since its incorporation the defendant

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(1) (1884) 25 Ch. Div. 194.

(2) (1913) 30 R.P.C. 725.

(3) (1934) Ex. C.R. 244 at 250.

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company has continued to use the trade-mark "Good Humor."

Bradley testifies that the defendant company sells its product to wholesalers, departmental and chain stores and to institutions.

Asked if his company advertised its product, Bradley replies:

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We have advertised in newspapers, periodicals and magazines and at conventions and we have sent out samples in cartons and folders and we have advertised by way of hand bills.

The witness adds that his company advertised by radio three times a week.

I may note that a folder containing specimens of advertising (tear sheets from newspapers, bulletins, leaflets, letters, etc.) was filed as exhibit G. The advertising made by the defendants appears to have been rather extensive; a minimum of \$6,000 was spent in this connection up to December, 1935, according to Bradley's statement.

The retail selling price of the defendants' product to the end of 1935 amounted to approximately \$25,000. Apart from the sales, the defendant company distributed some 30,000 sample packages of frumenty.

The defendant company's cereal meal "Frumenty" is, in my opinion, in a different class of wares from that of ice cream and ice cream confections. After careful consideration I have come to the conclusion that the trade-mark of the defendants is valid.

There will be judgment dismissing the plaintiff's action and its motion to expunge, with costs against the plaintiff in favour of defendants.

There will also be judgment maintaining the counter-claim of the defendants in part and directing that the trade-mark registered on February 9, 1924, under no. 34,886 be limited to ice cream and ice cream confections.

The defendants will have their costs of the counter-claim against the plaintiff.

Judgment accordingly.

ONTARIO ADMIRALTY DISTRICT

1936

Nov. 16 & 19.

Dec. 2.

BETWEEN:

BRUCE LINDSAY BROTHERS } PLAINTIFF;
LIMITED }

AND

THE BARGE BRUCE HUDSON, } DEFENDANT;
HER CARGO AND FREIGHT..... }

AND

CHARLES LEVENS, ET AL.....PLAINTIFFS;

AND

THE BARGE BRUCE HUDSON } DEFENDANTS.
AND LLOYD REFINERIES LIM-
ITED }

Admiralty—Practice—Salvage—Joinder of action in rem and action in personam.

Held: That actions for the recovery of salvage may be either *in rem* or *in personam*.

2. That an action for recovery of salvage must be continued in the form in which it is begun.

MOTION to have defendant Lloyd Refineries Limited struck out as being improperly joined.

The motion was heard before His Honour Frank M. Field, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

H. E. Langford and *Frank Wilkinson* for plaintiff, Bruce Lindsay Brothers Limited.

H. H. Harris and *K. B. MacLaren* for plaintiffs, Charles Levens et al.

Francis King, K.C., for all defendants.

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

FIELD D.J.A. now (December 2, 1936) delivered the following judgment:

Motion returnable November 16, 1936, and resumed November 19, 1936 (when judgment was reserved), for an order amending all proceedings in the action, begun in the Quebec Admiralty District, subsequently consolidated

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with the action begun in the Ontario Admiralty District, striking out Lloyd Refineries Limited as one of the defendants, on the ground that, as against Lloyd Refineries Limited (owners of the barge *Bruce Hudson*), the action being *in personam*, it is improperly joined with the action *in rem* against the barge *Bruce Hudson*.

Mr. King relies solely on *Atlantic Coast Steamship Company v. Montreal Transportation Company Limited et al* (1). I do not regard it as conclusive. It will be found on reading that reported case, the observation of the late Mr. Justice Cassels as to joining of claims *in rem* and *in personam* in one action are not essential to his decision, but are *obiter dicta*. That was a towage claim; these are salvage claims. The first action for an unstated sum, was begun as an action *in rem* in the Ontario Admiralty District, on November 18, 1935, for salvage services in Lake Ontario, on the 16th and 17th November, 1935, rendered by SS. *Brulin*, her master and crew.

Seized at Port Weller, Ontario, November 18, 1935, by the sheriff of Lincoln on the Admiralty Registrar's telegram, the *Bruce Hudson* was released on bail of \$15,000. \$6,500 was on July 20, 1936, paid into Court. Opportunity arising through defendant Barge *Bruce Hudson* mooring at Amherst Wharf at Pointe aux Trembles on April 27, 1936, in Montreal Harbour, the plaintiffs in the second action claiming \$2,950 against the *Bruce Hudson in rem* and against her owners Lloyd Refineries Limited *in personam*, Lloyd Refineries Limited filed a bond for \$3,400 and thereupon the defendant barge was released.

Upon the application of all the defendants both actions were consolidated and ordered to be brought to trial as one action, by my order of 21st May, 1936. To the statement of claim delivered by the solicitors for Bruce Lindsay Brothers Limited on the 10th January, 1936, a statement of defence was delivered in the first action on 31st January, 1936. No pleadings have been delivered in the second action. The Honourable Mr. Justice Demers, District Judge in Admiralty, Quebec Admiralty District, on 5th May, 1936, on application of defendants' solicitors, ordered that the action be tried at Toronto and the record be transmitted to the Toronto Registry of this Court on its Admiralty side.

There have been several applications regarding trial of the consolidated actions, mainly at the instance of solicitors for plaintiffs Charles Levens *et al*, and one of these by defendants' solicitors resulting in the order herein of July 14, 1936, fixing date of trial as November 30, 1936. On the 16th November, 1936, the trial was postponed to December 15, 1936.

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Since the case of *Atlantic Coast Steamship Company v. Montreal Transportation Company Limited et al (supra)* was decided on appeal from the Honourable Mr. Justice Hodgins (then L.J.A., Toronto Admiralty District) twenty-eight years ago, the general trend of practice and judicial sanction in all Courts of Justice has been towards one trial of claims arising out of the same circumstances. I do not think it would be just at this stage to grant the application.

Rule 228 governing Admiralty Practice (as found in Audette's Practice, Exchequer Court of Canada, 1st Ed., 1895), provides:

In all cases not provided for by these rules, the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed.

Rule 29 is in these terms:

Any number of persons having interests of the same nature arising out of the same matter, may be joined in the same action whether as plaintiffs or as defendants.

Rules 33 and 34 relating to "Consolidation of Actions" are also in point.

An action *in personam* for alleged salvage services rendered to ship, freight and cargo is not *prima facie* irregular. *The Elton* (1).

Actions for salvage may be either *in rem* or *in personam*. *The Hope* (2); *The Meg Merrilies* (3); *The Rapid* (4).

The action when it is once commenced either *in rem* or *in personam*, must be continued in the form in which it is begun and cannot be changed. *The Hope* (5); *Humphreys v. Edwards* (6).

I am indebted to the diligence of Mr. Harris for his very complete memorandum of the proceedings in the Quebec Admiralty District, filed with his memorandum of authorities on this application. He contends in the former that

(1) (1891) P. 265.

(2) (1801) 3 C. Rob. 215.

(3) (1837) 3 Hagg. 346.

(4) (1838) 3 Hagg. 419.

(5) (1838-42) 1 W. Rob. 154.

(6) (1875) 45 L.J. Ch. 112.

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the owners of the *Bruhin* had no mandate to act on behalf of the crew, and that the action he has taken on behalf of his clients in the Quebec Admiralty District has been fully justified in the form in which it was taken and continued. He cites *A. L. Smith* and *Chinook v. Ontario Gravel Freighting Company* (1); *Gilmore v. The Marjorie* (2); *The Cella* (3); *The Dictator* (4); *The Gemma* (5), and Roscoe's Admiralty Practice p. 33, and generally contends that the progress of this litigation to date of this motion (November 16, 1936) without objection heretofore to the form in which the action of Levens *et al* was instituted, now precludes granting of the application to dismiss Lloyd Refineries from the litigation. In this view I agree, and therefore dismiss the motion, costs in the cause.

Judgment accordingly.

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BETWEEN:

H. BROWN ET AL..... PLAINTIFFS;

AND

CANADIAN NATIONAL STEAM- }
 SHIPS COMPANY LIMITED.... } DEFENDANT.

Shipping—Canada Shipping Act, R.S.C. 1927, c. 186, s. 176—Anticipation of wages by seamen—Equitable settlement advantageous to seamen.

Plaintiffs were members of the crew of the SS. *Canadian Planter*, which was wrecked on May 3, 1936, thereby terminating plaintiffs' employment. Defendant paid their wages up to May 7, 1936, and was ready to pay to each plaintiff from day to day while unemployed, an amount equal to the daily wages he would have earned during the two months succeeding May 3, 1936. Plaintiffs applied to defendant to be allowed to anticipate in a lump sum the payments which would have been made to them from day to day to July 3, 1936. Defendant disputed this right of anticipation and the matter was referred to the Shipping Master of the Port of Montreal, it being agreed between the parties that the articles of agreement signed by the plaintiffs should constitute an agreement in writing to submit the dispute to the decision of the Shipping Master. Following the decision of the Ship-

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| (1) (1915) 23 D.L.R. 491; (1914) 51 S.C.R. 39, affirming (1915) 22 D.L.R. 488; (1914) 15 Ex C.R. 111. | (2) (1910) 15 O.W.R. 52; (1908) 12 O.W.R. 749. |
| | (3) (1888) 13 P. 82. |
| | (4) (1892) P. 304. |
| | (5) (1899) P. 285. |

ping Master defendant paid to each plaintiff a sum equal to one month's wages from May 8, 1936, to June 8, 1936.
 Plaintiffs brought action claiming the balance of two months' wages from May 3, 1936, to July 3, 1936.

Held: That s. 176 of the Canada Shipping Act, R.S.C. 1927, c. 186, is not applicable to this case.

2. That since the settlement arranged between the parties was equitable and advantageous to the plaintiffs, the action should be dismissed.

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ACTION *in personam* against defendant by plaintiffs claiming one month's wages due to them by reason of the wreck of the SS. *Canadian Planter*.

The action was tried before the Honourable Mr. Justice Philippe Demers, D.J.A., Quebec Admiralty District, at Montreal.

H. H. Harris for plaintiffs.

C. A. deL. Harwood, K.C., for defendant.

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

DEMERS D.J.A., now (December 30, 1936) delivered the following judgment:

This is an action *in personam* instituted by nineteen members of the crew of the steamship *Canadian Planter* claiming one month's wages due to them by reason of the wreck of the ship.

The defendant has pleaded, admitting the statements made in paragraph 1 of Plaintiffs' Statement of Claim, admitting that by reason of said wreck the services of plaintiffs were terminated before the date contemplated in plaintiffs' engagement with defendant company but denying the other allegations of paragraph 2 of Statement of Claim.

Defendant further states that on their arrival in Montreal, plaintiffs were, on or about May 5, 1936, paid an amount equal to the wages they would have earned from May 4, 1936, to May 7, 1936, inclusive; and on that date defendant company stood ready to pay to each plaintiff from day to day while each of them was unemployed, an amount equal to the daily wages he would have earned during the period of two months next succeeding May 3, 1936.

During the period May 5, 1936, to May 7, 1936, the plaintiffs, through their solicitor, made representation to

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the defendant company asking that the plaintiffs be allowed to anticipate in a lump sum payment, the payments which would otherwise have been made from day to day. The defendant company disputed the plaintiffs right to anticipate their wages in a lump sum but agreed to submit the dispute to the Shipping Master of the Port of Montreal.

The plaintiffs by themselves and by their solicitor, and defendant company by its agents agreed before the Shipping Master on May 7, 1936, that the articles of agreement and their respective signatures therein should constitute an agreement in writing to submit such dispute to the decision of the Shipping Master. Said dispute between the plaintiffs and the defendant company was heard by the Shipping Master on May 7, 1936, at his office in the Port of Montreal, and his decision therein is recorded in the articles of agreement.

Following the said decision made by the Shipping Master, the defendant company paid to each of the plaintiffs on or about May 8, 1936, a sum equal to one month's wages from May 8, 1936, to June 8, 1936.

Defendant company avers that such decision of the Shipping Master is binding on the parties under the provisions of the Canada Shipping Act, Revised Statutes of Canada (1927), Chapter 186, Section 176, and does not contravene any of the provisions of the said Act and that there are no wages unpaid and due the plaintiffs or any of them as detailed in the statement of claim. And subsidiarily, defendant company avers that:

(a) Plaintiff McLeod was paid the following sums, to wit:

On or about May 5, 1936.....	\$ 6 00
“ “ “ May 7, 1936.....	45 00
“ “ “ June 20, 1936.....	39 00

forming the total of \$90 for the period of two months from May 3 to July 3, 1936;

(b) Plaintiff Evans was paid as follows:

On or about May 5, 1936.....	\$ 3 60
“ “ “ May 7, 1936.....	27 00
“ “ “ June 20, 1936.....	23 40

forming a total of \$54 for the period of two months from May 3 to July 3, 1936;

(c) Plaintiffs C. Chisholm and R. J. Giggie were on or about May 8, 1936, signed on the SS. *Prince Henry*, on which vessel they have since been employed;

(d) Plaintiffs William O'Donohue and Martin Cluett did on or about June 7, 1936, sign on SS. *Cymbiline*, on which ship they have since been employed.

That part of the plea based on section 176 of the *Canada Shipping Act*, Chapter 186, Revised Statutes of Canada, 1927, is unfounded for two reasons: first, there was no reference in writing; second, this section does not apply to this case. There was no dispute between the parties and the Shipping Master did not decide the question. It is the seamen themselves who, being informed of their rights, decided to limit them.

A seaman is entitled, it is true, to be paid each day on which he is unemployed during two months, but the employer may prove that the seaman was able to obtain employment on that day. That is the reason why the crew, under the advice of their solicitor, the same who has taken this action, asked the company to pay them one month in satisfaction of their wages.

There is no doubt that this settlement was equitable and advantageous. The fact is that it is proved by the Shipping Master that within one month they could all get work.

It has also been admitted that six of them have no claim whatever; two of them were paid and repatriated; two of them signed on the 8th of May, and two of them within one month, according to their admission, but nine of them have filed affidavits to the effect that they could not get employment, and for these I am of the opinion that they have a claim if the limitation of their wages they made is illegal.

At first sight, if we read section 179 with the French translation of the word "abandon" as "renoncer," it would seem that this case does not fall under the terms of the law. I have not found any authority on this very question.

Roscoe, 5th Edition, cites only the case of the *Juliana* (1), where it was a renunciation by advance of wages in case of loss. But the question of abandonment of wages for salvage being in the same phrase, in virtue of the principle

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nosce a sociis, the plaintiffs' attorney invokes the case of *Rosario* (1), where it was decided that the prohibition applied to subsequent agreements. In the case of *Rosario*, the seamen had transferred their rights to their employer. They had abandoned their rights to salvage, but later on the same judge, quoting Lushington, in another case, the *Afrika* (2), where a payment in satisfaction was negotiated by the solicitor of the seamen, maintained the payment as equitable.

Now, let us see what interpretation of the word "abandonment" Judge Lushington gives us:

The Act of Parliament says that every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative, and the court has held, and must hold, that not only all agreements, barring salvage, are wholly inoperative, but that agreements limiting the proportion of salvage money are to be maintained only so far as they are really equitable (3).

That is to say, that Parliament has declared null the abandonment and the courts will annul an agreement limiting the right when it is not equitable.

Being of the opinion that this agreement was favourable to the seamen, I fail to see how the solicitor who suggested and negotiated it, can now contend decently that this agreement is null. These laws were passed to protect the seamen against their ignorance and weakness, not to protect fraud.

For these reasons, judgment should be entered dismissing the action, with costs.

Judgment accordingly.

BETWEEN:

PORT CREDIT REALTY LIMITED . . . APPELLANT;

AND

THE MINISTER OF NATIONAL }
 REVENUE } RESPONDENT.

1936
 June 25.
 1937
 April 1.

Revenue—Income War Tax Act, R.S.C. 1927, c. 97, secs. 2 and 21—Personal corporation controlled by executors and trustees appointed by will of the principal shareholder continues to be a personal corporation after the death of such principal shareholder—"Individual"—"Person"—"Personal corporation"—Interpretation.

Appellant company, capitalized at 10,000 shares, was incorporated in the Province of Ontario for the purpose of holding for and on behalf of

- (1) (1876) 3 Asp. N.S. 334. (2) (1880) 5 P.D. 192.
- (3) *The Enchantress* (1860) 1 Lush. 93 at 96.

one, James Harris, resident in Ontario, his bonds and securities in corporations located outside of Ontario, he holding 9,995 shares in appellant company, the balance being held by the incorporators.

James Harris died January 1, 1929, and by his will, after providing for certain specific legacies, bequeathed the residue of his estate to the executors named therein upon certain trusts, to pay income therefrom to his wife and children and distribute the corpus to his children on certain conditions. After the death of James Harris, as well as in his lifetime, appellant had no assets other than the securities assigned to it by him and the dividends from these securities constitute the only income appellant receives; this income is immediately turned over to the estate which pays all expenses. Appellant company is controlled by the executors and trustees named in the will of James Harris.

Appellant from the date of incorporation and for five years after the death of James Harris, was assessed as a personal corporation for income tax. In 1935 appellant was assessed as an ordinary corporation, the assessment being confirmed by the Minister of National Revenue from which decision appellant appealed.

Held: That appellant company continued to be a personal corporation for income tax purposes after the death of James Harris.

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

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

H. J. McLaughlin, K.C., for appellant.

W. S. Fisher for respondent.

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

ANGERS J., now (April 1, 1937) delivered the following judgment:

This is an appeal from an assessment by the Commissioner of Income Tax affirmed by the Minister of National Revenue, under sections 58 and following of the Income War Tax Act.

The appellant, Port Credit Realty Limited, is a body corporate and politic incorporated by letters patent issued in virtue of the Companies Act of the Province of Ontario on July 4, 1928; it was incorporated as a private company with a capital of 10,000 shares without any nominal or par value and with the power, among others, to buy, sell and deal and invest in, either as principal or agent, stocks, bonds, debentures, mortgages on real or personal property, notes, obligations and securities of all kinds.

The notice of assessment bearing date the 14th of November, 1935, is in respect of income for the year 1932.

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Port Credit Realty Limited was organized for the purpose of holding for and on behalf of one James Harris, in his lifetime of the City of Toronto, Province of Ontario, his bonds, shares and other securities in corporations located outside of the Province of Ontario.

The company was controlled by the said James Harris as long as he lived. Of the 10,000 shares outstanding he owned 9,995. The five remaining shares stood in the names of the incorporators.

James Harris died on January 1, 1929, leaving a will dated March 19, 1928, and a codicil which bears no precise date but appears to have been made sometime in 1928.

The testator, by his will, appointed his wife, his brothers (William Thomas and Joseph) and his friends James Stanley McLean and Robert James McLaughlin as executors and trustees. By his codicil James Harris stipulated that, in the event of Robert James McLaughlin predeceasing him, his son, Hugh Johnston McLaughlin, should replace his father as executor and trustee.

After declaring in his will that the proceeds of all policies of insurance on his life, which may be payable to his wife, shall be paid to his trustees subject to the following trusts, to wit: (a) to pay to his wife the sum of \$20,000; (b) to hold the balance in trust for his wife and children as provided for in the case of the residue of his estate, the testator gives and bequeaths the residue of his property to his executors and trustees upon certain trusts, particularly the following:

(e) To keep the residue of my estate invested and to distribute the income and the capital in the following manner, namely:—

(i) To set aside a fund, which, together with the proceeds of the insurance on my life payable to my trustees in trust for my wife and children, shall amount to Six Hundred Thousand Dollars, and to pay the income thereon to my wife for and during the term of her natural life, such income to be paid to her in monthly instalments, or otherwise as may be most convenient to her. Upon the death of my wife, such fund shall be divided among my children in the same manner as provided for in the case of the balance of the residue of my estate.

(ii) The balance of the residue of my estate shall be divided into as many equal shares as there may be children of mine living at the time of my decease, and children of mine who have predeceased me leaving issue or widow as the case may be, and such share shall be dealt with in the following manner:—

Share of a minor child: So much of the income as shall in their absolute discretion be considered advisable, my trustees and executors shall pay to the guardian of such infant for his or her maintenance,

support and education until he or she arrives at the full age of twenty-one years; the balance of the income to be added to the principal of such share;

Shares of daughters: The income on the share of each daughter of the full age of twenty-one years or when such daughter arrives at the full age of twenty-one years, shall be paid to her for and during the term of her natural life, and after her death, such share to be divided among her issue in such proportions as she may by will appoint, and subject to such terms as she may direct by will, and in default of such appointment to be divided equally among her issue, and the issue of any child or children of such daughter who may have died, per stirpes, the issue of any deceased child or children to take the share which would have gone to the parent if living.

Shares of sons: The income on the share of each son of the full age of twenty-one years, or after he arrives at the full age of twenty-one years, shall be paid to such son until he arrives at the age of twenty-five years, when one-half of the capital shall be transferred to him, and the income on the other half of the capital shall be paid to him until he arrives at the age of thirty years when the balance of the capital shall be paid to the said son.

In case, however, one or more of my sons should die before he is entitled to receive the whole capital of his share, the said share, or any part thereof which such son has not received or have become entitled to receive, shall go to his widow or children in such proportions as he shall by will appoint, but any appointment to his widow shall only be of the income until her death or remarriage, whichever first occurs, and in case such son should die intestate, then his widow shall be entitled to the income of such share or such part of such share until her death or remarriage, whichever first occurs, and the capital of such share shall be divided among the children of such deceased son and the issue of any deceased issue per stirpes, the children taking the share that the parent would have taken if living; and in case any son should die without issue, then, subject to the provision aforesaid for his widow, such share shall be added to the other shares in equal proportions, the share set aside in respect of any who predeceases me shall be disposed of in the same manner both as to income and principal.

From the date of its organization Port Credit Realty Limited was considered for income tax purposes as a personal corporation; it was so considered not only during the lifetime of James Harris but also after his decease which occurred on January 1, 1929, for the taxation periods of 1929, 1930, 1931, 1932, 1933 and 1934. It was not until November 14, 1935, that the Commissioner of Income Tax decided to assess the appellant as an ordinary corporation and sent a notice of assessment accordingly.

It was submitted on behalf of the respondent that Port Credit Realty Limited ceased to be a personal corporation the day James Harris died (January 1, 1929).

Before dealing with the legal aspect of the case, it will be convenient to see what was the the position of the appellant company after the death of James Harris.

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Arthur E. Allen, a chartered accountant, who is secretary of Port Credit Realty Limited and of the estate of the late James Harris and was at the time of the death of the latter his secretary, examined as witness for appellant, says in substance as follows:

At the beginning as well as at the end of the year 1932 there were outstanding 10,000 shares of Port Credit Realty Limited of which 9,995 were still in the name of James Harris and five in the names of the incorporators;

these shares had been paid for in full by James Harris;
 the widow and five children were the beneficiaries in receipt of all the income of the late James Harris during the year 1932;

from the date of the death of James Harris to the end of 1932 there was no change in beneficiaries in receipt of the income and there has been no change since the end of 1932;

the assets of Port Credit Realty Limited in 1932 consisted of stocks and the entire income of the company during that year was derived from these stocks;

in his capacity of secretary of the company and of the estate, the deponent filed, for the year 1932, income tax returns for the estate of James Harris, for Port Credit Realty Limited and for each of the beneficiaries, namely, the wife and the five children;

the beneficiaries paid approximately \$1,700 for the 1932 taxation period on Port Credit Realty Limited income and the assessment notice of November 14, 1935, shows a further tax of \$1,275 for the same year;

the corporate accounting and office expenses of Port Credit Realty Limited were paid by James Harris to the time of his death and afterwards by his estate;

the same returns as in 1932 were made for the years 1933 and 1934, i.e., a return for the estate of James Harris, a return for the company and a return for the widow and each of the children;

similar returns were also filed for the years 1929, 1930 and 1931; no assessment notices were received for the company, but the usual notices were received for the beneficiaries and receipted in full;

there was no reason for continuing the company's existence when James Harris died but there did not appear to be any object in winding it up at once and it was continued, the idea being that as soon as the securities were sold the company would be wound up; had there been any notion that additional taxes would be claimed the company could have been wound up on January 2, 1929;

the estate could not be wound up at once because there are large real estate holdings and also because there are life interests;

technically the income from the stocks goes into the company, but it is immediately turned over to the estate, before any expenses are paid; all expenses are paid by the estate.

It is quite obvious that after the decease of James Harris as well as during his lifetime Port Credit Realty Limited had no other assets than the shares assigned to it by James Harris and that the only income it ever received was the dividends derived from these shares.

It is admitted by the respondent that during the lifetime of James Harris the appellant company was a personal corporation and was recognized as such for the purposes of the Income War Tax Act; it is submitted, however, that upon the decease of James Harris the appellant company ceased to be a personal corporation and that it lost any claim that it might have for special treatment under the Act as such.

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There was no mention of personal corporation in the original Income War Tax Act, 1917 (7-8 Geo. V, chap. 28). The personal corporation was first introduced into the Income War Tax Act by 16-17 Geo. V, chap. 10, assented to on June 15, 1926. Section 3 of this statute reads in part as follows:

Section three of the said Act is amended by adding thereto the following subsections:—

“(10) (a) For the purposes of this Act a ‘personal corporation’ means a corporation or joint stock company (no matter when or where created) controlled directly or indirectly by one person, who resides in Canada, or by one such person and his wife or any member of his family, or by any combination of them, or by any other person or corporation on his or their behalf, whether through holding a majority of the stock of such corporation, or in any other manner whatsoever, the gross revenue of which is to the extent of one-quarter or more derived from one or more of the following sources, namely:—

from the ownership of or the trading or dealing in bonds, stocks or shares, debentures, mortgages, hypothecs, bills, notes or other similar property, or from the lending of money with or without security, or by way of rent, annuity, royalty, interest or dividend, or from or by virtue of any right, title or interest in or to any estate or trust.

(b) The income of a personal corporation, in lieu of being assessed the tax prescribed by subsection two of section four of this Act, shall on the last day of each year be deemed to be distributed as a dividend to the shareholders thereof and shall in their hands constitute taxable income for each year in the proportion hereinafter mentioned, whether actually distributed by way of dividend or not.”

Paragraphs (c) to (g) inclusive have no relevance to the question at issue herein.

When the statutes were revised in 1927, the definition of the personal corporation contained in paragraph (a) of subsection (10) of section 3 became paragraph (i) of section 2 of the new Act (R.S.C. 1927, chap. 97) and the provisions relating to the tax on personal corporations contained in paragraphs (b) to (g) inclusive of subsection (10) of section 3 became section 21 of the new Act.

Paragraph (i) of section 2 of chapter 97 of the Revised Statutes is similar to paragraph (a) of subsection (10) of section 3 of chapter 10 of the statute of 1926 (16-17 Geo.

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V) and subsection 1 of section 21 of said chapter 97 is similar to paragraph (b) of said subsection (10).

By 23-24 Geo. V, chap. 14, s. 1 (assented to on March 30, 1933), paragraph (i) of section 2 of the Income War Tax Act (R.S.C. 1927, chap. 97) was repealed and replaced by the following:

(i) "Personal corporation" means a corporation or joint stock company, irrespective of when or where created, whether in Canada or elsewhere, and irrespective of where it carries on its business or where its assets are situate, controlled, directly or indirectly, by one individual who resides in Canada, or by one such individual and his wife or any member of his family, or by any combination of them or by any other person or corporation or any combination of them on his or their behalf, and whether through holding a majority of the stock of such corporation or in any other manner whatsoever, the gross revenue of which is to the extent of one-quarter or more derived from one or more of the following sources, namely:—

- (i) From the ownership of or the trading or dealing in bonds, stocks or shares, debentures, mortgages, hypothecs, bills, notes or other similar property,
- (ii) From the lending of money with or without security, or by way of rent, annuity, royalty, interest or dividend, or
- (iii) From or by virtue of any right, title or interest in or to any estate or trust.

By section 3 of the same statute (23-24 Geo. V, chap. 14) subsection 1 of section 21 of the said Act was repealed and replaced by the following:

21. (1) The income of a personal corporation, whether the same is actually distributed or not, shall be deemed to be distributed on the last day of each year as a dividend to the shareholders, and the said shareholders shall be taxable each year as if the same had been distributed in the proportions hereinafter mentioned.

By section 4 of the same statute section 21 was further amended by the addition thereto of subsections (7), (8) and (9).

Subsection (9) reads as follows:

(9) The rates of tax applicable to corporations, as in this Act provided, shall not be imposed on any personal corporation.

Paragraph (i) of section 2 and subsection 1 of section 21 have not been amended since.

Section 10 of chapter 14 of 23-24 Geo. V dealing with the application of the various sections of the Act says *inter alia*:

10. It is hereby declared and enacted that the provisions of the Income War Tax Act shall be read and construed as if the amendments enacted by sections one, two and three of this Act had been contained therein since the fifteenth day of June, 1926, and the said Income War Tax Act as amended shall apply to the income of the 1925 taxation period and fiscal periods ending in 1925 and all subsequent periods . . .

Section 10 then goes on to say that sections 4, 5, 6 and 7 shall apply to the income of the 1932 taxation period, fiscal periods ending in 1932 and subsequent periods and that section 8 shall apply to the income of the 1917 taxation period, fiscal periods ending in 1917 and subsequent periods; these last provisions are irrelevant.

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The question coming up for determination is whether the appellant company ceased to be a personal corporation when James Harris died. I may say that the question narrows down to a mere interpretation of the definition of a personal corporation, seeing that the operations of the appellant company remained the same after the decease of James Harris as they were prior thereto. Both before and after his death the company's operations were confined to holding shares conveyed to it by James Harris, to draw the income derived therefrom and to hand it over to James Harris during his lifetime or to his estate after his death. Both prior and subsequent to Harris' death the company had no assets other than the shares aforesaid; it did nothing else but hold these shares, receive the income therefrom and remit it to the persons entitled thereto.

A personal corporation, according to paragraph (i) of section 2 of the Income War Tax Act, as amended by 23-24 Geo. V, chap. 14, s. 1, is a corporation or joint stock company controlled, directly or indirectly, by

one individual who resides in Canada, or
 one such individual and his wife or any member of his family, or
 any combination of them, or
 any other person or corporation or any combination of them on his or their behalf.

The substitution of the word "individual" for the word "person" by section 1 of chapter 14 of the statute 23-24 Geo. V, was made, it seems to me, with the intent of avoiding the definition of the word "person" contained in paragraph (h) of section 2 of the Income War Tax Act; this definition reads thus:

Person includes any body corporate and politic and any association or other body, and the heirs, executors, administrators and curators or other legal representatives of such person, according to the law of that part of Canada to which the context extends.

The word "individual" only applies to a natural person whilst the word "person" may also apply, as it does according to said paragraph (h), to an artificial person such as a corporation or association. I may say, however,

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that I do not think that the substitution of the word "individual" for the word "person" in paragraph (i) of section 2 has had the effect of restricting the scope of the definition therein contained; it is clear that the word "person" included in the definition of the personal corporation in paragraph (a) of subsection (10) of section 3 of the Income War Tax Act, as enacted by 16-17 Geo. V, chap. 10, s. 3, applied only to a natural person, seeing that it refers to a person who resides in Canada, or to one such person and his wife or any member of his family; the inclusion of the wife or any member of the family evidently excludes the artificial person. However it may be, the first question for me to determine is whether the word "individual" is intended to apply exclusively to males, thus preventing a widow or spinster from organizing a personal corporation. In common use, the word "individual" applies to either sex; as the word "person," it may mean a woman as well as a man.

Had the definition, on the subject of control, been limited to the first hypothesis, the matter would offer no difficulty; even so, I believe, if the definition had in addition merely mentioned any member of the family. The difficulty arises from the inclusion in the definition of the words "his wife." Does this mean that the word "individual" is used exclusively in the masculine gender? This would imply that a personal corporation could not be controlled by a widow or by a widow and a member of her family or by a spinster. A woman could only control a personal corporation jointly with her husband or with her husband and any member of his family. I must say that this does not seem reasonable to me. I am unable to convince myself that the legislature intended to deprive widows and spinsters of the right to enjoy the convenience of a personal corporation. Be that as it may, if the significance or import of the word "individual" is rather indefinite and doubtful, it seems to me that the insertion in the definition of the phrase "any combination of them" elucidates the subject and removes all doubt. "Any" combination may consist of the individual and his wife, or the individual, his wife and any member of his family, or the individual and any member of the family or the wife and any member of the family.

It may be contended and it was in fact contended that the corporation is not controlled by the wife nor even by the wife and the children or any other member of the family. Apart from particular legacies consisting of a sum of \$20,000, of the household goods, furniture and furnishings and of the free use of the family residence or of another residence at her option, the widow has only a life interest, to wit the income of a sum of \$600,000 during her lifetime.

James Harris, at the time of his death, left five children, two daughters and three sons. No child had predeceased him. The balance of the residue of the estate, as previously stated, is divided among the testator's children.

Each of the daughters is entitled to the income on her share from the age of 21 years during the term of her life, the capital of such share to be divided among her issue in such proportions as she may by will appoint and, in default of such appointment, equally among her issue and the issue of any child or children who may have died.

The sons get the income on their shares from the age of 21 years until the age of 25 years when one-half of the capital is to be paid to them; the income on the other half of the capital is payable to them until they reach the age of 30 years when they become entitled to the balance of the capital.

It seems obvious that during the lifetime of Mrs. Harris and of her daughters the bulk of the estate and in consequence the control of the appellant company remain vested in the trustees and executors.

The personal corporation, besides being controlled by an individual who resides in Canada or by such an individual and his wife or any member of his family or by any combination of them, may, according to the definition contained in paragraph (i) of section 2, be controlled by "any other person or corporation or any combination of them on his or their behalf." The word "person" for which the word "individual" has been substituted in other parts of the sentence has been left here, intentionally it may be assumed. The definition of the word "person" in paragraph (h) of section 2 here applies. The word "person," according to this definition, includes any body corporate and politic and any association or other body and the

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heirs, executors, administrators and curators or other legal representatives of such person.

This definition is broad; it seems to me to apply to the trustees and executors of the will of the late James Harris. The appellant company is at present controlled by these trustees and executors.

Port Credit Realty Limited has, since the decease of James Harris, preserved all the characteristics of a personal corporation and I see no reason why it ought not to be considered as such.

The appeal is allowed and the assessment of the 14th of November, 1935, is set aside.

The appellant will be entitled to its costs.

Judgment accordingly.

Case No. 16825, *Ernest Gilman, Incorporated v. The Minister of National Revenue*, was also decided by the Honourable Mr. Justice Angers, on April 12, 1937.

J. A. Mann, K.C., for the appellant.

W. S. Fisher for the respondent.

The appellant, a body politic and corporate, was incorporated by letters patent of the Province of Quebec for the purpose of acquiring and holding the personal assets of Ernest W. Gilman, a resident of Montreal, P.Q., who died on February 20, 1934, the appellant continuing to hold and manage the assets transferred to it by Ernest W. Gilman in his lifetime. By his will Ernest W. Gilman provided for certain specific legacies and bequeathed the residue of his estate to his executor in trust to provide for his wife and daughters and for certain other purposes. The executor controls the appellant corporation on behalf of the heirs of Ernest W. Gilman, it having no other assets than those transferred to it by Gilman and its income being wholly derived from such assets.

The learned Judge, holding that appellant continued to be a personal corporation after the death of Ernest W. Gilman, said:

The widow and the daughters have no title to or right of property in the capital of the estate; contrary to the contention of counsel for appellant, I do not think that the widow and daughters are institutes; no substitution is, in my opinion, created by the will of Ernest W. Gilman (see Articles 925 and following of the Civil Code of the Province of

Quebec). During the lifetime of the widow and the daughters the ownership of the estate remains vested in the executor and trustee, National Trust Company, Limited. It is only upon the death of Mrs. Ernest W. Gilman that the estate is to be divided into two shares, one to the lawful surviving issue of each of the testator's daughters. During the lifetime of the latter, the ownership of the estate also remains vested, I believe, in the executor and trustee. The ownership of these two shares passes to the lawful surviving issue of each of the daughters on their attaining the age of majority.

It seems obvious to me that during the lifetime of Mrs. Ernest W. Gilman as well as during the minority of her daughters' children the bulk of the estate remains vested in the executor and trustee; so does the control of the appellant corporation.

The personal corporation, besides being controlled by an individual who resides in Canada or by such an individual and his wife or any member of his family or by any combination of them, may, according to the definition contained in paragraph (i) of section 2, be controlled by "any other person or corporation or any combination of them on his or their behalf." The word "person" for which the word "individual" has been substituted in other parts of the sentence has been left here, intentionally it may be assumed. The definition of the word "person" in paragraph (h) of section 2 here applies. The word "person," according to this definition, includes any body corporate and politic and any association or other body and the heirs, executors, administrators and curators or other legal representatives of such person.

This definition is broad; it seems to me to apply to the trustee and executor of the will of the late Ernest W. Gilman. The appellant company is at present controlled by the said trustee and executor.

Ernest Gilman Inc. has, since the decease of Ernest W. Gilman, preserved all the characteristics of a personal corporation and I see no reason why it ought not to be considered as such.

BETWEEN:

WALKERVILLE BREWERY LIMITED...SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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 April 20-23.
 1937
 June 12.

Crown—Petition of right—Money paid under compulsion of legal process cannot be recovered.

In October, 1927, the Crown by Information filed in this Court, brought suit against the suppliant herein for the recovery of certain money for sales tax, excise tax, penalties and interest, under the *Special War Revenue Act 1915*, and amendments thereto, in respect to beer manufactured and sold by the suppliant for a period subsequent to January 1, 1924. A settlement was arrived at between the parties and the proceeding was discontinued, the settlement covering a longer period than that actually involved in the Information.

Suppliant now seeks to recover from the Crown the money paid under that settlement, together with a further sum, on the grounds that it was never liable to the Crown; that payment was procured under duress; that where payment was made it was understood between the

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parties that the money so paid would be refunded to suppliant should it later appear that it had overpaid the Crown or that suppliant was not legally liable for any of the taxes claimed in the Information.

The Court found that the money paid by suppliant was paid voluntarily and unconditionally in settlement of the suit brought against it by the Crown.

Held: That money paid under compulsion of a legal process cannot be recovered, although the defendant finds he has paid in error what he was not legally bound to pay, and the rule applies even though the process may never have terminated in a final order or judgment, and although it may have been withdrawn at the date when proceedings are taken for the recovery of the money, and although the payment was made under process.

PETITION OF RIGHT to recover from the Crown certain money paid it by suppliant for sales tax, excise tax, penalties and interest.

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

S. L. Springsteen, K.C. and *J. W. Reid* for suppliant.

W. N. Tilley, K.C., A. C. Hill, K.C. and *C. F. H. Carson, K.C.*, for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (June 12, 1937) delivered the following judgment:

The suppliant is a company incorporated under the laws of the Province of Ontario, and at the material time carried on the business of a brewer at Walkerville, in the Province of Ontario. In October, 1927, the Crown filed an Information in this Court claiming from Walkerville Brewery Ltd., the suppliant here, the sum of \$212,697.44 for sales tax under sec. 19 BBB, Part IV, of the *Special War Revenue Act, 1915*, and amendments thereto, in respect of beer manufactured and sold by the suppliant for a period subsequent to January 1, 1924, and also for excise tax—sometimes referred to as gallonage tax—under sec. 19 B of the same Act, and amendments thereto, in respect of the same beer and the same period; and interest and penalties in respect thereof. The *Special War Revenue Act, 1915*, as amended by later statutes, imposes the gallonage tax and the sales tax upon specified goods, including beer, manufactured in Canada. It is provided, however, that gallonage tax shall not be payable “when such goods

are manufactured for export, under regulations prescribed by the Minister of Customs and Excise," and that sales tax shall not be payable on "goods exported," with a provision for a refund "on domestic goods exported, under regulations" similarly prescribed.

When the Crown proceeded against the suppliant, as just mentioned, there was pending in this Court a proceeding by the Crown against Carling Export Brewing and Malting Company, a corporation carrying on the business of a brewer at London, Ontario, wherein the question of the liability of that brewer for excise and sales tax, in respect of beer manufactured by it and alleged to have been exported to the United States, was to be determined; while that action was pending, Walkerville Brewery Ltd. urged upon the Crown that the Information proceeding taken against it should not proceed to trial until the final determination of the *Carling* case. That case was ultimately determined in February, 1931, favourably to the defendant in the action, the Carling Export Brewing and Malting Co., by the Judicial Committee of the Privy Council (1), on grounds which I shall later mention. In the meantime, a settlement was arranged between the Crown and Walkerville Brewery Ltd. in respect of the amount claimed by the former in the Information proceeding taken against the latter, and the Information proceeding, which had then been set down for trial, was discontinued; that settlement, I understand, covered a longer period than that actually involved in the Information. By this petition the suppliant seeks to recover the moneys paid under the terms of the said settlement, \$260,000, and a further sum, upon the grounds that it was never liable for the payment of either the gallonage or the sales tax claimed by the Crown in the said Information; that payment of the said sum was procured under duress; and further, that when such payment was made it was upon the condition that if it later transpired that the suppliant had overpaid any moneys to the Department of National Revenue in that connection, or if it were established that the suppliant was not legally liable for any of the taxes it might pay in settlement of the claim set forth in the said Information, the same would be refunded. It is in these circumstances, and upon the

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facts which I have mentioned generally, that the suppliant by this petition now seeks to recover the moneys which it thus paid to the Crown.

It is the contention of the Crown that the beer in question was not manufactured or sold for export to the United States, and that the same was not in fact exported, within the spirit and meaning of the Act; that even if the beer were exported, the true nature of the suppliant's dealings with the same, and that of the alleged United States importers, did not entitle it to the benefit of the statutory exemptions; and that the moneys here sought to be refunded were paid voluntarily and unconditionally in settlement of the action for their recovery, and for taxes then due and payable by the suppliant, and are not now in law recoverable.

It will be convenient first to refer more specifically to the statutory provisions relevant to the controversy. The provisions as to gallonage tax, so far as material, are as follows:

19B 1. (b) There shall be imposed, levied and collected upon all goods enumerated in schedule II to this Part, * * * * when any such goods are manufactured or produced in Canada and sold * * * *, the rate of excise tax set opposite to each item in said schedule II.

The said schedule mentions "ale, beer, porter and stout, per gallon * * * twelve and one-half cents," and also cigars and carbonic acid gas. A proviso to the section mentioned is:

Provided that such excise tax shall not be payable when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise.

In the case of the sales tax, which is imposed by s. 19 BBB, subsec. 1, of the same statute as amended, the relevant provision is as follows:

In addition to any duty or tax that may be payable under this Part, * * * there shall be imposed, levied and collected a consumption or sales tax of five per cent on the sale price of all goods produced or manufactured in Canada * * * which tax shall be payable by the producer or manufacturer at the time of the sale by him; * * *. Provided that the consumption or sales tax specified in this section shall not be payable on goods exported.

In the case of the sales tax there is provision for a refund under subsec. 10:

A refund of the consumption or sales tax may be granted on imported goods on which customs duties have been refunded on exportation; and a refund of the said tax may be granted on domestic goods exported under regulations prescribed by the Minister of Customs and Excise.

