1920
Nov. 19.

ON APPEAL FROM THE DECISION OF THE COMMISSIONER OF PATENTS FOR CANADA.

No. 4004. IN THE MATTER OF AN APPLICATION OF THE LOCOMOTIVE STOKER CORPORATION FOR LETTERS PATENT OF INVENTION FOR NEW AND USEFUL IMPROVEMENTS IN LOCOMOTIVE STOKERS.

International Law—Canadian Patent Act, secs. 7 and 8; 10 Geo. V, ch. 30—Order in Council, 14th April, 1920—Treaty of Versailles—International Convention of 1883, —Convention of 1900 and of 1911.

Petitioners, citizens of the United States of America, a nation allied and associated with His Majesty in the war, filed on the 30th June, 1920, a petition for a patent in Canada. On the 1st August, 1914, when war was declared, the invention had not been in public use or on sale with consent of the inventor for more than one year previous to that date. The words "par un tiers" which are to be found in Article IV of the International Convention of 1883, were omitted from the said Article in the Convention of 1900. In the Washington Convention of 1911, ratified by Great Britain in 1913, the words "by a third person" were carried into the English translation, although in the French version, the words "par un tiers" are again omitted.

Held: That the French version must be regarded as the official embodiment of the treaty; and in that view, where any difference of construction arises between the French text and that of the English translation, the language of the former must prevail.

2. That section 83 of the Order in Council of the 14th April, 1920, passed under authority of 10 Geo. V, ch. 30, not only affects section 8 of the Patent Act by declaring in effect that, in computing the delay for filing application for a patent, referred to therein, the time between the 1st August, 1914, and the 11th July, 1920 should not be taken into account, but also section 7, by abrogating the provisions thereof for the same period. The words "rights of priority" in said section 83 of the Order in Council mean that the status of the applicant should not be lost by any act of omission or commission, if the right claimed had not expired on said 1st August, 1914, the said period being eliminated from the consideration of whether or not the year referred to in article 7 had elapsed.

Reporter's note.—The appeals in the cases of: *In re Eiseman Magnetic Corporation; In re Charles H. Norton and In re Hemphill Company,* were argued by Mr. Russel Smart, at the same time, and the same judgment rendered.

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In re APPEAL OF THE LOCOMOTIVE STOKER CORPORATION v. THE COMMISSIONER OF PATENTS.

Reasons for Judgment.

APPEAL from the following decision of the Commissioner of Patents for Canada: "The Office understands that section 83 of the Treaty of Peace (Germany), Order, April 14th, 1920, extends the time fixed by section 8 of the Patent Act until the 11th July, 1920, but does not abrogate the other requirements of the Patent Act, notably those of section 7."

November 10th, 1920.

The appeal was heard before the Honourable the President of the Court (Sir Walter Cassels) at Ottawa.

A. W. Anglin K.C., for the Locomotive Stoker Corporation.

R. V. Sinclair K.C., for the Commissioner of Patents.

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

The PRESIDENT OF THE COURT, now (November 19th, 1920) delivered judgment.

The questions involved in the four cases are identical. The questions of law in all four cases were argued together.

Section 7 of the Patent Act, provides that "Any person who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement in any art, machine, manufacture or composition of matter, which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent therefor in Canada, may, on a petition, etc."

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In re APPEAL OF THE LOCOMOTIVE STOKER CORPORATION *v.* THE COMMISSIONER OF PATENTS.

Reasons for Judgment.

I deal with the locomotive stoker case argued by Mr. Anglin. The Commissioner of Patents has refused to entertain the applications for patents, and the appeal is brought to this court under the provisions of the statute, 3-4 Geo V, Cap. 17, which reads as follows: "23*a*. Every applicant for a patent under the Patent Act who has failed to obtain a patent by reason of the objection of the Commissioner of Patents as in the said Act provided may, at any time within six months after notice thereof has been mailed, by registered letter, addressed to him or his agent, appeal from the decision of the said commissioner to the Exchequer Court. 2. The Exchequer Court shall have exclusive jurisdiction to hear and determine any such appeal."

By virtue of that statute appeals from the ruling of the Commissioner will have to be dealt with by the Exchequer Court, instead of by the Governor in Council. Under this statute these appeals were set down for hearing and came on to be argued on the 10th day of November, instant. Mr. Sinclair, K.C., argued the case on behalf of the Commissioner.

Shortly, the point in the case is as follows: The petition dated the 23rd day of June, 1920, was filed on the 30th June, 1920. It must be borne in mind that the applicants for patents in all four cases are citizens of the United States. On the 30th day of June, 1920, the application in the stoker case was, as I have mentioned, filed in the patent office. On the 1st August, 1914, when war was declared the invention was not in public use or on sale with the consent or allowance of the inventor for more than one year previous to the 1st August, 1914.

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In re APPEAL OF THE LOCOMOTIVE STOKER CORPORATION v. THE COMMISSIONER OF PATENTS.

Reasons for Judgment.

At the time of the filing of the application for the patent, namely, the 30th June, 1920, if the ruling of the patent office is correct, more than the year had elapsed.

The contention of the appellant is that under certain orders and treaties, which I will refer to, a period of time between the 1st of August, and the 11th day of July, 1920, has to be eliminated from the consideration of whether or not the year had elapsed before the application for the patent on the 30th June, 1920.

The Patent Office have ruled as follows: It is referred to in their letter of the 5th August, 1920, in which they state: "The Office understands that section 83 of the Treaty of Peace (Germany,) Order, April 14th, 1920, extends the time fixed by section 8 of the Patent Act until the 11th July, 1920, but does not abrogate the other requirements of the Patent Act, notably those of section 7."

If that view is the proper view to be taken of the meaning of the order, then the judgment of the Commissioner of Patents is correct. If, on the other hand, the view or the opinion of the Commissioner of Patents is erroneous, his judgment should be reversed and the matter should be left to the Commissioner to proceed with the applications in