This probably would be a convenient and appropriate stage at which to refer to the decision of the Privy Council in the *Carling* case, and which decision plays an important part in one aspect of this case. It was held by their Lordships that an export of beer to the United States was within the exempting provisions although the import was contrary to the law of that country, and that the prohibition laws of the United States affected only the quantum of proof of export; that the exemption from the gallonage tax, like that from the sales tax, applied only to goods actually exported and that it operated although no regulations had been prescribed; that beer sold to a purchaser in the United States was within the exemptions where the same had been consigned to him at a Canadian port, and was proved to have been shipped from there to the United States in smaller consignments, mostly to sub-purchasers, and at an advanced price. The most important evidence in support of proof of export was held to be found in documents relating to the consignments of beer, particularly the bills of lading and the customs forms known as B.13's, and the clearances through customs of the boats carrying the beer from Canadian ports to the United States. Other facts relied upon by their Lordships, in proof of export, were that the beer had been manufactured for export; that the goods were sold under the arrangement that the same were to be exported, and that the Carling Company saw to it that they were so exported. The beer in question was manufactured in London, Ont., where it was put on rail, consigned to the United States purchasers at Windsor, Ont., or one of the adjacent ports on the Canadian border, and from thence shipped to the United States by boats acting on behalf of the sub-purchasers, after entry outwards at and clearance by customs. The practice at the port of export was to split up the bulk consignments into small parcels to suit the capacity of the boats, or the requirements of the sub-purchasers, and accordingly to alter the B.13's which had accompanied the rail shipments from London; in these latter forms the Carling Company certified that the particular parcel was being delivered by them to the particular boat for exportation to the United States, and they were presented to and stamped by the customs officer at the port of exit. Boats acting on behalf of the sub-purchasers

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paid the purchase price, on shipment of the beer at the port of exit, but the designated consignees, Grandi or Savard, were usually extended credit by the Carling Company.

I do not propose reviewing in any great detail the evidence produced in proof of the export of the goods in question by the suppliant. The salient facts are much the same as in the *Carling* case. The goods were manufactured by the suppliant, and sold and consigned to one Clemens of Detroit, U.S.A., the same usually being ordered by Clemens by letter. Generally, the goods, packed in bags, were conveyed from the suppliant's brewery at Walkerville, by its own trucks, either directly to a boat, a United States boat, at some dock at Walkerville, or some other Canadian frontier port in that section of Ontario, or, the goods were temporarily warehoused on a dock pending the arrival of shipping facilities from the United States. Sub-sales were made by Clemens in the United States, as in the *Carling* case, and the quantity of beer carried by any boat clearing from a Canadian port would vary according to its carrying capacity, or according to the quantity of the individual sub-sale. In most instances the goods, as shipped from the brewery, were delivered at the Canadian border port to a company known as the Bermuda Export Company, which concern acted as forwarding agents not only for the suppliant but for other Canadian brewers, and during the period material in the *Carling* case it acted in a similar capacity for the Carling Company. The prescribed customs export entry form, B 13, required in the case of the exportation of domestic goods not subject to "Export, Customs or Excise Duties," accompanied each truck shipment from the brewery to the dock; usually, as I understand it, this B 13 would be held by a representative of the suppliant at the port of export, and fresh B 13's would be issued covering the quantity of each boat shipment, all this being done to the evident satisfaction of customs. After each shipment was loaded aboard a boat at the port of exit, a B 13 applicable to the same would be lodged at the nearest customs office, and by customs duly stamped after examination of the cargo; the stamp would indicate the date and place of exportation. Further, when the cargo was placed on board a boat, a report outwards signed by the master, stating the suppliant to be the shipper of the

goods and a port in the United States to be the destination, and the nature and quantity of the cargo, would be entered at customs, and on this report a clearance certificate would be granted by customs to the master.

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In the *Carling* case, their Lordships of the Judicial Committee discussed the construction of the words: "Provided that such excise tax shall not be payable when such goods are manufactured for export," in the proviso to s. 19 B, subsec. 1, relative to the excise tax, and they held that the words used necessarily imply not only, as the bare words might suggest, that the goods are manufactured and sold with an intention of export, but that they must, in fact, have been exported before the benefit of the exemption can be obtained.

The tax, they stated, is imposed "where goods are manufactured or produced and sold in Canada," and the words "and sold" must be held to be implied in the proviso, though the words are not repeated here. They said:

It is a possible view that subsequent export of the same goods by a purchaser, quite independently of the manufacturer, would sufficiently comply with the terms of the proviso, but their Lordships prefer the view that the tax being levied on sale by the manufacturer, it is for the latter, in claiming exemption, to prove that under the arrangement for sale the goods were to be exported, and that he secured that that condition was in fact carried out.

And their Lordships were of the opinion that "a similar construction applies in the case of the consumption or sales tax," but in respect of subsec. 10 of sec. 19 BBB, which relates to a refund of the sales tax "on domestic goods exported," they expressed the view that this would "apply to goods which, though not manufactured for export in the sense above described, are subsequently exported"; this I construe to mean that in the case of the sales tax, the goods exported need not have been specifically "manufactured for export."

It would seem therefore that, in order to obtain the exemption in respect of goods liable to the gallonage tax, it is necessary not only that they be manufactured and sold with the intention of export, but that before the benefit of the exemption can be claimed, the goods must, in fact, have been exported, or as stated by their Lordships in the *Carling* case, it is necessary in claiming exemption, to prove that "under the arrangement for sale the goods were to be exported, and that the manufacturer saw to it that that condition was in fact carried out"; in respect of goods liable to the sales tax it would not appear to be

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necessary that the goods be manufactured for export. It is a strange provision that makes the exemption in respect of the excise tax available only in the case of goods manufactured and sold with an intention of export; in the case of cigars, for example, it would seem that a wholesale dealer and exporter in that article, who was not the manufacturer, would not be entitled to the exemption, even if in fact he exported such goods, which might place him under a serious disadvantage with exporters from other countries, into neutral markets. The language of their Lordships to the effect that the manufacturer, in claiming exemption, must prove that under the arrangement of sale the goods were to be exported, and that he must see that they were in fact exported, occasion no particular difficulty here because the manufacturer and exporter was one and the same person; the difficulty which would arise in the case where one other than the manufacturer was the exporter does not therefore appear here. No difficulty, I think, arises concerning the requirement that when the goods are sold it must be arranged that they were to be exported. If goods are sold to a person in the United States, for export to that country, then it must be presumed that the arrangement was that they were to be exported, and I can hardly think that the use of the words "understanding," or "arrangement," as to export, can add to or take from that presumption. The requirement that the manufacturer, who sells for export, must see that the goods are in fact exported is not intended to mean that such person must accompany the goods to the importing country, or, in this case, that he should watch them during their entire journey to United States territory. I think it is clear from the language of their Lordships' judgment that all that is expected of the exporter is that he should put in motion the necessary transportation agencies and comply with the customs requirements regarding exportation of goods from Canada, in carrying out the export, and this, I think, would be done in a case of this kind by seeing that the goods left the brewery, and were delivered aboard a boat or boats which cleared for the United States, and that all the legal requirements in respect of shipping and customs documents pertaining to exports were observed.

In any event, the taxes in question having been levied against and paid by the suppliant, the burden rests upon it to prove that the beer, against the sale of which the taxes were levied and paid, was exported, if it is to recover the taxes so paid. The facts disclosed in this case alone would indicate that no insurmountable obstacle was likely to be encountered, at the period in question, in landing beer in the United States from the section of Canada with which we are here concerned, and abnormal profits were the prize to be won by those willing to engage in that class of trade; the quantity of beer which the suppliant alone alleges to have exported to that country, during the period in question, was quite substantial in volume. If that class of trade at and about the material time here, constituted an "export" under relevant Canadian statutes, and it has been so held by binding authority, then it appears that this "export" trade was carried on in a very substantial way; those about to engage in such a venture did not entertain the idea of participating in a series of magnificent failures, though perhaps realizing there was some risk to be assumed. It seems to have been a business very openly conducted. Accordingly one must not approach the question of proof of export in cases of this kind with the idea that successful export to the United States was something extremely difficult, if not impossible of accomplishment, and I am not disposed to attach any weight to the suggestion that all the motions of export made by the suppliant were mere simulations of export, and that its real and ultimate intention was to land and dispose of the beer in Canada. In the main I am satisfied that the goods in question were sold by the suppliant for export, that it saw the same were exported, and that in fact they were exported, within the meaning of the *Carling* case. The evidence that the goods were manufactured for export, or with the intention of exporting the same, is not very strong, and there is no documentary evidence, so far as I recall, supporting such fact or intention. I would be as readily disposed to believe that the beer was manufactured with the intention of exporting the same as the evidence stands, as if there were evidence of a written contract whereby Clemens undertook to purchase from the suppliant its entire output of beer during the period in question; I would be disposed to sus-

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pect that such documentary evidence was manufactured for the purpose of this case. I cannot believe that there could be any expectation of marketing lawfully for consumption in Canada, at the material time, such quantities of beer as the suppliant was manufacturing, and it would be unlikely that the same would be manufactured solely for unlawful sale in Canada. I have little hesitation in believing that the beer in question was manufactured for export, or with the intention of exporting the same; therefore I would be disposed to give the suppliant the benefit of any doubt that might exist as to this fact.

There is this, however, to be added to what I have just said. It was shown by quite a few witnesses that certain quantities of beer manufactured by the suppliant were sold to Canadians, chiefly residents of Windsor, Ont., from the so-called export docks at frontier ports, and by them resold in Canada. It was established in the *Carling* case that a sale or sales of the same character had been made by the Carling Company to one Bannon, and by him resold in Canada, and Bannon was one of the persons who purchased a quantity of the suppliant's beer, within the material period, from one of the docks from which the suppliant's beer was being exported. In the *Carling* case, the learned trial Judge held that the Carling Company was liable for any tax upon sales of beer diverted apparently from the shipments consigned for export, and this disposition of such irregular sales was not varied by the judgment of the Privy Council. In the event of an appeal from this judgment, and it being held that the suppliant was entitled to succeed in its petition, deductions from the amount sought to be recovered by the suppliant would have to be made, in my opinion, on account of the irregular sales which I have mentioned. How, or by whom the deductions should be ascertained I need not now delay to discuss; that would be determined either by the appellate court or the case would be remitted back to this Court for the determination of this point. If, therefore, I had to dispose of this case solely upon the question of fact as to whether the goods were manufactured and sold for export, and were in fact exported, I would feel obliged to sustain the contention of the suppliant. If the suppliant were here being sued for the

taxes in question, as in the *Carling* case, I would feel obliged to hold that the Crown must fail in its action.

The really important question, in my opinion, for decision here is whether the moneys in question, which the suppliant now seeks to recover, were paid to the Crown voluntarily in settlement of the suit brought against the suppliant, or whether the same were paid under some form of duress, or upon the condition that in a certain event, yet to be mentioned, they were to be refunded.

After the action brought against the suppliant for the recovery of the taxes mentioned was set down for trial, for June 25, 1928, to be exact, counsel acting on behalf of the Crown, Mr. Rowell, was informed by the Minister of National Revenue that certain proposals for settlement had been submitted on behalf of the suppliant and he was instructed to enquire into certain matters relative thereto, and to report to the Minister. Mr. Rowell then, through an auditor, caused an examination to be made of the suppliant's books concerning certain items for which the suppliant was claiming credit, and possibly other matters, and in due course he reported to the Minister. Later, Mr. Rowell was informed that a definite proposal of settlement had been made and he was asked to advise if he would recommend such a settlement; in the end Mr. Rowell recommended a settlement of the amount claimed in the action, up to March 31, 1928, in the lump sum of \$260,000, without interest and penalties, and without costs to either party, and he testified that he had never heard of any other condition attaching to the settlement.

The complete terms of settlement it seems were concluded between the Department of National Revenue and the suppliant. On June 7, 1928, the suppliant wrote the Minister of National Revenue as follows:

Confirming the verbal arrangement arrived at between your Department and our Mr. Thistle, we herewith enclose you our cheque for \$200,000. The understanding is that we are to send you a further cheque for \$60,000 within sixty days. The last-mentioned cheque, together with the cheque enclosed, is in full settlement of the claim contained in the Information dated 27th of October, 1927, and also other sales and gallons tax, interest and penalties up to the 30th day of April, 1928, and it is understood that the action commenced by the Crown is to be discontinued without costs and that upon payment of the full amount of settlement of \$260,000, your Department is to give us a full release of all claims up to the 30th of April, 1928.

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This letter was acknowledged by the Commissioner of Excise in the following terms:

I have for acknowledgment your letter of the 7th instant, enclosing cheque for \$200,000 to be applied against arrears of sales and gallonage taxes due by your company.

It is understood that a further payment of \$60,000 is to be made within sixty days, which will complete settlement of all sales and gallonage taxes and interest up to the end of March, 1928.

In your letter now under reply, you ask for a full release of all claims by the Department up to the end of April, 1928, but it was distinctly understood with the Honourable N. W. Rowell K.C., that payment of \$260,000 would complete the matter until the end of March, this being the date to which the accounts of your company were recently audited. The records for the month of April were not complete at the time Auditor G. N. Leaf was at your office, and consequently no assessment was made for this month.

I would be glad to have you confirm the understanding that after the payment of \$60,000 is made, settlement is completed for a period ending 31st March, 1928.

In the latter part of August, 1928, the suppliant requested an extension of sixty days for the payment of the \$60,000 instalment; this request the Commissioner of Excise at first refused but apparently an extension was later granted because payment of this instalment was not made until October, 1928. The payment of that instalment was accompanied by a letter, dated October 13, 1928, addressed to the Minister of National Revenue by the suppliant, and which was as follows:

We are enclosing herewith our cheque in the amount of \$60,000 in full payment of all claims of your Department against this company in respect to sales and gallonage taxes, this payment being the balance of the \$260,000 amount agreed to during the early part of the year.

Kindly acknowledge receipt of this settlement and oblige.

That concluded the payments to be made under the terms of the settlement of the action brought against the suppliant by the Crown.

The dispute as to whether the settlement included any taxes accruing due and payable for the month of April, 1928, was finally settled by the suppliant paying, as I understand it, the further sum of \$8,338.32. The month of April, 1928, did not fall within the period covered by the Information proceedings taken against the suppliant. During the negotiations between the parties in respect of this dispute, and which negotiations covered a considerable period, the suppliant was more than once informed in writing that legal action would be taken for the recovery of this claim, and possibly others, unless paid. While the suppliant for

a time was contesting any liability for the April claim, on the ground that it was included in the settlement referred to, still, in the end an agreement, both as to the liability for and the amount of the claim, was ultimately reached, and, the amount was unconditionally paid in June, 1930, and apparently without any formal protest. It is true that in April, 1930, the suppliant was advised that its licence as a brewer would not be renewed unless certain payments were made on account of taxes then claimed to be due the Crown, and this related either to the April claim, or to some claim or claims arising later, or both, exactly which is not quite clear to me. In point of fact the licence was shortly afterwards renewed, and so far as I can see the Crown would have been within its legal rights, at the time, in refusing a renewal of the licence. This incident cannot in my opinion be construed as constituting duress. The suppliant's letter accompanying the remittance in settlement of the April claim, and further balances, is dated June 16, 1930, and is as follows:

We are forwarding you herewith our cheque for Six thousand and Seventy-one Dollars, and Eighty-two Cents (\$6,071.82), being payment in full for all claims in respect to sales and manufacturers taxes, up to, and including September 30, 1929, as per arrangements made.

This settlement covered the period from April 1, 1928, to September 30, 1929, and it is not necessary to enquire just how the amount was reached. But, as I understand it, the amount paid at one time or another in settlement of the April claim amounted to \$8,338.32.

The suppliant also claims that the payments in question were made upon a certain condition, which had its origin in negotiations or understandings outside that already referred to, and which were participated in by Mr. Thistle on behalf of the suppliant, the Minister of National Revenue, and Mr. Odette, the representative of the federal electoral division in which was located the suppliant's place of business.

After a conference between Mr. Odette and the Minister of National Revenue the former wrote to the latter on August 3, 1928, as follows:

Confirming my conversation with you yesterday regarding payment of arrears of sales and gallonage taxes by the Walkerville Brewery Company, Walkerville, on which a final payment of \$60,000 is due from the above company, I believe on the 8th of this month. The President of the company is anxious to know what position the company will be in, in the

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event of the Courts deciding that sales and gallowage taxes are not payable on exported goods.

I stated to him that your Department did not desire to collect taxes that were not justly due and that in the event of such an occurrence as above mentioned, or in the event of the Walkerville Brewery over-paying, that they would be in a position to file claim with your Department for refund.

I understand that this is your attitude in the matter, and I would thank you to drop me a line confirming same, so that I can phone the Walkerville Brewery Company previous to the 8th instant, so that their check may go forward to you promptly.

It will be observed that this letter was considerably subsequent to the date of payment of the \$200,000 instalment.

The reply of the Minister to this letter was as follows:

You are right in your understanding as to my attitude. We do not desire to collect any taxes not properly due the Crown, and if it can be shown that any overpayment has been made by the company in question, or if it is established that they were not liable for any tax that they may have paid, you can assure them that refund will be made.

It is chiefly upon this letter from the Minister to Mr. Odette that the suppliant, as I understand it, seeks to base the contention that the payments in question were made conditionally. The correspondence referred to does not even remotely suggest that the payments made or to be made were conditional upon any future action the Minister might take. The payments, and the question of a refund, are entirely separate matters. Further, the Minister's letter contains no enforceable agreement to refund the moneys paid, and, in any event, the Minister could not in this way bind the Crown; whatever be the true implications of that letter they remain as they were when the letter was written; that letter, it seems to me, is something that cannot be considered in this case.

An involuntary payment of money under pressure may be recoverable, but as a general rule money paid in satisfaction of a claim for the recovery of which an action is pending cannot be recovered, even though it should afterwards appear that the claim was unfounded. By some it has been stated that a distinction must be made between the compromise of an action and the payment of a claim on the ground, that in the former case the defendant promises to pay a sum of money in consideration of the plaintiff discontinuing his action; it is a contract, with the ordinary incidents of contract, and money paid is paid under the contract and not by compulsion of legal process. It appears to be the general rule that where money has been paid

under compulsion of a legal process it cannot afterwards be recovered, although the defendant finds that he has paid in error what he was not legally bound to pay. It is against public policy, in the absence of fraud, to allow a matter to be reopened after the law had been called in to effect a settlement and a payment has been made under the pressure of the law. The rule that money paid under compulsion of legal process cannot be recovered applies although the process may never have terminated in a final order or judgment, and although it may have been withdrawn at the date when proceedings are taken for the recovery of the moneys, and although the payment was made under protest and that the payer reserved all his rights. In *Moore v. Vestry of Fulham* (1), Lord Halsbury discussing this principle stated:

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The principle is based upon this, that when a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defence to the original action.

Lord Halsbury in his judgment refers to such cases as *Milnes v. Duncan* (2); *Hamlet et al. v. Richardson* (3); see also the judgments of Lindley L.J. and Smith L.J. in the same case, and Bray J. in *Clydesdale Bank Ltd. v. Schroder & Co.* (4). These cases seem to me to be conclusive against the suppliant as to the recovery of the payment of \$260,000; as to the balance, I do not think it can be said that the payment was made under any form of compulsion, or conditionally. Accordingly, I do not think it necessary to discuss any other grounds of defence raised by the Crown.

In the state of facts, and the law, relative to the payment of the moneys here sought to be recovered, it is my conclusion that the suppliant must fail, and its petition is dismissed with costs.

Judgment accordingly.

(1) (1895) 1 Q.B.D. 399.

(3) (1833) 9 Bing 644.

(2) (1827) 6 B. & C. 671.

(4) (1913) 2 K.B.D. 1 at p. 5.

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BETWEEN:

BOHN ALUMINUM & BRASS COR- }
 PORATION } PLAINTIFF;

AND

OTTO CARTER BERRY DEFENDANT.

Patents — Conflicting application for patents — Date of discovery of invention.

Plaintiff is the assignee of one, Nelson. Nelson and defendant working independently of each other, and of other persons, invented a method of constructing pistons for use in internal combustion engines. Nelson applied for a patent in the United States in June, 1923. He filed his application in Canada on December 5, 1925. Defendant made application for a patent in the United States on March 20, 1922, and in Canada on February 27, 1926. Certain claims in each application were declared in conflict by the Commissioner of Patents for Canada.

The evidence established that as early as May, 1918, and not later than February, 1919, Nelson had made a complete invention of the idea of controlling aluminum piston expansion and had so formulated that idea as to afford the means of making the invention defined in his claims, thereby anticipating Berry.

Held: That by the date of discovery of the invention is meant the date at which the inventor can prove that he has first formulated, either in writing or verbally, a description which affords the means of making that which he has invented. *Christiani and Nielson v. Rice* (1930) S.C.R. 443, followed.

ACTION brought before this Court, under section 44 of the *Patent Act*, for a declaration as to who, as between the assignor of plaintiff and the defendant, was the first inventor of the subject-matter of their applications for patent, in respect of which the Commissioner of Patents had declared a conflict.

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

R. S. Smart, K.C. and *W. A. McRae* for plaintiff.

W. D. Herridge, K.C. and *E. G. Gowling* for defendant.

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

THE PRESIDENT, now (July 17, 1937) delivered the following judgment:

This proceeding is one under s. 44 of the *Patent Act*, and the claims in the conflicting applications for letters patent relate to new and useful improvements in pistons.

The first applicant was one Nelson of Detroit, U.S.A., assignor of the plaintiff, his application being filed on December 5, 1925, the other applicant, the defendant Berry, of Indianapolis, U.S.A., filed his application on February 27, 1926. Berry was the first of the rival applicants here to file an application in the United States in respect of the same subject-matter, which he did on March 20, 1922, while Nelson did not file in that country until June, 1923, some fifteen months later. Both applicants are mechanical engineers and it appears that the training and experience of each, prior to the alleged dates of their respective inventions, was largely associated with internal combustion engines and engine pistons, and consequently there is nothing strange in the fact that each of the applicants, quite independently of each other, and independently of other persons also it seems, came to direct their attention to certain improvements in pistons particularly designed for use in motor engines, and more specifically to means of controlling piston expansion, which pistons, then generally made of aluminum alloy, were well known to possess an undesired tendency to expansion under heat.

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This matter is by no means free of quite substantial difficulties, as is very usual in cases of conflicting applications, because there is always involved the determination of the date of invention of rival inventors. The difficulties are enhanced here by reason of the fact that certain evidence taken in proceedings in the United States, relative to the same subject-matter in issue here, was, by agreement between counsel, put in evidence here without the calling of the witnesses who gave such evidence. In that jurisdiction, as I understand it, and contrary to the rule here, it is incumbent upon an applicant for a patent of invention, in order to secure priority over a rival applicant claiming the same invention, to establish not only that he was the first to conceive the alleged invention but that he diligently proceeded to reduce it to practice; an application for a patent is there treated as a constructive reduction to practice. Therefore the United States evidence was in part directed to the point of "diligent reduction to practice," and this tended in some degree to make that evidence confusing here. It will be convenient here to state that in the United States, the invention in question here was apparent-

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ly the subject of a prolonged contest in the Patent Office, in interference proceedings so-called, as to priority of invention between Nelson and Berry, and ultimately it appears to have been held, by the Court of Customs and Patent Appeals, a federal court, affirming the decision of the Patent Office Board of Appeals, that Berry was entitled to the date of September 28, 1921, for conception, and to the filing date of his application, March 20, 1922, for reduction to practice, while Nelson was given the date of April 8, 1921, for conception, and his filing date of June 5, 1923, for reduction to practice.

In Canada it is the first inventor who is entitled to a patent. In *Christiani and Nielson v. Rice* (1) the law upon this point is discussed at great length, and with great care. In that case the Supreme Court of Canada said:

The holding here, therefore, is that by the date of discovery of the invention is meant the date at which the inventor can prove he has first formulated, either in writing or verbally, a description which affords the means of making that which is invented. There is no necessity of a disclosure to the public. If the inventor wishes to get a patent, he will have to give the consideration to the public; but, if he does not and if he makes no application for the patent, while he will run the risk of enjoying no monopoly, he will none the less, if he has communicated his invention to "others," be the first and true inventor in the eyes of the Canadian patent law as it now stands, so as to prevent any other person from securing a Canadian patent for the same invention. Coming now to apply these guiding principles to the facts of this case, we find that the commission evidence, taken in Denmark establishes that in 1921—almost a year before the earliest date to which Rice's invention can be carried back—Bayer conceived the idea, disclosed it to "others" (Maule, Jacobsen, Philipsen, Schnadorph), instructed experiments, made some on his own account and produced porous cement. Therefore, he had invented the process * * * * * Bayer invented a new principle and a practical means of applying it. He "was not bound to describe every method by which his invention could be carried into effect." (Terrell on Patents, 7th ed., at p. 144). The conception of the idea "coupled with the way of carrying it out" (*Hickton's Patent Syndicate v. Patents, etc., Limited*) and "reduced to a definite and practical shape" (*Permutit Co. v. Borrowman*) constituted the invention of his process, which he communicated to others.

It will be obvious that what has actually occurred in the mind of an inventor is not of the slightest importance, or, as was laid down in *Permutit Company v. Borrowman* (2):

It is not enough for a man to say that an idea floated through his brain; he must at least have reduced it to a definite and practical shape before he can be said to have invented a process.

(1) (1930) S.C.R. 443 at p. 456. (2) (1926) 43 R.P.C. 356.

The effect of the rule laid down by the Supreme Court in *Christiani and Nielson v. Rice* (1), I might point out, has since been modified by the enactment of s. 61 (1) of the *Patent Act*.

Certain claims in each application being declared in conflict by the Patent Office, and it seems to be conceded that they each define substantially the same invention, the issue for determination here is restricted to the question of priority of invention, as between each applicant, in respect of such claims. We are not concerned here as to whether or not the claims in conflict contain subject-matter and for which letters patent might be granted; we have to assume subject-matter in the case of each application because it is only the question of priority of invention in respect of the claims in conflict that has been put in issue, and upon that footing only was this matter heard.

It will be convenient now to turn to what appears to be the invention claimed by Nelson and by Berry. I think the substance of the invention of each applicant may be stated quite briefly, eliminating any detailed description of the manufacture of the embodiment of the invention, a piston. The pistons of internal combustion engines are, and were at the material time, usually made of aluminum alloy, or some nonferrous metal. The temperatures of both the piston and the cylinder vary under different operating conditions, and the metal of both expands as the temperature increases. The piston becomes hotter than does the cylinder wall, and therefore expands more, thus ordinarily making the clearance less in a hot than in a cold engine. When the coefficient of expansion is small, however, and is the same in both the piston and the cylinder, this difference in expansion may be kept within the allowable limits of the clearance variation. Thus when both the piston and the cylinder are made of cast iron it is not difficult to avoid at least the greater part of the troubles due to clearance. The advantages of pistons made of aluminum alloy over cast iron are that they are lighter, have a large coefficient of expansion, and are usually softer than cast iron so that in the event of trouble they are not so liable to score the cylinder wall; the clearance between the piston and the cylinder of an internal combustion engine must necessarily be kept

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within close limits, but generally speaking such limits are definitely determinable. The disadvantages of non-ferrous metals in piston construction are due largely to their higher thermal coefficient of expansion. As Berry puts it, the piston that is a proper fit when the engine is at normal operating temperatures will be excessively loose when the engine is cold, and at the same time will be too tight when the temperature rises above normal. If the piston has the proper clearance when the engine is cold, it will become so tight that it will seize when the engine is in operation. The object which both Nelson and Berry had in mind by their inventions was to make possible the use of a non-ferrous metal piston and yet to eliminate or reduce to a minimum the disadvantages usually incident to non-ferrous pistons, such as excessive expansion upon heating.

A piston is comprised of what is known as the head and the skirt, the head being usually separated or spaced by a gap from the skirt, the latter preferably being divided in construction into two opposite segments or sections. Usually, the head is provided with an internal supporting or depending cross-rib, or web, the ends of which extend downward and form an integral part of what is known as the piston pin bosses located in the skirt, and which carry the bearings of the piston pin, the piston pin bosses being at about the centre of the skirt and extending inwardly and transversely some distance from the skirt wall. This description of the construction of a piston may not be entirely complete or accurate, or perhaps very clear, but I think it will suffice; the construction of a piston may of course vary considerably in detail.

Now, what both Nelson and Berry claim to have invented was a method of piston construction which would overcome the disadvantages I have mentioned, and what each has proposed, in the way of accomplishing that end, is the placing of metal struts, having a low coefficient of expansion, from one skirt segment to another, or from one side of the skirt to the opposite side, having their ends anchored to the opposite walls of the skirt, which walls are at that point thickened, and similarly connected with the pin bosses intermediately, that is, at or near the inner ends of the piston pin bosses, the purpose being to provide a relatively small diametrical expansion in a direction at right

angles to the axis of the piston pin, whereas the separated skirt segments permit circumferential expansion; the struts are provided with suitable openings or holes for the piston pins to pass through, the holes being sufficiently large so that the ends of the struts do not reach the bearing surface of the bosses. Referring more precisely to the material of the struts, and their form, Nelson suggests that preferably they be stamped out of sheet nickel-steel and have a central opening into which a number of tongues extend, these tongues serving to permit the metal to shrink tightly on each tongue while the boss contracts in the mold. At their opposite ends each strut has a plurality of fingers by means of which they are firmly anchored or connected to the skirt portion of the piston. Fig. 5 of Nelson's drawings shows the construction of the struts. Preferably also the struts have a plurality of apertures at the points indicated by the numerals 19 in fig. 5 of the drawings. Each strut, at the one side of the piston, may be made up of two or more stampings, tubes or bars, and each set so formed may be placed out of a common plane. The planes of one set may be parallel or non-parallel to the planes of the other set of struts, on the other side of the piston. Berry suggests that the struts be made of corrugated sheet metal, extending from one skirt segment to the other, and connected to the piston pin boss intermediately. The ends of the corrugated struts are to be embedded in the vertically extending thickened portions of the skirt segments, and a middle portion embedded in circumferential ribs at or near the inner ends of the piston pin bosses, which Berry refers to as the wrist pin bosses. The corrugated struts are to have suitable openings through them, at the piston pin bosses, for the piston pins to pass through, the holes being sufficiently large so that such corrugated portions do not reach the bearing surfaces of such bosses. Berry also states that he prefers to use steel, or some strong metal, which has a coefficient of expansion not greater than that of the metal of the cylinder, and materially less than that of cast iron. He also states that he prefers that the sheet steel, from which the struts are to be made, be "corrugated for greater strength," an effect which of course would be well known.

The Commissioner of Patents has declared a conflict between claims 1 to 34 inclusive, and claims 37 and 38, of

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Nelson's application, and claims 1 to 6 inclusive, and 12 to 41 inclusive, of Berry's application. Each applicant claims that he is entitled, as against the other, on the ground of priority of invention, to those claims mentioned in his application and which are said to be in conflict with certain claims in the other application. Claim 1 of Nelson, a broad claim, may be referred to, and it is as follows:

A piston comprising a head, portions depending from the head and having piston pin bosses formed therein, a cylinder-bearing portion separated from the head by a slot, and struts of material different from that of the skirt, said struts contacting with the depending portions and with the cylinder-bearing portion.

Claim 6 is as follows:

A piston comprising a head, piers depending from the head, piston pin bearings formed in the piers, cylinder-bearing portions formed of relatively lightweight material, and struts extending between the cylinder-bearing portions, said struts being of less expansible material than the bearing portions and having their intermediate portions embedded in the piers and their ends having a cast-in joint with the cylinder bearing portions.

Claims 1 to 6 and 19, of Berry's application, are as follows:

(1) A piston, comprising a head-part, wrist-pin bosses rigidly connected to said head-part, skirt segments spaced from said wristpin bosses, and members made of a metal different from said skirt segments and each connecting said skirt segments together and to said wrist-pin bosses and controlling the spacing between said skirt segments.

(6) A piston, comprising a head-part of non-ferrous metal, wrist-pin bosses rigidly connected to said head-part, skirt segments spaced from said wrist-pin bosses, and members made of sheet metal connecting said skirt segments together and to said wrist-pin bosses.

(19) In a piston, a head, a separate skirt of material having a high coefficient of expansion, and transverse struts of less expansible material arranged as chords of circles intersecting the cylinder, said struts connecting opposite sides of the skirt, substantially as set forth.

These rival claims are clearly in conflict, and it seems to be agreed that the other mentioned claims are equally in conflict.

Mr. Smart, on behalf of the plaintiff, contended that May 8, 1918, was the date of Nelson's invention, or at least some date prior to any Berry could claim as the date of his invention; the earliest date of invention claimed for Berry is January, 1921. The debate in respect of the contention advanced on behalf of Nelson's alleged date of invention arises largely from the fact that the proof rests very largely upon sketches and memoranda which Nelson recorded in pocket note books or diaries, and which he never disclosed to others. However, Mr. Herridge agreed that the veracity

of Nelson, who appeared before me, in respect of his evidence concerning the sketches and memoranda made in his diaries, and elsewhere, was not to be questioned; likewise Mr. Smart agreed that the evidence of Berry given in the United States proceeding, in respect of certain disclosures of his invention to others, was not to be challenged. We will therefore first consider the evidence of Nelson, and others, adduced in support of the plaintiff's contention that Nelson was the first to make the invention in question.

After graduating from the University of Illinois, as a mechanical engineer, in 1916, Nelson became employed, as an experimental engineer, with the Premier Motor Corporation, in Indianapolis, U.S.A., his duties there being largely concerned with the development of motors. One of the chief problems at that time confronting Premier Motor Corporation derived from the fact that when the motors were cold the piston would slap, which was a very detrimental thing, and if the clearance in the cylinder were too small the piston would stick in the cylinder, when the motors became hot; this was common to all types of aluminum pistons. In June, 1917, Nelson entered war service with the United States Government, his duties there relating chiefly to guns, motors and aeroplanes, and in that service he remained until January, 1919, when he resumed his employment with Premier Motor Corporation; there he remained until late in 1922 when he went into private practice at Indianapolis, in which he continued until 1924, when he joined the plaintiff company with which he is to-day. While in the service of the United States Government he took part in the development of a piston in which the skirt was tapered from the centre upwards, to allow for a little more expansion at the top where the piston was hottest, which partly overcame the trouble, but he learned that additional means of controlling expansion of the piston skirt was required. During his war service Nelson conceived the idea of using in aluminum pistons, steel struts placed across the piston and of a material having a lower coefficient of expansion than aluminum alloy, and he made sketches and notes of his idea of such a piston structure, and he discussed the same with others. This began in 1918. These sketches show steel struts placed across the

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skirt of a piston to control expansion, some being placed on the centre and some off the centre, and he also sketched curves showing the theoretical work underlying the general mechanical considerations of piston construction; in the early stages his idea was to start out with a steel strut across the centre of the skirt and to work out the expansion by moving the struts farther and farther apart, to show the effect of expansion upon the piston.

The earliest sketches and notes made by Nelson appear in his 1918 pocket diary, under the date of May 8, of that year. One sketch, in pencil, shows a piston with a head, two piers depending from the head, and in these piers, in the piston skirt portion, the piston pin bosses are formed. So far this construction was old and well known. Depending from the pier and extending across the piston skirt, the sketch shows a steel member called a "strut," which is anchored to the opposite walls of the skirt, and to the pier and bosses at the centre of the strut. Significant notations relevant to this sketch are: "Aluminum steel-alloy piston expansion controlled," and, "With steel in the struts as used at Illinois Lab. extensometers would perhaps work fine. The cost would be high for invar." Invar is a special nickel-steel, with which Nelson was acquainted at the time and which was known to have a low thermal expansion. Now this steel strut, compared with aluminum alloy would have a low coefficient of expansion and therefore would control, in some degree or other, expansion of the skirt under heat. The sketch also shows dovetailed indentations or fingers at the ends and centre of the strut; this is shown very clearly in fig. 5 of Nelson's patent application drawings and in exhibit 31. The purpose of the fingers is to permit the aluminum alloy of the piston itself, when being molded, to flow between the fingers of the strut and thus give a tighter joint or bond between the steel and the aluminum; another sketch, on the same page of the diary, shows the fingers at the ends of the strut to be bent inwardly, the purpose being to increase further that bond. The sketch of this strut, it will be seen, shows four holes or circles and Nelson explained that this was for the purpose of lightening the strut, and "to form a convenient location of the strut in the mold when casting," which I understand to mean that the holes are also de-

signed to position the strut in the mold before the casting of the piston. There are also the notations: "slot may be cut on one side only," "saw cuts," and "relief only if desired," which merely indicate that the outside diameter of the skirt might be slotted or cut in different ways to relieve expansion of the piston skirt, which, as I have already mentioned, expands faster than the walls of the cylinder, and any relief of this nature would tend to avoid scoring or unusual friction between the piston skirt and the cylinder.

Another sketch on the left hand side of the same page, and also made on May 8, shows much the same thing as the first sketch, though in some details the construction varies. Nelson testified concerning this sketch that the strut has been lightened slightly more than in the previous sketch by making a large hole through the centre of the strut and having a top member and a lower member. Each member is cast into the pier extending from the head past the pin bosses down to the bottom of the skirt. The upper and lower members of the struts have fingers projecting from the same which are intended to make a better joint between the aluminum and steel.

A notation relevant to this sketch states: "Strut cast in place—low coef. of exp. material." It was explained that this means that the strut could be made of ordinary carbon steel or steel with various amounts of coefficient nickel, and that the strut would be put in place in the mold and that the aluminum alloy, in the molding state, would sink around the strut. Another sketch on the same page of the diary shows what is called a "vector diagram"; this indicates theoretically the forces exerted on a strut controlled piston, and by such a diagram it seems the final result in expansion, which is made up of several different components, may be determined. That sketch is also dated May 8, 1918, and is authenticated by the signature of Nelson. Another vector diagram appears on the next page of the diary with a notation immediately below stating, in part, that the spacing of the struts will have to be worked out, in order to get the proper or desired expansion result. On the next following page is a sketch showing a single strut in a piston, and the possibility of using an adjustable strut. The diary contains several other sketches with related notations showing various forms of a steel strut piston, modifications of the first and second sketches. Then there is Nelson's diary for 1919 in which is recorded other sketches

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showing various features of a strut controlled piston, and also curve sheets showing various calculations for coefficients. It is not necessary I think to describe these sketches as they merely show modifications of the principle of a strut controlled piston, earlier shown.

After Nelson returned to the Premier Motor Company, early in 1919, he continued his work on the problem of controlling the expansion of pistons by means of steel struts and he states that, in February, 1919, he made a drawing disclosing a structure embodying substantially the invention described in his patent application, and, as Nelson stated in his evidence, it is quite clear from the general theory worked out by the vector diagrams, that there was a wide field in which one might work, starting with a strut in the centre of the piston. Experimental or working pistons were made, in February or March, 1919, from castings on hand in the Premier Motor Company plant, secured together instead of casting them in place, according to the drawing just referred to, and which is now exhibit 7. This exhibit is a blue print of an aluminum piston that the Premier Motor Company was producing at the time, and superimposed upon that blue print is a pencil drawing, made on February 25, 1919, showing all the changes in detail required to make working pistons; this modified drawing is sketched in Nelson's 1919 diary, and there are notations relevant to actual experiments made with the working pistons constructed according to the modified blue print, exhibit 7. The working pistons were tested with a single strut, and with four struts. Exhibit 8 is a drawing showing more clearly the Premier Motor Company's blue print piston as modified by the pencil alterations superimposed thereon. This exhibit shows a piston with four steel struts, the head separated from the skirt by horizontal slots, and the skirt in segments; the drawing shows that the two steel struts at the top of the skirt are anchored at the ends of the skirt only, and the two lower struts show them screwed into the skirt at the ends and screwed into a lug depending from the piston pin bosses, or partly screwed into the boss or lug depending from the boss; exhibit 7 also shows a piston with a single strut at the upper end of the skirt screwed in place. The piston drawing on exhibit 7, and as shown on exhibit 8, would have the same function

as that shown in Nelson's earliest diary sketches, made in May, 1918. The working pistons made according to this drawing showed results in agreement with the general theory worked out on Nelson's curve sheets; Nelson states that his tests of the working pistons—engine tests I think—having two struts and four struts were satisfactory; the piston having four struts apparently showed more expansion than the one with a single strut in the centre of the piston. Later, the Premier Motor Company, in May, 1920, started to make actual samples of pistons with a single strut in the centre, as it was then thought that this form would give the most satisfaction. A sketch was made by Nelson of the actual work on a single strut piston, when explaining to his assistant, a Mr. Nutt, the general theory of pistons, the single strut and multiple strut, and the object of controlling expansion. That sketch, exhibit 9, made on April 8, 1921, relates to two different pistons, one with a steel disc strut, the other it is claimed, being substantially the same as that shown in Nelson's diary sketch of May 8, 1918. The latter sketch, in the upper right hand corner of the exhibit, shows a cross section of a piston through the pin bosses, and a side view showing the ends of the struts, the struts showing fingers at their ends. In the lower part of the cross section the fingers are shown bent towards the centre of the piston at the ends of the strut, and at the centre of the strut which is cast into the bosses the fingers are shown bent away from the centre of the piston to give a good bond or anchorage of the steel into the aluminum bosses and skirt. There are relevant notations on this sketch, exhibit 9. This sketch, Nelson states, was only intended to illustrate, during a talk or discussion with Nutt, some of the various types of pistons they would be considering in their development work. Nelson continued his development work, and later he applied for a patent in the United States, for his invention corresponding to the one here in question; he later interested the plaintiff corporation in that invention, and they proceeded to develop it commercially.

Reference must be made to certain evidence, tendered on behalf of the plaintiff, relative to disclosures said to have been made by Nelson of his invention, to others, and also evidence relative to the construction of experimental pistons

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embodying that invention, in the early part of 1919. Brown, a mechanical engineer, with considerable experience in automotive engineering, became acquainted with Nelson in March, 1918. In the latter part of May, 1918, Nelson discussed with Brown the matter of the control of expansion of aluminum pistons by means of struts to be placed at different distances from the centre line of the piston, which struts were to be made of steel of a different coefficient of expansion so as to control the amount of expansion of the pistons, which, to Brown, was then a novel idea. Brown states that while this discussion was in progress Nelson illustrated by a sketch his proposed construction of such a piston, and his recollection was that Nelson spoke of two steel struts, parallel to each other and to a centre line through the piston at right angles to the centre line of the piston pin, and he then understood Nelson to say that the spacing of the struts would have some effect on the functioning of the piston; Nelson mentioned to Brown that the strut material might be a steel having incorporated in its composition a large percentage of nickel, a material of this composition having a much lower coefficient expansion than ordinary steel. Nelson never showed his diary sketches to Brown, but the latter, upon being shown the sketches on the first page of Nelson's 1918 diary, stated that the sketch at the bottom of the right hand page, near May 10, resembled the sketch Nelson made before him. The witness Fox states that a few months after Nelson returned to the employ of the Premier Motor Company after the war, where Fox was also employed, Nelson worked on some aluminum pistons, other than those being produced by the Premier Motor Company, one of which had four steel screw struts across the skirt, two of them connecting the bosses, and two of them just above the bosses; and another piston had a single screw strut on the inside of the piston. Fox himself did some work on the four strut piston and he saw it before and after it had been installed and tested in a motor. At the same time to which Fox referred, one Hopkins, then also in the employ with Premier Motor Company, testified that Nelson designed and made two or three aluminum pistons with four steel struts, two above the boss and two screwed into the piston pin bosses, all the struts being at

right angles to the piston pin; these pistons were given motor tests and Hopkins saw them after they had been tested.

Nutt, a mechanical engineer, whom Nelson mentioned as having worked with him on experimental pistons made according to the sketches shown in exhibit 9, dated April, 1921, and which Nutt witnessed, also gave evidence, and he confirms in several respects the evidence of Nelson. Nutt stated that Nelson made many sketches for him, in May or June, 1920, on odd pieces of paper, showing how control of the expansion of aluminum pistons could be accomplished, for example, by the use of a single steel strut across the diameter of the skirt at right angles to the piston pin bosses, and similarly by two or more struts, the strut being composed of a material of a lower coefficient of expansion than aluminum alloy. The idea of casting the struts in place was discussed but it was deemed more feasible to make the first experimental samples by purely machine methods, as this work could be done more rapidly than the pattern equipment could be made for cast-in samples, but which Nutt himself knew from experience in other work to be feasible. Nelson showed him a vector-graph of the expansions of the aluminum and the steel or nickel-steel alloys which might be used in the double strut type, and showed how it was possible to vary the magnitude of the resultant of these two expansions to almost any limit desired. Nutt became satisfied that the vector method of studying the expansion rate in composite pistons should be valuable, and as what might be expected in actual service. The witness Crawford, presently an engineer in the employ of General Motors Company, but in the service of Premier Motor Company from 1916 to 1919, stated that in September of 1918 Nelson explained to him in a general way his idea of the control of aluminum piston expansion, and that in the early spring of 1919 Nelson disclosed to him various means of controlling the skirt diameter of aluminum pistons. Crawford was shown sketches of pistons having steel strut bars which ran diagonally from the upper inside corner of the piston head down to the upper portion of the piston skirt on each side, also sketches of pistons with a strut bar located above the piston pin boss and having its axis on a line at right angles to the face of

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the thrust, this strut being anchored at each end of the thrust faces of the piston skirt, also sketches showing two pairs of struts which were at right angles to the face of the thrust, one pair being located well up in the upper portion of the skirt of the piston, the other pair being located below the piston pin boss. In the sketches of pistons with the strut located above the boss the strut was at right angles to the piston pin and was located on the centre line of the piston, which centre line was at right angles to the piston pin, and it extended from the centre of the thrust face from one side to the other. Crawford explained, much as did Nelson, how the struts were anchored. Crawford distinctly remembered, "just like it was yesterday" being shown the blue-print, together with pencil sketch thereon, exhibit 7, dated February 25, 1919, about the time Nelson disclosed to him his idea of controlling piston expansion. Nelson also suggested that the struts might be cast in place in the piston instead of being screwed into it. Then Crawford states that a set of four strut pistons was constructed in March, 1919, according to Nelson's sketch of February 25, 1919, exhibit 7, and the same was tested by Nelson in an engine, but he was not clear when a single strut piston which was made in accordance with the pencil sketch shown at the left of exhibit 7, was tested, but he thought at a date later than March, 1919.

After hearing Nelson's evidence, supported in so many particulars by his diary sketches and accompanying notations, by his curve sheets and pencil drawings, by the construction of his experimental pistons, and by his disclosures to others orally and otherwise, confirmed by several witnesses, I cannot but conclude that in May, 1918, and not later than February, 1919, Nelson had made a complete invention of the idea of controlling aluminum piston expansion by means of the use of steel struts, which would long anticipate Berry, and that by these dates he had so formulated that idea as to afford the means of making the invention defined in his claims, thus bringing himself within the rule laid down in the case of *Christiani and Nielson v. Rice* (1). The first two or three sketches in his diaries

(1) (1930) S.C.R. 443 at p. 456.

seem to me to disclose substantially the piston construction claimed in his patent application. These sketches show precisely what is found in Nelson's broad claim no. 1, namely,

a piston comprising a head, portions depending from the head and having piston pin bosses formed therein, a cylinder-bearing portion separated from the head by a slot, and struts of material different from that of the skirt, said struts contacting with the depending portions and with the cylinder-bearing portion.

We also find in such sketches other features or elements, mentioned in other claims, such as claims numbered 12, 13 and 14. It seems to me that an engineer of relevant competency could construct the piston claimed by Nelson, from his earliest diary sketches of May, 1918, or from his drawing of February, 1919, from which he actually made working pistons. When once the object of the invention is stated, and the use of steel or nickel-steel struts is stated as the fundamental means for solving the problem of piston expansion, and the general method of construction is suggested, which Nelson in those sketches has shown, then, it seems to me that a competent engineer could construct the piston which Nelson claims in his patent application, and that is the only piston with which we are concerned. In the use of steel struts lies the essence of the invention. It is quite apparent, I think, that once the use of steel struts having a low coefficient expansion is seized upon, for the purpose of controlling piston expansion, there might be various embodiments of the idea or principle of construction defined in the claims of Nelson, depending on the amount of control required, and the details of the most efficient construction could be determined by a competent workman in the relevant art. The field was wide for variations in strut construction or employment, if I understand correctly what is shown by the vector diagrams of Nelson, but that I apprehend would not destroy the claim to invention in the broad principle of the use of struts for the purpose mentioned in the specification, and the construction thereof as defined in the claims of Nelson. I do not think, for our purposes here, there is any importance in the distinction between an "imbedded" strut and a strut connected by "screws," and the evidence shows that Nelson was aware that a piston might be cast with the strut first being

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positioned in the mould, and it seems to me that his earliest sketches disclose this construction.

It is understandable how Nelson might follow up his first conception of strut construction, by experimenting with variants of it, patenting some of them, and postponing application for the precise invention here in question. That does not mean that he thereby abandoned his first conception of construction, or that he treated the same as being something incomplete or impractical. It was necessary that he secure the co-operation and financial aid of some manufacturer, or other person, before he proceeded to exploit commercially his invention, and this frequently requires a great deal of time, and a great deal of persuasion. And it is always to be remembered in justice to inventors of some mechanisms, or some methods, that their final acceptance and adoption, in industry or commerce, depends upon the willingness of manufacturers, consumers or others, to depart from current practice or experience, and adopt something new, which frequently means a considerable expenditure of money and time. No very good reason was given by Nelson as to why he did not show to others his diary sketches, but I do not think that this is fatal; it would seem that he reproduced substantially the same thing when making the sketches which accompanied the oral disclosure of his invention to others, and whose evidence I have referred to. In any event, I do not think all the other evidence can be disregarded on this account.

The first disclosure of any kind which Berry made was to one Vesey, now deceased, late in June, 1920, and I would infer from his evidence, that he showed Vesey some sketches of his proposed improved piston, made a day or so previously, but which were not available for production in the United States proceedings. Upon the evidence, I should hesitate to hold that Berry had formulated his invention in June, 1920, and Mr. Herridge did not urge this upon me. The earliest date of invention seriously advanced for Berry, by Mr. Herridge, was January, 1921, by which time Berry, with the assistance of one Barnes, had prepared some charts presumably descriptive of his invention. By September 28, 1921, Berry had prepared a set of drawings of his invention, which he signed himself on that date, and Mr. Smart's submission was that in any event this was the

earliest date to which Berry was entitled, and much might be said in support of that view; but in my view of the case it is a matter of indifference whether the month of January, or the month of September, 1921, be accepted as the date when Berry first formulated his invention. Nelson, I think, is entitled to rely upon the date of May, 1918, or the date of February, 1919, both of which are prior to any date which Berry might fairly claim. Considering the evidence only of Nelson and Berry, which I am asked to accept as being reliable, and disregarding the question of the quantum or quality of evidence which a court should accept as proof of the date of invention prior to any application for patent, I entertain no doubt but that Nelson was the first to conceive the invention, the first to disclose it to others, the first to commit it to paper, and the first to make a physical working embodiment of it.

I am of the opinion therefore that the plaintiff is entitled to the claims which are declared to be in conflict with certain of Berry's claims, on the ground that Nelson was the first to make the invention. Cases where the actual dates of invention of rival inventors, working contemporaneously, are to be determined, are usually difficult, and this is not an exception, but the conclusion which I have reached is, I think, supported by the evidence, and by the law as laid down by the Supreme Court of Canada in *Christiani and Nielson v. Rice* (1). This case, like many others of the kind, emphasizes the idea so often expressed by those having to do with patent cases, namely, that it would be more satisfactory to all concerned, if the *Patent Act* went still further than s. 61 now goes, and enacted that as between two or more inventors of the same subject-matter, the monopoly shall go to him who first applies therefor and makes a contribution to the public by showing them how to practise the invention. The plaintiff will have its costs of the proceeding.

Judgment accordingly.

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(1) (1930) S.C.R. 443 at p. 456.

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BETWEEN :

LINDA JOKELA SUPPLIANT;

AND

HIS MAJESTY THE KING RESPONDENT.

*Crown—Petition of right—Public work—Bridge—Injury to person—Main-
tenance—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c).*

Suppliant suffered personal injuries and loss by breaking through a plank on the sidewalk of a roadway leading to and from the north end of Chaudiere bridge, an interprovincial bridge crossing the Ottawa river, and connecting the city of Ottawa, Ontario, and the city of Hull, Quebec.

By her petition of right suppliant charged "that the injuries and loss so caused to the suppliant are a direct result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work. The said negligence consists particularly of failure to maintain or keep in proper repair the plank sidewalk aforesaid."

Held: That liability of the Crown for damages for any death, or injury to the person or to property, is qualified and limited by the Exchequer Court Act and cannot be enlarged except by express words or necessary implication, and liability for injury resulting from nonfeasance is excluded. *McHugh v. The Queen* (1900) 6 Ex. C.R. 374, followed.

PETITION OF RIGHT by the suppliant claiming damages for an injury to the person alleged to have been caused by the negligence of an officer or servant of the Crown on a public work.

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

Charles H. Blair for the suppliant.

Francois Caron for respondent.

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

THE PRESIDENT, now (July 20, 1937) delivered the following judgment:

The suppliant brings her petition of right to recover damages for bodily injuries and loss occasioned by an accident that happened to her by breaking through a plank on the sidewalk of a roadway leading to and from the north end of the Union Bridge, popularly known as the Chaudiere Bridge, an interprovincial bridge crossing the Ottawa river, and connecting the city of Ottawa, in the province of

Ontario, and the city of Hull, in the province of Quebec. The action is rested on sec. 19 (c) of the *Exchequer Court Act*, R.S.C., 1927, c. 34, which reads:

The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters: * * * (c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

The language of this section is practically the same as when first enacted by chap. 16, s. 16 (c) of the *Statutes of Canada*, 1887. The wrong alleged against the Crown by the petitioner is:

That the injuries and loss so caused to the suppliant are a direct result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work. The said negligence consists particularly of failure to maintain or keep in proper repair the plank sidewalk aforesaid

I might at once state, in case this petition should go to appeal, that if I were finding negligence and liability on the part of the Crown, I would award the suppliant the full amount of damages claimed, \$1,000.

The facts may be briefly stated. The Chaudiere bridge, a steel structure, was built many years ago by the Government of Canada, and by it since maintained. After crossing the bridge from the Ontario side there immediately follow several large rock ledges or islands, between which flow minor streams of the Ottawa river, and this formation continues to the shore line of the river on the Quebec side, which is virtually Main street, in the city of Hull. When the Chaudiere bridge was constructed these rock ledges or islands were elevated or lowered, as the case might be, to the level or grade of the bridge, and over and across the same was constructed a roadway or approach to the bridge, called a "causeway" by one witness, and in a judgment rendered in the Superior Court of Quebec, to be later mentioned, called a "stone bridge"; I shall throughout employ the term "roadway." It is this roadway that constitutes the approach to the Chaudiere bridge from the Hull side of the Ottawa river. On one side of the roadway is a wooden sidewalk built for pedestrians, and upon this sidewalk the suppliant was walking towards Hull, in September, 1935, when a plank in the sidewalk gave way beneath her, throwing her to the sidewalk and causing the injury and damages complained of. This roadway, includ-

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ing the sidewalk, was, I understand, originally constructed by the Crown, and by it maintained until January, 1934, when instructions were issued by the Chief Engineer of the Dominion Department of Public Works, to his District Engineer, with the authority no doubt of the Minister of Public Works, that thenceforth no work was to be done by the Department of Public Works, towards the maintenance and repair of this roadway and none has since been done, and no money has since been voted by Parliament for that purpose, and the city of Hull was in due course advised of this decision. It is hardly in controversy that the sidewalk, at the time material here, was in a dangerous condition and in urgent need of repairs, and that the accident to the suppliant was attributable to this fact. In point of fact this condition of the sidewalk was reported more than once to the Department of Public Works by some of its engineers.

It would appear to be the contention of the city of Hull that while the roadway is within the bounds of the corporation, yet the obligation to maintain the same rests upon the Crown; and the corporation has never expended thereon any moneys for maintenance or repairs, and has always refused to acknowledge any liability to do so. A few years ago, jointly with other public authorities it contributed towards the cost of resurfacing the travelled portion of the roadway, but, in circumstances which would hardly constitute an acknowledgment of liability for the maintenance of the roadway. Mr. St. Laurent, District Engineer of the Department of Public Works, stated in evidence that the Department of Public Works still exercised supervision over the substructure of the roadway but not the surface. I understood this to be taken as meaning that the Crown acknowledged liability for the maintenance and repair of the substructure of the roadway, but that only. I am not sure whether Mr. St. Laurent would be competent, or was authorized, to make such an admission, nor do I propose to enter into a discussion of the legal implications of such an admission, even if made with authority. I was referred to an action between *The Ottawa and Hull Power and Manufacturing Company v. The Ottawa Electric Railway Co.*, heard in the Superior Court of the Province of Quebec, in 1905, in which action the Dominion Minister

of Justice intervened with the plea that the roadway in question here was the property of the Crown in the right of the Dominion, and that plea was sustained by the court. In my view of this case, it does not become necessary to decide who is responsible for the maintenance of the roadway, or its surface, but if that decision has sometime to be made and with some confidence, it would presently appear to me to be necessary to have a more complete presentation of the facts than was made in this case, and it seems to me there should be available further facts pertinent to that dispute. Manifestly the controversy concerning the maintenance of this roadway should be definitely and finally determined in some way because the roadway is an extremely busy one and should be kept constantly in a safe condition for those using it, either by the Government of Canada, the Government of the Province of Quebec, or the city of Hull.

It will be observed that under s. 19(c) of the *Exchequer Court Act* the liability of the Crown for damages for any death or injury to the person or to property is qualified and limited. The death or injury must happen on or in connection with a public work, and must result from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment, and the Crown's liability cannot be enlarged except by express words or necessary implication. That provision would seem to exclude the case in which the injury resulted from nonfeasance. The petition of right in this case states that the alleged negligence "consists particularly of failure to maintain or keep in repair the plank sidewalk aforesaid," and all the suppliant's evidence was directed to establish the fact that the injury resulted from nonfeasance. The Crown is charged with not doing what was necessary to be done in order to prevent the roadway from becoming dangerous. As was said by Burbidge J. in the case of *The City of Quebec v. The Queen* (1) what is alleged against the Crown is literally a charge of personal negligence which cannot be imputed to the Crown, and for which, if it occurred, the law affords no remedy, for the doctrine of the Crown's immunity from liability for personal negligence is in no way altered by s. 19(c) of the *Exchequer Court Act*.

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In the case of *McHugh v. The Queen* (1), it was held that there was nothing in the *Public Works Act* (R.S.C., 1886, c. 36' in relation to the maintenance and repair, by the Minister of Public Works, of bridges belonging to the Dominion Government, which makes him "an officer or servant of the Crown" for whose negligence the Crown would be liable under ss. (c) of s. 16 of the *Exchequer Court Act*, now s. 19. In that case the suppliant's petition was brought to recover damages for personal injuries that he suffered by falling from his horse while crossing a bridge belonging to the Dominion Government, and which bridge was alleged to be out of repair; the learned trial judge found it unnecessary to determine any of the issues of fact. In rendering judgment Burbidge J. said:

There is no evidence that the injury resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, so as to bring the case within clause (c) of the 16th section of *The Exchequer Court Act*. It was contended for the suppliant that the Minister of Public Works is an "officer or servant of the Crown" within the meaning of that provision; and that under *The Public Works Act* it was his duty to keep this bridge in repair; and that for his negligence in that respect the Crown is liable. It was not suggested, of course, that the Minister was under any duty himself from time to time to inspect the bridge and to see that it was repaired, if repairs were needed; but that he should have taken care that there was some one charged with that duty. It is not for me, I think, to express any opinion as to whether the Minister ought or ought not under the circumstances existing in this case to have appointed, or to have recommended the appointment of, an overseer or caretaker for this bridge. That was, it seems to me, a matter within his own discretion which is not to be reviewed in this court, and for the proper exercise of which he is answerable to Parliament alone. There is no duty on the Crown, or any Minister of the Crown, to keep a public work, such as this bridge was, in repair, for the failure of which a petition of right will lie against the Crown at the suit of one injured by reason of non-repair. In such a case the suppliant cannot recover against the Crown unless the case falls within the terms of the provision of *The Exchequer Court Act* to which reference has been made. This case is not, I think, within the statute.

I see no reason for departing from the conclusion reached by Burbidge J. in that case, and which seems to me to be entirely applicable here; and I know of no later authority which might throw doubt upon the conclusion there reached. The petition is therefore dismissed with costs but which I hope the Crown will not exact.

Judgment accordingly.

BETWEEN:

WINTHROP CHEMICAL COMPANY }
INCORPORATED } APPELLANT;

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AND

THE COMMISSIONER OF PATENTS... RESPONDENT.

Patent—Appeal from Commissioner of Patents—Patent Act 25-26 Geo. V, c. 32, s. 40—Product claims—Specification.

Appellant applied for a patent for medical or therapeutic substances prepared by chemical processes described in the specification. The Commissioner of Patents rejected the claims made by the applicant on the ground that it is necessary that the process be disclosed clearly and completely in the claims and that the product claims be restricted to the product when prepared or produced by such process.

Held: That there cannot be a reference in a claim to the specification in the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine.

2. That under s. 40, ss. 4 of the *Patent Act, 25-26 Geo. V, c. 32*, an appeal to the Exchequer Court of Canada may be taken from the decision of the Commissioner of Patents even though there had been no refusal on his part to grant a patent.

APPEAL from the decision of the Commissioner of Patents rejecting certain claims in an application for a patent.

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

C. Robinson for the appellant.

W. L. Scott, K.C. for the respondent.

The facts are stated in the reasons for judgment.

ANGERS J., now (April 24, 1937) delivered the following judgment:

This is an appeal from the decision of the Commissioner of Patents rejecting all the claims of an application by Max Bockmühl and Walter Krohs, of Germany, dated January 22, 1934, for a patent for alleged new and useful improvements in "pyrazolones containing wholly or partially hydrogenated cyclic hydrocarbon radicals."

In opening the case counsel for the appellant moved verbally to substitute the name Winthrop Chemical Company, Incorporated, for that of I.G. Farbenindustrie A.G. as appellant, Winthrop Chemical Company, Incorporated, being the assignee of the alleged invention and the appli-

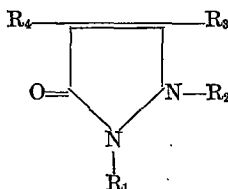
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cation in connection therewith. Counsel for the Commissioner of Patents declared that he was satisfied that the change should be made and the motion was accordingly granted.

The application is for medicinal or therapeutic substances prepared by chemical processes described in the specification. It is not necessary for the purpose of the present appeal to discuss what the products and what the processes are.

The application contains seven claims; it will suffice to cite the first one; this claim was originally worded as follows:

1) The compounds of the following general formula:



where R_1 stands for phenyl or a wholly or partially hydrogenated cyclic hydrocarbon radical, R_2 for alkyl or a wholly or partially hydrogenated cyclic hydrocarbon radical, R_3 for alkyl, and R_4 for hydrogen, alkyl or

the group $-N$ wherein X_1 and X_2 stand for hydrogen, alkyl, aralkyl, or a wholly or partially hydrogenated cyclic hydrocarbon radical,

at least one wholly or partially hydrogenated cyclic hydrocarbon radical being present in the molecule, said compounds being colourless substances of a feebly alkaline reaction.

On March 6, 1935, the Acting Commissioner wrote to the applicants, through their attorneys in Ottawa, quoting a communication from the examiner of the department in charge of the application, reading thus:

Attention is directed to Section 17 of the Patent Act, relating to food and medicine. Under this section no product can be claimed unless it is accompanied by and restricted to patentable process claims.

On March 6, 1936, the applicants wrote to the Commissioner as follows:

In response to the official action of March 6, 1935, please cancel the claims on file and substitute the new claims presented herewith in triplicate.

Remarks: In accordance with section 40 of the Act, the claims have been restricted to the process of manufacture and, in view of the amendment, further action on the merits of the application is respectfully requested.

The claims were amended by adding after the word "formula" in the first line thereof the words "when

produced by the processes of manufacture particularly described or by their obvious chemical equivalents.”

On March 23, 1936, the applicants wrote to the Commissioner supplementing their letter of the 6th of March with regard to the amended claims; the letter of March 23 reads in part thus:

With reference to the amended claims submitted on March 6th last, the examiner will have noticed that separate process claims have not been presented as suggested by him since it is submitted that these are not required by section 40.

If the case were not one which fell within the section, there would be no question that the product might be claimed as such without limitation to any particular process of manufacture, since the product would properly be said to be “the invention.” In our submission section 40 makes no change in this respect. Its only effect is to restrict the scope of the monopoly in the case of products to which it applies by disentitling the patentee from asserting that his rights have been infringed except when the alleged infringer has used the processes which the patentee has devised. The “invention” is still the product; the process is only a means to an end. Therefore, when the section says that a substance may not be claimed except when prepared by the methods of manufacture “particularly described and claimed,” it does not mean that these methods must be set out in independent process claims as independent inventions but simply that the processes must be described in the specification and that the claims must in terms be limited to the product when made by such processes.

On May 7, 1936, the Commissioner replied to the applicants’ letter of the 23rd of March quoting a communication from the examiner in charge of the application; it seems to me expedient to cite the essential statement of this communication:

The Office cannot concur with the attorneys’ interpretation of section 40 of the Act. To do so, requires that the last lines of sec. 40 (1) are read “except when prepared * * * * * by the methods * * * * * particularly described or claimed * * * * * equivalent.” If the Act were so worded it would clearly indicate that the inclusion of process claims was optional. However the Act is not so worded nor can this interpretation be read into the section. The words “particularly described *and* claimed” leave the Office no alternative and it must therefore insist that some process claims are made part of the application so that the section may be satisfied.

In a letter to the Commissioner dated June 12, 1936, the applicants reiterated the opinion that the amended claims complied with the requirements of section 40 of the Patent Act; the letter contains *inter alia* the following statements:

The argument made in the applicants’ letter of March 23, 1936, is believed to accord perfectly with the terms of section 40. In the applicants’ submission the phrase “particularly described and claimed” means “particularly described in the specification and specified in the claims.”

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The phrase "particularly described or claimed" would have defeated the purpose of the provision since it is quite clear that the claims must be restricted to the product when produced by the process invented. The section's purpose is fully effected by giving the phrase as it stands the common sense meaning suggested.

On July 2, 1936, the Commissioner replied in part as follows:

The position of the Office has been made clear in the Examiner's report of May 7, 1936, and it is not deemed necessary to restate it again.

The phrase "particularly described and claimed" is perfectly clear and it is absolutely necessary that the process be disclosed clearly and completely in the claims and that the product claims be restricted to the product when prepared or produced by such process. If the applicants have discovered several processes to make the product they have made as many inventions which call for as many patent applications to protect them.

The claims are now finally rejected under the above rule.

The notice of appeal sets out the following reasons, to wit:

That the processes of manufacture of the product described in the application are not required by section 40 of *The Patent Act, 1935*, to be set out in independent process claims but merely to be described in the specification; that the product claims are not required by the said section to refer back to such process claims but merely to be limited in terms to the product when made by the processes described; and that accordingly the claims of the said application, being so limited, comply with the said section.

Subsection (1) of section 17 of the Patent Act, R.S.C., 1927, chap. 150, in force when the appeal was lodged, applies to the question at issue; it reads as follows:

In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the special methods or processes of manufacture described and claimed or by their obvious chemical equivalents.

The Patent Act, chapter 150 of the Revised Statutes of Canada, 1927, was repealed and replaced by the Patent Act, 1935, 25-26 Geo. V, chap. 32, which came into force by proclamation on August 1, 1935. Section 17 of the old Act became section 40 of the new Act. Subsection (1) of section 40 is worded as follows:

In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.

As one may note the adjective "special" which immediately preceded the word "methods" in subsection (1) of section 17 was deleted from subsection (1) of section 40, but the adverb "particularly" which did not appear in

subsection (1) of section 17 was added before the word "described" in subsection (1) of section 40. I do not think that the change has any materiality in the present case.

It was submitted on behalf of the Commissioner that the appeal had been improperly brought, because there had been no refusal on the part of the latter to grant a patent; this submission is based on section 21 of the old Patent Act or section 43 of the Patent Act, 1935, which is in substance similar. The appeal however, in my opinion, lies under subsection (4) of section 17 of the old Act or subsection (4) of section 40 of the new Act, which are literally the same, both being in the following terms:

Any decision of the Commissioner under this section shall be subject to appeal to the Exchequer Court.

This clause is very broad and I have no doubt that an appeal lies from the Commissioner's decision in a matter of the nature of the one before me. The question remaining for determination is whether the appeal in the present instance is well founded or not.

Section 17 of the old Patent Act, as well as section 40 of the Patent Act, 1935, provides that, when an invention relates to a substance prepared or produced by chemical processes and intended for food or medicine, the specification cannot include claims for the substance itself, except when the substance is prepared or produced by the methods or processes described and claimed or by their obvious chemical equivalents. It was argued on behalf of the appellant that the inclusion in each of the claims, as amended, of the words "when produced by the processes of manufacture particularly described or by their obvious chemical equivalents" complies adequately with the requirements of subsection (1) of section 17 (or 40). In other words, it was contended that, if the method or process were described in the specification, it was not necessary that the method or process should be made the subject of a distinct claim. I must say that I do not feel disposed to agree with this view.

It was urged that, if the Commissioner's contention that subsection (1) of section 17—or of section 40 of the new Act—requires an applicant for a patent for an invention relating to a substance prepared or produced by chemical processes and intended for food or medicine to have in his

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application independent claims to the processes to which the product claims should refer is right, it means that the applicant would be put in the position of claiming something which he might not have considered to be his invention. I do not believe that this proposition is founded because in the case of inventions referring to substances prepared or produced by chemical processes and intended for food or medicine the inventor cannot obtain a patent for the substance alone but he must get a patent for the substance prepared or produced by a method or process of his own. So that, in making a claim for the method or process of manufacture by which he has prepared or produced the substance described, he is claiming the very thing which he has invented and for which he is entitled to obtain a patent; if he has no claim to the method or process of manufacture, he is not entitled to a patent, the substance itself alone not being patentable.

It was also urged that if the Commissioner's interpretation of subsection (1) of section 17 were adopted, an applicant might be compelled to take out a number of patents, to wit one for each of the processes described. If the applicant has invented various processes and if he wishes to protect them all, he may have to apply for several patents. This may occasion a certain hardship, but it is no answer to the exigencies of subsection (1). Perhaps I may note incidentally that, in this regard, rule 34 of the Patent Act rules and regulations, approved by an Order in Council passed on September 26, 1935, may possibly be of some assistance to the applicant; rule 34 was formerly, in a somewhat different and narrower form, rule 29 of the rules and regulations approved by an Order in Council bearing date the 16th of September, 1933.

Subsection (1) of either section 17 of the old Act or of section 40 of the new Act is, in my judgment, clear and precise; the difference in their text is, in the present instance, unimportant and immaterial. The use of the conjunction "and" between the verbs "described" and "claimed" indicates unequivocally, to my mind, that the methods or processes have to be both described and claimed in the application. The Act does not permit a reference in a claim to the specification. The only reference in claims which the statute allows are those men-

tioned in subsection (3) of section 35, which reads as follows:

A dependent claim may refer to one preceding claim only. The latter may itself be a dependent claim.

The legislature having deemed it necessary to enact that a dependent claim may refer to a preceding claim, I think that it must be inferred that the legislature did not intend to allow a reference to the specification; otherwise it would have stipulated it.

Section 17 was first introduced in the Patent Act in 1923: 13-14 Geo. V, chap. 23. Subsection (1) of section 17 then contained a proviso which later became subsection (2) of section 17. This proviso has no relevance to the matter in controversy.

Subsection (1) of section 17, with its proviso, is in almost identical terms as subsection (1) of section 38A of the Patents and Designs Act, 1919 (Imp.), 9 & 10 Geo. V, ch. 80, from which it was derived. Subsection (1) of section 38A, leaving out the proviso which, as previously stated, is irrelevant, reads thus:

In the case of inventions relating to substances prepared or produced by chemical processes or intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the special methods or processes of manufacture described and claimed or by their obvious chemical equivalents: * * *

The only substantial difference between the British section and the Canadian one is the substitution in the latter of the word "and" after the words "chemical processes" for the word "or." The change, needless to say, greatly reduces the scope of the operation of the provision; it does not, however, affect the present appeal.

I may note briefly that subsection (1) of section 38A of the English Act was amended in 1932 (Patents and Designs Act, 1932, 22 & 23 Geo. V, chap. 32, s. 8) by striking out the word "special," by inserting the word "particularly" after the words "manufacture" and by substituting the word "ascertained" for the word "claimed." The proviso was omitted and the clause which followed the words "provided that" was made a separate subsection; another proviso was added to subsection (1), which has no bearing on the question at issue.

With the amendment made in 1932 to section 38A the English Act is, on the point with which we are concerned, essentially different from the Canadian Act. Since the

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amendment in question there is, in my opinion, no requirement in section 38A to claim with regard to the methods or processes of manufacture. In 1935 when our Patent Act was revised, the Canadian Parliament had before it the Act passed in England in 1932 and it did not deem fit to adopt the amendment therein enacted. Prior to the amendment of 1932 to subsection (1) of section 38A of the English Act the said subsection was substantially similar to subsection (1) of section 17 of the Canadian Patent Act. In view of this similarity the decisions rendered in England are useful; reference may be had with benefit to the following: *In the matter of an application for a Patent by the S. Co.* (1); *In the matter of M's application for a Patent* (2); *In the matter of an application for a Patent by R. R.* (3); *Sharp & Dohme Inc. v. Boots Pure Drug Company Ltd.* (4).

It was submitted on behalf of appellant that the insertion of the phrase "when produced by the processes of manufacture particularly described or by their obvious chemical equivalents" filled the requirements of subsection (1) of section 17; I am unable to share this view. As I have previously stated, the statute does not permit a reference in a claim to the specification. Moreover paragraph (c) of subsection (1) of section 14 of the old Act (R.S.C., 1927, chap. 150) as well as subsection (2) of section 35 of the new Act enact that the specification shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property or privilege. The claims in the appellant's application do not comply with these requirements.

In this connection reference may be had to the case of *Ingersoll Sergeant Drill Company v. Consolidated Pneumatic Tool Company Ltd.* (5); see also Terrell on Patents, 8th ed., p. 134.

For the above reasons I am of opinion that the appeal fails. The appeal is accordingly dismissed, with costs against appellant.

Judgment accordingly.

(1) (1921) 38 R.P.C., 399 at 402

(2) (1922) 39 R.P.C. 261.

(3) (1925) 42 R.P.C. 303.

(4) (1928) 45 R.P.C. 153 at 174
and 182.

(5) (1908) 25 R.P.C. 61 at 82.

BETWEEN:

DOMINION DISTILLERY PRODUCTS
COMPANY LIMITED

} SUPPLIANT;

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Jan. 23, 24.
Feb. 3, 4, 5,
8, 15.

AND

HIS MAJESTY THE KING RESPONDENT.

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Crown—Petition of right—Action for recovery of money paid for sales tax and excise tax—Special War Revenue Act, R.S.C., 1927, c. 179, s. 117, as amended by 23-24 Geo. V, c. 50, s. 24—Failure to make demand for return of money within period of limitation—Non-user of corporate powers by incorporated company—Forfeiture of charter—Companies Act, R.S.C., 1927, c. 27, s. 29, as amended by 24-25 Geo V, c. 38—Transfer of entire assets by one company to another company—“Action on a statute”—“Action given by a statute”—Action for debt—Period of limitation—Ontario Limitation Act, R.S.O., c. 106—Exchequer Court Act, R.S.C., 1927, c. 34.

Suppliant, a licensed manufacturer and producer under Part IV of the Special War Revenue Act, 1915, and licensed as a distiller under Part III of the Inland Revenue Act, R.S.C., 1906, c. 51, by its petition of right filed in this Court on December 14, 1934, sought recovery of moneys paid the Crown as sales tax and excise duties prior to January 26, 1926, upon liquors purchased by it for export and which it claimed were exported to the United States. In May, 1926, suppliant by an agreement in writing sold and transferred to Dominion Distillers Limited its business and undertaking as a going concern as the same existed at the close of business June 30, 1925, including “all the book and other debts due the party of the first part (suppliant) in connection with the said business, and the full benefit of all securities for such debts, together with the full benefit of all pending contracts and engagements to which the party of the first part may be entitled in connection with the said business.” The terms of this agreement were fulfilled and suppliant had not carried on business since 1925 or 1926.

The Court found that the goods in question were purchased by suppliant for the purpose and with the intention of exporting the same to the United States, and, with the exception of a limited quantity, sold and delivered to residents of Canada, were exported to that country.

By s. 24, c. 50, 23-24 Geo. V, amending the Special War Revenue Act, R.S.C., 1927, c. 179, s. 117, it is provided that “(1) no refund or deduction from any of the taxes imposed by this Act shall be paid unless application in writing for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act or under any regulations made thereunder. (2) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.”

Held, that s. 24, c. 50, 23-24 Geo. V, is retroactive and suppliant not having applied for a refund of the sales taxes paid by it, within the period of limitation set by the statute, the present action fails.

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2. That the Companies Act, R.S.C., 1927, c. 27, s. 29, as amended by s. 12, c. 9, 20-21 Geo. V, automatically and without any preliminary procedure operates a forfeiture of a charter, 'if in fact there has been non-user of the corporate powers for three consecutive years; suppliant company had consequently ceased to exist by reason of the forfeiture of its charter for non-user, and the petition herein was therefore unauthorized and a nullity.
3. That suppliant's claim is in the nature of a debt, and rests upon an implied promise that the moneys in question would be refunded if the goods were shown to have been exported, and is barred by the Ontario Limitation Act, R.S.O., c. 106, s. 48.

PETITION OF RIGHT by suppliant to recover moneys paid the Crown for sales taxes and excise duties.

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

L. A. Forsyth, K.C., Oscar Gagnon, L. J. de la Durantaye and J. W. Reid for suppliant.

W. N. Tilley, K.C., F. P. Varcoe, K.C. and C. F. H. Carson, K.C. for respondent.

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

THE PRESIDENT, now (June 12, 1937) delivered the following judgment:

The suppliant in this petition of right, filed on December 14, 1934, was licensed as a manufacturer and producer under Part IV of the Special War Revenue Act, 1915, and was licensed also as a distiller under Part III of the Inland Revenue Act, Chap. 51, R.S.C., 1906; its principal place of business was at Montreal, Que. The suppliant seeks a refund of the sum of \$121,401.61 paid by it as sales tax under the provisions of the Special War Revenue Act, in respect of a certain quantity of spirits purchased from Hiram Walker & Sons Ltd., hereafter to be referred to as "Walker," licensed distillers, of Walkerville, Ont.; the suppliant claims that such spirits were purchased for export and were in fact exported, to the United States. The suppliant also claims a refund of the sum of \$1,296,557.01, which it paid on account of excise duties upon the identical spirits, under the provisions of the Inland Revenue Act, at the time of the removal of the same from Walker's bonding warehouse at Walkerville. The suppliant claims it is entitled to the benefit of certain statutory exemptions from both the sales

and excise taxes, in favour of goods exported, and one of the issues raised for determination relates to the construction of the statutory provisions as to the exemptions, and also there is the issue as to whether the dealings with the goods in question were such as to entitle the suppliant to the benefit of the exemptions. Several important questions are raised by the Crown contesting the right of the suppliant to recover any portion of the taxes so paid, even if export of the goods in question were in point of fact established.

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The suppliant in its petition sets forth that officers of the Crown, contrary to the statute and any regulations made thereunder, illegally, and without colour of right, compelled it to pay the said excise taxes as a prerequisite to the granting of a permit to remove the spirits in question from the bonding warehouse at Walkerville, for export from Canada, and similarly compelled it to pay the sales tax upon the said spirits; and it claims that by virtue of the provisions of the statutes mentioned it is entitled to recover the sums respectively paid as sales tax and excise tax. As the suppliant's right to recover the moneys in question is dependent upon the provisions of the Special War Revenue Act, and the Excise Act, it may be convenient and desirable to state at once the relevant provisions of such statutes.

Section 19 BBB of the Special War Revenue Act provides:

In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of five per cent on the sale price of all goods produced or manufactured in Canada, * * * * which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him; * * * * Provided that the consumption or sales tax specified in this section shall not be payable on goods exported, * * * *

Subsec. 10 of the same section provides:

* * * * and a refund of the said tax may be granted on domestic goods exported, under regulations prescribed by the Minister of Customs and Excise.

Section 58 of the Inland Revenue Act provides:

No goods, subject to a duty of excise under this Act, shall be removed from * * * * any warehouse in which they have been bonded or stored, until the duty on such goods has been paid or secured by bond in the manner by law required.

Sec. 68 provides that

Goods warehoused under this Act may be transferred in bond, and may be exported or removed from one warehouse to another, without payment of duty, under such restrictions and regulations as the Governor in Council deems necessary.

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Sec. 73 states that

No goods shall be removed from warehouse for consumption unless upon the payment of the full amount of duty accruing thereon.

Sec. 140 provides:

The Governor in Council may make such regulations for the warehousing and for the ex-warehousing, either for consumption, for removal, for exportation, or otherwise, of goods subject to a duty of excise, and for giving effect to any of the provisions of this Act, and declaring the true intent thereof in any case of doubt as to him seems meet.

Sec. 174 provides:

The duty paid on spirits taken out of warehouse for consumption, or which have gone directly into consumption, shall not be refunded by way of drawback or otherwise upon the exportation of such spirits out of Canada, unless when specially permitted by some regulation made by the Governor in Council in that behalf.

Sec. 177 provides that

No spirits shall be removed from any distillery, or from any warehouse in which they have been bonded or stored, until a permit for such removal has been granted in such form and by such authority as the Governor in Council, from time to time, directs and determines.

There are sections in this Act, such as numbers 141 and 176, which provide that on exportation of goods manufactured wholly or partially from articles subject to a duty of excise, and on which such duty of excise has been paid, a drawback equal to the excise duty so paid may be allowed, and similarly upon export of spirits in the production whereof any malt is used and upon which any duty of excise has been paid; but such provisions for drawback are not applicable here.

Coming now directly to the facts pertaining to the transactions from which arise this controversy, and which perhaps should be stated rather fully. In the material period, from January 31, 1924, to January 25, 1926, the suppliant purchased from Walker certain quantities of spirits, the particulars of which are contained in a schedule to the petition. For the greater part, these transactions originated on the written orders of the suppliant to Walker, to ship to the former at Montreal, by rail, a specified quantity of spirits (rye whisky) "duty paid"; such shipments were always in substantial quantities, rarely, I think, being less than 1,000 cases. These orders contained no reference to the time, place, or manner of payment for such goods, but Walker's terms of sale were said to be "net cash." In the invoices rendered by Walker to the suppliant, the excise duties paid the Crown by Walker did not appear as a separate item and outwardly constituted a part of the sales

price to the suppliant; the sales tax, also paid by Walker as manufacturer or producer of the spirits, in accordance with the statute, always appeared on the invoices rendered the suppliant as a separate item. Walker was paid at its place of business the amount of any invoice rendered, ordinarily, I think, prior to shipment, though subsequent thereto on many occasions, usually by one Cooper, president of the suppliant company, who, in the material period, lived at Walkerville or in that vicinity. Walkerville, and such places as Sandwich, Ford, Belle River, La Salle and Amherstburg, are situated rather closely together on the Canadian side of the Detroit river, and are outports of the customs port of Windsor, and within the Customs Division of Windsor, Ont. One or other of these ports, it is claimed, was the port of export of the goods in question, to Detroit, U.S.A., on the opposite side of the Detroit river; a comparatively short distance away.

In the early stages of the transactions in question, covering a period of about three months, any spirits purchased from Walker by the suppliant would be moved by motor trucks from the bonding warehouse either directly to a boat for export to the United States, or to a warehouse—doubtless subject to customs supervision—on a certain dock for temporary storage, at the port of Walkerville. During this limited period, it may be assumed that customs was aware that the suppliant was exporting, or attempting to export, from Walkerville, such spirits to the United States; they were there entered at customs for export to that country. On April 26, 1924, instructions were issued by Mr. Taylor, Assistant Commissioner of Customs at Ottawa, to Walker, in respect of future shipments of spirits to the suppliant, in the following terms:

I am directed to inform you that the officer in charge of your distillery is being instructed, by means of a copy of this letter, to refuse delivery or issue of permit for the removal of duty-paid spirits from your distillery to the Dominion Distillery Products Company Limited, unless the goods are shipped direct to their licensed premises in Montreal.

Henceforward all shipments of spirits were made by Walker directly by rail to Montreal, and from there the same would be promptly reshipped by rail to one of the mentioned Canadian ports on the Detroit river, in the Windsor Customs District, in the Province of Ontario; in practically all cases the spirits, as I understand it, would not actually be

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removed from the cars to the suppliant's warehouse but would be routed to the port of export in the same car or cars after examination by, and with the permission of, Montreal customs authorities. The procedure in such cases throughout would be about as follows:

On receipt of an order from the suppliant for a specified quantity of duty paid spirits, Walker would procure from the Collector of Customs and Inland Revenue at Walkerville, a permit to remove the same in bond from the Walkerville bonding warehouse to Montreal, and the same would then be forwarded by rail, consigned to the order of the Collector of Customs and Excise at Montreal, who would in due course notify the suppliant of their arrival. On application of the suppliant, another permit would then issue from Customs and Excise at Montreal permitting the shipment of the same goods by rail to one of the Detroit River points mentioned, and always, we may assume for the purposes of this case, by the same cars, after the same were opened, the contents checked, and the cars resealed, all by customs. The bill of lading accompanying the rail shipment would usually name one Scherer of Detroit, sometimes one Kemp of the same place, as consignee, and one of the Detroit River ports mentioned would be named as the Canadian destination of the rail shipment; the bill of lading would also contain the name of the boat by which the goods were to be exported from the designated Canadian port to Detroit. The prescribed customs form B 13, an export entry for articles of domestic production and foreign articles not subject to customs or excise duties, containing the name of the shipper, the name and address of the consignee, the number of packages, a description of the goods together with their quantity and value, and the name of the Canadian port and the boat at and to which the goods were to be delivered for exportation, would accompany the shipping documents; the Montreal customs permit would not issue until a B 13, covering the entire shipment, was supplied by the suppliant. After the shipment reached the designated Canadian port of export, and when the goods, or a portion of them, were placed on board a boat and examined by customs, a B 13 would then be tendered on behalf of the suppliant to the customs office nearest the port of exit, and if found satisfactory, customs would affix

thereon its stamp on the lower left hand corner, and this would also indicate the date of the export entry; in some cases the stamp would bear the words "for exportation." The master of any boat, before his departure outwards, would make at customs the required entry outwards, for Detroit in these cases, therein declaring his cargo content; thereupon a clearance certificate would be granted by customs to the master and in due course he would depart from port with his cargo. I should perhaps explain that the boats, in the large majority of cases at least, would receive the goods in fulfilment of sub-sales made to purchasers by Scherer or Kemp, and generally at an advanced price, I might add. Therefore the goods designated in any single export entry would vary according to the capacity of the boat, or the requirements of the sub-purchaser. The total quantity of goods shown in these B 13's would in the result be the equivalent of the quantities shown in the B 13's accompanying the rail shipments from Montreal. This practice seems to have been allowed by customs during the period in question but I believe the practice was later discontinued.

In case this matter be further considered, and for the moment disregarding all other grounds of defence which have been raised, it may be desirable that I express my opinion upon the question as to whether or not the goods in question, or a substantial portion of them, were in fact exported to the United States. Upon this point, the judgment of the Judicial Committee of the Privy Council in the case of *Carling Export Brewing and Malting Co. Ltd. v. The King* (1), was relied upon by each party as conclusive of that issue. In that case the Crown proceeded against the Carling company for the recovery of a considerable sum of money in respect of gallonage and sales tax levied under the provisions of the Special War Revenue Act, 1915, in respect of lager manufactured and sold by that company, between April 1, 1924, and May 1, 1927. The Carling Company claimed the benefit of exemption from such taxes on the ground that the beer had been manufactured for export to the United States, and had been actually exported to that country. The Special War Revenue Act, 1915, imposed a gallonage tax and a sales tax

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upon specified goods, including beer, manufactured in Canada. It provided, however, that the gallonage tax in respect of beer should not be payable "when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise," and that the sales tax should not be payable on "goods exported," with a provision for a refund on "domestic goods exported under regulations" similarly provided.

It was held by their Lordships that the exemption from gallonage tax, like that from sales tax, applied only to goods actually exported, and that it operated although no regulations had been prescribed, and that an export of beer to the United States was within the exemption provisions although the import was contrary to the law of that country. It was also held that beer sold to a purchaser in the United States was within the exemptions where it had been consigned to him at a Canadian port, and was proved to have been shipped from there into the United States in smaller consignments, mostly to sub-purchasers. The provision in s. 19 B that the excise tax there imposed shall not be payable where the goods are "manufactured for export," does not enter into this case, because the words "manufactured for export" are not to be found in sec. 19 BBB of the same statute or in the Inland Revenue Act. As already stated, sec. 19 BBB of the Special War Revenue Act provides that the sales tax shall not be payable on goods exported, and subsec. 10 thereof provides that a refund of the sales tax "may be granted on domestic goods exported" under regulations prescribed by the Minister of Customs and Excise, and their Lordships, in the *Carling* case, were of the opinion that this proviso, in respect of the refund of the sales tax, would apply to goods which, "though not manufactured for export," were subsequently exported. Therefore, as I understand their Lordships' decision in the *Carling* case, it is not a requirement in the case under discussion that the goods be "manufactured for export" in order to become entitled to the exemption from the sales tax, or to a refund of the same if paid; the only requirement is that the goods be actually exported.

As to the proof of export in the *Carling* case their Lordships held that the most important evidence was to be found in the bills of lading, and the customs forms known

as B 13's which accompanied each consignment of beer, the latter of which were presented to and stamped by the customs officers at the port of exit; further proof of export they held was to be found in the fact that on shipment of the goods on board a boat a report outwards was signed by the master, which stated the Carling company to be the shipper of the goods and a port in the United States as the destination, and on this report a clearance certificate was granted by the customs officer at the port of exit; and further, it was held, that the supervision by one Low of the Carling company at the riverside up to the shipment of the goods on board the boats, along with the documentary evidence, and the fact that the beer had been manufactured for export, sufficiently proved that the Carling company saw that the arrangement for export to the United States was, in fact, carried out. There having been no B 13's produced for a certain percentage of the consignments their Lordships sustained the finding of the learned trial Judge who held that in respect of such percentage the Carling company was liable for both the gallonage and sales tax, and was also liable for the same taxes on account of any sales made from such consignments in Canada to one Bannon, a resident of Canada, and which goods Bannon resold in Canada.

On the assumption that there was here involved but the one question for determination, that is, whether or not the goods in question were in fact exported to the United States, I would feel bound by the *Carling* case to hold that in the main they were so exported, and that the suppliant was entitled to recover back the greater portion of the taxes paid. The facts here as to exportation are not to be seriously distinguished from those of the *Carling* case, and the proof of export in this case, I think, is equally as strong as in the *Carling* case. I entertain no doubt whatever but that the goods in question were purchased by the suppliant for the purpose and with the intention of exporting the same to the United States, and that they were exported to that country with the exception of a limited quantity sold and delivered to residents of Canada, at one or more of the Canadian export points, and by them relanded or resold in Canada, corresponding exactly to the sales made to Bannon in the *Carling* case, and which transactions were

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not held to taint in any way the balance of the export transactions; in fact the same Bannon was one of such Canadian sub-purchasers in this case. The shipments here were supervised on behalf of the suppliant by its officers or servants, and most of the B 13's have been reasonably accounted for. That the spirits in question were not shown to have been expressly manufactured by Walker for the suppliant, for export to the United States, is, as I have already pointed out, of no importance here. There were obvious reasons why persons willing to risk engagement in this class of exports to the United States, during its prohibition period, should attempt to carry out their intentions, and, in fact, in this case it would not appear to have been very difficult to do so. It is not a mere fiction to assume that in the United States there were to be found, during the period in question, many persons whose requirements for alcoholic beverages would be as amply satisfied with rye whisky, as with rice beer. If I were pronouncing judgment in this case, upon the assumption mentioned, I would feel obliged to hold that the suppliant was entitled to recover the amount sued upon, less the taxes paid upon goods for which there was no reasonable accounting for the B 13's and also upon any of the goods shown to have been sold and relanded in Canada. In view of what I am later to say I need not now take time to discuss how the resulting calculation should be arrived at, or estimated. The result may be determined if and when it is held by any court reviewing this judgment that the suppliant is entitled to recover back the taxes paid on goods proven to have been exported, either by that court of review, or by this court, if counsel themselves were unable to agree upon the amount.

The suppliant's right to recover is however contested upon grounds other than those emerging from the decision in the *Carling* case. First it is contended that the claim for recovery of the sales tax is barred by sec. 117 of the Special War Revenue Act. Sec. 117 of the Special War Revenue Act, as enacted by chap. 54 of the Statutes of Canada 1931, provided that:

No refund or deduction from any of the taxes imposed by this Act shall be paid unless application for the same is made by the person entitled thereto within two years of the time when any such refund or

deduction first became payable under this Act or any regulations made thereunder.

By chap. 50, sec. 24, of the Statutes of Canada 1932-33, this section of the Special War Revenue Act was repealed but re-enacted in precisely the same terms, but with the addition of the following subsection:

(2) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

The sales taxes here in question were paid on goods sold and exported at least sometime prior to January 26, 1926, and it was not till December 14, 1934, nearly eight years thereafter, that this petition of right was filed; and it does not appear from the evidence that any application in writing was ever made for a refund of such taxes prior thereto, or, at least, within two years of the time when any such refund or deduction first became payable under the Act. Section 117 of the Act was obviously intended to be retro-active, and it is not unusual for similar taxing statutes to contain some such provision. I have read this section many times and I can only interpret it as meaning that if one has paid or overpaid to the Crown any taxes imposed by this Act, the same shall not be refunded unless application has been made in writing within two years of the time when any such refund or deduction became payable, which would be within two years after such moneys were paid or overpaid. On this ground alone I think the suppliant must fail in respect of its claim for a refund of the sales tax.

On a motion made on behalf of the respondent, which was adjourned to the trial, it was sought to dismiss the petition upon the ground that the suppliant company had, prior to the filing of this petition, sold and transferred its business and undertaking as a going concern to another corporation, Dominion Distillers Ltd., and that thereafter the suppliant company had ceased to exist and its charter had become forfeited under the provisions of the Companies Act, R.S.C., chap. 27, sec. 29, and amending Acts, and that consequently this petition could not have been authorized by the suppliant.

In May, 1926, just four months after the last of the transactions with which we are here concerned took place,

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the suppliant company by an agreement in writing, sold and transferred to Dominion Distillers Ltd. its business and undertaking as a going concern, and "as the same existed at the close of business on the 30th of June, 1925," including all property movable and immovable, stock in trade, plant, equipment, goods, cash in hand and at the bank, and all bills and notes in connection with the said business, and

all the book or other debts due the party of the first part, (suppliant) in connection with the said business, and the full benefit of all securities for such debts, together with the full benefit of all pending contracts and engagements to which the party of the first part may be entitled in connection with the said business * * * *

The consideration for the sale was the issue by the purchasing corporation to the vendor, the suppliant company, of the sum of \$1,200,000 payable in the fully paid preference stock and common shares of the purchasing corporation, and which stock and shares were distributed among the shareholders of the suppliant company, four or five in number, I believe, and who alone thereafter held all the stock and shares of the Dominion Distillers Ltd.

On the motion, to dismiss the petition, upon this and another ground, Mr. Gagnon, of counsel for the suppliant company, submitted an affidavit to the effect that in August, 1933, he had been consulted by Mr. Leo George, president of the Dominion Distillery Products Company Ltd., regarding the matter of the initiation of this petition of right proceeding against the Crown; that in May, 1934, this petition of right was drafted by him; that frequent meetings of directors of that company had been held since August, 1933, for the purpose of discussing the proposed petition of right proceeding; that he had been verbally instructed by the directors to launch a petition of right proceeding; and that a careful search failed to reveal any written assignment by Dominion Distillery Products Company Ltd., to Dominion Distillers Ltd., of the claims mentioned in the petition of right herein, other than the agreement of May, 1926, already mentioned. Mr. George, who had been president of the suppliant company since 1923 or 1924, also filed an affidavit but he merely confirmed the statements contained in the affidavit of Mr. Gagnon.

Both Mr. Gagnon and Mr. George were examined upon their affidavits but nothing that will assist us here was

disclosed on the examination of the former. Mr. George testified that the suppliant had not been manufacturing or exporting liquor, or carrying on any business, since 1925 or 1926; that the assets of the suppliant company had been transferred to Dominion Distillers Ltd. in conformity with the agreement of May, 1926; that the office of the suppliant was closed in 1926 and it was no longer listed in the Montreal City Directory or in the Montreal Telephone Directory; that no meeting of the suppliant company was held between March 9, 1926, and February 16, 1935, and that there was no election of directors or of any auditor during that period; that the suppliant had no assets except possibly the amounts claimed from the Crown in this petition; and that no return had been made by the suppliant to the Department of the Secretary of State since April 4, 1925, and no company fees had been paid to that Department since that date. I might add that on June 26, 1926, Dominion Distillers Ltd. forwarded to the Secretary of State a letter in the following terms:

We take this opportunity of advising you that with the reorganization of the Dominion Distillery Products Company Limited, to the Dominion Distillers, Limited, that the office which was formerly used by the first above mentioned company has been discontinued. So therefore all correspondence which you will have in the future should be addressed Dominion Distillers Limited, P.O. 670, Montreal, Can. There is no longer any office at 1185 St. James St. So we would consider it a great favour if you would advise your office as to this change.

The Companies Act, Revised Statutes of Canada, 1927, chap. 27, sec. 29, provided that:

In case of non-user by the company of its charter for three consecutive years or in case the company does not go into actual operation within three years after the charter is granted, such charter shall be and become forfeited.

Section 29 of the Act was amended by chap. 9, s. 12, of the Statutes of Canada, 1930, by adding thereto the following subsection:

In any case of doubt whether a charter has become forfeited under this section, if the Secretary of State is satisfied by such evidence as he may require that the charter is subsisting and valid, he may by supplementary letters patent so declare.

I might add that the Companies Act was re-enacted by chap. 33, of the Statutes of Canada, 1934, assented to June 28, 1934, and section 28 formerly section 29, is now as follows:

(1) If a company does not go into actual *bona fide* operation within three years after incorporation or for three consecutive years does not use its corporate powers its charter shall be and become forfeited. (2) In any

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action or proceeding where such non-user is alleged proof of user shall lie upon the company. (3) The Secretary of State may upon application of any person interested revive any charter so forfeited upon compliance with such conditions as he may prescribe.

It was contended by Mr. Tilley that the suppliant's charter had become forfeited because of non-user for three consecutive years; that the sale of the suppliant's business and assets carried with it every right the suppliant possessed, even the claim against the Crown; and that, in any event, the authorization of Mr. George to initiate this petition of right proceeding was given as an individual and not as president or as a director of the suppliant company, all of which grounds were contested by Mr. Forsyth. In my view of the first ground of attack, that is, whether the suppliant's charter had become forfeited, it is not necessary to pronounce any opinion upon the last two mentioned points. The intention and purpose of sec. 29 of the Companies Act, as found in the Revised Statutes of 1927, and as amended in 1930, seems to me to be quite clear, and there is much to be said for the existence of such a legislative provision. It seems to me that the statute automatically, and without any preliminary procedure, operates a forfeiture of a charter, if in fact there has been non-user of the corporate powers for three consecutive years. Any doubt as to this seems to be put at rest by the amending enactment, chap. 9, s. 12, of the Statutes of 1930. From the section as thus amended, I think, it is clear that the legislature intended that forfeiture for non-user would take place automatically, without any procedure previously taken by any public authority responsible for the administration of the Companies Act, or by the company concerned, but if any doubt existed as to whether upon the facts forfeiture occurred, machinery was provided for removing that doubt, and if the Secretary of State were satisfied, on the application of the company no doubt, that the charter was in point of fact subsisting and valid he might by supplementary letters patent so declare. This means, I think, that a charter *prima facie* forfeited, might, upon cause shown, be declared valid, and unless automatic forfeiture for non-user were intended by the statute no purpose would be served by providing a procedure whereby such a charter might be declared valid by supplementary letters patent. There can be no doubt upon the facts here that for three

and more consecutive years, after some month in 1926, there was non-user of the suppliant's corporate powers, for any purpose whatever, and the facts clearly indicate, I think, that the directors and shareholders of the suppliant company regarded the charter as having lapsed. And the suppliant never applied to the Secretary of State for a declaration validating the charter. There may be doubt as to whether sec. 28 of the Companies Act, 1934, may be referred to here and I am not therefore relying upon it. It is my view that the suppliant company had ceased to exist by reason of the forfeiture of its charter for non-user; the petition herein was therefore unauthorized and is a nullity, and upon this ground the suppliant fails.

The Exchequer Court Act provides that the laws relating to prescription and the limitations of actions in force in any province between subject and subject, shall, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province. This cause of action, I think, arose in the Province of Ontario. The Ontario Limitation Act, R.S.O., Chap. 106, s. 48, subsec. 1 (b) provides that an action upon a "bond, or other specialty" shall be commenced within twenty years after the cause of action arose, and by subsec. 1 (g), within six years in the case of an action for "trespass to goods or land, simple contract or debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin or upon the case other than for slander." It is pleaded by the suppliant that under the provisions of the Inland Revenue Act, and the Special War Revenue Act, as in force at the material time, it is entitled to the return of the moneys in question, and that under the said statutes the said moneys are due and payable, and to be refunded by the Crown to the suppliant. The contention is therefore advanced that the suppliant's claim, being founded upon those two statutes, is a specialty debt, and not barred until the lapse of twenty years after the accrual of the cause of action. The Crown contests this proposition and urges that the claim is one for money had and received, or, an action upon the case, and therefore barred by the lapse of more than six years from the time the cause of action arose.

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It seems to be established by the authorities that an action for a statutory debt, or an action brought upon a statute, is an action upon a specialty, but that there is a distinction between an action given by a statute, and an action on the statute. Illustrative of this point there are certain well known authorities and they are discussed by Romer J. in the case of *Aylott v. West Ham Corporation* (1), and in referring to such authorities I shall employ almost the precise language of Romer J. In *Cork and Bandon Railway Co. v. Goode* (2) an action to recover calls on shares was brought by the railway company which was subject to the provisions of the Companies Clauses Act, 1845. The declaration stated that the defendant was the holder of thirty shares in the plaintiff company and was indebted to the company in a certain sum in respect of certain calls, whereby an action had accrued to the said company by virtue of the Companies Clauses Act, 1845, and the company's private Act. The defendant pleaded that the action was founded upon contracts without specialty and that the cause of action did not accrue within six years before the suit. It was held that the plea was bad, as the action was founded upon the statute and therefore upon a specialty; that but for the Act of Parliament, no action could be brought by the company against one of its members; and that the action was brought in respect of a liability entirely created by statute and therefore was an action founded upon the statute. Maule J. after stating that it was manifest upon reading the declaration that it was a declaration in debt founded upon the two statutes said (p. 835):

Now, a declaration in debt upon a statute, is a declaration upon a specialty; and it is not the less so because the facts which bring the defendant within the liability, are facts dehors the statute; that must constantly arise in actions for liabilities arising out of statutes * * * There may, undoubtedly, be cases where a statute enables an action to be brought, which nevertheless is not an action on the act of parliament. But the question is, whether that state of facts exists here. I think it manifestly appears that this is an action of debt, and upon the statute, and therefore an action upon a specialty.

(1) (1927) 1 Ch. D. 30.

(2) (1853) 13 C.B. 828.

In the case of *In re Cornwall Minerals Ry. Co.* (1) the question was as to whether the liability of a railway company to pay interest on debenture stock issued under the Companies Clauses Act, 1863, was a statutory liability, and there it was held, by Vaughan Williams J. on the principle laid down in the *Cork and Bandon Railway* case, that the liability to pay the interest was to be found in the statute alone. But, again it is to be observed, the fact that a liability to make a payment is imposed by statute does not necessarily lead to the conclusion that an action brought to enforce such liability is an action upon a specialty.

In the case of *Thomson v. Lord Clanmorris* (2) an action was brought against certain directors to recover compensation under the Directors Liability Act, 1890, for alleged untrue statements in a prospectus, and which Act was passed to obviate the conclusion arrived at as to the liability of directors in *Derry v. Peek* (3). It was contended by the directors that the action was one for "penalties, damages or sums of money given to the party grieved by any statute" within the meaning of sec. 3 of the Civil Procedure Act, 1833, and that, inasmuch as the action had not been commenced within two years after the plaintiff's cause of action arose, his claim was barred by that section. This contention was held unsound, and, as the action was commenced within six years of the accrual of the cause of action, it did not become necessary to determine whether the action was governed by the Civil Procedure Act, or 21 Jac. 1, c. 16. But in giving judgment Vaughan Williams J. expressly dealt with that point. He said (p. 727):

One must consider what is really the nature of the enactment contained in s. 3 of the Directors Liability Act, 1890. And it seems to me that, though that section does not in form give a new action though it only says that directors and others "shall be liable to pay compensation to all persons who shall subscribe for any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement in the prospectus," yet what the section really does is to give a new action on the case. It creates a new negative duty. The directors or promoters, or whatever other class is included in this section, have cast upon them a new duty in respect of prospectuses and similar documents. Speaking generally, one may say that the Act creates a new statutory duty of accuracy—a new statutory duty to abstain from inaccurate and untrue statements, and then in effect gives a new action on the case to those persons who may have been injured by the neglect of that statutory duty. It seems to me, therefore, that this case is provided

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(1) (1897) 2 Ch. 74.

(2) (1900) 1 Ch. 718.

(3) (1889) 14 A.C. 337.

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for by the statute 21 Jac. 1, c. 16. The action is an action on the case, and if so of course the six years' limitation would apply. But it is said that this is not an action on the case, but an action on the statute, and *Cork and Bandon Ry. Co. v. Goode (supra)* is relied on. But it must be remembered that there the action was for a statutory debt, and the sole question was whether that debt was, within the terms of s. 3 of the statute of James, "grounded on a contract without specialty." It does not seem to me that that decision is really material to the case now before us. Maule J. pointed out that there is a difference between an action which is given by a statute and an action on the statute. *Cork and Bandon Ry. Co. v. Goode (supra)* was an action of debt on the statute. And, as I have already said, the only question there really was whether the action came within the words of s. 3 of the statute of James. In the present case it seems to me that a new duty of accuracy in respect of the preparation and issue of prospectuses is created, and an action on the case is given to those persons who are injured by the breach of that duty. It is said that this is a new form of statute. But I do not think that in substance this statute differs from the Statute of Marlbridge (52 Hen. 3, c. 1 and c. 4), by which, in respect of not only illegal but irregular and excessive distresses, it is provided that, notwithstanding the liability to punishment, "nevertheless sufficient and full amends shall be made to them that have sustained loss by such distresses." So here it seems to me that the effect of s. 3 of the Act of 1890 is that amends shall be made to those who have sustained loss by being induced to subscribe for shares by reason of mis-statements in the prospectus.

By the statute a liability was imposed upon the directors to pay compensation. Apart from the statute they were not liable. But the Lord Justice treated the action not as one brought on the statute, but as an action given by the statute, although in terms the statute did not purport to give any right of action.

I have earlier quoted all the provisions of the Inland Revenue Act, and the Special War Revenue Act, which are at all relevant to this point. Those provisions, it seems to me, are far from creating a statutory liability, or giving an action for a statutory debt, or an action on the statute; and they do not even, in express terms, purport to give any right of action. As a matter of fact the only relief available to the defendant is by way of petition of right. Therefore, in my opinion this is not an action upon a specialty, and the limitation period of twenty years does not apply here.

It was contended on behalf of the Crown that the claim here was one falling within sec. 48, subsec. 1 (g) of the Ontario Limitation Act, and that it was one for money had and received, or, an action on the case. The forms of action have now been abolished, and therefore the suppliant's claim is not specifically laid in simple contract,

debt, money had and received or on the case; all that is now required is that every pleading shall contain a statement in summary form of the material facts on which the party pleading relies. But it is still often of importance, in considering the question whether a plaintiff has a cause of action under particular circumstances, and in determining the period of limitation prescribed for the particular ground of complaint in question, to inquire what should have been the form of action under the old practice. "Relief" in the Petition of Right Act includes every species of relief claimed or prayed for, whether a restitution of any incorporeal right, or a return of lands or chattels, or payment of money, or damages, or otherwise.

Simple contracts include all contracts which are not contracts of record or contracts under seal, or specialties, and they may be either wholly or partly implied. A contract is in some cases said to be implied by law, which really is an obligation imposed by law independently of any actual agreement between the parties, and may even be imposed notwithstanding an expressed intention by one of the parties to the contrary; it is an obligation of the class known in the civil law as quasi-contracts. As already mentioned, in the case of simple contract or debt grounded on any contract without specialty, the period of limitation is six years under the Ontario Limitation Act.

It was particularly contended by Mr. Tilley that the form of the suppliant's form of claim or action was one for money had and received under an implied contract. The historic basis of such a claim or action is a promise implied by law. While the basis of such a claim or action is a contract implied in law, yet that principle is not to be confused with the separate question of when a court will imply a contract. The count for money had and received belongs to the field of quasi-contracts, or contract implied by law, other common counts belong to the field of promises implied by fact. It was laid down by Lord Mansfield in the much debated case of *Moses v. Macferlan* (1), where any notion of an actual contract was excluded, that

where a defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render the receipt a receipt by the defendant for the use of the plaintiff,

(1) (1760) 2 Burr. 1005 at p. 1009.

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an action for money had and received may be maintained. Lord Mansfield explained how in such circumstances the law treated the defendant as being in the same position as if he had incurred a debt:

If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as if it were upon a contract.

This principle was held in many later cases to have been too widely expressed. It was said that to ask what course would be *ex aequo et bono* to both sides never was a very precise guide and the weight of authority seems to be that there is no ground for suggesting as a recognized equity the right to recover money merely because it would be the right and fair thing that it should be refunded to the payer. However, I understand the authorities now to hold that the law will not refuse to imply a promise to repay money received where the law can consistently impute to the defendant at least the fiction of a promise.

The doctrine enunciated by Lord Mansfield was discussed at considerable length in the speeches of Lord Haldane and Lord Sumner in the important case of *Sinclair v. Brougham* (1), and one of the effects of the decision in that case is that in many cases a contract may be implied as a basis for an action for money had and received, regardless of any moral obligation. For a very considerable time many entertained the view that Lord Mansfield in *Moses v. Macferlan* (*supra*) altered the basis of the action by introducing a theory of *aequum et bonum* to replace the theory of a contract implied by law, and that view more or less held the field until, in 1914, *Sinclair v. Brougham* (*supra*) marked a return to the theory of implied contract, and that a promise to repay money on the part of the recipient will be implied unless for some reason the very fiction of contract is excluded by law. In that case the court had to decide whether a promise to pay could be imputed where moneys had been deposited with the "Burbeck Bank," under a contract that was *ultra vires*, and it was held that a promise could not be imputed, and that the courts will not imply a contract in circumstances where an express promise could not be valid. The effect of this decision, as I construe it, is to establish the rule that the court will not imply a contract in circumstances where an express promise

(1) (1914) A.C. 398.

could not be valid, but where there is debt a promise to repay on the part of the recipient will be implied, unless for some reason the very fiction of a contract is excluded by law.

Assuming then that upon the facts disclosed and the statutes involved, and without having regard to the Limitation Act, the suppliant is entitled to the relief claimed, it seems to me that the ground of the suppliant's claim is in the nature of a debt, and rests upon an implied promise that the moneys in question would be refunded if the goods were shown to have been exported; that, I think, is the form of the action, and it may be said therefore to be one for money had and received, and if not that then it is one on the case. If I be correct in this view, then the suppliant's claim is barred by sec. 48, subsec. 1 (g) of the Ontario Limitation Act because the petition was laid more than six years after the cause of action arose.

I might well conclude here but in fairness to counsel I perhaps should briefly refer to some other points that were raised and pressed upon me, even though they be of no ultimate consequence in view of the conclusions which I have already expressed. It was contended by Mr. Tilley that Walker, and not the suppliant, would be the proper party, if any, to enforce a claim for a refund of the excise duties paid. I do not think this contention is sound. The moneys paid over as excise duties by Walker were those of the suppliant, and in doing so, Walker, I think, must be held to have acted merely as the agent of the suppliant. Because of want of interest I do not think Walker could be heard to claim a refund of such duties. If a cause of action lies for the recovery of the excise duties, then, it appears to me it must be with the suppliant. I do not understand the same contention to be advanced in respect of the sales tax. Mr. Tilley also urged that the Inland Revenue Act does not contemplate a refund of excise duties paid upon spirits where the same were subsequently sold and exported at an advanced price, and so calculated as to absorb the amount of such duties so paid. I know of no principle which would limit the price the suppliant, the exporter here, might charge the United States importer, and I cannot think there is any substance in this point, even if it were conceded that the advanced price was expressly calculated to include the excise duties paid.

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It was also contended that there was no proof that Walker sold the goods to the suppliant under the arrangement that they were to be exported, and that it saw to it that they were exported in any event; this contention could only be applicable to the sales tax. In the *Carling* case it is true that the Privy Council held that the sales tax was not payable if it were established (a) that the goods were sold under the arrangement that they were to be exported, and (b) that the Carling Company saw to it that they were so exported. But there the Carling Company was the exporter. In the *Carling* case, the goods were manufactured and sold by the Carling Company for export, to the United States, and proof of export was necessary to secure the exemption; it was hardly necessary to say that it had to be established that the arrangement was that the goods were to be exported, and that the Carling Company was to see that the goods were in fact exported; all that would be implied in any sale of goods for export. I assume that if some unquestioned proof of export had been made, and there was entirely lacking any evidence of any specific engagement on the part of the Carling Company to see that the goods were in fact exported, that the Crown would have failed in its action, as it did. The *Carling* case held that an export of beer to the United States was within the exempting provisions, although the import was contrary to the law of that country, and that the prohibitory laws of the United States only affected the quantum of proof of export; and the Judicial Committee's notion of proof of export was satisfied by that series of facts mentioned in their judgment. Once it is conceded that at the material time a Canadian might export beer or spirits to the United States, and be entitled to exemption from the sales taxes, then, in my opinion, only the fact of export is to be established, and that may be done in the same way as any other question of fact is established, that is to say, it must be done to the satisfaction of the tribunal trying the issue of fact; and in the case of the sales tax it is not, I think, a requirement that the manufacturer be the exporter, nor do I understand that such was decided in the *Carling* case. Subsec. 10 of sec. 19 BBB could never have contemplated that only the manufacturer of domestic goods was entitled to the exemption on exported goods. Therefore I do not think it can be successfully contended that when Walker

sold the goods in question to the suppliant here, it was a necessary condition of the sale that the goods were to be exported, before the suppliant would be entitled to the exemption.

The next point is one of general importance, and its application here is subject to many difficulties. It is contended that the spirits were released for domestic consumption from Walker's bonding warehouse and that the excise duties having been so paid they cannot now be refunded. All the circumstances attending the transactions in question clearly indicate, I think, that the suppliant purchased the spirits with the intention and for the purpose of exporting the same; in the circumstances of the time any other suggestion would seem altogether improbable. It is difficult to understand why, in the circumstances, the excise taxes were exacted or paid and there is practically no evidence to enlighten one upon the point. The spirits might, under the statute, have been removed from Walker's bonding warehouse to that of the suppliant without payment of duty; in fact, I am unable to see how the suppliant, as an exporter, could lawfully be denied the right of shipping the same directly from the former warehouse, without payment of duty, to a designated port of export, if it were to be permitted at all to export to the United States; that, I think, is now made more clear by the decision in the *Carling* case. The goods apparently were not removed from the Walkerville warehouse for domestic consumption, otherwise such an entry would have been made on the form prescribed by the regulation, and it would have been in evidence. Again, they were not entered for consumption at Montreal, but on the contrary were there entered for export, and up to that time the goods had never been released from customs. If the goods were in fact intended to be entered for consumption, either at Walkerville or Montreal, then it would appear that the statute and regulations were not observed, and it is difficult to attribute this to error or oversight. If excisable goods are removed from a warehouse for consumption, that would be a matter of record, and sec. 73 of the Inland Revenue Act requires payment of the excise duty thereon before the removal; in this case it is only by reason of the payment of the excise duty before removal from the Walkerville warehouse that removal for

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consumption might be inferred, but otherwise there is no evidence upon the point. Sec. 174 of the Act provides that the duty paid on spirits taken out of warehouse "for consumption, or which have gone directly into consumption," shall not be refunded upon the exportation of such spirits out of Canada, unless specially permitted by some regulation made by the Governor in Council in that behalf. It is difficult to say just what was the intended purpose of this section, or why it is found just where it is in the Act. It is arguable that the section was intended to apply only to spirits removed to a bonded manufactory, for a bonded manufacturer. Having provided by sec. 73 for the payment of duty in the ordinary case of removal of goods from a warehouse for consumption, it is difficult to conclude that the words "or which have gone directly into consumption" in sec. 174 could have been intended to refer to spirits other than that which had gone into consumption in the manufacture of other goods, in a bonded manufactory. However, reading the section literally, there is no evidence that the spirits were removed for consumption, or that they went directly into consumption in any way. Sec. 174 provides for a refund being made upon exportation, but only when specially permitted by regulation; there then arises the question whether, in the absence of such regulations, the statutory right to a refund is thereby rendered nugatory; this would seem to impose a hardship, not intended by the legislature, upon a *bona fide* exporter, and the authorities would seem to be to the effect that the exporter in such a case was not to be prejudiced by reason of the failure to make the necessary regulations applicable thereto, and as authorized by statute. If it appeared from the evidence that the suppliant was a willing party to the payment of the duties on the basis of their removal from warehouse for domestic consumption, for its own convenience, protection or advantage, though actually export was intended, the question for determination might then be a different one.

The facts and the statute relating to this point are so difficult and confusing, and the whole procedure attending the transactions involved is so unusual, that I refrain from pronouncing any definite opinion upon this point until it arises under a more definite state of facts; and it is un-

likely that the point will arise again in quite the same state of facts and circumstances. I therefore rest my judgment upon the defences already discussed.

Before concluding I might make a brief but inconclusive reference to the contention advanced by Mr. Tilley that the transfer of the suppliant's undertaking as a going concern, to Dominion Distillers Ltd., included any right which the suppliant had in the claim here sued upon, and that the suppliant had no further interest in the said claim. At the moment I am rather impressed with this view. The claim which is sought to be recovered here is in the nature of a debt, and claims for a refund of duties paid the Crown must be quite common in the experience of business concerns who are importers of goods, or dealers in excisable goods; in the event of the sale or transfer of the undertaking of such a business, as a going concern, it seems to me that the transfer should be interpreted to include debts or claims of the nature mentioned unless there was a specific reservation of the same. The assignment here was not one of a right of action which offends against the law relating to champerty, nor does it seem to fall within any other exception applicable to assignments of debts, and choses in action. There may be some doubt, as contended, as to whether a petition of right would lie against the Crown by an assignee in a matter of this kind. It was urged on behalf of the suppliant that because the claim in question was not one enforceable by an assignee, against the Crown, that it therefore remained an asset belonging to the suppliant company and that this fact was evidence of the continued corporate existence of the suppliant. Robertson, Civil Proceedings By and Against the Crown, chapter 3, states that there seems to be no reason why, subject to limitations of general application, any person or persons should not present a petition of right who would be entitled to bring an action against a subject, whether jointly or severally, by assignment, representation, or succession. While I am presently inclined to the view that a claim of the nature in question, against the Crown, is one that is assignable, yet I do not propose expressing any definite opinion upon the point.

I omitted earlier to explain that the title of the Inland Revenue Act, R.S.C., 1906, chap. 51, was, by chap. 26 of the Statutes of Canada, 1921, changed to the "Excise Act,"

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but I thought it more convenient and less susceptible to confusion to refer to the Act under its former title.

The petition is therefore dismissed and costs will follow the event.

Judgment accordingly.

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BETWEEN:

ROCH LABELLE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Exchequer Court Act—Jurisdiction—Civil Code Articles 1053 and 1054—Negligence—Damages.

L., a prisoner in the St. Vincent de Paul penitentiary, was required by the authorities to assist in planing certain planks on a planing machine in the carpenter shop of the penitentiary. His sole duty was to feed the planks into the machine. On the occasion in question the machine blocked, owing to one of the planks being too wide to go through. Thereupon L. went forward to try and ascertain the cause of the blockage, and either due to his tripping into the machine or some other reason his fingers were caught in the knives and his hand mutilated to such an extent that it had to be amputated. He claims the damages suffered, alleging negligence of the employees of the Crown within the scope of their duties consisting, (1) in furnishing planks too wide for the machine; (2) in that the foreman was not within call; and (3) in that the machine was old and not as well protected as the modern machines. The machine was an old one and possibly not as well protected as the more modern ones, but was in good operating condition. L. had been ordered and forbidden in any way to touch the machine in the event of anything unusual happening, but was to call the foreman. The Court found that the foreman was in the room at the time of the accident.

Held: That the *causa causans* and immediate and determining cause of the accident was L's disobedience of orders in going forward to see what had happened instead of remaining at his post, and to his own imprudence in that regard, and was not due to any of the causes above mentioned.

- 2. That the provisions of articles 1053 and 1054 of the Civil Code of Quebec do not apply to the Crown in right of the Dominion. That the Crown is not responsible in damages for things it has under its care, unless it is shown that there was negligence of an employee or servant of the Crown acting within the scope of his duties or employment in regard thereto.

PETITION OF RIGHT to recover damages for injuries due to an accident occurring in St. Vincent de Paul penitentiary.

The action was heard before the Honourable Mr. Justice Angers, at Montreal, P.Q.

P. Dubois and *J. E. Lacourciere* for suppliant.

Gustave Adam, K.C., for respondent.

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

ANGERS J., now (August 26, 1937) delivered the following judgment:

Le pétitionnaire réclame de Sa Majesté le Roi la somme de \$10,000 pour dommages subis à la suite d'un accident dont il a été victime le 24 octobre 1922 au pénitencier de Saint-Vincent-de-Paul, où il était détenu.

Dans sa pétition de droit Labelle allègue en substance ce qui suit:

* * * * *

La preuve révèle les faits suivants.

Le 24 octobre 1922, le pétitionnaire, détenu au pénitencier de Saint-Vincent-de-Paul, travaillait dans l'atelier de menuiserie. Cet atelier contenait une quantité de machines diverses. Labelle travaillait avec un autre détenu, un nommé Bouchard, à une raboteuse (planer). Tous deux étaient sous les ordres de Charles Roussel, également détenu.

Le 24 au matin, Roussel avait reçu instruction de François-Xavier Godin, instructeur en charge de l'atelier, de passer dans la raboteuse cinq madriers de huit pouces de largeur par trois pouces environ d'épaisseur pour les réduire et en faire des madriers de huit pouces de largeur par deux pouces d'épaisseur. Les autorités du pénitencier étaient à construire une aile au pénitencier et ces madriers devaient être utilisés dans la construction.

Au dire du pétitionnaire, Roussel lui avait donné ordre de ne pas opérer la raboteuse durant son absence (dép. Labelle, p. 21). Roussel avait dû s'absenter pour joindre les rangs des prisonniers qui devaient subir un examen médical. Sur les entrefaites, et avant le retour de Roussel de ce que l'on a appelé la "parade des malades," l'instructeur Godin serait arrivé, aurait manifesté son mécontentement de constater que les madriers n'avaient pas encore été passés à la machine et aurait donné instruction à Labelle de faire l'ouvrage immédiatement.

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Le pétionnaire travaillait à l'extrémité de la machine où l'on introduit la pièce de bois que l'on désire raboter ou planer. Son compagnon Bouchard était à l'autre extrémité, recevant les madriers au sortir de la machine.

Les deux premiers madriers ont passé dans la machine sans encombre. Le troisième a bloqué, dû au fait qu'il était trop large.

Les madriers que l'on devait passer dans la machine étaient censés avoir une largeur de huit pouces et la raboteuse avait été réglée en conséquence. La troisième madrier, au dire des témoins, avait une largeur de plus de huit pouces, et ce serait la raison pour laquelle il aurait bloqué.

Labelle travaillait à une distance de cinq ou six pieds des couteaux. Il dit que, lorsque le madrier a bloqué, il s'est approché des couteaux afin de constater quelle en était la cause. D'après lui la succion causée par la rotation rapide des couteaux aurait attiré sa main gauche vers l'un des couteaux. Je doute fort que la succion ait été assez forte pour entraîner une main vers les couteaux. Il me paraîtrait plus plausible que Labelle ait glissé ou trébuché, comme cela a été suggéré. Quoi qu'il en soit, Labelle a eu la main gauche coupée et amputée au poignet par l'un des couteaux. Il a été conduit à l'infirmerie où il est resté sous traitement jusqu'à sa sortie du pénitencier.

Labelle a obtenu sa libération conditionnelle au début de janvier 1923.

Le pétitionnaire attribue l'accident à trois causes: le fait que l'un des madriers remis au pétitionnaire pour le passer dans la raboteuse avait plus que huit pouces de largeur; la fait que ni Godin ni Roussel n'étaient dans l'atelier au moment de l'accident, alors que l'un d'eux aurait dû se trouver là pour conduire la raboteuse; le fait que la raboteuse était une vieille machine et n'avait point, comme les machines plus modernes, d'appareil ou dispositif de protection contre les couteaux.

Il est probable que, si le troisième madrier eût été de la même largeur que les deux premiers, la machine n'aurait pas bloqué et que l'accident ne serait pas arrivé. La trop grande largeur de ce madrier n'est pas cependant, à mon avis, la cause immédiate et déterminante de l'accident.

Quant à ce qui concerne l'absence conjointe de Godin et de Roussel de l'atelier, la preuve est contradictoire et il

faut opter entre deux versions. Je suis porté à croire la version de Roussel quand il déclare qu'il était à une vingtaine de pieds de Labelle lorsque celui-ci a été blessé. Roussel m'a paru un témoin désintéressé et je ne puis concevoir de motif qui aurait pu l'induire à déclarer qu'il était dans l'atelier de menuiserie au moment de l'accident si en fait il n'y était pas. Au surplus il est, sur ce point, corroboré par le témoin Bouchard (dép. p. 49).

La raboteuse était un vieux modèle, mais elle était en bon état; elle n'offrait point l'appareil de protection contre les couteaux dont sont munies les raboteuses plus modernes. Il se trouve encore néanmoins de ces raboteuses en usage. Dans l'opinion du témoin Bock, marchand de bois, entendu comme témoin de la part de l'intimé, il y a dans les raboteuses du type de celle sur laquelle le pétitionnaire s'est blessé un "couvercle" au-dessus des couteaux qui constitue une protection suffisante. Au dire du même témoin la machine se trouve dans une charpente en fonte; tous les couteaux sont à l'intérieur de cette charpente et, pour les atteindre, il faut se pencher au-dessus de cette charpente.

Labelle avait instruction de ne pas toucher à la machine; de son propre aveu, il lui était interdit de la mettre en mouvement lui-même. Il était du ressort de Godin, ou de Roussel en son absence, de la faire fonctionner. Les attributions du pétitionnaire se limitaient à placer les madriers sur la table située à l'extrémité de la raboteuse et de les pousser vers les couteaux.

Quand la machine a bloqué, le pétitionnaire n'avait pas d'autre chose à faire que d'appeler Roussel et, s'il n'était pas là, d'attendre son retour ou encore l'arrivée de Godin. Godin et Roussel étaient familiers avec la raboteuse et ils étaient les seuls aptes à la manœuvrer. En agissant comme il l'a fait, Labelle a outrepassé ses devoirs, il a assumé une charge qui n'étaient pas de son domaine, il a enfreint les instructions qu'il avait reçues. Le pétitionnaire a agi dans un bon but, mais il s'est exposé au danger et il a été blessé.

Le recours en dommages contre Sa Majesté le Roi est basé sur l'article 19 de la Loi de la Cour de l'Échiquier; les dispositions de cet article qui sont pertinentes se lisent ainsi:

La Cour de l'Échiquier a aussi juridiction exclusive en première instance pour entendre et juger les matières suivantes:

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b)

c) Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public;

Pour qu'il y ait réclamation contre la Couronne provenant de blessures à la personne, trois éléments sont essentiels: il faut que les blessures résultent de la négligence d'un employé ou serviteur de la Couronne, agissant dans l'exercice de ses fonctions dans un chantier public: *Joubert v. The King* (1); *Legault v. The King* (2); *Johnson v. The King* (3); *Manseau v. The King* (4); *Capon v. The King* (5).

Voir aussi *Fort Frances Pulp & Paper Co. v. Spanish River Pulp & Paper Mills Ltd.* (6).

Contrairement à la prétention émise par les procureurs du pétitionnaire, le cas qui nous occupe n'est pas régi par les articles 1053 et 1054 du Code civil de la Province de Québec; il est assujéti aux dispositions du paragraphe (c) de l'article 19 de la Loi de la Cour de l'Echiquier. Je noterai en particulier que la Couronne n'est point responsable du dommage causé par le fait d'une chose sous sa garde, à moins que la victime rattache le fait de cette chose à la négligence d'un employé ou serviteur de la Couronne agissant dans l'exercice de ses fonctions.

Je suis porté à croire que le pénitencier de Saint-Vincent-de-Paul, propriété de la Couronne et administré par elle, est, au sens du paragraphe (c) de l'article 19, un chantier public.

La preuve cependant ne révèle, à mon avis, aucun acte de négligence de la part d'un employé ou serviteur de la Couronne dans l'exercice de ses fonctions.

L'accident est imputable, je crois, à l'imprudence du pétitionnaire lui-même. Conformément aux instructions qu'il avait reçus, il aurait dû s'abstenir de tenter de manœuvrer la machine. Quand celle-ci a bloqué, son devoir était d'appeler Roussel ou, si celui-ci n'était pas dans l'atelier comme il le prétend, d'attendre son retour ou celui de Godin. Il ne devait pas assumer une tâche pour laquelle il n'avait point la compétence voulue.

(1) (1931) Ex. C.R. 113.

(2) (1931) Ex. C.R. 167.

(3) (1931) Ex. C.R. 163.

(4) (1923) Ex. C.R. 21.

(5) (1933) Ex. C.R. 54.

(6) (1931) 2 D.L.R. 97.

Pour ces raisons la réclamation du pétitionnaire me paraît mal fondée. Le pétition de droit est en conséquence rejetée.

L'intimé a plaidé la prescription annale de l'article 2262 c.c. Il est à propos de noter en passant qu'en vertu de l'article 32 de la Loi de la Cour de l'Echiquier les lois relatives à la prescription en vigueur dans la Province de Québec sont applicables en l'espèce, la cause d'action y ayant pris naissance. La prescription est interrompue par la remise au Secrétaire d'Etat de la pétition de droit: *Vinet v. The King* (1); *Saindon v. The King* (2); *Girard v. The King* (3); *Thériault v. The King* (4); *Courteau v. The King* (5); *Dionne v. The King* (6); *Mavor v. The King* (7). Une lettre du Sous-Secrétaire d'Etat adjoint en date du 11 octobre 1923, déposée au dossier, accuse réception de la pétition de droit. L'accident est arrivé le 24 octobre 1922. La pétition a donc été remise au Secrétaire d'Etat dans l'année de la date de l'accident. Le plaidoyer de prescription n'est point fondé.

Je ne crois pas que les décisions invoquées par le procureur de l'intimé au soutien de son plaidoyer de prescription: *Savard v. Cité de Montréal* (8), *Depuis v. Canadian Pacific Railway Co.* (9), et *O'Connor et al v. Scanlan* (10) s'appliquent en l'espèce.

L'intimé aura droit à ses dépens contre le pétitionnaire, s'il juge à propos de les réclamer.

Judgment accordingly.

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| (1) (1905) 9 Ex. C.R. 352 à 356 | (6) (1914) 18 Ex. C.R. 88. |
| (2) (1914) 15 Ex. C.R. 305 à 307 | (7) (1919) 19 Ex. C.R. 304 à 307. |
| (3) (1916) 16 Ex. C.R. 95 à 98. | (8) (1908-09) 10 R.P.Q. 333. |
| (4) (1917) 16 Ex. C.R. 253. | (9) (1897) R.J.Q. 12 C.S. 193. |
| (5) (1915) 17 Ex. C.R. 352. | (10) (1893) R.J.Q. 3 C.S. 112. |

BETWEEN:

LAUREAT GENOIS SUPPLIANT;

AND

HIS MAJESTY THE KING RESPONDENT.

Petition of right—Crown—Contract of hire—Civil Servant—Dismissal at will—Restriction of general rule—Damages for dismissal before end of term.

G. was hired as a seasonal fireman for a term of seven months from October 1, 1935, to April 30, 1936. The contract contained no stipulation that G. could be dismissed for cause only. On the 7th December, 1935, he was dismissed without notice and without cause, and now claims damages for loss of salary for the balance of his term of hire.

Held: That the right of the Crown to dismiss its servants at will may be restricted by law or by contract for a fixed term, explicitly stipulating that the servant can only be dismissed for cause; and that as the contract in question failed to provide expressly for dismissal for cause only, G. was not entitled to any part of the relief sought by his petition of right. *Reilly v. The King* (1932) Ex. C.R. 14; (1932) S.C.R. 597, and (1934) A.C. 176 referred to).

PETITION OF RIGHT by the suppliant claiming damages due to loss of salary for the unexpired term of his contract of employment.

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

R. De Blois, K.C. for suppliant.

M. Boisvert, K.C. for respondent.

The facts are stated in the reasons for judgment.

ANGERS J. now (July 16, 1937) delivered the following judgment:

Le pétitionnaire, Lauréat Genois, par sa pétition de droit, réclame de Sa Majesté le Roi la somme de \$453.53 pour dommages résultant de la rupture d'un contrat de louage de service.

La pétition allègue en substance ce qui suit:

le pétitionnaire, plombier de son métier, a été engagé par le département des Travaux Publics du Gouvernement fédéral pour l'entretien des fournaies dans les édifices dudit Gouvernement à Quebec pour une période de sept mois, du 1er octobre 1935 au 30 avril 1936, par une lettre en date du 8 octobre 1935 à lui adressée par le "Maintenance Office—

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le 12 octobre 1935, le pétitionnaire a envoyé au département des Travaux Publics une lettre acceptant de travailler comme chauffeur aux édifices du Gouvernement fédéral à Québec à raison de \$95 par mois;

le pétitionnaire a commencé à travailler le 15 octobre 1935 et a toujours rempli fidèlement et avec compétence les devoirs de sa charge, à la satisfaction de ses supérieurs, et il a été payé pour ses services;

le 7 décembre 1935, il a été remercié de ses services sans avis et sans cause;

il est sans travail depuis le 8 décembre 1935 et il le sera au moins jusqu'au 30 avril 1936, souffrant ainsi un dommage de \$453.53, soit \$73.53 pour la balance du mois de décembre 1935 et \$95 pour chacun des mois de janvier, février, mars et avril 1936;

le pétitionnaire a requis le département de lui payer ce montant, mais celui-ci néglige et refuse de le faire.

L'intimé, dans sa défense, admet avoir reçu la lettre d'acceptation du pétitionnaire mais dit n'être pas lié par icelle, nie les autres allégués de la pétition et plaide particulièrement ce qui suit:

l'intimé n'était pas obligé de donner au pétitionnaire un avis de congé;

le pétitionnaire était au service de Sa Majesté le Roi et celui-ci peut congédier toute personne à son service sans avis et suivant son bon plaisir;

il n'y a pas de relation contractuelle entre Sa Majesté et ses serviteurs et le pétitionnaire n'a pas le droit de réclamer de Sa Majesté des dommages pour rupture de contrat d'engagement;

le requérant a lui-même interprété son engagement comme étant suivant le bon plaisir de Sa Majesté, en disant dans sa lettre:

Il me fait grand plaisir de vous informer que j'accepte et si votre département peut me faire travailler pendant les mois que je serai libre, j'en serais très heureux;

les instructions communiquées au pétitionnaire au nom de Sa Majesté par Monsieur A. Pouliot spécifient rétentio des services suivant bon plaisir;

la pétition de droit n'est fondée ni en fait ni en droit.

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La contestation a été liée par une réponse qui est une dénégation générale.

La lettre adressée par un officier du "Maintenance Office—Dominion Public Buildings," du bureau de l'architecte en chef du Ministère des Travaux Publics, le 8 octobre 1935, au pétitionnaire, aux soins d'Arthur Pouliot, à laquelle réfère la pétition de droit, se lit comme suit (pièce n° 1):

Re: P.W.D. Staff—Quebec, P.Q.

I beg to advise you that the Honourable the Minister of Public Works has been pleased to appoint you as a Seasonal Fireman on this Department's staff at Quebec at a remuneration of \$95.00 per month, your appointment to date from October 1st, the date on which you commenced your duties.

Mr. A. Pouliot, this Department's Clerk of Works at Quebec, will give you full instructions regarding your duties.

Your appointment is to this Department's general staff in Quebec so that your services as a Seasonal Fireman can be used in any Government building in that city when and where required.

You will please note that your appointment is Seasonal only, i.e., for the firing season only and your services will not be retained after April 30th, 1936.

Advise me please per return of post whether you accept the appointment.

J. A. Heisler,
 Maintenance Office.

Le réponse du pétitionnaire en date du 12 octobre, produite comme pièce n° 2, se lit comme suit:

En réponse à votre lettre du 8 octobre me demandant si je consens à travailler pour une période de sept mois, comme chauffeur à raison de quatre-vingt quinze piastres par mois, je me fais plaisir de vous informer, que j'accepte, et si votre département peut me faire travailler pendant les mois que je serai libre, j'en serais très heureux.

Bien à vous,

Lauréat Genois.

Comme on le constate, la lettre de Genois est une acceptation pure et simple de la position offerte: il déclare accepter de travailler pour une période de sept mois comme chauffeur à raison de quatre vingt quinze piastres par mois; il ajoute—et ceci est une proposition distincte—que, si le département peut le faire travailler pendant les mois qu'il sera libre, il en sera très heureux. Il me paraît évident qu'en faisant allusion à ses mois de liberté, Genois veut dire les mois qui suivront le 30 avril, la date du terme de son engagement; en parlant des mois où il sera libre, Genois ne peut et ne veut sûrement pas référer aux mois compris entre le 1er octobre 1935 et le 30 avril 1936, vu que durant cette période il n'est pas libre, mais bel et bien engagé.

Il est regrettable que l'on ait jugé à propos, dans la défense, d'écourter la citation de la lettre du pétitionnaire et de lui faire dire ainsi ce qu'en fait elle ne dit pas.

Les deux lettres, à mon avis, constituent un contrat de louage de service.

La question à déterminer est celle de savoir si l'intimé était libre de congédier le pétitionnaire, sans avis et sans cause, à son bon plaisir.

Je noterai en passant que le pétitionnaire a déclaré que l'on ne s'était jamais plaint de ses services; son témoignage n'a pas été contredit. Il y a lieu de prendre pour acquis que le pétitionnaire a rempli ses devoirs de façon satisfaisante. Le congédiement a été fait sans cause.

Etant donné que le pétitionnaire remplissait ses devoirs de façon satisfaisante, pouvait-il être démis de ses fonctions au bon plaisir de l'intimé sans raison ou celui-ci devait-il exécuter son contrat et maintenir le pétitionnaire en fonctions jusqu'au 30 avril 1936, terme du contrat?

Si Genois avait été engagé pour une période indéterminée, je n'hésiterais pas à dire que l'intimé aurait été libre de se dispenser des services du pétitionnaire à son bon plaisir. C'est une prérogative de la Couronne de pouvoir congédier à sa guise et sans motif ses employés ou serviteurs: *Chitty, Prerogatives of the Crown*, 82.

L'existence d'un contrat stipulant une période de location des services a-t-elle eu pour effet de restreindre les droits de la Couronne? Le pétitionnaire soutient que oui; l'intimé, de son côté, prétend que non.

Au soutien de sa prétention que la Couronne était liée par son contrat et devait respecter l'engagement du pétitionnaire jusqu'à son terme, savoir le 30 avril 1936, le procureur du pétitionnaire a invoqué la cause de *Reilly v. His Majesty the King*, donnant comme référence (1932) 3 D.L.R. 529. Ce volume contient le rapport du jugement de la Cour Suprême; il y a eu appel de ce jugement au Conseil Privé. Le jugement du Conseil Privé, qui a confirmé celui de la Cour Suprême, est rapporté dans (1934) A.C. 176. J'y reviendrai dans quelques instants.

Le procureur de la Couronne, de son côté, à l'appui de sa prétention que la Couronne n'était point liée par le contrat et que, nonobstant ce contrat, elle était demeurée libre de congédier à son gré, sans cause ni raison, le pétitionnaire, a

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cité la cause de *Rederiaktiebolaget Amphitrite v. The King*, rapportée dans (1921) 3 K.B., 500; il a en outre cité Robertson, *The Law and Practice of Civil Proceedings by and against the Crown*, à la page 359.

Dans la cause de *Rederiaktiebolaget Amphitrite v. The King*, la note explicative et le "jugé" en tête du rapport se lisent comme suit:

During the war neutral shipowners, being aware of the liability of neutral ships to be detained in British ports, obtained an undertaking from the British Government that if they sent a particular ship to this country with a particular class of cargo she should not be detained. On the faith of that undertaking the owners sent the ship to a British port with a cargo of the stipulated kind. The British Government subsequently withdrew their undertaking and refused her clearance. On a petition of right for damages for breach of contract:—

Held, that the Government's undertaking was not enforceable in a court of law, it not being within the competence of the Crown to make a contract which would have the effect of limiting its power of executive action in the future.

Je crois opportun de citer un passage du jugement du juge Rowlatt; celui-ci après avoir relaté les faits, assez bien résumés dans la note ci-dessus, s'exprime ainsi (p. 503):

Now under those circumstances what I have to consider is whether this was a contract at all. I have not to consider whether there was anything of which complaint might be made outside a court, whether that is to say what the Government did was morally wrong or arbitrary; that would be altogether outside my province. All I have got to say is whether there was an enforceable contract, and I am of opinion that there was not. No doubt the Government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach. But this was not a commercial contract; it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future in relation to a particular ship in the event of her coming to this country with a particular kind of cargo. And that is, to my mind, not a contract for the breach of which damages can be sued for in a court of law. It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is that it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus in the case of the employment of public servants, which is a less strong case than the present, it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except upon the terms that he is dismissible at the Crown's pleasure; the reason being that it is in the interests of the community that the ministers for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable.

Cette action est d'une nature différente de celle qui nous occupe; néanmoins les remarques du juge Rowlatt repro-

duites ci-dessus, d'un caractère plutôt général, offrent quelque intérêt et méritent considération; je ne crois pas cependant que cette décision justifierait le rejet de la réclamation du pétitionnaire.

Dans une cause de *Shenton v. Smith* (1), où il s'agissait d'une réclamation en dommages par un officier médical pour renvoi immotivé, il a été décidé par le Conseil Privé qu'un gouvernement colonial est sur le même pied que la Couronne en Angleterre pour ce qui concerne l'emploi et le renvoi des serviteurs ou employés de la Couronne et que, sauf dans les cas spéciaux où il est autrement prévu, ceux-ci détiennent leurs charges ou positions suivant le bon plaisir de Sa Majesté.

Il me semble à propos de citer les remarques suivantes de Lord Hobhouse, qui a rendu le jugement (p. 234) :

It appears to their Lordships that the proper grounds of decision in this case have been expressed by Stone J. in the Full Court. They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind.

Une autre cause, où s'est soulevée la question du droit de la Couronne de congédier l'un de ses serviteurs à son bon plaisir est celle de *Dunn v. The Queen* (2). Il s'agissait dans l'espèce d'une réclamation par un agent consulaire engagé pour une période de trois ans et démis de ses fonctions avant l'expiration du terme de son engagement. Il y a été décidé par la Cour d'Appel que les serviteurs de la Couronne, civils aussi bien que militaires, excepté dans les cas où il est autrement prévu par la loi, détiennent leurs positions selon le bon plaisir de la Couronne.

Lord Esher, M.R., à la page 118 du rapport, fait les observations suivantes :

In this case the petitioner was employed as a civil servant of the Crown in the public service at a certain salary, and the question has arisen with relation to his service which, in the case of *De Dohsé v. Reg.*, I foresaw might arise, and with respect to which I then indicated what would probably be my view when it did arise. I said, in giving judgment in that case: "It is said that it was lawful to make such an engagement with him (the suppliant) for seven years, because the engagement offered and proposed was not an engagement of military service, it being admitted in argument that, if the engagement was for military service as a soldier,

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(1) (1895) A.C. 229.

(2) (1896) 1 Q.B.D. 116.

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whether an officer or private, it is contrary to public policy that any such contract should be made. Now, whether that doctrine with regard to the Crown is confined to military service or not need not be decided to-day, but I do not at all accept the suggestion that it is so confined. All service under the Crown itself is public service, and to my mind it is most likely that the doctrine which is said to be confined to military service applies to all public service under the Crown, because all public service under the Crown is for the public benefit." That case came before the House of Lords; and it seems to me that Lord Watson in his judgment almost in terms decides that what I thought would probably turn out to be the right view on the subject is correct. He says: "In the first place it appears to me that no concluded contract is disclosed in the statements contained in this petition of right; and in the second place I am of opinion that such a concluded contract, if it had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss. Further, I am of opinion that, if any authority representing the Crown were to exclude such a power by express stipulation, that would be a violation of the public policy of the country and could not derogate from the power of the Crown." Anything more distinct and general than that there could not be. It seems to me that the rule, as laid down by the House of Lords, is in consonance with what I suggested to be the true rule in the Court of Appeal. The case of *Shenton v. Smith* (1895, A.C. 229) appears to me to be really equally conclusive of the matter.

Lord Herschell, de son côté, s'exprime ainsi (p. 119):

The petitioner was appointed by Sir Claude McDonald, consular agent for the Niger Protectorate, and as such he was the servant of the Crown, representing the Crown for certain purposes. The question is whether the Crown was entitled to dismiss the petitioner. His case is that, he being engaged for a period of three years, the Crown had no right to put an end to his engagement as it did, and he is therefore entitled to damages. I take it that persons employed as the petitioner was in the service of the Crown, except in cases where there is some statutory provision for a higher tenure of office, are ordinarily engaged on the understanding that they hold their employment at the pleasure of the Crown. So I think that there must be imported into the contract for the employment of the petitioner the term which is applicable to civil servants in general, namely, that the Crown may put an end to the employment at its pleasure.

Dans une cause de *Gould v. Stuart* (1), le Conseil Privé, confirmant le jugement de la Cour Suprême des Nouvelles Galles du Sud, a décidé—je transcris le "jugé" qui me paraît exact—ce qui suit:

The Crown has by law, whether in England or New South Wales, power to dismiss at pleasure either its civil or military officer, a condition to that effect being an implied term of the contract of service except where it is otherwise expressly provided:—

But held, that certain provisions of the New South Wales Civil Service Act of 1884, being manifestly intended for the protection and benefit of the officer, are inconsistent with such a condition and consequently restrict the power of the Crown in that respect.

Le jugement du Comité judiciaire du Conseil Privé a été rendu par Sir Richard Couch; il convient, à mon avis, d'en citer le passage suivant (p. 577):

It is the law in New South Wales as well as in this country that in a contract for service under the Crown, civil as well as military, there is, except in certain cases where it is otherwise provided by law, imported into the contract a condition that the Crown has the power to dismiss at its pleasure: *Dunn v. Reg.* (1896, 1 Q.B. 116); *De Dohse v. Reg.* (1896, 1 Q.B. 117, n. 7) (a). The question then to be determined is, Has the Civil Service Act, 1884, made an exception to this rule?

Sir Richard Couch discute ensuite certains articles du "Civil Service Act, 1884" qui ne nous concernent évidemment point et il ajoute (p. 578):

These provisions, which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. In that case they would be superfluous, useless, and delusive. This is, in their Lordships' opinion, an exceptional case, in which it has been deemed for the public good that a civil service should be established under certain regulations with some qualification of the members of it, and that some restriction should be imposed on the power of the Crown to dismiss them.

Il s'agit d'un cas d'espèce qui n'offre aucun intérêt particulier; seules les observations de caractère général de Sir Richard Couch, en premier lieu citées, méritaient d'être notées, comme pouvant avoir une portée sur le litige.

Il découle de ces divers arrêts que la Couronne peut démettre ses serviteurs ou employés à son gré, sans cause ni raison, sauf dans les cas où la loi stipule le contraire.

J'en arrive maintenant à la cause de *Reilly v. The King* (1).

Reilly, avocat au barreau de Québec, avait été, par arrêté ministériel et par commission, nommé membre du Bureau fédéral d'appel en vertu de l'article 10 de la Loi modifiant la Loi des pensions, 13-14 Geo. V, chap. 62. Le terme de son engagement avait été prolongé à diverses reprises, la dernière prolongation étant pour une période de cinq ans à compter du 17 août 1928. Par le chapitre 35 du statut 20-21 Geo. V, intitulé "Loi modifiant la Loi des pensions," le Bureau fédéral d'appel a été aboli. Reilly a poursuivi la Couronne en dommages pour rupture de contrat. Le président de cette cour a rejeté la pétition de droit; son jugement est rapporté dans (1932) Ex. C.R. 14.

(a) La cause de *De Dohse v. Reg.* a été rapportée subseqüemment dans (1897) L.J. Q.B. 422.

(1) (1932) Ex. C.R. 14; (1932) S.C.R. 597; (1934) A.C. 176.

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Reilly a porté la cause en appel devant la Cour Suprême; celle-ci a confirmé le jugement de première instance. L'honorable juge Orde, siégeant ad hoc en Cour Suprême, a rendu jugement tant pour lui-même que pour le juge en chef (Anglin) et les juges Rinfret et Lamont; le jugement contient, entre autres, les remarques suivantes (1):

Whether the Crown might not so bind itself by contract to pay for specific services over a certain period as to incur liability for a breach thereof is not the question here. Assuming the possibility of such a contract, was there any such contract in the present case?

I find it difficult to see in what way the appointment of the appellant to be a member of the Federal Appeal Board under the *Pension Act* as it then stood differed from many other appointments to offices under the Crown. It was urged during the argument that the earlier negotiations or communications between the Minister and the appellant, which culminated in the Order in Council authorizing the appointment, constituted, by way of offer and acceptance, a contract binding upon the Crown. But the circumstances leading up to the appointment did not differ materially from those which must accompany most appointments to public offices, and I cannot see how they distinguish this appointment from any other.

There is, of course, in every appointment to public office a contractual element in that the Crown, in effect, promises to pay the salary or other emolument fixed by law for services performed. But this in no respect affects the Crown's prerogative right, unless restricted by statute, to dismiss the servant at any time without liability for damages or further compensation.

The principles governing appointments to civil offices under the Crown are summarized in Robertson's *Civil Proceedings By and Against the Crown*, at p. 359. Even if there be a contract of service, the Crown's absolute power of dismissal is deemed to be imported into it, and nothing short of a statute can restrict that power.

Le juge Cannon a également conclu au rejet de l'appel.

Reilly s'est de nouveau pourvu en appel; le Comité judiciaire du Conseil Privé a rejeté l'appel à l'unanimité.

Lord Atkin, rendant le jugement du tribunal, dit, entre autres choses, ce qui suit (p. 178, in fine):

The petition of right is founded on averments that there was a contract between the suppliant and the Crown and that the contract had been broken. Both courts in Canada have decided that by reason of the statutory abolition of the office Mr. Reilly was not entitled to any remedy, but apparently on different grounds. Maclean J. concluded that the relation between the holder of a public office and the Crown was not contractual. There never had been a contract: and the foundation of the petition failed. Orde J.'s judgment in the Supreme Court seems to admit that the relation might be at any rate partly contractual; but he holds that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure. If so, there could have been no breach.

Their Lordships are not prepared to accede to this view of the contract, if contract there be. If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine "for

cause" it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded. This appears to follow from the reasoning of the Board in *Gould v. Stuart* (1896, A.C. 575). That was not the case of a public office, but in this connection the distinction between an office and other service is immaterial. The contrary view to that here expressed would defeat the security given to numerous servants of the Crown in judicial and quasi-judicial and other offices throughout the Empire, where one of the terms of their appointment has been expressed to be dismissal for cause.

In this particular case their Lordships do not find it necessary to express a final opinion on the theory accepted in the Exchequer Court that the relations between the Crown and the holder of a public office are in no degree constituted by contract. They content themselves with remarking that in some offices at least it is difficult to negative some contractual relations, whether it be as to salary or terms of employment, on the one hand, and duty to serve faithfully and with reasonable care and skill on the other. And in this connection it will be important to bear in mind that a power to determine a contract at will is not inconsistent with the existence of a contract until so determined.

De toutes les décisions passées en revue, celle du Conseil Privé dans la cause de *Reilly v. The King* me paraît être la plus favorable à la prétention du pétitionnaire, particulièrement à cause des observations de Lord Atkin reproduites ci-dessus, lesquelles cependant ne sont pas la ratio decidendi.

La règle générale est que la Couronne a le privilège de démettre ses serviteurs selon son bon plaisir. Ce privilège peut être restreint par une disposition expresse d'une loi ou par un contrat pour un terme fixe stipulant explicitement que le serviteur ne pourra être destitué que pour cause. Le contrat en l'espèce est pour une période déterminée; il stipule clairement que le pétitionnaire est nommé "seasonal fireman," que sa nomination est pour la saison où l'on chauffe et que ses services ne seront pas requis après le 30 avril; malheureusement pour le pétitionnaire, il n'y est pas dit explicitement qu'il ne pourra être congédié que pour cause. Cette omission, je crois, lui est fatale; j'avouerais cependant que ce n'est pas sans hésitation que je suis arrivé à cette conclusion.

Dans les circonstances et vu la citation écourtée de la lettre d'acceptation du pétitionnaire dans la défense, laquelle était susceptible d'induire la Cour en erreur si la lettre n'avait pas été produite, je ne crois pas qu'il y ait lieu d'accorder ses dépens à l'intimé.

La pétition de droit est rejetée sans frais.

Judgment accordingly.

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 BETWEEN:

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AND

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HIS MAJESTY THE KING RESPONDENT.

Crown—Petition of right—Government annuity—Contract of insane person not voidable when other contracting party unaware of insanity.

Suppliant's husband died in July, 1929. In December, 1928, he had contracted for the purchase of an annuity under the provisions of the Government Annuities Act, R.S.C., 1927, c. 7, paying therefor the sum of \$10,000 cash. Suppliant as sole executrix and beneficiary of deceased's will now seeks a declaration that such contract was void or voidable and that the Crown be condemned to pay to her the said sum of \$10,000 less any money paid to deceased in his lifetime, on the ground that deceased at the time of entering into the contract was insane.

The Court found that deceased at the time he entered into the contract to purchase the annuity was of unsound mind and incapable of appreciating the nature of his act; that the postmaster with whom deceased had deposited the money to purchase the annuity was not an agent of the Minister in the sale of the annuity; that neither the Minister, the Superintendent, nor any of the officers of the Government Annuities Branch were aware of the deceased's state of mind at the time the contract was entered into.

Held: That contracts by way of sale and purchase made by a person apparently sane, but afterwards found to be insane, will not be set aside as against those who dealt with him on the faith of his being a person of competent understanding.

PETITION OF RIGHT by suppliant herein asking that the amount of money paid to the Crown by suppliant's husband, now deceased, for an annuity, be refunded to suppliant.

The petition was heard before the Honourable Mr. Justice Maclean, President of the Court, at St. Catharines.

J. J. Bench and *H. P. Cavers* for suppliant.

F. E. Hetherington for respondent.

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

THE PRESIDENT, now (September 13, 1937) delivered the following judgment:

The suppliant is the sole beneficiary and executrix of the will of George S. Wilson, her deceased husband, late of the Town of Merritton, Ontario, who died on or about

July 24, 1929. By this petition of right the suppliant seeks to have it declared that a contract entered into by her late husband, in December, 1928, for the purchase of a certain annuity for his life, under the provisions of the Government Annuities Act, R.S.C., 1927, chap. 7, was void or voidable, and that the Crown be condemned to repay to her the sum paid for the said annuity, \$10,000, less any annuities paid the deceased in his life time, upon the ground that when the deceased purchased the said annuity he was not of sufficient mental capacity to enter into such a contract, or to understand the nature and consequences of the same, and that he was in fact insane. By the terms of the contract Wilson was to be paid \$1,512.86 per annum, in monthly instalments of \$126.07, and prior to his death he had received seven monthly instalments.

Generally, the suppliant's case is that for three or more years before her late husband purchased the annuity in question, he had become permanently afflicted with the insane delusion that the suppliant, and a son, were attempting to end his life by poisoning him, in order to become possessed of his property, and that this delusion caused or influenced the deceased, then seventy-three years of age and otherwise in ill-health, to purchase the annuity, and that this delusion rendered him incapable of understanding the nature and effect thereof. The deceased applied for the annuity, in the manner later to be mentioned, through one Morley Schooley, Postmaster for the Town of Merritton, and it is the contention of the suppliant that the said Schooley was at the time, in respect of the sale of annuities, the agent of the Minister of Labour, the Minister appointed to administer the Government Annuities Act, and that it was well known to Schooley that the deceased was of unsound mind at the time material. Counsel for the Crown did not, at the trial, contest the allegation that the deceased was, at the time he purchased the annuity, afflicted with the delusion mentioned, but contended that this was in any event unknown to the respondent, and that the existence of the said delusion was not sufficient to deprive Wilson of the capacity to contract; and he further contended that Schooley did not act as agent of the Department of Labour, under the provisions of the Government Annuities Act or otherwise, in the sale of the annuity in question.

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The suppliant and the deceased were married in the year 1884. Originally, the occupation of the deceased was that of a diver employed on the Welland Canal, and in the course of that occupation he had lost a leg. Later he conducted a fire insurance agency business, assisted by his wife. He had in the course of time accumulated some \$10,000, which he had invested in bonds of the Dominion of Canada, and it was with the proceeds of such bonds he purchased the annuity in question. At the time of his death he was the owner of two small dwelling houses, one of which was occupied as his home, and they were appraised for probate purposes at \$3,000 and \$1,500 respectively, and in addition he was the owner of three bonds of the par value of \$100 each.

In July, 1911, the deceased and the suppliant made mutual wills each in favour of the other, and, concurrently I understand, entered into an agreement whereby they undertook to and with each other that they would never change their respective wills then made, under which each was to leave everything he or she had to the other. In July, 1929, only a few days before his death, and about seven months subsequent to the purchase of the annuity, Wilson made a will in which he directed his estate to be divided among a number of legatees and charitable organizations, and among the specific legacies was one of \$800 to "my housekeeper, Effie Rogers, of Merritton, Ontario," this being the maiden name of his wife, the suppliant. This will was declared null and void by the late Garrow J., of the Supreme Court of Ontario, in an action brought by the suppliant, on the ground of lack of testamentary capacity. This will having been declared void, the first mentioned will was probated as the last will and testament of the deceased Wilson.

It will be convenient now to review the evidence with some care, and I fear at some length. This will be desirable in the event of an appeal from this judgment, and such an appeal is I expect probable. After Wilson lost his leg and was unable to continue in his usual occupation, the suppliant for a time maintained the family by working in a cotton mill at Merritton; later, in 1922, or 1923, Wilson commenced to carry on a fire insurance business which, it seems, the suppliant looked after almost entirely during

the greater part of Wilson's life time. The suppliant testified that in 1924 or 1925 her husband commenced to develop a hostile attitude towards her, and to openly accuse her with attempting to poison him, and of this he then began to speak to others. In the early stages of this condition of mind he would partake of meals which she had prepared for him only if she would first eat or drink some of the same. The suppliant stated that in 1925 her husband's condition physically and mentally had become noticeably impaired, and he was constantly under a doctor's care; he began to keep largely to his own bedroom which he usually kept locked; his language towards her became highly improper and violent; he would frequently throw upon the floor food which she brought him in order to give her "lots of work"; he would frequently have food brought to him from outside and this he would arrange to be placed in a container outside his home and he would pull the same up to his bedroom window by a string; he became filthy in his habits and refused to use a nearby toilet; he persisted in telling persons coming to see him that his wife was attempting to poison him and that he would "never leave her a cent," and such remarks she frequently heard herself; he would also accuse his son, now deceased, of attempting to kill him; and he would frequently tell his wife that he was going to buy an annuity so that she would have to live on anything "you can get," and that she would "have to go out and pick the pebbles off the road and eat them." On one occasion, more than a year before his death, he came down stairs from his own room and turned on the gas in a stove in a room in which his wife was accustomed to lie down upon a couch and in which room she then was, and he closed the doors leading from that room; the gas was turned on outside the room in question. After Wilson returned upstairs to his room the suppliant, of course, turned the gas off—being afraid to do so while he was downstairs. She was of the opinion that he intended to "end her." It has that appearance and I have no reason for refusing to believe that her fears were well grounded. In July, 1929, at his own home, Wilson attempted suicide, and he died some days afterwards.

The suppliant, I might add, also testified that Schooley the postmaster, would visit her husband almost daily in

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his room in the last two years of his life, and if she should then happen to be in her husband's room he would tell her to leave. She stated that she overheard her husband tell Schooley that she was trying to poison him and that he would never leave her a cent. The suppliant, it might be said, was not a particularly good witness on her own behalf, but I am confident that her evidence upon vital matters may be relied upon. Her recollection, for example, as to when her husband left Merritton and went to Los Angeles, U.S.A., was not very clear, and she was not able I think to fix it accurately, but that I think is not of any consequence. Her evidence as to the part taken by her in the management of the insurance business was not very well stated. I am satisfied from all the evidence that upon her fell the major part of the work, and it is more than probable that this business could not have continued without her attention to it, and, at times at least, her livelihood depended on what she got from it.

Dr. Chapman, a medical practitioner of over thirty years' experience, knew Wilson professionally for four or five years before his death, and he stated that invariably on visiting Wilson, he would introduce his domestic affairs, and that he was afflicted with the delusion that his wife was attempting to poison him and many times this was the reason for his being called to see Wilson; frequently he would find in his room food which he had refused to eat because, he would say, his wife had put poison in it. On one occasion Wilson had an abrasion on his head and he informed Dr. Chapman that this was caused by his son hitting him with a bottle, and that the son had threatened to shoot him, which Dr. Chapman believed to be a pure delusion, and later Wilson admitted his story to be untrue. On another occasion he had pulled down the curtains from the windows in his bedroom so that he said, he could quickly give an alarm if his son attempted to shoot him. On more than one occasion Wilson spoke to Dr. Chapman about his buying an annuity, and when the latter advised against it on several grounds, Wilson would say that he, Dr. Chapman, was like all the lawyers in St. Catharines, some of whom, it seems, had similarly advised him, and whom he said were all "in a ring." On such occasions Wilson would insist he was going to buy an annuity in order to leave his wife penniless. Once Wilson explained to Dr.

Chapman the advantage of buying an annuity by saying that his wife and son wished to see him dead so that they would get his money, but if he bought an annuity it would be to their advantage to keep him alive, because, if he died everything would be gone and there would be no monthly income. After Wilson had purchased the annuity he told Dr. Chapman that Schooley had twice failed to get him an annuity, and had talked him out of it, but that in the end he went to the bank and got the "collateral" and shook the same in Schooley's face and told him if he did not get him the annuity he would see that he was dismissed from his office; then, he said, Schooley got the annuity for him. I might say that the reception of this particular piece of evidence was objected to by Mr. Hetherington, but I think it was admissible on one ground at least, and I may say I am not disposed to attach any weight to it in establishing agency on the part of Schooley.

Dr. Chapman gave it as his opinion that for the last two or three years before Wilson purchased the annuity his mind was not in a fit state to do business that directly or indirectly affected his wife. He also stated that at the time Wilson spoke to him about buying an annuity, and at the time he bought the annuity, his general health was seriously impaired and that his expectation of life was short; and that he was liable to die within a few months, or a few weeks. Shortly after Wilson attempted to take his own life Dr. Chapman attended him, and asking Wilson why he had done so the reply was that he was getting so feeble that he had made up his mind "they had me," that is, his wife and son, and "rather than let them get me I was going to cheat them"; Dr. Chapman stated that the words he used may not have been the precise words used by Wilson on that occasion, but that in substance they were.

Dr. Currey, medical officer of health for the City of St. Catharines, and in that capacity having occasion to examine persons as to their mental state, gave evidence. He stated that after Wilson attempted to take his own life he was called in by Dr. Ludwig, since deceased, to examine Wilson and to give his opinion as to the wisdom of sending him to some institution for the insane; he found him to be too weak to warrant sending him to such an institution,

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though insane. He found his condition, senile dementia, was of long standing; that his case was not one of acute mental illness, but one due to some other cause, and the cause, as usual, was existent for many years. He said Wilson's condition was due to a circulatory condition, "which by closing off the vessels in the brain caused his insanity," and that, in his experience, a case such as Wilson's would take at least two years to reach the state he found him in, at the time mentioned. He gave it as his opinion that Wilson could not possibly have been sane in November, 1928, after seeing his condition a few months later, with that type of insanity.

Dr. Poirier had been requested to call upon Wilson in May, 1929, after the purchase of the annuity, and his evidence confirms in several respects the testimony of the other medical witnesses already mentioned, and particularly in respect of Wilson's delusions as to his wife. He found Wilson's mind definitely disordered. He visited Wilson also in July following, on the occasion of his attempted suicide. His opinion was that Wilson was suffering from a progressive deterioration, beginning as a circulatory and kidney condition, affecting his mental condition, and which had been in progress a long time; he stated that Wilson's ideas respecting his wife were undoubtedly thoroughly fixed and had existed for a long time, and if they were insane delusions, then he had been insane for some time; and that Wilson's mental condition had probably been growing worse gradually for years, and between November, 1928, and May, 1929, but that his condition six months prior to May, 1929, would not be a great deal different from what it was when he saw him in May, 1929. He said Wilson's trouble had not come on in six months, it had been coming on for years progressively, for three or four years at least.

Mr. McRae, Inspector of the London and Lancashire Fire Insurance Company in Toronto, a company represented by Wilson at Merritton, gave evidence, which was corroborative of much that has already been mentioned. In respect of the insurance business McRae dealt largely with the suppliant, though remittances to his company were largely made by Wilson, by cheque. Another officer of the same insurance company, Mr. Spencer, gave evidence to much

the same effect; he stated that the suppliant attended to all the insurance business, including the correspondence, and cheques were filled out by the suppliant though usually, I gather, signed by Wilson. In 1926, Wilson consulted Mr. McCarron, a solicitor, regarding the sale of his insurance business, but Wilson's instructions were so unsatisfactory and changeable that in the end McCarron declined to have anything more to do with it. In 1926 Wilson asked McCarron to draw his will, at the time instructing him that he was not going to leave his wife or his son a cent, and that he wished to dispose of his property in such a way that his wife would receive nothing. Mr. McCarron in the end did not draw the will because he did not consider him of testamentary capacity. Mrs. Patterson, a family friend, last saw Wilson in August or September, 1928, when he spoke to her about his wife attempting to poison him in order to get his money. Mrs. Patterson's evidence was of importance in other respects but I shall not delay to repeat more of it. Mr. Carson, manager of the Bank of Nova Scotia at Merritton, between 1921 and 1934, at which banking office Wilson kept his account, testified that for three or four years prior to his death Wilson would express to him fear of his life at the hands of his wife and son, and he would speak of disposing of his property so that his wife and son would have no object in getting rid of him, or of poisoning him. Wilson discussed with Carson, several times, the matter of his buying an annuity, and Carson advised against it, having in mind his mental condition. Carson states that Wilson relied on him a great deal to look after his banking business, and business matters generally; he would fill out his cheques, or the suppliant would, and he would tell Wilson they were in order. Carson said: "He could sign his name, and I knew the cheque was in order and would assure him it was all right and he would sign the cheque." Carson also stated that he had a great deal of hesitation in dealing with him as a customer of the bank, and that he had to be careful of everything he did with him. I think it is clear that whatever business Wilson himself attended to, he was guided largely by Carson, who did for him more than might be expected ordinarily by a bank customer.

Then there was some evidence particularly directed to the relations between Wilson and Schooley, and I should

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make a brief reference to the same. The post office was just across the road from the residence of Wilson, and I am satisfied that both Schooley and his wife, for some years prior to the purchase of the annuity in question, very frequently called to see Wilson. Schooley seems to have regularly called to see Wilson, chiefly in his bedroom, and Wilson was heard by the suppliant telling Schooley about her intention to poison him. Wilson's delusion at least must have been well known to Schooley; he could hardly have failed to become aware of the same. The whole community I have no doubt were aware of it, as appears from the testimony of one witness at least. Unfortunately Schooley was dead at the time of the trial. Schooley wrote several letters to the Superintendent of the Government Annuities Branch on behalf of Wilson, and the matter of the purchase of an annuity must have been the subject-matter of discussion between them. I shall presently refer to such letters.

Some correspondence passing between Wilson and the Superintendent of the Government Annuities Branch, and also between Schooley and the said Superintendent, was put in evidence, and for more than one reason this correspondence should be referred to with some exactness.

In December, 1923, and January, 1924, Wilson wrote the Superintendent for information concerning the cost of annuities, and he requested that the replies thereto be sent to Schooley and this was done. Apparently Wilson did not pursue the matter further in those years. His next inquiry directed to the Superintendent was in February, 1925, wherein he asked that there be sent him a handbook of information relating to annuities, which was supplied him, and on March 7 following he wrote stating that he had ten thousand dollars to invest in an ordinary life annuity and he inquires what annuity that amount of money will purchase, and he made a similar inquiry on May 13, 1927, but nothing ensued from this correspondence. On November 24, 1928, Wilson deposited with Schooley \$10,000 and on that date Schooley wrote the Superintendent stating this fact. This letter states that he had that day "accepted \$10,000, ten thousand dollars, for the purchase of an immediate annuity for Geo. S. Wilson," and he therein states Wilson's age, and he asks what amount of annuity this sum of money will purchase for Wilson, (1) to cease at

death, and (2) guaranteed for twenty years, and he requests that blank forms of application for each form of annuity be sent him.

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In a letter dated November 20, 1928, which date is obviously in error, Wilson himself wrote the Superintendent stating that he had a few days ago "deposited \$10,000, number 33662, to purchase an annuity," but that he had not made up his mind as to the plan of annuity he wished to purchase, and he asks that his application be held over for a few days. He asks if he should "take a second party in on it," what would be the extra cost, if any. In due course this letter was answered by the Superintendent directly to Wilson. Wilson, as will appear from a letter written in June, 1929, evidently had in mind some man as the second party, and Schooley also wrote the Superintendent on November 28, asking what amount of annuity \$10,000 would buy on the "last survivor immediate annuity" plan for two persons, and Wilson's age is given, and the age of the other person is stated as being 48 years; this second person could not therefore have been Wilson's wife, and consequently Wilson must have had some one else in mind; Schooley's letter was answered in due course by the Superintendent. A few days later, December 6, 1928, Wilson wrote the Superintendent stating that he had decided to take the ordinary life plan annuity and he stated that he wished the annuity to be remitted to him on the 24th day of each month. On December 15, following, the annuity contract was forwarded to Wilson by the Superintendent, and on December 19, Wilson in acknowledging receipt of the contract stated that he had examined it and found the same satisfactory. On March 14, 1929, Wilson wrote the Superintendent asking that his March annuity be directed to him at Los Angeles, U.S.A., to which place he was about to proceed. The same request was later made in respect of the April annuity. On June 15, 1929, Schooley wrote the Superintendent, at the request of Wilson, to ascertain what amount of annuity payable monthly, a further sum of \$8,000 would purchase, on three different stated plans, the last being "a last survivor annuity," the letter stating "another man with him aged 48 years." This second party would likely be the same person Wilson had in mind in his own earlier

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inquiry of the same nature, and which I have already referred to. This correspondence, appearing in the evidence as exhibits, are typewritten copies of original letters. On reference to the original letters I found that some of Wilson's letters were typewritten, and others were written evidently by some person other than himself, but not, I think, by Schooley; in some cases Wilson's signature is obviously impressed by a stamp of some sort, while in other cases the signature is in type; and in one case Wilson's signature is in his own handwriting though the body of the letter is not. There is only to add in this connection that the application form for the annuity contains a declaration made by Wilson on November 30, 1928, before a notary public, and to the effect that the statements contained in the application were true.

Reference must be made to some of the provisions of the Government Annuities Act because of the claim that Schooley, under the terms of that Act and regulations made thereunder, and as postmaster at Merritton, acted as the agent of the Minister of Labour in the sale of the annuity in question. Sec. 13 (*d*) provides that the Governor in Council may make regulations as to the selection of agents of the Minister to assist in executing the provisions of this Act, and the remuneration, if any, to such agents therefor.

Regulation no. 4 provides:

That the agents permanently appointed to assist in executing the provisions of this Act, and their remuneration shall be such as may be recommended by the Minister of Labour and approved by the Governor in Council; but the Minister may from time to time employ such temporary assistance as in his opinion is required, and upon such terms as may be agreed upon.

Regulation 7 (*a*), (*b*) and (*c*) are as follows:

7. Payments on account of the purchase of Canadian Government Annuities may be made at any Post Office or Sub-Post Office in the Dominion of Canada where a Money Order Office is established, during the hours at which the office is required to be open for the transaction of Post Office business, and the Postmaster or Acting Postmaster of such office is hereby authorized and required to receive such payments, and to remit the same in manner instructed by the Superintendent of Annuities; or the purchaser may, if he prefers, send his payments direct to the Superintendent of Annuities by registered letter; or payments may be made in person at the Annuities Department, Ottawa. Where payment is made by cheque, bank draft, money order, or postal note, it should be drawn to the order of the Receiver General of Canada.

(*a*) Every Postmaster or Acting Postmaster of any Post Office or Sub-Post Office in the Dominion of Canada where Money Order business is transacted, other than those whose salaries are paid on a city office

basis, shall be allowed a commission of five per cent on all moneys remitted by him for the purchase of deferred annuities.

(b) A commission of one per cent shall be allowed to any Postmaster or Acting Postmaster as aforesaid on all moneys remitted by him for the purchase of Immediate Annuities.

(c) The said rates of commission shall be allowed the Postmaster or Acting Postmaster not only on all moneys remitted by him, but also on all moneys remitted to the Department direct by or on behalf of a purchaser where it can be shown to the satisfaction of the Department that the Postmaster or Acting Postmaster was instrumental in inducing the said purchaser to purchase.

There was put in evidence a sample of a circular letter forwarded to postmasters from time to time, by the Government Annuities Branch, and in that circular letter appears the following:

I am forwarding to you under separate cover all supplies necessary for the transaction of Government Annuities business.

I am also sending to you herewith a copy of instructions to Postmasters as to the proper method of handling payments received for the purchase of annuities.

The posters should be placed in a conspicuous position in your office where they may be seen by the public. The descriptive booklets are, of course, for distribution to persons who make inquiry, or to those persons who you feel might be interested in the purchase of Government Annuities.

Postmasters who are on a commission basis are allowed a commission of eleven-fortieths of one per cent on applications secured or payments received for the purchase of immediate annuities and one per cent on deferred annuities.

Many postmasters throughout Canada who devote a portion of their time towards the sale of Government Annuities receive a considerable proportion of their income from this source. I would, therefore, suggest that you familiarize yourself with the various plans of annuity available in order that you may be in a position to intelligently deal with persons making inquiry.

The Department of Labour is actively promoting the sale of these annuities and it would be to your personal advantage to do what you can to increase the number of applications being received from your vicinity.

Upon the evidence I feel compelled to reach the conclusion that when Wilson entered into the contract to purchase the annuity he was of unsound mind, and was incapable of knowing what he was doing, except perhaps the mechanical act of signing his name to some letters and other documents, referable to the contract. The evidence which I have narrated leads, I think, irresistibly to the conclusion that he was incapable of managing his affairs in the sense of disposing of such a large and liquid a portion of his property to the end in question. Considering his physical and mental condition, his age, and all the

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other circumstances of the case, I cannot but think that the purchase of the annuity in question was the act of a person of unsound mind. Long before the material date he became afflicted with the insane delusion mentioned, which had no existence, and he was apparently incapable of being reasoned out of that delusion, and at no time was it shown that he had any lucid interval; in fact everything indicates he was becoming progressively worse. At the time of his death his insanity is not susceptible of debate, and there is nothing to indicate that seven or eight months earlier his mental condition was less unfavourable. I might refer to a definition of a "delusion" to be found in Halsbury, Volume 21, 2nd Ed., paragraph 472. It is as follows:

A man who suffers from illusions or hallucinations is not necessarily insane; he may be able to recognize such illusions or hallucinations for what they really are; it is the inability to realize that they are illusions or hallucinations which is indicative of insanity. A man, who, having conceived something extravagant to exist which has no existence but in his own heated imagination, and who is incapable of being permanently reasoned out of that conception, is said to be under a "delusion"; and, if the delusion is one which, in the judgment of an ordinary person, no man in possession of his senses could have entertained, the man suffering from such delusion is to be held as being of unsound mind.

Coming now to a discussion of the law applicable to the case. I had the advantage of very careful and able arguments from counsel, and a great number of authorities were referred to. Most of the authorities relevant to the major point in this case were referred to and discussed at length in the Australian case of *McLaughlin v. Daily Telegraph Newspaper Co. Ltd.* (1), and they are also to be found in contributed articles published in the Canadian Fortnightly Journal, Vol. 5, at page 248, and Columbia Law Journal, Vol. 21, at page 424. The general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests is that in all cases there must be a free and full consent to bind the parties. It is stated in Halsbury, Vol. 21, 2nd Ed., p. 280, that:

Consent is an act of reason accomplished by deliberation, and it is upon the ground that there is a want of rational and deliberate consent that the conveyances and contracts of persons of unsound mind are gener-

(1) (1904) 1 C.L.R. 243; (1904)
 A.C. 776.

ally deemed to be invalid; or, in other words (subject to the exceptions mentioned below), there cannot be a contract by a person of unsound mind.

What has been said to be the modern rule, as to the capacity of persons of unsound mind to enter into contracts, was laid down in the case of *Molton v. Camroux* (1). In that case the administrators of one Lea, sued an assurance society for the recovery of sums paid by Lea in respect of two annuities which were determinable with his life, and it was proved that Lea was of unsound mind at the date of the purchase of the annuities. It was the plaintiff's contention that Lea being of unsound mind could not make a valid contract. It was held by Pollock C.B. that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in *statu quo*, such a contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him, and it was held that such was the contract there, for it was the purchase of an annuity which had ceased. From that it followed that unsoundness of mind would now be a good defence to an action on a contract, if it could be shown that the defendant was not of capacity to contract, and the plaintiff knew it. On appeal to the Exchequer Chamber the judgment below was affirmed (2). There was the suggestion in this case, in both courts, that distinction might be drawn between executory and executed contracts, but such a distinction does not seem to have been recognized or adopted in later cases; at any rate that is not of importance here because the contract in question was executed, and the annuity had ceased before action was brought.

The next case of importance to be decided, over forty years later, was *Imperial Loan Co. v. Stone* (3). This was an action on a promissory note signed by the defendant as surety; the contract was executory on his part, and he had received nothing and consequently there was nothing to be restored. The statement of defence alleged that the defendant was not capable of understanding the transac-

(1) (1848) 2 Exch. 487.

(2) (1849) 4 Exch. 17.

(3) (1892) 1 Q.B.D. 599.

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tion, and that the insanity of the defendant was known to the agent of the plaintiff who was present when the note was signed; on behalf of the plaintiff it was contended that when total incapacity is proved there is no contract on which to proceed, and that the contract of suretyship was one which should be based on the free and voluntary agency of the individual who enters into it. In the court below it appears judgment was entered for the defendant notwithstanding that the jury, though finding the defendant insane when he signed the note, were unable to agree upon the question as to the knowledge of the plaintiff's agent who was present when the note was signed, and the plaintiff applied for judgment or a new trial. The Court of Appeal ordered a new trial on the ground that it was necessary to show not only the incapacity of the defendant, but also the plaintiff's knowledge of that fact. In the Court of Appeal Lord Esher, M.R., stated (p. 601):

When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding upon him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

Fry., L.J., quoting with approval Pollock, C.B., in *Molton v. Camroux*, stated (p. 602):

that there had been grafted on the old rule the exception that the contracts of a person who is *non compos mentis* may be avoided when this condition can be shewn to have been known to the plaintiff, and he added that so far as he knew that was the only exception. The judgment of Lopes, L.J., may also be referred to. He said (p. 602):

A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed. Applying that in the present case, it is apparent that the verdict entered for the defendant cannot stand, but that there must be a new trial.

The Australian case of *McLaughlin v. Daily Newspaper Co. Ltd.* (1) presents some new features. In that particu-

lar case the plaintiff being insane, and incapable of managing his affairs, but having lucid intervals, executed a power of attorney giving his wife absolute power to dispose of his real and personal estate. Acting under the power of attorney, the wife sold and transferred certain shares held by the plaintiff in the defendant company, who had no notice of the insanity, to third persons who also had no notice. The plaintiff on recovering his sanity, brought a suit against the defendant to compel it to rectify its register by entering his name as holder of a number of shares equal to the number sold. The suit was dismissed by the Chief Judge in Equity in the court below, who was of the opinion, upon the evidence, that the plaintiff sufficiently understood the nature of the power of attorney when he signed it, and further, that whether he did or not, he was bound by the acts of his attorney. On appeal the High Court found, upon the evidence, that the plaintiff did not, when he executed the power of attorney, know that it was a power of attorney, and that this fact was known to the attorney when she procured its execution, and that the power of attorney was absolutely void, and that the plaintiff was entitled to the relief prayed. Further, it was held, that it was immaterial whether the defendants had or had not notice of the insanity. It seems to have been admitted that before the plaintiff's recovery the proceeds of the shares were applied for his benefit, partly in maintenance of himself and his family.

The High Court of Australia, after a careful review of the authorities, was of the opinion that the decision in *Molton v. Camroux (supra)* and *Imperial Loan Co. v. Stone (supra)*, were in principle the same, and that it was settled law that, on the ground of public policy, like in the case of obligations implied by law, a contract made by a person of unsound mind with another person who was not aware of his incapacity, was valid; that if the man dealing with the person of unsound mind is aware of his insanity, the contract is voidable at the option of the latter, and that the validity of a contract made with an apparently sane person is to be determined by the application of the same rules as are applied in ordinary cases. They expressed doubt as to whether the doctrine of *Molton v. Camroux (supra)* and *Imperial Loan Co. v. Stone (supra)*

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applied to the case of a deed or power of attorney, and they thought it unnecessary to decide that question, but they thought if an agent were directly appointed, and had no knowledge of the unsoundness of mind of his principal, the appointment was good as between the principal and agent, and possibly as between the principal and an innocent third party; a point which does not arise in this case. Many authorities seem to distinguish between a deed or power of attorney and a sale and purchase in the market overt. The basis of the decision in the Australian case was, that the plaintiff did not know what he was doing except that he knew he was signing his name, that is to say, the plaintiff did not intend to execute a power of attorney; that the wife knew of her husband's incapacity when the power of attorney was signed; that the plaintiff did not intend to appoint his wife as his agent, and that therefore the power of attorney was void and the deed of transfer a nullity. They said:

We are herefore compelled to the conclusion that whether a power of attorney given by a person of unsound mind is void or voidable is to be determined on the same principles as in the case of a power of attorney given by a sane person and that if it is shown that the insane person did not know what he was doing, that is, that he did not intend to execute a power of attorney, and the person who procured the execution was aware of the fact, it is absolutely voidable. In such a case any person setting up the authority must be bound by the ordinary rule that it is for the parties alleging agency to prove it; and in the case supposed he can no more prove it than if the power of attorney had been a forgery as in the case of *Oliver v. Bank of England* (1).

On motion for special leave to appeal to the Privy Council, their Lordships, in refusing leave, after hearing arguments on both sides, expressed the opinion that the judgment of the High Court was right, that is, the power of attorney being void everything else was. The decision in the Australian case does not seem to assist us here, and it would seem that so far as the case under discussion is concerned the authorities to which I have referred remain undisturbed.

The latest case to which I was referred was *York Glass Co. Ltd. v. Jubb* (2), in which an executory contract made by a lunatic was upheld. The Court of Appeal confirmed the judgment of Lawrence, J., and affirmed the doctrine

(1) (1902) 1 Ch. 610.

(2) (1924) 131 T.L.R. 559; (1926) 134 L.T.R. p. 36.

laid down in *Molton v. Camroux (supra)* and *Imperial Loan Co. v. Stone (supra)*. Pollock, M.R., stated therein, that the result of the authorities appeared to be that dealings by way of sale and purchase by a person apparently sane, but afterwards found to be insane, would not be set aside as against those who had dealt with him on the faith of his being a person of competent understanding. The contract in this case was entered into by correspondence.

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It follows, I think, from the authorities which I have discussed, and which seem to have been followed in this country, that I am bound to hold that the suppliant must fail in her petition unless it be shown that Schooley acted as the agent of the Minister in the sale of the annuity to Wilson, and that he was then aware of Wilson's mental state. Upon the evidence before me, something may be said in support of that contention. It cannot be contended that the Minister, the Superintendent, or any of the officers of the Government Annuities Branch, were aware of Wilson's state of mind when the contract was entered into, nor can unfairness of dealing be imputed to them. In transactions of such a nature as the one before me, it should be possible to provide some procedure whereby the mental condition of applicants might be disclosed to the Minister so that his mind would be brought to bear on the question of the expediency of selling an annuity. Any authorized body selling annuities cannot well be imposed upon unless there has been some misrepresentation or error as to the age of the applicant, and for that situation the contract provides for an adjustment, if and when the fact is discovered. I have given anxious consideration to this point and I have concluded that I cannot hold that Schooley was the agent of the Minister in the sale of the annuity in question, although I entertain no doubt that Schooley was aware of Wilson's condition, and it is quite possible that he advised Wilson against the purchase of the annuity. I do not think that Schooley can be considered an agent of the Minister in the sense contemplated by regulation no. 4. A careful analysis of regulation no. 7, I think, will show that certain postmasters are constituted depositaries of payments made by applicants on account of the purchase of annuities, which they are required to forward to the Government Annuities Branch at Ottawa, and in such

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cases postmasters are allowed a commission; Schooley was allowed and paid a commission of one per cent, under regulation 7 (b), for remitting to Ottawa the deposit of \$10,000 made by Wilson with Schooley, as postmaster at Merritton. Regulation 7 (c) provides for the payment of a commission to postmasters on all moneys remitted directly or indirectly to the Government Annuities Branch, by the purchaser of an annuity, provided it can be shown that the postmaster was instrumental in inducing the purchaser to buy the annuity. It does not appear that Schooley either claimed or was paid any commission on that ground. The acceptance of the deposit of \$10,000 by Schooley, as postmaster, would not of itself constitute agency; postmasters are required to accept such deposits for the convenience of applicants for annuities, Wilson in this case.

A careful reading of Schooley's letters to the Superintendent leaves me with the impression that they were written on behalf of, or at the request of Wilson, for the purpose of securing certain information for the latter; these letters do not possess the characteristics usually found in those of an agent to his principal. Wilson himself carried on the major part of the correspondence with the Superintendent of the Government Annuities Branch and the contract appears to have been consummated between them; the contract was forwarded direct to Wilson and he it was who acknowledged receipt of the same; and the Superintendent does not seem to have treated Schooley as its agent in the transaction. Schooley's few letters to the Superintendent would not indicate that he had solicited Wilson to purchase the annuity, and neither do the letters of Wilson. The circular letter which I have already referred to, and which was circulated among postmasters by the Superintendent, and certain of the evidence of the Superintendent himself, point rather strongly to agency, but, on a careful examination of the same, I think, it will be found that both must be construed in a qualified sense, in their application to the facts of this case, and that neither establish agency on the part of Schooley in the controversy here. I do not think, upon the facts before me, it can be said that Schooley acted as the agent of the Minister in the sale of the annuity in question to Wilson. I do not think therefore that I would be justified in holding that Schooley was the

agent of the Minister in this transaction, or that Schooley's knowledge of Wilson's mental condition can be held to be the knowledge of the Minister, and I reach that conclusion with some regret.

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The foundation for the suppliant's contention that the Minister had knowledge of Wilson's state of mind therefore fails, and the petition is accordingly dismissed. This is a case, I think, where I would be justified in declining to make any order as to costs.

Judgment accordingly.

BETWEEN:

SHERWIN WILLIAMS COMPANY } APPELLANT;
OF CANADA, LIMITED..... }

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Oct. 7.

AND

THE COMMISSIONER OF PATENTS. .RESPONDENT.

Trade-mark—"Semi-Lustre"—Descriptive word within the meaning of par. (c), ss. 1, s. 26 of the Unfair Competition Act.

Held: That the trade-mark *Semi-Lustre* is descriptive within the meaning of par. (c), ss. 1, s. 26, of the Unfair Competition Act.

APPEAL from the refusal of the Registrar of Trade-Marks to register the trade-mark "Semi-Lustre."

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

W. J. Green for appellant.

W. P. J. O'Meara K.C. for respondent.

The facts are stated in the reasons for judgment.

ANGERS J., now (October 7, 1937) delivered the following judgment:

This is an appeal by Sherwin Williams Company of Canada, Limited from the refusal of the registrar under paragraph (c) of subsection (1) of section 26 of the Unfair Competition Act, 1932, to register the word mark "Semi-Lustre."

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The application for the trade-mark states (*inter alia*):

The mark of which registration is desired, is a word mark consisting of the following letters in the following grouping

Semi-Lustre

We have used the said mark in Canada since January, 1928, on wares ordinarily and commercially described by us as Paints and Enamels.

Such use by us has been principally in United States and Canada.

In addition to wares of the kind described, we are commercially concerned with wares ordinarily and commercially described as Paints, Varnishes and Enamels.

The registrar refused to register the mark on the ground that it was descriptive under the provisions of paragraph (c) of subsection (1) of section 26 and consequently not registrable.

Subsection (1) of section 26 of the Act reads in part as follows:

Subject as otherwise provided in this Act, a word mark shall be registrable if it

(a)

(b)

(c) is not, to an English or French speaking person, clearly descriptive or misdescriptive of the character or quality of the wares in connection with which it is proposed to be used, or of the conditions of, or the persons employed in, their production, or of their place of origin;

The word mark in question is a mere combination of two English words: "semi" and "lustre."

The word lustre is defined as follows:

In the Oxford Dictionary

1. the quality or condition of shining by reflected light; sheen, refulgence; gloss.

2. luminosity, brilliancy, bright light; luminous splendour.

In the Imperial Dictionary

brightness; splendour; gloss.

The word "semi" is defined thus:

In the Oxford Dictionary

1. compounded with adjs. and pples., with the meaning "half, partly, partially, to some extent."

2. compounded with sbs.: a. with nouns of action or condition, as semi-allegiance=partial, imperfect or incomplete allegiance; b. with descriptive sbs., as semi-acquaintance=one with whom one is partially acquainted.

In the Imperial Dictionary

a prefix signifying half; half of; in part; partially.

The words compounded with the prefix "semi" are numerous, the prefix being used in the sense of half, partial or partially, imperfect or imperfectly, incomplete or incompletely, according as it is used in conjunction with an adjective or a substantive.

The word "semi-lustre" indicates a partial or incomplete lustre or, if we take the substantives by which "lustre" is defined in the dictionaries, a partial or incomplete brightness, or gloss, or splendour, or sheen.

It was submitted on behalf of the appellant that the registrar had allowed the registration of certain word marks ("Flo-Glaze," "Satinamel," "Satin-Glo," "Semiplast") and that the word "Semi-Lustre" is no more descriptive of the quality or character of paints, varnishes and enamels than the word-marks aforesaid. I do not know the conditions and circumstances in which these word-marks were allowed to be registered; there may have been particular reasons in support of their registration. Assuming, however, that there were not, the fact that the registrar might have granted word-marks which were descriptive of the character or quality of the wares in connection with which they were supposed to be used cannot affect the validity or lack of validity of the present application. Supposing that the registrar may have erred on previous occasions, he is surely at liberty to amend!

It was urged on behalf of appellant that the word-mark "Semi-Lustre" was registered by the appellant in the United States Patent Office on August 3, 1926; with all due deference I may say that I do not feel bound by the decisions of the Commissioner of Patents of the United States.

It was also urged that the appellant has used the mark "Semi-Lustre" on wares ordinarily and commonly described as paints and enamels continuously in Canada since January, 1928, and for many years previous to that in other countries and that the said mark has become associated in the mind of the public with the products of the appellant. This, in my opinion, is no ground for an appeal against the decision of the Commissioner. If, really, the

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mark "Semi-Lustre" has become associated with the products of the appellant, the appellant may possibly have a recourse under section 29 of the Act.

See Kerly on Trade-Marks, 6th ed., pp. 39 and 209; Sebastian, Law of Trade-Marks, pp. 66 and 76; *Channell Limited et al. v. Rombough et al* (1); *Sears and Nichols Company v. Brakely* (2); *Ex parte Newton* (3); *Ex parte The De Long Hook and Eye Company* (4); *J. W. Windsor Limited v. Maritime Fish Corporation Limited* (5); *Lamont, Corliss & Company v. The Star Confectionery Company* (6); *Kops Brothers v. Dominion Corset Company* (7); *Bowker Fertilizer Company v. Gunns Limited* (8).

After careful consideration I have reached the conclusion that the word "Semi-Lustre" is descriptive within the meaning of paragraph (c) of subsection (1) of section 26 and that the registrar was right in refusing to register it.

For these reasons, the appeal must be dismissed.

This is a case where I believe that there should be no order as to costs.

Judgment accordingly.

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- | | |
|---|---|
| (1) (1925) 1 D.L.R. 233. | (4) (1907) 128 Off. Gazette U.S. Patent Office, 1291. |
| (2) (1912) 180 Off. Gazette U.S. Patent Office, 882. | (5) (1926) Ex. C.R., 31. |
| (3) (1910) 160 Off. Gazette U.S. Patent Office, 1037. | (6) (1924) Ex. C.R. 147. |
| | (7) (1913) 15 Ex. C.R., 18. |
| | (8) (1916) 16 Ex. C.R., 520. |

BETWEEN:

HILLIARD C. McCONKEY.....APPELLANT;

AND

THE MINISTER OF NATIONAL }
REVENUE } RESPONDENT.

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Oct. 20.

Revenue—Income tax—Payment from reserve or depletion fund—Company not in liquidation can only make payment to shareholders by way of return of capital as a step in authorized reduction of capital.

Appellant was a shareholder in Hy-Grade Coal Company of Drumheller Limited from its incorporation in 1919 until its voluntary liquidation in 1933. The company was engaged in coal mining. In May, 1932, the company distributed the sum of \$12,000 to its shareholders of which amount the appellant received \$5,028. Appellant was assessed income tax on this amount, which assessment was affirmed by the Minister of National Revenue, and from that decision appellant appealed. Appellant contended that such distribution was made out of assets representing the capital of the company and in anticipation of winding up of the company in 1933, and that such distribution was not "income" and was not "annual net profit or gain" to the shareholders within the meaning of s. 3 of the Income War Tax Act.

The Court found that the payment of \$12,000 in 1932 was made out of the exhaustion or depletion fund and that this fund was accumulated, during a period of years, with the knowledge and approval of the Minister, and for the purpose of replacing the capital assets of the company, which consisted solely of a wasting property.

Held: That a corporation not in liquidation can make no payment to its shareholders by way of return of capital except as a step in an authorized reduction of capital and that any other payment made to its shareholders can only be made by way of dividing profits.

2. That until a reserve fund is effectively capitalized it retains the characteristics of distributable profits.
3. That the payment of \$12,000 by the company in 1932, while still a going concern, must be treated as a distribution of a dividend and not a return of capital, and appellant's share of such distribution was taxable as income.

APPEAL under the provisions of the Income War Tax Act from the decision of the Minister of National Revenue.

The appeal was heard before the Honourable Mr. Justice Angers, at Calgary.

H. S. Patterson, K.C. and *A. W. Hobbs* for appellant.

C. J. Ford, K.C. for respondent.

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

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ANGERS J., now (October 20, 1937) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue rendered on September 18, 1935, affirming an assessment made by the Commissioner of Income Tax on November 19, 1934. The appeal is brought under sections 58 and following of the Income War Tax Act.

The appellant was a shareholder of Hy-Grade Coal Company of Drumheller Limited, a company incorporated in 1919 under the laws of the Province of Alberta; he remained a shareholder until the voluntary liquidation of the company in 1933.

On January 4, 1919, the company purchased the unexpired portion or term of a coal lease granted by the Drumheller Land Company Limited to J. C. Coward and others dated September 12, 1918. This lease was for a period of twelve years from September 1, 1918, and was afterwards renewed. The lessor, Drumheller Land Company Limited, later assigned the lease to Drumheller Consolidated Collieries Limited. On November 1, 1928, an agreement was entered into between Drumheller Consolidated Collieries Limited and Hy-Grade Coal Company of Drumheller Limited.

Under the terms of this agreement Hy-Grade Coal Company of Drumheller Limited undertook to carry on mining operations on the lands described in the lease according to the most approved coal mine engineering practice so as to extract from the whole area the maximum quantity of coal possible.

The Hy-Grade Coal Company of Drumheller Limited further agreed that it would not abandon or leave unworked any portion of the area leased except with the consent of the lessor and that no block or section of said area would be abandoned or left unworked so long as the coal therein could be mined without actual loss to the lessee.

It was stipulated in the said agreement (*inter alia*) that the lessee would continuously carry on mining operations upon the said area as market conditions would warrant until all the merchantable coal had been removed and would, in each year, mine a minimum of 30,000 tons.

The lease contains other stipulations which have no relevance to the matter at issue in the present case.

Hy-Grade Coal Company of Drumheller Limited commenced mining operations in compliance with the terms of the lease aforesaid in 1919 and continued them until 1933, when the company was wound up.

The notice of appeal after alleging that appellant was a shareholder of Hy-Grade Coal Company of Drumheller Limited, that on January 4, 1919, the company acquired the unexpired portion of the coal lease granted by Drumheller Land Company Limited and that from the said date the company conducted mining operations on the property until June 1, 1933, the date of its winding up, says in substance as follows:

statements have been filed with the Income Tax Department showing that as at April 30, 1932, there was a deficit on revenue account of \$28,995.41 and, owing to losses of capital, a deficit on capital account of \$63,023.30;

in May, 1932, the company, having in bank a greater balance than would be required to finance the operations of the ensuing season, distributed the sum of \$12,000 among its shareholders and the appellant received the sum of \$5,028 as his share, which amount has been included in the assessment under appeal as income for 1932;

the statements submitted to the Department show that in May, 1932, the company had no undivided profits or surplus and that its capital was impaired by \$63,023.30 on capital account and by \$28,995.41 on revenue account including the net loss on operations for the year ended April 30, 1932, of \$4,714.14; the distribution in May, 1932, therefore cannot have been made out of the accumulated surplus at the 30th of April, 1932, as there was no surplus, nor out of the profits for the year ended on the 30th of April, 1932, as there were no profits; on the contrary the distribution of \$12,000 was made out of assets representing the remaining capital of the company;

such distribution was not "income" and was not "annual net profit or gain" to the shareholders within the meaning of section 3;

the distributions in May, 1931 and 1932, were made in anticipation of the winding up of the company, which it was expected would occur in or about the year 1933 (the

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operations of the company being continued because it was bound under contract with the lessor to extract all merchantable coal) and in June, 1933, the company went into voluntary liquidation; the statements already filed show that even after charging against capital account the distributions in May, 1931 and May, 1932, there was still a deficit in revenue account of \$21,445.38;

the appellant is informed that following a ruling of the Commissioner of Income Tax (memorandum 55 1932-33, October 20, 1932) the distribution of \$12,000 is deemed by the Department to be a dividend paid by the company while a going concern and therefore taxable in full in the hands of the shareholders as the company did not reduce its capital by an amendment to its memorandum of association; in regard to this the appellant says that the said memorandum was not in force at the time of the said distribution and that the Minister was not competent by any such memorandum to alter the intention of the Act and to make taxable moneys which by the terms of the Act are not included in the definition of income.

On September 18, 1935, the Minister, represented and acting by the Commissioner of Income Tax, rendered his decision affirming the assessment; the decision reads in part as follows:

The Honourable the Minister of National Revenue, having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating, hereby affirms the said assessment on the ground that the dividend was declared and paid in the year 1932 by Hy-Grade Coal Company of Drumheller Limited while a going concern; that the said dividend is taxable in the hands of the recipient shareholders within the meaning of the Act as provided by section 3 and other provisions of the Income War Tax Act in that respect made and provided. The only occasion on which a shareholder may receive back capital from a company is on the reduction of the company's capital by Supplementary Letters Patent or on the winding up of the company.

The notice of dissatisfaction, dated October 4, 1935, repeats the facts and reasons set out in the notice of appeal.

Income tax returns were filed in due course by Hy-Grade Coal Company of Drumheller Limited from the date of its organization to the date of its winding up, viz., from 1919 to 1933, and the Minister of National Revenue, pursuant to section 5, subsection (a) of the Income War Tax Act, made from year to year an allowance for the exhaustion of the mine.

The material provisions of section 5 and subsection (a) read as follows:

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“Income” as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:

(a) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in determining the income derived from mining and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair. And in the case of leases of mines, oil and gas well and timber limits, the lessor and the lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree, the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive;

A statement entitled “Summary of Income Tax Assessments” was filed as exhibit 5, which shows the respective amounts of the exhaustion or depletion allowance, of the taxable income, of the tax and of the interest for each year from 1919 to 1933 inclusive; it may be convenient to reproduce here this statement in extenso:

	Depletion allowance.	Taxable income.	Tax.	Interest.
1919..	\$ 6,857 14	\$ 3,517 25	.....	.....
1920..	20,571 43	23,685 24	\$ 2,276 95	\$ 41-60
1921..	6,449 05	43,715 83	4,380 15	257-21
1922..	7,261 80	58,615 18	5,944 59	82-70
1923..	10,585 70	59,649 98	6,053 24	.....
1924..	11,584 50	78,147 01	7,995 43	36-15
1925..	7,669 40	49,258 72	4,253 28	54-79
1926..	4,295 60	4,091 20	.....	.....
1927..	6,184 70	2,360 00	.....	.....
1928..	8,890 93	11,703 95	776 32	.....
1929..	6,578 82	38,816 32	2,945 30	28-57
1930..	10,860 70	5,685 74	368 57	11-31
	<hr/>	<hr/>	<hr/>	<hr/>
	\$107,789 77	\$354,309 52	\$ 34,993 83	\$512 33
1931..	6,119 69	24,743 08	.....	.....
1932..	7,130 76	6,154 20	.....	.....
1933..	7,866 55	7,874 43	984 30	.....
	<hr/>	<hr/>	<hr/>	<hr/>
	\$128,906 77	\$331,281 67	\$ 35,978 13	\$512-33

John Henry Williams, a chartered accountant, who acted as auditor for Hy-Grade Coal Company of Drumheller Limited for practically the whole period of its existence and prepared its income tax returns every year, referring to the statement or summary of income tax assessments filed as exhibit 5 says that he made it himself and that it

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is correct; it seems to me expedient to cite an extract of his testimony on the subject:

Q. And you have made, prepared, a summary from the returns filed by this company, from the years 1919 to 1932 inclusive?

A. From the returns as amended after agreement on the figures with the Department.

Q. That is, I should say from the assessment as finally agreed upon?

A. Yes.

Q. I am showing you a summary which purports to be a summary of income tax assessments for the Hi-Grade Coal Company of Drumheller?

A. Yes.

Q. That is a correct summary of the assessments from year to year?

A. Yes.

Q. And in the first column you have the depletion allowance?

A. Those figures represent the amounts which were allowed by the Department for depletion of the coal lease in arriving at the taxable income.

Q. And in the second column you have items under "Taxable income"; what are those figures?

A. The black figures represent the amount of income on which assessments were levied; the italicized figures represent the losses during those years, the amounts of which were agreed with the Department.

Q. So that all these figures were agreed between yourself and the Department?

A. Yes.

The statement or summary exhibit 5 shows that the total net profits, after deduction of the exhaustion or depletion allowance, up to April 30, 1930, amounted to \$354,309.52. Williams explains how these net profits were dealt with by the company; his explanations appear on pages 12 and 13 of his deposition. The witness summarized his version in this respect in a statement which was filed as exhibit 6. This statement discloses that, after payment of income taxes and interest thereon and dividends, for the years 1920 to 1929 inclusive, there was left on April 30, 1930, a sum of \$18,053.36.

A dividend of \$36,000 was paid in May, 1930, the excess over \$18,053.36 being drawn out of the depletion reserve. This distribution was taxed in full by the Department as income to the shareholders. In 1931 a further distribution of \$18,000 was made and the same was also taxed as income to the shareholders; the appellant paid the tax on his share and made an application for refund. Another distribution of \$12,000 was effected in 1932, being the one in question in the present suit. The appellant's share of this distribution amounted to \$5,028; it is the tax assessed thereon that is in issue herein.

All profits that were available in 1930 were included in the distribution of \$36,000 made in that year; in 1931 the company had a loss of \$24,748.08 and in 1932 another of \$6,154.20; it follows that there were no profits left in 1932 from which the sum of \$12,000 could have been paid. It seems obvious that this sum was drawn from the exhaustion or depletion reserve.

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Let us consider briefly the circumstances in which the distribution of the sum of \$12,000 took place.

On May 23, 1932, the directors of Hy-Grade Coal Company of Drumheller Limited passed a resolution reading as follows:

That the directors recommend to the shareholders that a disbursement of capital of \$4 per share be declared on all shares issued, payable June 1, 1932.

On the same day the shareholders passed a resolution in the following terms:

That (on) consideration of the directors' recommendation that a disbursement of capital be declared, do hereby adopt this resolution and declare a disbursement of \$4 per share on all shares issued for the fiscal year ending April 30, 1932, payable June 1, 1932.

Pursuant to these resolutions the sum of \$12,000 was distributed to the shareholders; the appellant's share, as previously stated, was \$5,028.

On May 22, 1933, the shareholders of Hy-Grade Coal Company of Drumheller Limited decided to wind up the company; the following resolution was adopted:

Whereas, all merchantable coal on the company's lease will have been extracted by the 31st day of May instant, and whereas the company will after that date have no further reason for continuing its existence, and whereas it is expedient that the company should be wound up voluntarily under the Companies Act, 1929, as from that date.

Be it resolved, that this company be wound up voluntarily under the Companies Act, this resolution to take effect on the first day of June, 1933, and be it further resolved that H. C. McConkey be and he is hereby appointed liquidator of the company at remuneration of three hundred dollars (\$300) per month for the first four months and two hundred dollars (\$200) per month for the next four months if the liquidation should continue for that length of time, such appointment to be effective as from the said 1st of June, 1933, and that he be bonded for the sum of five thousand dollars (\$5,000) in conjunction with the Drumheller Coal Agy. Ltd.

Provided that if this resolution is not strictly in accordance with the requirements of the Companies Act the winding up shall be deemed to have commenced on the 22nd day of May, 1933.

The company went into liquidation as at the 1st of June, 1933, in accordance with the above resolution and H. C. McConkey, the appellant, was appointed liquidator.

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Williams says that he acted for the liquidator in settling his returns and assessments with the Department. According to him there were no disputes regarding these returns and assessments with the Department and a clearance certificate was issued by the Commissioner of Income Tax on November 21, 1934.

Dealing with the effect of the payment to the shareholders of the sum or \$12,000 in 1932, of the sum of \$18,000 in 1931 and of an approximate sum of \$18,000 (exactly \$17,946.64) in 1930, Williams testified as follows:

Q. Now what was the effect, so far as the distribution to shareholders was concerned, of this payment of \$12,000 paid in 1932?

A. The effect was that when he became liquidator there was that much less available for distribution to the shareholders because they had already received that.

Q. Was that a distribution of dividends or capital?

A. A distribution of capital because there were no profits left to distribute.

Q. So that the amount the shareholders received was proportionately reduced on account of this?

A. Certainly.

Q. And also by the distribution of eighteen thousand?

A. Yes, in the previous year.

Q. And also approximately eighteen thousand in the previous year?

A. In the year 1930.

The witness then proceeded to say that the amounts paid by the liquidator to the shareholders totalled \$76,500. He filed as exhibit 8 a copy of a report made, in his capacity as auditor, to the shareholders of the company dated February 27, 1934, showing (*inter alia*) that the liquidator had, between June 1, 1933, and February 26, 1934, distributed to the shareholders a total amount of \$75,000. The report indicates that there was a balance at the bank and on hand of \$1,569.12; of this balance, \$1,500 was distributed to the shareholders after June 27, 1934, date of the report aforesaid. The liquidation being closed, the liquidator obtained his discharge and transferred to the Royal Trust Company, as trustee for the individual shareholders, the remaining assets, consisting of accounts receivable amounting to \$18,722.57 (to mention only those considered good) and of about \$200 in cash.

The several amounts distributed to the shareholders by the company and the liquidator and the accounts receivable and cash transferred to the Royal Trust Company form a total of approximately \$143,000. The exhaustion or

depletion allowance, as shown by the statement exhibit 5, amounts to \$128,906.77. The difference of \$14,093.23 was realized from the sale of machinery and chattels and constituted a distribution of capital.

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The respondent claims that the distributions of \$17,946.64 in 1930, \$18,000 in 1931 and \$12,000 in 1932 should be regarded as income. On this basis the capital recovery by the shareholders would only be \$95,422.57, as follows:

Amounts distributed by the liquidator..	\$76,500 00
Accounts receivable (\$18,722.57) and amount of money (about \$200) transferred to Royal Trust Company.. . .	18,922 57
	\$95,422 57

The total depletion allowance being \$128,906.77, there would be a shortage in capital recovery of approximately \$33,484.20.

Williams, on the other hand, who acted as auditor for the company and for the liquidator, claims that the three distributions aforesaid in 1930, 1931 and 1932 were made from capital. In this case the capital recovery would amount to \$143,369.21, as follows:

Amount distributed in 1930..	\$ 17,946 64
" " " 1931..	18,000 00
" " " 1932..	12,000 00
Amounts distributed by the liquidator (\$75,000 and \$1,500)..	76,500 00
Accounts receivable and money assigned to Royal Trust Company.	18,922 57
	\$143,369 21

If we deduct the amount assigned to the Royal Trust Company, namely, \$18,922.57, for accounts receivable and cash on hand, we are left with a balance of \$124,446.64. The capitalized value of the lease to the company was \$240,000; at least the promoters of the company received \$240,000 in stock for the lease.

It is submitted on behalf of the appellant that the shareholders did not obtain a return of capital commensurate with the amount allowed by the Minister for the exhaustion of the mine or with the capital value of the lease. It is further submitted on behalf of the appellant that the

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Minister should not in equity be permitted to violate the settlements made with the company under which the fund out of which the distribution was made was earmarked as a capital fund.

On the other hand, it is urged for the respondent that the payment of \$5,028 to the appellant, being his share of the \$12,000 paid by the company to its shareholders in 1932, constituted a dividend from stocks and came within the definition of income under section 3 of the Act; that moreover, as this amount was not paid to him in winding up proceedings or in the way of an authorized reduction of the capital of the company, it must be regarded as a payment to the appellant of his share of a dividend of \$12,000 declared and distributed to the shareholders.

The only question arising for determination is whether the sum of \$12,000 distributed in 1932 by Hy-Grade Coal Company of Drumheller Limited to its shareholders was income or capital.

“Income” is defined in section 3 of the Act, the relevant provisions whereof read thus:

For the purpose of this Act, “income” means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be, whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source. . . .

There follows an enumeration of various sources foreign to the question in controversy, which it is inexpedient to quote.

Then section 5 sets out the deductions and exemptions allowed; subsection (a), as previously noted, deals with the depreciation and exhaustion in the case of mines, oil and gas wells and timber limits.

Stress was laid by counsel for respondent on the fact that the definition of income contained in section 3 includes dividends from stocks, his conclusion being that if the receipt by the appellant of the sum of \$5,028 is a dividend, the question is settled adversely to him.

I must say that I am unable to follow this reasoning. Section 5 says that "income" as hereinbefore defined, i.e., as defined in section 3, is subject to the following exemptions and deductions, which are enumerated in several subsections, particularly subsection (a) dealing, as we have seen, with depreciation and exhaustion. It does not matter from what source the income is derived; if it comes within the scope of any of the subsections of section 5, it is subject to the exemptions and deductions therein stated.

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I may repeat that the only point for decision on the present appeal is whether the sum of \$12,000 distributed by Hy-Grade Coal Company of Drumheller Limited to its shareholders in 1932 was capital or income.

Counsel for the appellant submitted that the onus was on the respondent to establish that the distribution of \$12,000, of which the appellant received \$5,028, was taxable and, in support of his contention, cited the following decisions: *Secretary of State in Council of India v. Scoble et al.* (1) and *Spooner v. Minister of National Revenue* (2). The rule that it is the duty of the party who asserts and not of the party who denies to establish the proposition sought to be established is well settled: Taylor on Evidence, 12th ed., vol. 1, 252, para. 364; Best on Evidence, 12th ed., 248, para. 269.

Has the respondent succeeded in establishing that the sum of \$12,000 distributed by Hy-Grade Coal Company of Drumheller Limited to its shareholders in May, 1932, was income? That is the question which I have to determine.

In support of his contention that the sum of \$12,000 was income, counsel for respondent relied mainly on the following cases: *Hill v. Permanent Trustee Company of New South Wales Limited* (3) and *Northern Securities Co. v. The King* (4).

In the case of *Hill v. Permanent Trustee Company of New South Wales Limited* (*supra*) the facts were briefly as follows. The respondent company, as trustee of the will and codicils of one Richard Hill, deceased, held 40,800 shares in a company known as the Buttabone Pastoral

(1) (1903) A.C. 299 at 302.

(2) (1931) S.C.R. 399 at 407.

(3) (1929) 29 N.S.W. St. R. 53;
 (1930) A.C. 720.

(4) (1935) Ex. C.R. 156.

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Company Limited and, as trustee under a declaration of trust, it held 17,600 additional shares in the same company. In November, 1927, the respondent company received from the Buttabone Pastoral Company a sum of £19,380 in respect of the 40,800 shares and a sum of £8,360 in respect of the 17,600 shares. The respondent company issued an originating summons in the Supreme Court of New South Wales to determine whether the said sums should be treated as capital or income under the respective trusts.

Richard Hill died on August 19, 1895; at the time of his death he was the owner of a grazing property known as "Buttabone Station." A suit brought by certain beneficiaries under the will against the trustee of the testator's will and codicils was compromised with the approval of the court and in pursuance of an order of the court a company called Buttabone Pastoral Company Limited was formed, which purchased from the trustee "Buttabone Station" and another property. As consideration for this purchase the company issued fully paid shares of £1 each, 85,000 shares being received by the trustee of the will as representing the capital of the testator's estate employed in the said business and 91,000 shares being issued to the individuals whose income arising from the estate had been used for capital purposes.

In 1914, the declaration of trust aforesaid was executed in the exercise of powers contained in the will for the purpose of settling upon certain trusts one of the shares of the estate, and some of the 85,000 shares of the company were appropriated to these trusts. Some of the settled shares held under the will having been distributed upon the deaths of tenants for life leaving issue, the result was that, at the time of the institution of the action, the trustee company held the said 40,800 shares and the said 17,600 shares in the capacities aforesaid.

Buttabone Pastoral Company Limited carried on business from the date of its incorporation; its business included wool-growing, sheep and cattle breeding and the buying and selling of live stock.

In 1924, the board of directors of the company determined to dispose of the lands and stock to the best advantage of the shareholders. Between December 9, 1924, and April 22, 1925, the whole of the lands, live stock and other

assets were sold. As to some of the land the terms of the sale allowed six years for the payment of the total purchase price. The proceeds of the sale of the capital assets, except so far as some part had been distributed, were invested and the income from these investments and the interest paid by the purchasers of the land sold on terms, were distributed periodically in the form of dividend among the shareholders.

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No resolution was ever passed for the winding up of the company, but on April 12, 1926, a resolution for voluntary liquidation proposed by a shareholder was defeated.

On April 28, 1926, the board of directors declared and subsequently paid to the shareholders an interim dividend at the rate of 11s. 8 $\frac{3}{4}$ d. per share, such dividend being moneys arising wholly out of profits derived from the sale of the company's lands and improvements thereon and the shareholders were advised by letter that the directors had "decided to pay this dividend for the purpose of making a distribution of capital assets in advance of the winding up of the company, as the company had ceased to carry on its business."

No question arose for decision on the appeal with regard to this dividend of 11s. 8 $\frac{3}{4}$ d. per share.

On November 11, 1927, the Board declared and subsequently paid to the shareholders a dividend at the rate of 9s. 6d. per share. The shareholders were advised, by means of a circular letter, that this dividend "is being paid out of the profits arising from the sale of breeding stock, being assets of the company not required for purposes of resale at a profit, and that it is free of income tax."

Under its articles of association the Buttabone Pastoral Company Limited had power by resolution to increase its capital.

Regarding dividends, the articles of association contained, among others, the following provisions:—

Art. 122. No dividend shall be payable except out of the profits arising from the business of the company, and no dividend shall carry interest.

Art. 124. The directors may from time to time pay to the members (on account of the next forthcoming dividends) such interim dividends as in their judgment the position of the company justifies. Subject as aforesaid the dividends shall be declared by the company at its ordinary general meetings.

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By special resolution passed in 1926, article 122 was altered by striking out the words "arising from the business"; article 124 was cancelled and the following substituted therefor:

Art. 124. The directors may from time to time pay to the members such interim dividend as in their judgment the position of the company justifies.

It was in connection with the dividend of 9s. 6d. that the originating summons was issued by the trustee.

The Supreme Court of New South Wales held that the distribution in question should be treated as capital (1).

The trial Judge, after discussing the decisions in *Knowles v. Ballarat Trustees, Executors and Agency Company Ltd.* (2), *Fisher v. Fisher* (3), *Drew v. Vickery* (4) and *In re Bates* (5), concluded as follows (p. 63):

In the present state of the authorities, therefore, it seems to me that the question for my determination resolves itself into a question of fact, as to what was the intention of the company in making the distribution in question, and that the principles upon which the question must be determined are (1) that conversion of profits into share capital is not necessary to convert them into capital for the purpose of a case between life tenant and remainderman; (2) that, although due weight will be attached to expressions of intention on the part of the company, the determining factor is the substance of the transaction; and (3) that if the distribution is in substance a distribution of the assets in anticipation of the liquidation of the company, and is in effect expressed so to be, the assets so distributed will, in a case between life tenant and remainderman, be received as capital and not as income of the investment.

In the present case, taking all the admissible evidence into consideration, the conclusion is, I think, irresistible that the substance of the transaction was, to use the language of Harvey J. in *Drew v. Vickery* (19 S.R. 245, at 251), "a distribution of the assets in anticipation of the liquidation of the company"; . . .

An appeal was taken from the judgment of the Supreme Court of New South Wales to the Judicial Committee of the Privy Council. The decision of the Judicial Committee is reported, as previously mentioned, in (1930) A.C., 720.

The Judicial Committee expressed the opinion that "the two sums mentioned in the originating summons should be treated as income."

(1) (1929) 29 N.S.W., St. R. 53.

(3) (1916-17) 23 C.L.R., 337.

(2) (1916-17) 22 C.L.R., 212.

(4) (1919) 19 N.S.W., St. R. 245

(5) (1928) Ch. 682.

Lord Russell of Killowen, who delivered the judgment of the Judicial Committee, after stating the facts and referring to the terms of the will says (p. 730):

The learned judge in the present case decided that the two sums in question should be treated as corpus and not as income. The grounds of his decision appear to have been that the answer to the question depended upon what was the intention of the company in making the distribution, and that upon the whole of the evidence he came to the conclusion that the distribution was in fact, and was intended by the company to be, a distribution of capital assets in anticipation of liquidation. He further held that in order to convert profits into corpus as between tenant for life and remainderman, no conversion by the company of the profits into share capital was necessary, but that profits distributed might be corpus as between tenant for life and remainderman, even though no part of the fund was retained by the company in a capitalized form. As regards this part of his decision he realized that such a view was in conflict with the judgment of Eve J. in *In re Bates* (1928 Ch. 682), but he felt himself bound to consider the law as settled otherwise by reason of two decisions of the High Court of Australia—namely, *Knowles v. Ballarat Trustees, Executors and Agency Co.* (22 C.L.R. 212) and *Fisher v. Fisher* (23 C.L.R. 337).

Lord Russell of Killowen then states that, before considering these authorities and deciding which of them is based on a correct interpretation of the law, it would seem advisable to draw attention to certain salient points relevant to the issue. Among these points, there are two which appear to me particularly relevant to the present case and I deem it apposite to quote the observations of the learned Lord thereon (p. 731):

(2) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called "dividend" or "bonus," or any other name, it still must remain a payment on division of profits.

(3) Moneys so paid to a shareholder will (if he be a trustee) *prima facie* belong to the person beneficially entitled to the income of the trust estate. If such moneys or any part thereof are to be treated as part of the corpus of the trust estate there must be some provision in the trust deed which brings about that result. No statement by the company or its officers that moneys which are being paid away to shareholders out of profits are capital, or are to be treated as capital, can have any effect upon the rights of the beneficiaries under a trust instrument which comprises shares in the company.

The judgment then deals with the case of a company having power to increase its capital and possessing a fund of undivided profits, the whole of which is applied in paying up new shares which are allotted proportionately to the shareholders who would have been entitled to receive these

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profits had they been divided and paid as dividend. I do not think that the point in question has any materiality in the present case.

After reviewing the decisions which had formed the basis of the judgment of the Supreme Court of New South Wales, namely, *Knowles v. Ballarat Trustees, Executors and Agency Co.* (*ubi supra*) and *Fisher v. Fisher* (*ubi supra*), Lord Russell of Killowen concludes as follows (p. 735):

These were the two authorities which in the present case Long Innes J. felt constrained to follow, in preference to adopting the reasoning of Eve J. in the later case of *In re Bates* (1928 Ch. 682).

There the directors of a limited company had made payments to shareholders out of distributable profit, but had stated: "It must be clearly understood that this is neither a dividend nor a bonus, but is a capital distribution." Eve J. held that the payments were income receivable by a tenant for life. This appears to their Lordships to be an authority directly applicable to the present case, and their Lordships find themselves in complete agreement with the learned judge, both as regards his decision and the reasoning upon which it is based. Their Lordships desire to adopt the language used by Eve J., and to say in regard to the fund out of which the sums of £19,380 and £8,360 were paid by the Buttabone Company to the trustee company: "Unless and until the fund was in fact capitalized it retained its characteristics of a distributable property no change in the character of the fund was brought about by the company's expressed intention to distribute it as capital. It remained an uncapitalized surplus available for distribution, either as dividend or bonus on the shares, or as a special division of an ascertained profit and in the hands of those who received it it retained the same characteristics."

For these reasons their Lordships are of opinion that the two sums here in question should be treated as income and not as corpus. They are "net income or profits derived from such investment or investments"; they are not "capital of my said trust estate."

It was urged on behalf of the appellant that the case of *Hill v. Permanent Trustee Co. of New South Wales* differs from the present one in that:

(a) it was a contest between life tenant and remainderman;

(b) the distribution was admittedly made from profits;

(c) in the case at bar there is an agreement between the parties that the fund from which the sum of \$12,000 was distributed in 1932 was to be considered as capital;

(d) in the case at bar the company went into liquidation and the capital distribution to the shareholders was reduced *pro tanto* by the distribution of the sum of \$12,000.

Counsel for the appellant submitted that, in the present case, once the depletion or exhaustion allowance is identi-

fied as a capital fund the converse of Lord Russell of Killowen's statement is equally the law as the company is prohibited by article 122 of its articles of association from paying any dividend except out of the profits arising from the business of the company.

Article 122 reads as follows:

Interest may be paid out of the capital where by virtue of the statutes it is lawful so to do, but no dividend shall be payable except out of the profits arising from the business of the company.

The decision in the *Hill* case was discussed by the President of this Court in *Northern Securities Company v. The King* (1). In this case, the suppliant, a company incorporated under the laws of the State of New Jersey, a non-resident of Canada, sought to recover from the Crown a tax of 5% levied on the amount of a dividend received from Crow's Nest Pass Coal Company Limited, a company incorporated under the Companies Act (Canada) for the chief object of mining.

The assessment had been made under subsection 2 (a) of section 9 B of the Income War Tax Act; subsection 2 (a) reads thus:

2. In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons who are non-residents of Canada in respect of

(a) All dividends received from Canadian debtors irrespective of the currency in which the payment is made,

I may note that the Crow's Nest Pass Coal Company Limited was a mining company subject to section 98 (2) of the Companies Act (Canada) and as such entitled to pay dividends out of funds derived from its operations, notwithstanding that the value of the net assets of the company might thereby be reduced to less than the par value of the issued capital stock.

After reviewing the decisions in *Hill v. Permanent Trustee Company of New South Wales Limited (ubi supra)*, *Bouch v. Sproule* (2), *Knowles v. Ballarat Trustees, Executors and Agency Co. (ubi supra)*, *In re Bates (ubi supra)* and *Lee v. Neuchatel Asphalte Co.* (3), the President came to the conclusion that the suppliant must fail. He said that, even if the dividends paid out were derived from capital, they could lawfully be paid therefrom by virtue of section 98 of the Companies Act; and he added (p. 165):

(1) (1935) Ex. C.R. 156.

(2) (1887) 12 A.C. 385.

(3) (1889) 41 Ch. D. 1.

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But while this provision of the Companies Act permitted the company to pay a "dividend," even if it impaired capital, that does not make the payment of the "dividend" a distribution of capital, which might have been done by reducing the capital of the company, if the company had acquired the power to do so; it permits that which was done here, the payment of "dividends" to shareholders, from funds derived from the mining operations of the company, which, I think, must be held to constitute income in the hands of the shareholders, because it is a dividend upon shares of the capital stock of the company. The exception, as to the payment of dividends, in favour of mining companies where capital is impaired, does not give a new characteristic to the dividend paid; it is like any other dividend and is not a return of capital.

The learned judge however said that he did not think it necessary to rely upon decided authority to determine the point at issue before him; he thought it was sufficient to look at section 9 B alone. Answering the question as to what the legislature intended by enacting this section, the learned judge said (p. 165):

Plainly, I think, it was to impose a tax upon two classes of dividends, and also upon interest payments,—excepting those made in respect of bonds of the Dominion of Canada—paid by Canadian debtors, regardless of the source from which they came. It is a tax quite distinct from the income taxes contemplated by sec. 9 of the Act, and the other provisions of the Act have no application to sec. 9 B. It is a tax upon certain dividend and interest payments payable by the recipient thereof. A reference to the first clause of 9 B will show that the tax is payable only on dividends received by residents of Canada when the same is payable in a currency which is at a premium in terms of Canadian funds. The purpose of this clause is quite obvious. Then dividends paid to non-residents of Canada are taxable, with the object, I assume, of placing all shareholders in Canadian companies on a parity, in respect of dividends paid by such companies. Then under subsec. 5 of sec. 9 B, the tax is imposed on many of the persons, companies, associations, etc., that are exempt from income tax under sec. 4 of the Act. But for the sake of convenience it seems to me sec. 9 B might have been enacted as an independent statute, because it only purports to tax specific receipts of moneys, when paid as dividends or interest, by Canadian debtors, and in respect of which no deductions are allowable. I do not think one is required to go behind the payments and inquire into anything antecedent. Therefore it would seem to me to be unnecessary to look beyond the four corners of sec. 9 B to determine the question at issue here.

It was submitted on behalf of the appellant that the case of *Northern Securities Company v. The King* differed from the present one in the following respects:

the decision in that case related to the meaning of section 9 B and the Court held that the question of whether the fund was capital or income was immaterial;

the Court was not satisfied that the distribution had the effect of depleting the capital, whilst in the present

case it is clear that the distribution had this effect, there being no other funds from which it could have been made;

the Crow's Nest Pass Coal Company was a mining company subject to section 98 (2) of the Companies Act (Canada) which, because of the fluctuating value of mining assets, relaxes the distinction between capital and income;

the Hy-Grade Coal Company was prevented by its articles from paying a dividend out of capital;

the Crow's Nest Pass Coal Company did not go into liquidation, which might have revealed the true character of the fund; in the present case liquidation followed and the capital which the shareholders would otherwise have received was reduced by the amount of the distribution in question.

Counsel for the respondent also relied on the case of *Lee v. Neuchatel Asphalte Company* (1). The head-note, which contains a concise and fair summary of the facts and of the decision, may conveniently be cited:

Where the shares of a limited company have, under a duly registered contract, been allotted as fully paid-up shares in consideration of assets handed over to the company, it is under no obligation to keep the value of its assets up to the nominal amount of its capital, and the payment of a dividend is not to be considered a return of capital, merely on the ground that no provision has been made for keeping the assets up to nominal amount of capital.

There is nothing in the Companies Acts to prohibit a company formed to work a wasting property, as, e.g., a mine or a patent, from distributing, as dividend, the excess of the proceeds of working above the expenses of working, nor to impose on the company any obligation to set apart a sinking fund to meet the depreciation in the value of the wasting property. If the expenses of working exceed the receipts, the accounts must not be made out so as to shew an apparent profit, and so enable the company to pay a dividend out of capital, but the division of the profits without providing a sinking fund is not such a payment of dividends out of capital as is forbidden by law.

At page 24 Lord Lindley says:

Now we come to consider how the *Companies Act* is to be applied to the case of a wasting property. If a company is formed to acquire and work a property of a wasting nature, for example, a mine, a quarry, or a patent, the capital expended in acquiring the property may be regarded as sunk and gone, and if the company retains assets sufficient to pay its debts, it appears to me that there is nothing whatever in the Act to prevent any excess of money obtained by working the property over the cost of working it, from being divided amongst the shareholders, and this in my opinion is true, although some portion of the property itself is sold, and in some sense the capital is thereby diminished.

(1) (1889) 41 Ch. D. 1.

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It seems to me expedient to quote an extract from the remarks of Eve J. in *In re Bates* (1):

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That no doubt was done with the intent, which was indeed expressed, to protect the recipients from liability to taxation, but the mere impressing of these distributions with the appellation of "capital distributions" cannot in my opinion determine their true character. One must inquire a little closer for the purpose of ascertaining whether they were in fact distributions of capital or distributions of something which, although in one sense capital, in that it originated by the realization of assets and not from the ordinary income of the company's business, could not properly be regarded as capital for all purposes. The suspense account represented realized profit on the company's capital assets, and inasmuch as the equilibrium between capital and liabilities on the one side and assets on the other was maintained without any necessity to resort to this fund, it represented what I think is spoken of in one of the cases as "the total appreciation of the capital assets"; In this state of affairs it was a fund which the company could treat as available for dividend and could distribute as profits, or having regard to its power to increase capital could apply to that purpose by, for example, increasing the capital, declaring a bonus and at the same time allotting to each shareholder shares in the capital of the company paid up to an amount equivalent to his proportion of the bonus so declared. Unless and until the fund was in fact capitalized it retained its characteristics of a distributable profit, and on the authority of the passages which have been read from Lord Herschell's speech in *Bouch v. Sproule* (12 App. Cas. 385, 399), the only method by which a company with power to increase its capital can capitalize such a fund is to increase its capital by an amount equivalent to the sum sought to be capitalized.

McNeil v. Federal Commissioner of Taxation (2) may also be consulted with interest.

See *Palmer's Company Law*, 15th ed., 223:

The rule prohibiting payment of dividend out of capital as formerly understood was very much modified by some far-reaching decisions of the Court of Appeal, of which the following are the most important: *Lee v. Neuchatel Asphalte Co.*, 41 Ch. D. 1; *Verner v. General Commercial Trust* (1894) 2 Ch. 239; and *Wilmer v. Macnamara* (1895) 2 Ch. 245; below referred to as the *Lee v. Neuchatel* series of decisions. These decisions were very strongly criticized by the author at the time; but they have remained unaltered for many years and have been followed and applied in *Ammonia Soda Co. v. Chamberlain* (1918) 1 Ch. 266 (C.A.), and *Lawrence v. West Somerset Rail. Co.*, (1918) 2 Ch. 250, and the principles based upon them and now generally accepted may be stated as follows:—

1.
2.
3. To divide the net income arising from a company's property is not to be regarded as in any sense a return of capital, even when the income arises from a wasting property acquired by an expenditure of capital, for instance, from a lease of ten acres of coal, one acre of which is worked out each year.

(1) (1928) Ch. D. 682 at 687.

(2) *Australasian Income Tax Decisions* (Ratcliffe and McGrath) 35.

4. Therefore, though an express power in the memorandum to return capital to shareholders can only be exercised with the sanction of the Court, a power in the articles to apply the proceeds arising from a wasting property in paying dividends, is free from objection, although the result is much the same. *Lee v. Neuchatel, &c. Co.*, 41 Ch. D. 1.

See also *Wegenast, The Law of Canadian Companies*, 615.

The facts are simple and are not disputed. There is no doubt, in my mind, that the payment to the shareholders of the sum of \$12,000 in 1932 was made out of the exhaustion or depletion fund and that this fund was accumulated, during a period of years, with the knowledge and approval of the Minister. This exhaustion or depletion reserve was built up for the purpose of replacing the capital assets of the company, which consisted solely of a wasting property.

The cases cited are not identical with the present one although to a certain extent analogous; they may, in some measure, be distinguished; I do not deem it expedient, however, to dwell on this particular phase. It will suffice to note that they lay down categorically the following principles by which I feel I must be governed:

that until a reserve fund is effectively capitalized it retains the characteristics of distributable profits;

that a corporation not in liquidation can make no payment to its shareholders by way of return of capital except as a step in an authorized reduction of capital and that any other payment made to its shareholders can only be made by way of dividing profits.

A careful perusal of the evidence, oral and literal, as well as of the precedents has led me to conclude, not entirely without hesitation I must admit, that the sum of \$12,000 distributed to the shareholders in 1932 and of which the appellant received \$5,028 as his share must be treated as income and not as capital. If this sum had been held by the company until the winding up and had been distributed to the shareholders by the liquidator, it would very likely, and should in my opinion, have been considered as capital. This sum having been paid by the company while still a going concern the payment cannot, in the face of the decisions aforesaid, be considered as a return of capital but must be treated as the distribution of a dividend. The share received by the appellant was accordingly taxable as income.

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Reliance was placed by the appellant on section 18 of the Act; I do not think that this section has any application in the present case.

For these reasons I believe that the assessment must be affirmed and the appeal dismissed.

Angers J.

The respondent will have his costs against the appellant.

Judgment accordingly.

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Oct. 13 & 14.

THE KITCHEN OVERALL & SHIRT }
CO. LTD.

PLAINTIFF;

AND

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Oct. 28.

THE ELMIRA SHIRT & OVERALL }
CO., LTD.

DEFENDANT.

Trade-mark—Passing off—Unfair Competition Act, 22-23 Geo. V, c. 33, s. 11 and s. 4, ss. 4—Trap orders—Insufficient notice given of instances relied upon—Isolated instances—Onus on plaintiff not discharged—Conduct of defendant calculated to deceive—Unfair dealing on part of defendant—Injunction granted.

The plaintiff, a manufacturer of goods consisting chiefly of men's overalls, shirts and pants, brought this action against defendant to restrain it from using the words "Bruce Kitchen" in association with its goods, on the ground that the same is calculated or likely to cause confusion between the goods of the plaintiff and those of the defendant. The statement of claim contained a general allegation that the defendant had sold and passed off its goods as those of the plaintiff.

Plaintiff's business had been originally founded by two brothers of the name of Kitchen and its goods have been sold for many years under the trade name of "Kitchen," "Kitchen's" or "Kitchens" by means either of a small label sewn on the garments, or by a card affixed in some way to the garments, or by both means. The plaintiff also advertised its goods extensively, displaying the word "Kitchen" or "Kitchen's" quite conspicuously in all advertising matter. Plaintiff's business was a large one and its customers, who were retailers, in ordering specific garments, would very frequently describe them by the prefix "Kitchen."

Bruce Kitchen, a brother of the original founders of plaintiff's business, is manager of defendant company, having been appointed in May, 1934; he is also a shareholder, a director and treasurer of defendant company. From 1909 to 1934 he had been employed by plaintiff company or its predecessors, and had become personally acquainted with dealers in the plaintiff's goods throughout a large part of Canada. In December, 1935, defendant obtained registration of the words "Bruce Kitchen" as a trade-mark, for use in connection with the manufacture and sale of overalls, pants, coats, windbreakers and other garments, and on all garments sold by defendant to retailers

the words "Bruce Kitchen" appear more conspicuously than any other words on the labels attached to such garments; examples of the wording are "The Bruce Kitchen" (Guaranteed Shirt) of Elmira, "The Bruce Kitchen (Guaranteed Product) of Elmira," or "A Bruce Kitchen Guaranteed Product."

Plaintiff adduced evidence of certain instances of passing off of defendant's goods as those of the plaintiff in response to oral trap orders given by a person on behalf of plaintiff. The reception of this evidence was objected to by defendant on the ground that particulars of such evidence should have been given to the defendant immediately after the occurrence of those incidents.

Defendant objected that since plaintiff's trade-mark was unregistered, no action for infringement would lie by virtue of s. 4, ss. 4, of the Unfair Competition Act.

Held: That the plaintiff's action is founded on s. 11 of the Unfair Competition Act, 22-23 Geo. V, c. 38, and therefore properly instituted irrespective of whether or not plaintiff's trade-mark were registered.

2. That in an action for passing off the offence must be proved in the fullest possible way and notice as soon as practicable of the incidents relied upon should be given to the defendant.
3. That the defendant's conduct is not one of fair dealing, and its course of conduct is such as is likely to lead to confusion and the plaintiff is therefore entitled to the relief claimed.

ACTION by the plaintiff asking for an injunction restraining defendant from using the words "Bruce Kitchen" in association with its goods.

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

E. G. Gowling and *D. K. MacTavish* for plaintiff.

O. M. Biggar, K.C. and *C. Robinson* for defendant.

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

THE PRESIDENT, now (October 28, 1937) delivered the following judgment:—

In this action the plaintiff, having its principal office at Brantford, Ontario, seeks to restrain the defendant from using the words "Bruce Kitchen" in association with its goods, on the ground that the same is calculated or likely to cause confusion between the goods of the plaintiff and those of the defendant, the former of which, it is alleged, have been distinguished for a long number of years by the use of the unregistered trade mark or trade name of "Kitchen"; and it is alleged that the plaintiff's goods, of the same general character as those produced by the de-

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defendant, chiefly men's overalls, shirts and pants, bearing the said name "Kitchen," have become known to the trade and public in Canada as the goods of the plaintiff company. The facts of the case are unusual, and the point to be determined is of importance and not free from difficulty.

It will be convenient first to dispose of a preliminary point raised by Mr. Biggar. The statement of claim refers frequently to the word "Kitchen" as a "trade mark" and Mr. Biggar very properly contended that if the word were a trade mark, and unregistered, no action for infringement would lie by virtue of s. 4, ss. 4, of the Unfair Competition Act which provides that no person shall institute any proceedings to prevent the infringement of any trade mark unless the trade mark is registered. It is evident that the action here is not one for "infringement," that word not being once used in the statement of claim, nor is it alleged that the word "Kitchen" is registered as a trade mark. On the other hand, one paragraph of the statement of claim alleges that the defendant wrongfully sold and passed off, and continues to do so, the plaintiff's goods as its own. I do not think therefore that the defendant could have been led to believe that the action was one for the infringement of a trade mark. Whether the mark "Kitchen" falls within the definition of "trade mark," as found in s. 2 (m) of the Act, is perhaps questionable, but I can hardly say that the plaintiff was not entitled in its pleadings, or at the trial, to refer to the mark in question as a "trade mark," even though it be not strictly accurate. The action is what has been long known as one for "passing off," that is to say, it is based on the allegation that the defendant has represented, or has done some act calculated to lead the ordinary purchaser to believe that its, the defendant's goods, are the goods of the plaintiff. That may be proved by establishing that the defendant has adopted methods of business which are calculated to lead purchasers intending to buy the goods of the plaintiff to buy in mistake the goods of the defendant. In a trade mark action the plaintiff must prove his title to the mark he claims, and proof of registration is, at least *prima facie* proof of title. If the mark has been actually or substantially copied that constitutes infringement although it is not shown that the copy is calculated to deceive. In a passing-off action the plaintiff's case

is very similar to this, but registration forms no part of it, and it must be established that the conduct of the defendant is calculated to pass off the defendant's goods as his. That is the nature of the plaintiff's action here, whatever it be called, and I do not think it important how the plaintiff describes the name or mark which it alleges the defendant substantially copies in such a way as to deceive or cause confusion, between their respective wares, in Canada.

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In this case, however, we are governed by the Unfair Competition Act, enacted in 1932, which by s. 11 gives a statutory right of action for the same wrongs for which a remedy was given at common law in passing off cases. The plaintiff's action is founded upon that statutory provision, which is as follows:—

No person shall, in the course of his business, (a) make any false statement tending to discredit the wares of a competitor; (b) direct public attention to his wares in such a way that, at the time he commenced so to direct attention to them, it might be reasonably apprehended that his course of conduct was likely to create confusion in Canada between his wares and those of a competitor; (c) adopt any other business practice contrary to honest industrial and commercial usage.

This provision of the Unfair Competition Act was no doubt intended to give legal effect, in Canada, to Article 10 *bis* of the International Convention for the Protection of Industrial Property, made at The Hague on November 6, 1925, to which Canada was a signatory, and adhered to by His Majesty on behalf of the Dominion of Canada. That Article is as follows:—

The contracting countries are bound to assure to persons entitled to the benefits of the Union an effective protection against unfair competition. Every act of competition contrary to honest practice in industrial or commercial matters constitutes an act of unfair competition. The following acts among others shall be prohibited: (1) All manner of acts, of such a nature as to create confusion by any means whatsoever with the goods of a competitor; (2) False allegations in the course of trade, of such a nature as to discredit the goods of a competitor.

Article 10 *ter* of the Convention provided:—

The contracting countries undertake to assure to persons within the jurisdiction of other countries of the Union appropriate legal remedies to repress effectively all acts referred to in Article 9, 10 and 10 *bis*.

Within the terms of Article 10 *bis* of the Convention, and s. 11 of the Unfair Competition Act, would fall those acts or offences for which there was a remedy at common law in actions for passing off, a branch of the law which primarily concerns commerce and which was built up chiefly for the protection of traders and for the prevention of com-

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mercial dishonesty. If therefore the acts or conduct of the defendant here complained of fall within the ambit of s. 11 of the Unfair Competition Act, the plaintiff then as of right would be entitled to restrain the defendant against the continuance of such acts or conduct, as it would at common law prior to the enactment of s. 11 of the Unfair Competition Act; and that statutory provision seems to express substantially the common law in such cases while at the same time implementing Canada's obligations, in part at least, under the Convention. The decisions of courts in passing off cases may therefore be of assistance in this case. No question was raised as to the jurisdiction of this court to entertain actions of the nature contemplated by s. 11 of the Unfair Competition Act.

For a considerable number of years, since 1918 at least, the goods of the plaintiff, and its predecessors, have been sold under the trade name of "Kitchen," or "Kitchen's" or "Kitchens," by means either of a small cloth label sewn on the garments, or by a card affixed in some way to the garments, or by both means; in the former case the trade name would usually be accompanied by a registered trade mark such as "Railroad Signal," or "Jiffy," or some other registered mark, to distinguish particular garments, for example, "Kitchen's Railroad Signal," on shirts, and similarly by unregistered marks. The cards, while prominently displaying the trade name, would carry other printed matter, for example, "Kitchen's Coat Style Shirt," or "Kitchen's Green Label Quality Shirts," the cards being green in colour in the latter case. For a time, and in the case of some goods, the labels or cards would bear the trade name or words "Kitchen-Peabody," "Kitchen-Peabody Pants," or "Kitchen-Peabody Jumbo Overall"; the word "Peabody" had its origin in the fact that a business concern so known, and engaged in a similar business, also at Brantford, I think, was acquired by the Kitchen concern. The plaintiff advertised its goods quite extensively through trade journals and newspapers, and by circulars, booklets, and otherwise, expending in this connection between 1918 and 1935 inclusive, approximately the sum of \$135,000. In all this advertising matter the word "Kitchen" or "Kitchen's" was displayed quite conspicuously. Customers of the plaintiff, who were retailers, in ordering specific

garments, would very frequently describe the same by the prefix "Kitchen," for example, "Kitchen Shirts," of a given size.

As I understand it, the founders of the plaintiff's business were two brothers of the name of "Kitchen." Later, it would appear from the evidence, the business was conducted for a time under the partnership name of "Whitaker and Kitchen," and then for about two years prior to 1912 under the name of The Kitchen Overall and Shirt Company, which company was incorporated in 1912 under the laws of the Province of Ontario. Later, that corporation forfeited its provincial charter and acquired another under the provisions of the Dominion Companies Act, under which charter the plaintiff company now carries on its business. The Kitchen brothers, founders of the business, were, in their lifetime, shareholders in both corporations, and their several interests in the plaintiff corporation, or a portion of the same, is presently held by their heirs.

One, Bruce Kitchen, a brother of the original founders of the plaintiff's business, is the manager of the defendant company, having been appointed in that capacity in May, 1934; he is also a shareholder, a director, and the treasurer, of the defendant company. The defendant company was incorporated in 1933 under the name of the "Elmira Garment Company Ltd.," under the laws of the Province of Ontario, and in that year it first began business. In 1934 its name was changed to "The Bruce Kitchen Company Ltd.," and in 1935, as a result of the protest of the plaintiff company, that name was abandoned at the instance of the Provincial Secretary of the Province of Ontario, and the present name of the defendant company was adopted. From 1909 to 1934 Bruce Kitchen was in the employ of the plaintiff company, or its predecessors, in one capacity or another, but from 1920 to 1934 he acted in the capacity of travelling salesman, and he thus became personally acquainted with dealers in the plaintiff's goods throughout quite a section of Canada. When he joined the predecessor of the defendant company, the Elmira Garment Company Ltd., he acquired shares therein to the par value of \$1,500, which then made the issued capital of the company \$15,000, and he states that that company then agreed to sell its business to him whenever he was ready to take over the

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same. He shortly afterwards caused an application to be made to change the name of the company to "The Bruce Kitchen Company Ltd.," the alleged reason being that he did not want to build up a business under the name of the "Elmira Garment Company Ltd.," if it were to become his business, and because he had "such a wide clientele." By "clientele" I think he must refer to the plaintiff's clientele with whom he had become acquainted, and who, Kitchen himself states, "always called him Bruce." The name "The Bruce Kitchen Company Ltd.," as already explained, was a few months afterwards changed to that of the defendant company. In April, 1934, an agreement was entered into between the Elmira Garment Company Ltd., and Bruce Kitchen, wherein the former gave the latter the exclusive option to purchase, on giving thirty days' notice in writing, its assets, subject to certain stated exceptions. There was no stated time within which Kitchen was to exercise the option and he has not yet done so. If the option is exercised at any time the amount to be paid the defendant company is to be agreed upon between the parties, and failing that to be determined by three arbitrators.

In December, 1935, the defendant company applied for and obtained registration of the words "Bruce Kitchen," in the form of the facsimile signature of "Bruce Kitchen," as a trade mark, for use in connection with the manufacture and sale of overalls, pants, coats, shirts, windbreakers, etc. The cloth labels, or printed cards, sewn or affixed to the defendant's goods, shirts at least, when forwarded to dealers, bear the words "The Bruce Kitchen (Guaranteed Product) of Elmira," or "The Bruce Kitchen (Guaranteed Shirt) of Elmira," or, "A Bruce Kitchen Guaranteed Product," sometimes with other words added. In all cases the words "Bruce Kitchen" seem to be displayed more conspicuously than any other words used. In the case of the cloth labels sewn on the defendant's garments the word "Elmira" is used quite distinctly in addition to the words "Bruce Kitchen," but without any other words; in the case of the printed cards, affixed otherwise to the garments, while the words "Bruce Kitchen" and other words stand out in very conspicuous type, the words "The Elmira Shirt & Overall Company Limited, Elmira, Ontario," are in rela-

tively inconspicuous type. I should state that before Bruce Kitchen joined the Elmira Garment Company Ltd., that company used certain trade marks or names, but so far as I can recall, it does not appear from the evidence what they were.

Coming now to a brief review of the evidence adduced by the plaintiff in support of its action, Mr. Learie, Secretary of the Canadian Association of Garment Manufacturers, for fifteen years prior thereto general manager of W. R. Johnston Company, of Toronto, clothing manufacturers, and acquainted more or less with the plaintiff's product since 1914, and which he stated have been generally known throughout the trade as "Kitchens," testified that the similarity of the trade names used by the plaintiff and the defendant would undoubtedly mislead or confuse him. Mr. Linahan, for seven years in the employ of J. M. Strachan, of St. Clair avenue, Toronto, and who sell men's work pants and shirts among other articles of wear, testified that customers always asked for the plaintiff's goods as "Kitchen's shirts," or "Kitchen's overalls," as the case might be. A Mr. Laughlin, a commercial traveller for Bradshaw & Sons, of Toronto, manufacturers of overalls and shirts, gave evidence but, if it has any value at all, it would be favourable to the defendant. Mr. Biggs, a son of the president of the plaintiff company, gave evidence in respect of purchases made by him, what is frequently described as "trap orders," that is, purchases made for the purpose of procuring evidence to establish infringement or passing off. This witness went into seven different retail shops in different towns in the Province of Ontario, and in each case he asked for a "Kitchen Navy Blue Shirt, size 16," and in five instances he was sold the defendant's product, while in the remaining cases he received the plaintiff's product. Biggs, I might here point out, did not call the attention of the persons serving him, in the cases where he was sold the defendant's product, to the fact that he had not been sold the article requested, or anything of that sort. The defendant was not advised of these incidents before the trial. Mr. Habbishaw, for fifteen years in the employ of the Canadian Department Stores of Ottawa, Ontario, and its predecessor, testified that the goods of the plaintiff had been known to him by the trade name of

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"Kitchen" during the whole of that period, and that the buying public would ask for such goods under the name of "Kitchen." On cross-examination he stated that the public ask for such goods by the name of the "Kitchen Overall & Shirt Company Limited of Brantford," which would seem to me to be a most improbable thing if he intended to say that the buying public would ask for the plaintiff's goods in precisely that way. Another witness, McElroy, a commercial traveller for concerns manufacturing workmen's clothing, testified that the plaintiff's goods were known to him as "Kitchen Overall and Shirts," which, of course, is practically the name of the plaintiff company.

Mr. Biggar objected to the reception of the evidence of Biggs on the ground that the incidents related by him referred to transactions with a party other than the defendant, and that in any event any evidence concerning a trap order given to a defendant, or a third party, should not be received unless particulars are given to the defendant immediately afterwards so that he may investigate the same, and it will be convenient to discuss this evidence before referring to the balance of the plaintiff's evidence.

The plaintiff's statement of claim did not allege, as is sometimes done in such cases, that in response to orders, the defendant, his servants or agents, or a retailer of the plaintiff's goods, passed off the defendant's goods as those of the plaintiff, and all that is alleged is that the defendant has distributed its goods throughout Canada bearing the name "Bruce Kitchen," and has "used" the name "Bruce Kitchen" in association with its wares "by publication of price lists, catalogues and other material bearing the said name 'Bruce Kitchen' identified with the said articles of clothing," and that "the defendant has thereby wrongfully sold and passed off . . . its goods as those of the plaintiff." There being no specific allegation of passing off in response to orders for the plaintiff's goods, particulars were not requested by the defendant, and it is possible that the defendant, upon the pleadings, did not expect to meet that sort of evidence, and at the time of the trial, as Mr. Biggar urged, it was hardly practical to do so because in the meantime about one year had elapsed. Whether or not the plaintiff would have been required to furnish any or all particulars of the incidents, had particulars been

demanded, I need not decide. It does appear that the plaintiff has merely put in issue the fact that the defendant by the use of the words "Bruce Kitchen," on its goods and otherwise, has caused confusion in the trade and in the minds of the public, between the goods of the plaintiff and those of the defendant. The evidence of Biggs is before me and I must decide what weight is to be attached to it, and I propose viewing that evidence just as if the trap orders were given to the defendant, or its servants, and as if the same were not complicated by the intervention of a third party.

It is, of course, open to a trader if he suspects anything in the nature of passing off by any person, in the same line of business, to send trap orders to get at the truth of the matter. It has been frequently held, however, that the order must be clear and unambiguous, it must be brought to the mind of the shopman what was really wanted, and for that reason a written order is always preferable. The words used in asking for the article must denote the plaintiff's goods and the order should be given to a person of responsibility; and when a trap order is executed the defendant, or his assistant, should be informed at once that it is proposed to give evidence in court of the incident relied upon so that he may recall his recollection of the circumstances and be ready to give his reply in court. These rules regarding evidence of this character have been laid down, I apprehend, because in allegations of actual passing off, the burden of proof resting upon a plaintiff is an unusually onerous one. The words of Tomlin J. in the case of *C. C. Wakefield & Co. Ltd. v. Board* (1) are, I think, applicable here. He said:—

There is this observation again to be made here that, if a plaintiff goes and gives an order of this kind, intending to found an action on it and believing that the order is going to be executed dishonestly, it is essential that he should give the order in terms which are clear and capable of being understood and that he should give it to somebody who is sufficiently responsible. I confess that the plan of campaign here seems to me wholly inadequate, that you should go to a place, give an order to a boy in a casual offhand sort of way and then rest on the result of that order, without satisfying yourself in any way at all that the order has been heard or understood or that it has been executed in the sense in which you desire it to be executed; that is to say, in a fraudulent way, although as a matter of fact what has been done may have been done as a result of a pure misunderstanding.

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Again,, I might refer to the remarks of Farwell J. in *C. C. Wakefield & Co. Ltd. v. Purser* (1). He said:—

Test orders or, as the Defendant prefers to call them, trap orders are in a case of this kind, it seems to me, quite essential. I fail to see how the Plaintiffs can safeguard themselves or the public without having resort to some such method of testing the matter as is used in the present case; but, trap orders or test orders, whichever they may be called, are scrutinised by the Courts with some jealousy, and rightly so, because, if, as the result of a trap order or a test order, a person is to be charged with the very serious offence of fraudulently misrepresenting the goods which he is supplying to the public, to the detriment of the public as well as of the Plaintiffs, the Court must be satisfied that the offence has been proved strictly. Further, if a person is resorting to a test order or a trap order, even in a case of this kind, where the necessity for such a device may be a real one, that person is bound to carry out the proceeding with the utmost fairness to the prospective defendant to the action. It is essential, if the plaintiff is to succeed in the action which he ultimately brings, that he should be able to satisfy the Court that he has acted throughout with the most exact fairness to the defendant and has given him every reasonable chance of investigating the matter for himself, so that he may be in a position to put forward in the action, if one follows, any and every defence properly open to him.

In many respects, what I have just quoted from the cases mentioned, is applicable to the evidence of Biggs, and if this case rested alone on the incidents testified to by him, I think it would be impossible for me to come to the conclusion that the plaintiff had sufficiently discharged the burden of proving that the defendant's goods had been passed off as those of the plaintiff; if I am correct in this then it follows, I think, that the evidence of Biggs is valueless in respect of the general allegations that the defendant's course of conduct was likely to create confusion between its goods and those of the plaintiff because that point was not put to that witness. The evidence of Biggs is, I think, altogether too bare to warrant my attaching weight to it. There was but a single purchase made in each shop, and it was open to the defence to say that those were isolated incidents and were explicable by reason of some honest mistake, which might well have happened. It therefore becomes unnecessary to consider that evidence with regard to the fact that the purchases were made from third parties.

I come now to the balance of the plaintiff's evidence, which I have reviewed, some of which may be disregarded altogether because it is valueless so far as the plaintiff is concerned, or the same is inconclusive. A plaintiff is not

(1) (1934) 51 R.P.C. 167 at 171.

permitted to put it to a witness, that some one, other than himself, or the public, would be deceived or confused by reason of conflicting or similar trade names, since this would be merely his opinion about a conclusion to which the court is to arrive. But a witness may be asked the question whether he himself, being in the trade and familiar with the subject matter concerned, would be misled. See Lord Loreburn in *Claudius Ash, Sons & Co. Ltd. v. Invicta Manufacturing Co. Ltd.* (1). And evidence may be called as to whether certain features are common to the trade, how intending purchasers describe certain articles, who the intending purchasers are likely to be, and other matters. There was some evidence, though small in quantity, given on behalf of the plaintiff, tending to show that, using the words of the statute, it might be reasonably apprehended that the defendant's conduct was likely to create confusion between its goods and that of the plaintiff. And I refer particularly to the evidence of Learie, who was conversant with the trade, and he said the rival marks would mislead him. I think the fair inference from the evidence of Habbishaw and McElroy is that the plaintiff's goods were known to the public as "Kitchen's," something which the plaintiff must establish. All that evidence I accept. In the passing off case of *Iron-Ox Remedy Company Ltd. v. Co-operative Wholesale Society Ltd.* (2), Parker J. said:—

The real question I have to ask myself is whether there is anything in the words "Iron Oxide Tablets" which would lead persons of average intelligence, in that class of the public likely to buy proprietary articles of that sort, into accepting the goods of the Defendants as and for the goods of the Plaintiffs—that is to say, under the impression that they were getting "Iron-Ox Tablets." I have to consider not only the case of a person who has been accustomed to buy the Plaintiffs' goods and might, therefore, having regard to the difference of get-up, be unlikely to be deceived, but I have also to consider the case of a person who has, for example, seen an advertisement of, or has otherwise been told of "Iron-Ox Tablets," and who goes into a retail shop with the intention of buying them. In considering a question of this sort it is always very material to know the precise circumstances under, and the precise reasons for which the trade description to which objection is made, has been adopted. If the conclusion is once arrived at that the description was adopted not with the object of fairly describing the goods to which it is applied, but with the object either of actually misleading the public, or taking an undue advantage of the business connection, or the expenditure, of a rival trader, it does not, I think, require much further evidence to justify the conclusion that the public is likely to be misled; and, on the assump-

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(1) (1912) 29 R.P.C. 465 at 476. (2) (1907) 24 R.P.C. 425 at 430.

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tion that the goods are so described as to be likely to mislead the public, it is not necessary to prove that anyone has been actually deceived or misled; and, therefore, further, the person who supplies the goods with the misleading description may be liable to an injunction, even though the class of persons to whom he supplies them are certain to know what the goods are, and are not themselves likely to be in any way misled.

Before expressing my final conclusion in this case there are several decisions, in passing off actions, to which I wish to refer, and which I think are of some assistance here, and I must also refer to the contention of Mr. Biggar that the defendant, or Bruce Kitchen, was justified in using the name "Bruce Kitchen" in the manner already described.

Mr. Biggar contended that by reason of the option to purchase given to Bruce Kitchen by the defendant, and his acquaintance with the trade, it was permissible in law for the defendant to use, or to permit to be used, the name of "Bruce Kitchen," as a trade name. Mr. Biggar referred to the case of *The Hurlbut Co. v. The Hurlburt Shoe Co.* (1) and others of a similar nature, but it seems to me they are entirely irrelevant here because Bruce Kitchen is not a defendant in this action; it is the defendant who is here charged with a course of conduct likely to create confusion between the goods of the plaintiff and those of the defendant, and not Bruce Kitchen; and it is fair to assume that to the public the relation of Bruce Kitchen to the defendant company is unknown, except that to some he may be known as manager of that company. It is not the business of Bruce Kitchen that the defendant carries on, and it is not the goods of Bruce Kitchen that are being sold. The contingency of Bruce Kitchen exercising the option to purchase the defendant's business is altogether irrelevant presently, and, in my opinion, does not warrant the defendant using the name of Bruce Kitchen as a trade name in its business, nor does it justify the defendant in permitting Bruce Kitchen to impose upon the defendant the use of his name in that way, if such be the fact. The motives of Bruce Kitchen in the matter are altogether beside the question.

In the two passing off actions of *Croft v. Day* (2), and *Clayton v. Day* (3), a person of the name of Day, the defendant in each case, obtained the authority of one Martin to use his name, and under the name of Day and

(1) (1925) S.C.R. 141.

(2) (1843) 7 Beav. 84.

(3) (1881) 26 Sol. J. 43.



Martin set up the business of making and selling "black-  
ing," which was sold in bottles with labels having a general  
resemblance and only colourably differing from those used  
by the long-established firm of Day and Martin, who also  
manufactured and sold "black-  
ing." It was held by Lang-  
dale M.R. in the first case, that there was quite sufficient  
to mislead the ordinary run of persons, and that the object  
of the defendant was to persuade the public that the new  
establishment was, in some way or other, connected with  
the old firm or manufacturer, and an injunction was  
granted. In the second case Chitty J. was of the opinion  
that the facts showed an attempt to obtain the benefit of  
the plaintiff's long-established business, and that the court  
should protect a trade name as well as a trade mark, and he  
granted an injunction until the trial. In the case of  
*M. Melachrino and Co. v. The Melachrino Egyptian Cigar-  
ette Co. and U. Melachrino* (1), one U. Melachrino, a bro-  
ther of the plaintiffs, a well-known firm of cigarette manu-  
facturers, and who had been formerly employed by the  
plaintiffs as their servant or employee, entered into an  
agreement with one Poulides to act as manager of a cigar-  
ette business for Poulides, to be carried on under the style  
of "The Melachrino Cigarette Co.," and the new firm used  
every device to attract to themselves the plaintiff's custom.  
On motion for an interim injunction after an action was  
brought Chitty J. granted an injunction restraining the  
defendants from carrying on the business then being car-  
ried on under the name of Melachrino & Co. or The Mela-  
chrino Egyptian Cigarette Co. "I shall hold," he said,  
"that a man cannot sell his own name to another for the  
purpose of carrying on a rival trade fraudulently." He  
also said: "I say he has lent the use of his name to Pou-  
lides for the fraudulent purpose of taking away the plain-  
tiff's business." In the case of *Kingston, Miller & Co. Ld.  
v. Thomas Kingston & Co. Ld.* (2), it appears that one  
Thomas Kingston, a son of one of the founders of the  
plaintiff company, had been an assistant manager of that  
company; he left their service on the termination of his  
agreement and took steps to obtain the formation of a new  
company, of which he should be the managing director.

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

(2) (1912) 29 R.P.C. 289

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Accordingly the defendant company was formed having the same objects as the plaintiff company, and Thomas Kingston was engaged as managing director of the new company. The defendants contended that Thomas Kingston had that which was equivalent to a good will which he could transfer to a company, and that he might by such transfer give the company the right to use his name. It was held that all he had was a certain qualification attaching to himself, which he might make use of for his own benefit or transfer to somebody else, but his name was not incident to that qualification in the sense that it could be transferred to another person and give that person the right to use it whether or not it deceived the public. In the case of *M. P. Guimaraens & Son v. Fonseca & Vasconcellos Ltd.* (1), the defendant company was perpetually restrained from carrying on business in Great Britain as importers of or dealers in port wine under the name of Fonseca and Vasconcellos Ltd. or any other name of which the name Fonseca forms a part, although Fonseca was the name of one of the three directors of the company. I should point out, however, that Younger L.J. indicated that the plaintiffs might not have been entitled to the injunction if the defendants had been a partnership instead of a limited company. I would refer also to the case of *W. H. Dorman & Co. Ltd. v. Henry Meadows Ltd.* (2).

From the cases to which I have just referred it is to be inferred that the courts will not hesitate from forbidding persons to trade under a name, even though the firm name is a true description of the persons belonging to it, if the intention of the defendant is fraudulent and calculated to deceive. However, in such cases it is not necessary to establish actual fraud. Ordinarily a man will not be restrained from carrying on business in his own name, however much confusion be caused thereby so long as he does it honestly, but no person is entitled to carry on his business in such a way as to represent that it is the business of another. The distinction is of course very subtle and hard sometimes to enforce in practice. It has been put in this way by Warrington J. in *Teofani & Co. Ltd. v. A. Teofani* (3): "the mere fact that the name which the defendant is

(1) (1921) 38 R.P.C. 388.

(2) (1922) 2 Ch. 332.

(3) (1913) 30 R.P.C. 76 at 90.

using is his own name is not conclusive evidence that he is not passing off his goods as the goods of somebody else." The very fine distinctions that arise in this class of cases need not seriously concern us here because the defendant is not selling the goods of Bruce Kitchen, and Bruce Kitchen is not selling his goods under his own name. The case of the defendant here is much weaker than that of the defendants in the cases which I have just mentioned.

The plaintiff's case is founded on the probability of confusion between the goods of the plaintiff and those of the defendant by reason of the latter's use of the trade mark "Bruce Kitchen"; it is based on the allegation that the defendant has done some act calculated to lead intending purchasers or customers to believe that its goods are the goods of the plaintiff. Using more precisely the language of the statute, the plaintiff claims that the defendant has directed public attention to his goods in such a way that it may be reasonably apprehended that its course of conduct is likely to create confusion between its goods and those of the plaintiff. As in most cases of this kind the complaint is not quite that the defendant expressly and falsely represents its goods to be those of the plaintiff, which is the rare case, but rather it is that there is an implied representation in the use or imitation of a mark or trade name, with which the goods of the plaintiff are associated in the minds of the public, or of a particular class of the public, and the question to be decided is whether, having regard to all the circumstances of the case, the use by the defendant of the trade mark "Bruce Kitchen" impliedly represents its goods to be the goods of the plaintiff, or, whether it may be reasonably apprehended that such use is likely to create confusion between the goods of the plaintiff and the defendant.

It has been sufficiently established, I think, that the use of the word "Kitchen," or "Kitchen's," in association with the class of goods with which we are here concerned, is reputed in the market to import that the goods are the plaintiff's goods. Considering the name of the plaintiff company, its history and that of its predecessors, one could hardly expect anything else to occur. That phase of the issue, I think, requires no further discussion. Now, is the conduct of the defendant likely to cause confusion? One

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feels compelled to ask oneself the question: Why does the defendant use, or permit to be used, as a trade mark or trade name, the name of its manager, Bruce Kitchen, to designate its goods? The goods are not his, they are not made or sold for him. It must be because Bruce Kitchen had come to know the plaintiff's trade and customers, and that trade name being similar to that used by the plaintiff, some advantage would accrue to the defendant's business, in some way or other, by the use of Bruce Kitchen's name, as a trade name. The defendant's mark, being the name of a person, is so used as to leave the impression that the goods are those of Bruce Kitchen, in fact on some of the cards attached to the defendant's goods they are referred to as "A Bruce Kitchen Guaranteed Product," which is not, I think, true, and even while the words "Manufactured by The Elmira Shirt & Overall Company Limited, Elmira, Ontario," appear on the same card in smaller type, yet one cannot but feel that the form and arrangement of the printed matter on the card was designed to leave the impression that the goods were those of Bruce Kitchen, or were manufactured for Bruce Kitchen; in fact the statement of defence alleges that "the business of the defendant is in effect carried on for the direct benefit of Bruce Kitchen whose name in facsimile constitutes the defendant's trade mark," which plea has not in fact been established, and even if it were I do not think it would assist the defendant in this case. On another card which is used, we find the words "The Bruce Kitchen Shirt of Elmira," which, I think, is far from being a frank representation of the facts; I think it is quite plain that these words are used to convey the idea that the shirt was manufactured by Bruce Kitchen, the addition of the words "of Elmira" being, I think, merely a precautionary measure adopted for the purpose of explaining away any subsequent complaint of "confusion." It is not of importance, in my opinion, that Bruce Kitchen is a shareholder in, or a director of, the defendant company, or that he holds an option to purchase the defendant's business; that could be no answer in an infringement action, or in an action to expunge, or in a passing off action. I cannot avoid the conviction that the plaintiff's complaint is well founded, that the defendant's conduct is not one of fair dealing, and that its course of

conduct is likely to lead to confusion. In fact, I do not see how confusion could possibly be avoided in all the circumstances of the case. The defendant has advanced no convincing explanation or reason for the use of the mark.

I think therefore the plaintiff is entitled to the relief claimed. If the plaintiff desires to press its claim for damages there will be a reference to assess the same. The defendant must pay the plaintiff's costs.

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OVERALL  
& SHIRT  
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with Respondent, represented by the Minister of Marine and Fisheries, to construct six steel cargo steamers; the first contract covered four ships, and the second contract, two ships. Both contracts provided that any dispute or difference arising between the parties thereto, during the term of the agreements or within six months after the termination thereof, in relation to the various matters therein set forth, should be referred to three arbitrators to be chosen as therein provided and whose decision should be final and binding. Suppliant claimed that it required certain disputes be submitted to arbitration but that the Respondent refused to do so. Respondent denied that such request was made or refused, or that any dispute was referred to or settled by arbitration, and contended that the arbitration clause in such contracts was a bar to the various claims set forth in the petition. Suppliant claimed that in ascertaining the "deadweight" of the ships an allowance should be made for the weight of water in the boilers of the ships. A term of the second contract reads as follows: It is hereby mutually agreed upon between the Minister and the contractors that the contractors shall purchase the steel plates entering into the construction of the hulls of the said vessels from the Minister at a base price f.o.b. mills Sydney that shall be equal to the base price f.o.b. Pittsburgh, U.S.A., of plates manufactured in the United States of similar specifications at the time the specifications are deposited with the Minister, the said price not to be less than \$2.75 per 100 pounds base f.o.b. mills Sydney. Suppliant claimed that it had been overcharged for steel supplied for the ships covered by the second contract and also that an excess of steel had been delivered from the United States mills in connection with the first contract and claimed payment therefor from the Minister. *Held:* That since Respondent had granted Suppliant a fiat and also had pleaded a defence, the arbitration claims had been waived and another forum substituted. 2. That an objection to the right to bring an action should be taken by interlocutory motion, and if that course is not followed, the Court should not entertain at trial an application to dismiss the action. 3. That boiler water was not "fresh water" referred to in the first contract, and that it was not the custom or usage in Canada to make an allowance for boiler water in computing the deadweight of ships. 4. That "base" in the steel trade refers to steel of certain standard dimensions and shapes, and "base price" means the price for steel

**CROWN—Ship-building contract—Arbitration—Boiler water not included in deadweight — Waiver of arbitration clauses by pleading—"Base steel"—"Base Price"—Custom of steel trade—Custom of ship-building yards.** By two contracts in writing Suppliant agreed



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within certain standards of size and shape; in the contract entered into therefore the term "base price" means the price of "base" steel products, those ship plates of standard shapes and sizes, and steel other than that of standard dimensions and shapes is liable to an extra charge over "base" steel. 5. That it is a usage of ship-building yards to order slightly more than the precise amount of steel that would enter into the construction of a ship, in order to provide against the contingency of injury to, or destruction of, a plate or plates, and that on a consideration of the evidence it was not shown that the amount of steel delivered to Suppliant was unreasonably excessive. *J. COUGHLAN & SON LTD. v. THE KING*, 29

2.—*Petition of right—Action for recovery of money paid for sales tax and excise tax—Special War Revenue Act, R.S.C., 1927, c. 179, s. 117, as amended by 23-24 Geo. V, c. 50, s. 24—Failure to make demand for return of money within period of limitation—Non-user of corporate powers by incorporated company—Forfeiture of charter—Companies Act, R.S.C., 1927, c. 27, s. 29, as amended by 24-25 Geo. V, c. 38—Transfer of entire assets by one company to another company—"Action on a statute"—"Action given by a statute"—Action for debt—Period of limitation—Ontario Limitation Act, R.S.O., c. 106—Exchequer Court Act, R.S.C., 1927, c. 34.* Suppliant, a licensed manufacturer and producer under Part IV of the Special War Revenue Act, 1915 and licensed as a distiller under Part III of the Inland Revenue Act, R.S.C., 1906, c. 51, by its petition of right filed in this Court on December 14, 1934, sought recovery of moneys paid the Crown as sales tax and excise duties prior to January 26, 1926, upon liquors purchased by it for export and which it claimed were exported to the United States. In May, 1926, suppliant by an agreement in writing sold and transferred to Dominion Distillers Limited its business and undertaking as a going concern as the same existed at the close of business June 30, 1925, including "all the book and other debts due the party of the first part (suppliant) in connection with the said business, and the full benefit of all securities for such debts, together with the full benefit of all pending contracts and engagements to which the party of the first part may be entitled in connection with the said business." The terms of this agreement were fulfilled and suppliant had not carried on business since 1925 or 1926. The Court found that the goods in question were purchased by suppliant for the purpose and with the

## CROWN—Continued

intention of exporting the same to the United States, and, with the exception of a limited quantity, sold and delivered to residents of Canada, were exported to that country. By s. 24, c. 50, 23-24 Geo. V, amending the Special War Revenue Act, R.S.C., 1927, c. 179, s. 117, it is provided that "(1) no refund or deduction from any of the taxes imposed by this Act shall be paid unless application in writing for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act or under any regulations made thereunder. (2) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid." *Held*, that s. 24, c. 50, 23-24 Geo. V, is retroactive and suppliant not having applied for a refund of the sales taxes paid by it, within the period of limitation set by the statute, the present action fails. 2. That the Companies Act, R.S.C., 1927, c. 27, s. 29, as amended by s. 12, c. 9, 20-21 Geo. V, automatically and without any preliminary procedure operates a forfeiture of a charter, if in fact there has been non-user of the corporate powers for three consecutive years; suppliant company had consequently ceased to exist by reason of the forfeiture of its charter for non-user, and the petition herein was therefore unauthorized and a nullity. 3. That suppliant's claim is in the nature of a debt, and rests upon an implied promise that the moneys in question would be refunded if the goods were shown to have been exported, and is barred by the Ontario Limitation Act, R.S.O., c. 106, s. 48. *DOMINION DISTILLERY PRODUCTS CO. LTD. v. THE KING* ..... 145

3.—*Petition of right—Contract of hire—Civil Servant—Dismissal at will—Restriction of general rule—Damages for dismissal before end of term.* G. was hired as a seasonal fireman for a term of seven months from October 1, 1935, to April 30, 1936. The contract contained no stipulation that G. could be dismissed for cause only. On the 7th December, 1935, he was dismissed without notice and without cause, and now claims damages for loss of salary for the balance of his term of hire. *Held*: That the right of the Crown to dismiss its servants at will may be restricted by law or by contract for a fixed term, explicitly stipulating that

## CROWN—Continued

the servant can only be dismissed for cause; and that as the contract in question failed to provide expressly for dismissal for cause only, G. was not entitled to any part of the relief sought by his petition of right. *Reilly v. The King* (1932) Ex. C.R. 14; (1932) S.C.R. 597, and (1934) A.C. 176 referred to). *LAUREAT GENOIS v. THE KING*.... 176

4.—*Petition of right—Public work—Bridge—Injury to person—Maintenance—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c)*. Suppliant suffered personal injuries and loss by breaking through a plank on the sidewalk of a roadway leading to and from the north end of Chaudiere bridge, an interprovincial bridge crossing the Ottawa river, and connecting the city of Ottawa, Ontario, and the city of Hull, Quebec. By her petition of right suppliant charged "that the injuries and loss so caused to the suppliant are a direct result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work. The said negligence consists particularly of failure to maintain or keep in proper repair the plank sidewalk aforesaid." *Held*: That liability of the Crown for damages for any death, or injury to the person or to property, is qualified and limited by the Exchequer Court Act and cannot be enlarged except by express words or necessary implication, and liability for injury resulting from nonfeasance is excluded. *McHugh v. The Queen* (1900) 6 Ex. C.R. 374, followed. *LINDA JOKELA v. THE KING*..... 132

5.—*Exchequer Court Act—Jurisdiction—Civil Code Articles 1053 and 1054—Negligence—Damages*. L., a prisoner in the St. Vincent de Paul penitentiary, was required by the authorities to assist in planing certain planks on a planing machine in the carpenter shop of the penitentiary. His sole duty was to feed the planks into the machine. On the occasion in question the machine blocked, owing to one of the planks being too wide to go through. Thereupon L. went forward to try and ascertain the cause of the blockage, and either due to his tripping into the machine or some other reason his fingers were caught in the knives and his hand mutilated to such an extent that it had to be amputated. He claims the damages suffered, alleging negligence of the employees of the Crown within the scope of their duties consisting, (1) in furnishing planks too wide for the machine; (2) in that the foreman was not within call; and (3) in that the machine was old and not as well pro-

## CROWN—Continued

tected as the modern machines. The machine was an old one and possibly not as well protected as the more modern ones, but was in good operating condition. L. had been ordered and forbidden in any way to touch the machine in the event of anything unusual happening, but was to call the foreman. The Court found that the foreman was in the room at the time of the accident. *Held*: That the *causa causans* and immediate and determining cause of the accident was L's disobedience of orders in going forward to see what had happened instead of remaining at his post, and to his own imprudence in that regard, and was not due to any of the causes above mentioned. 2. That the provisions of articles 1053 and 1054 of the Civil Code of Quebec do not apply to the Crown in right of the Dominion. That the Crown is not responsible in damages for things it has under its care, unless it is shown that there was negligence of an employee or servant of the Crown acting within the scope of his duties or employment in regard thereto. *ROCH LABELLE v. THE KING* ..... 170

6.—*Petition of Right—"Public Work"—Responsibility of the Crown—Contributory Negligence*. About 9 a.m. on the 23rd January, 1934, M. when going to the Post Office in the Town of St. Laurent on business and while walking on the sidewalk leading to the Post Office fell and broke his wrist. It had been raining during the night and the sidewalk was covered with ice. At the place where M. fell there was a depression in the cement walk which held the water on the ice. The caretaker had spread sawdust on the walk instead of the sand provided for the purpose, and this did not adhere to the ice but floated on the water. *Held*: That a Post Office is a public work within the meaning of the statute. (*Leprohon v. The King*, 4 Ex. C.R. 100, and *Johnson v. The King* (1931), Ex. C.R. 163, followed). 2. That the act of the caretaker in spreading sawdust where water was lying when instructions had been given to put sand, was negligence on his part which bound the Crown and rendered it liable in damages. 3. That M. having admitted that on approaching the place in question he saw the floating sawdust he should have realized the danger, and, in view of the dangerous condition of the roads generally, his act in persisting in passing at this place instead of turning back or going by another entrance constituted an act of negligence on his part which contributed to the accident, and M. under the law of Quebec had to bear a part of the damages which was fixed

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by the Court at one-third the total damages. **LUDGER MARCOUX v. THE KING**..... 23

7.—*Petition of right—Money paid under compulsion of legal process cannot be recovered.* In October, 1927, the Crown by Information filed in this Court, brought suit against the suppliant herein for the recovery of certain money for sales tax, excise tax, penalties and interest, under the *Special War Revenue Act 1915*, and amendments thereto, in respect to beer manufactured and sold by the suppliant for a period subsequent to January 1, 1924. A settlement was arrived at between the parties and the proceeding was discontinued, the settlement covering a longer period than that actually involved in the Information. Suppliant now seeks to recover from the Crown the money paid under that settlement, together with a further sum, on the grounds that it was never liable to the Crown; that payment was procured under duress; that where payment was made it was understood between the parties that the money so paid would be refunded to suppliant should it later appear that it had overpaid the Crown or that suppliant was not legally liable for any of the taxes claimed in the Information. The Court found that the money paid by suppliant was paid voluntarily and unconditionally in settlement of the suit brought against it by the Crown. *Held:* That money paid under compulsion of a legal process cannot be recovered, although the defendant finds he has paid in error what he was not legally bound to pay, and the rule applies even though the process may never have terminated in a final order or judgment, and although it may have been withdrawn at the date when proceedings are taken for the recovery of the money, and although the payment was made under process. **WALKERVILLE BREWERY LTD. v. THE KING**..... 99

8.—*Petition of right—Government annuity—Contract of insane person not voidable when other contracting party unaware of insanity.* Suppliant's husband died in July, 1929. In December, 1928, he had contracted for the purchase of an annuity under the provisions of the Government Annuities Act, R.S.C., 1927, c. 7, paying therefor the sum of \$10,000 cash. Suppliant as sole executrix and beneficiary of deceased's will now seeks a declaration that such contract was void or voidable and that the Crown be condemned to pay to her the said sum of \$10,000 less any money paid to deceased in his lifetime, on the ground that deceased at the time of entering

**CROWN—Concluded**

into the contract was insane. The Court found that deceased at the time he entered into the contract to purchase the annuity was of unsound mind and incapable of appreciating the nature of his act; that the postmaster with whom deceased had deposited the money to purchase the annuity was not an agent of the Minister in the sale of the annuity; that neither the Minister, the Superintendent, nor any of the officers of the Government Annuities Branch were aware of the deceased's state of mind at the time the contract was entered into. *Held:* That contracts by way of sale and purchase made by a person apparently sane, but afterwards found to be insane, will not be set aside as against those who dealt with him on the faith of his being a person of competent understanding. **EFFIE WILSON v. THE KING**..... 186

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2.—*Appeal from Commissioner of Patents*—*Patent Act, 25-26 Geo. V, c. 32, s. 40*—*Product claims*—*Specification*. Appellant applied for a patent for medical or therapeutic substances prepared by chemical processes described in the specification. The Commissioner of Patents rejected the claims made by the applicant on the ground that it is necessary that the process be disclosed clearly and completely in the claims and that the product claims be restricted to the product when prepared or produced by such process. *Held*: That there cannot be a reference in a claim to the specification in the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine. 2. That under s. 40, ss. 4 of the *Patent Act, 25-26 Geo. V, c. 32*, an appeal to the

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Exchequer Court of Canada may be taken from the decision of the Commissioner of Patents even though there had been no refusal on his part to grant a patent. *WINTHROP CHEMICAL Co. INC. v. COMMISSIONER OF PATENTS.* 137

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11. PERSONAL CORPORATION CONTROLLED BY EXECUTORS AND TRUSTEES APPOINTED BY WILL OF THE PRINCIPAL SHAREHOLDER CONTINUES TO BE A PERSONAL CORPORATION AFTER THE DEATH OF SUCH PRINCIPAL SHAREHOLDER, No. 4.
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**REVENUE—Continued**

13. SALES TAX, No. 1.

14. SPECIAL WAR REVENUE ACT, R.S.C. 1927, c. 179, secs. 80, 81, 86 & 95, No. 1.

15. TRANSFER IN FULFILMENT OF MARRIAGE CONTRACT IS NOT A TRANSFER TO EVADE TAXATION, No. 3.

**REVENUE—Sales Tax—Excise Tax—Special War Revenue Act, R.S.C. 1927, c. 179, secs. 80, 81, 86, 95—"Manufacturer."** The defendant purchased in bulk lots, by the pound, old motor vehicle tires which could no longer be used as such, paying for them at so much per ton. These worn-out tires were treated and retreaded by defendant, the number and name of the manufacturer of the original tire remaining apparent on the side walls along with the serial number marked thereon by the defendant. These rebuilt tires were sold under the name Biltrite Tires to casual purchasers or wholesale dealers; the defendant also carried on a mail order business in such tires. *Held:* That defendant is a manufacturer within the scope of the Special War Revenue Act, R.S.C. 1927, c. 179, and amendments thereto, and liable to pay the sales and excise taxes and licence fees provided in such Act. *THE KING v. BILTRITE TIRE Co.* ..... 1

2.—*Income tax—Payment from reserve or depletion fund—Company not in liquidation can only make payment to shareholders by way of return of capital as a step in authorized reduction of capital.* Appellant was a shareholder in Hy-Grade Coal Company of Drumheller Limited from its incorporation in 1919 until its voluntary liquidation in 1933. The company was engaged in coal mining. In May, 1932, the company distributed the sum of \$12,000 to its shareholders of which amount the appellant received \$5,028. Appellant was assessed income tax on this amount, which assessment was affirmed by the Minister of National Revenue, and from that decision appellant appealed. Appellant contended that such distribution was made out of assets representing the capital of the company and in anticipation of winding up of the company in 1933, and that such distribution was not "income" and was not "annual net profit or gain" to the shareholders within the meaning of s. 3 of the Income War Tax Act. The Court found that the payment of \$12,000 in 1932 was made out of the exhaustion or depletion fund and that this fund was accumulated, during a period of years, with the knowledge and approval of the Minister, and for the purpose of replacing the capital assets of the company, which

## REVENUE—(Continued)

consisted solely of a wasting property. *Held*: That a corporation not in liquidation can make no payment to its shareholders by way of return of capital except as a step in an authorized reduction of capital and that any other payment made to its shareholders can only be made by way of dividing profits. 2. That until a reserve fund is effectively capitalized it retains the characteristics of distributable profits. 3. That the payment of \$12,000 by the company in 1932, while still a going concern, must be treated as a distribution of a dividend and not a return of capital, and appellant's share of such distribution was taxable as income. **HILLIARD C. MCCONKEY v. MINISTER OF NATIONAL REVENUE**..... 209

3.—*Income tax—Quebec Civil Code—Transfer of property in fulfilment of marriage contract is not a transfer to evade taxation—Income War Tax Act.* By his marriage contract entered into on March 28, 1913, wherein separation as to property was stipulated, Kenneth Molson, resident in Montreal, P.Q., made to his future wife a donation *inter vivos* of the sum of \$20,000. By a deed made on March 23, 1925, the said Kenneth Molson in fulfilment of the conditions of his marriage contract with respect to the said donation, transferred and conveyed to his wife certain shares of the capital stock of various corporations, the wife accepting such shares in full payment of the sum of \$20,000. The returns of income he made for the years 1925 to 1931 inclusive omitted the income derived from these shares. He died on April 9, 1932. On April 11, 1933, the Commissioner of Income Tax sent notices of assessment to one of the executors of the will of the said Kenneth Molson, assessing the dividends paid on such shares between March 23, 1925, and December 31, 1931. *Held*: That the conveyance made by Kenneth Molson to his wife was not a transfer to evade taxation; it was made in fulfilment of his marriage contract and from the date of transfer he had no further interest in the shares transferred to his wife and was no longer liable to taxation on the income derived therefrom. **COLIN JOHN GRASSET MOLSON et al v. MINISTER OF NATIONAL REVENUE**..... 55

4.—*Income War Tax Act, R.S.C. 1927, c. 97, secs. 2 and 21—Personal corporation controlled by executors and trustees appointed by will of the principal shareholder continues to be a personal corporation after the death of such prin-*

## REVENUE—Concluded

*cipal shareholder—“Individual”—“Person”—“Personal corporation”—Interpretation.* Appellant company, capitalized at 10,000 shares, was incorporated in the Province of Ontario for the purpose of holding for and on behalf of one, James Harris, resident in Ontario, his bonds and securities in corporations located outside of Ontario, he holding 9,995 shares in appellant company, the balance being held by the incorporators. James Harris died January 1, 1929, and by his will, after providing for certain specific legacies, bequeathed the residue of his estate to the executors named therein upon certain trusts, to pay income therefrom to his wife and children and distribute the corpus to his children on certain conditions. After the death of James Harris, as well as in his lifetime, appellant had no assets other than the securities assigned to it by him and the dividends from these securities constitute the only income appellant receives; this income is immediately turned over to the estate which pays all expenses. Appellant company is controlled by the executors and trustees named in the will of James Harris. Appellant from the date of incorporation and for five years after the death of James Harris, was assessed as a personal corporation for income tax. In 1935 appellant was assessed as an ordinary corporation, the assessment being confirmed by the Minister of National Revenue from which decision appellant appealed. *Held*: That appellant company continued to be a personal corporation for income tax purposes after the death of James Harris. **PORT CREDIT REALTY LTD. v. MINISTER OF NATIONAL REVENUE**..... 88

## SALES TAX

See REVENUE, No. 1.

## SALVAGE

See SHIPPING, No. 2

## SHIP-BUILDING CONTRACT

See CROWN, No. 1

## SHIPPING

1. ANTICIPATION OF WAGES BY SEAMEN, No. 1.
2. CANADA SHIPPING ACT, R.S.C. 1927, c. 186, s. 176, No. 1.
3. EQUITABLE SETTLEMENT ADVANTAGEOUS TO SEAMEN, No. 1.
4. JOINDER OF ACTION IN REM AND ACTION IN PERSONAM, No. 2.
5. PRACTICE, No. 2.
6. SALVAGE, No. 2.

**SHIPPING** — *Canada Shipping Act, R.S.C. 1927, c. 186, s. 176—Anticipation of wages by seamen—Equitable settlement advantageous to seamen.* Plaintiffs were members of the crew of the SS. *Canadian Planter*, which was wrecked on May 3, 1936, thereby terminating plaintiffs' employment. Defendant paid their wages up to May 7, 1936, and was ready to pay to each plaintiff from day to day while unemployed, an amount equal to the daily wages he would have earned during the two months succeeding May 3, 1936. Plaintiffs applied to defendant to be allowed to anticipate in a lump sum the payments which would have been made to them from day to day to July 3, 1936. Defendant disputed this right of anticipation and the matter was referred to the Shipping Master of the Port of Montreal, it being agreed between the parties that the articles of agreement signed by the plaintiffs should constitute an agreement in writing to submit the dispute to the decision of the Shipping Master. Following the decision of the Shipping Master defendant paid to each plaintiff a sum equal to one month's wages from May 8, 1936, to June 8, 1936. Plaintiffs brought action claiming the balance of two months' wages from May 3, 1936, to July 3, 1936. *Held:* That s. 176 of the Canada Shipping Act, R.S.C. 1927, c. 186, is not applicable to this case. 2. That since the settlement arranged between the parties was equitable and advantageous to the plaintiffs, the action should be dismissed. *H. BROWN et al v. CANADIAN NATIONAL STEAMSHIPS CO. LTD.*..... 84

2.—*Practice—Salvage—Joinder of action in rem and action in personam.* *Held:* That actions for the recovery of salvage may be either *in rem* or *in personam*. 2. That an action for recovery of salvage must be continued in the form in which it is begun. *BRUCE LINDSAY BROS. LTD. v. The Barge Bruce Hudson et al.*..... 81

**SPECIAL WAR REVENUE ACT, R.S.C., 1927, c. 179, s. 117 AS AMENDED BY 22-23 GEO. V, c. 50, s. 24**

*See CROWN, No. 2.*

**SPECIAL WAR REVENUE ACT, R.S.C. 1927, c. 179, secs. 80, 81, 86 and 95**

*See REVENUE, No. 1.*

## SPECIFICATIONS

*See PATENTS, No. 2.*

## TRADE-MARKS

1. ASSOCIATED COMPANIES UNDER ONE MANAGEMENT USING SAME TRADE-MARK, No. 1.

## TRADE-MARKS—Continued

2. BRITISH NORTH AMERICA ACT, No. 1.
3. CONDUCT OF DEFENDANT CALCULATED TO DECEIVE, No. 2.
4. CONSTITUTIONAL LAW, No. 1.
5. DESCRIPTIVE WORD WITHIN THE MEANING OF PAR. (c), ss. 1, s. 26 OF THE UNFAIR COMPETITION ACT, No. 3.
6. GENERAL TRADE-MARK, No. 1.
7. "GOOD HUMOR," No. 1.
8. INJUNCTION GRANTED, No. 2.
9. INSUFFICIENT NOTICE GIVEN OF INSTANCES RELIED UPON, No. 2.
10. ISOLATED INSTANCES, No. 2.
11. LIMITATION OF TRADE-MARK, No. 1.
12. ONUS ON PLAINTIFF NOT DISCHARGED, No. 2.
13. PASSING OFF, No. 2.
14. "SEMI-LUSTRE," No. 3.
15. TRAP ORDERS, No. 2.
16. UNFAIR COMPETITION ACT, Nos. 1 and 2.
17. UFAIR DEALING ON PART OF DEFENDANT, No. 2.
18. VALIDITY OF TRADE-MARK, No. 1.

**TRADE-MARK**—*General trade-mark—Associated companies under one management using same trade-mark—Validity of trade-mark—Limitation of trade-mark—Unfair Competition Act—Constitutional law—British North America Act—"Good Humor."* Plaintiff, a company incorporated in 1928 in the State of Ohio, one of the United States of America, deals in candy, food products and ice cream and ice cream confections, under the trade-mark "Good Humor" which had been adopted originally by one, Burt, in 1919, and registered in Canada as a general trade-mark on February 9, 1924, plaintiff having acquired it together with the good will and business of Burt. Plaintiff had never used in Canada the trade-mark "Good Humor" and such trade-mark had been made known in Canada since 1930 only, and only in connection with ice cream and ice cream confections. Plaintiff carries on business by means of a number of operating companies, incorporated in various States of the Union, licensing them to manufacture and sell ice cream and ice cream confections, the operations of all companies being identical; the stock of plaintiff and the operating companies is owned wholly by a Delaware company called Good Humor Corporation, and all companies are managed and governed by a committee of five members, the same committee for each company. Defendant company was incorporated in the Province of Ontario, defendant Bradley being its President. Bradley had developed and marketed a cereal known as "Good Humor Fru-menty," having adopted the trade-mark

TRADE-MARKS—*Continued*

"Good Humor" in September, 1934, which trade-mark was registered in Canada, February 1, 1935, and later assigned to defendant company which had acquired the assets and good will of the business carried on by Bradley. In this action plaintiff asked, *inter alia*, an injunction restraining defendant company from using the trade-mark "Good Humor" either for food products or as part of its corporate name; a declaration that defendant Bradley's application for registration of the words "Good Humor" as a trade-mark for cereal meals should not be granted. By counterclaim defendants asked for an order expunging plaintiff's trade-mark or in the alternative that it be limited to ice cream and ice cream confections. *Held*: That although the operating companies of plaintiff's organization are separate entities, distinct from the plaintiff company and Good Humor Corporation, the holding company, they all constitute one organization with the plaintiff company under its direction and control, and consequently the several trade-marks registered in plaintiff's name are valid and may properly be held by plaintiff. 2. That Plaintiff's Canadian trade-mark should be limited to ice cream and ice cream confections. 3. That defendants' trade-mark in connection with cereal meal is valid. 4. That the Parliament of Canada under par. 2 of s. 91 of the British North America Act has the necessary competence to legislate in connection with trade names and that secs. 3, 7 and 11 of the Unfair Competition Act, 22-23 Geo. V, c. 38, are *intra vires* of the Canadian Parliament. GOOD HUMOR CORPN. OF AMERICA *v.* GOOD HUMOR FOOD PRODUCTS LTD. *et al.*..... 61

2.—*Passing off—Unfair Competition Act, 22-23 Geo. V, c. 38, s. 11 and s. 4, ss. 4—Trap orders—Insufficient notice given of instances relied upon—Isolated instances—Onus on plaintiff not discharged—Conduct of defendant calculated to deceive—Unfair dealing on part of defendant—Injunction granted.* The plaintiff, a manufacturer of goods consisting chiefly of men's overalls, shirts and pants, brought this action against defendant to restrain it from using the words "Bruce Kitchen" in association with its goods, on the ground that the same is calculated or likely to cause confusion between the goods of the plaintiff and those of the defendant. The statement of claim contained a general allegation that the defendant had sold and passed off its goods as those of the plaintiff. Plaintiff's business had been originally founded by two brothers of the name of Kitchen

TRADE-MARKS—*Continued*

and its goods have been sold for many years under the trade name of "Kitchen," "Kitchen's," or "Kitchens" by means either of a small label sewn on the garments, or by a card affixed in some way to the garments, or by both means. The plaintiff also advertised its goods extensively, displaying the word "Kitchen" or "Kitchen's" quite conspicuously in all advertising matter. Plaintiff's business was a large one and its customers, who were retailers, in ordering specific garments, would very frequently describe them by the prefix "Kitchen." Bruce Kitchen, a brother of the original founders of plaintiff's business, is manager of defendant company, having been appointed in May, 1934; he is also a shareholder, a director and treasurer of defendant company. From 1909 to 1934 he had been employed by plaintiff company or its predecessors, and had become personally acquainted with dealers in the plaintiff's goods throughout a large part of Canada. In December, 1935, defendant obtained registration of the words "Bruce Kitchen" as a trade-mark, for use in connection with the manufacture and sale of overalls, pants, coats, windbreakers and other garments, and on all garments sold by defendant to retailers the words "Bruce Kitchen" appear more conspicuously than any other words on the labels attached to such garments; examples of the wording are "The Bruce Kitchen" (Guaranteed Shirt) of Elmira, "The Bruce Kitchen (Guaranteed Product) of Elmira," or "A Bruce Kitchen Guaranteed Product." Plaintiff adduced evidence of certain instances of passing off of defendant's goods as those of the plaintiff in response to oral trap orders given by a person on behalf of plaintiff. The reception of this evidence was objected to by defendant on the ground that particulars of such evidence should have been given to the defendant immediately after the occurrence of those incidents. Defendant objected that since plaintiff's trade-mark was unregistered, no action for infringement would lie by virtue of s. 4, ss. 4, of the Unfair Competition Act. *Held*: That the plaintiff's action is founded on s. 11 of the Unfair Competition Act, 22-23 Geo. V, c. 38, and therefore properly instituted irrespective of whether or not plaintiff's trade-mark were registered. 2. That in an action for passing off the offence must be proved in the fullest possible way and notice as soon as practicable of the incidents relied upon should be given to the defendant. 3. That the defendant's conduct is not one of fair dealing, and its course of conduct is such as is likely to lead to confusion



**TRADE-MARKS—Concluded**

and the plaintiff is therefore entitled to the relief claimed. *THE KITCHEN OVERALL & SHIRT Co. LTD. v. THE EL-MIRA SHIRT & OVERALL Co. LTD.*..... **230**  
**3.**—“*Semi-Lustre*”—*Descriptive word within the meaning of par. (c), ss. 1, s. 26 of the Unfair Competition Act. Held:* That the trade-mark *Semi-Lustre* is descriptive within the meaning of par. (c), ss. 1, s. 26, of the Unfair Competition Act. *SHERWIN WILLIAMS Co. OF CANADA, LTD. v. COMMISSIONER OF PATENTS* ..... **205**

**TRANSFER OF ENTIRE ASSETS BY ONE COMPANY TO ANOTHER COMPANY**

*See* CROWN, No. 2.

**TRANSFER OF PROPERTY IN FULFILLMENT OF MARRIAGE CONTRACT IS NOT A TRANSFER TO EVADE TAXATION**

*See* REVENUE, No. 3.

**TRAP ORDERS**

*See* TRADE-MARK, No. 2.

**UNFAIR COMPETITION ACT**

*See* TRADE-MARK, Nos. 1, 2 & 3.

**UNFAIR DEALING ON PART OF DEFENDANT**

*See* TRADE-MARK, No. 2.

**VALIDITY OF TRADE-MARK**

*See* TRADE-MARK, No. 1.

**WAIVER OF ARBITRATION CLAUSES BY PLEADING**

*See* CROWN, No. 1.

**WORDS AND PHRASES**

- “*Action given by a statute.*” *See* DOMINION DISTILLERY PRODUCTS Co. LTD. v. THE KING..... **145**
- “*Action on a statute.*” *See* DOMINION DISTILLERY PRODUCTS Co. LTD. v. THE KING..... **145**
- “*Base price.*” *See* J. COUGHLAN & SON LTD. v. THE KING **29**
- “*Base steel.*” *See* J. COUGHLAN & SON LTD. v. THE KING..... **29**
- “*Good Humor.*” *See* GOOD HUMOR CORPN. OF AMERICA v. GOOD HUMOR FOOD PRODUCTS LTD. ET AL. **61**
- “*Individual.*” *See* PORT CREDIT REALTY LTD. v. MINISTER OF NATIONAL REVENUE..... **88**
- “*Manufacturer.*” *See* THE KING v. BILTRITE TIRE Co..... **1**
- “*Person.*” *See* PORT CREDIT REALTY LTD. v. MINISTER OF NATIONAL REVENUE ..... **88**
- “*Personal Corporation.*” *See* PORT CREDIT REALTY LTD. v. MINISTER OF NATIONAL REVENUE ..... **88**
- “*Public work.*” *See* LUDGER MARCOUX v. THE KING..... **23**
- “*Semi-Lustre.*” *See* SHERWIN WILLIAMS Co. OF CANADA LTD. v. COMMISSIONER OF PATENTS ..... **205**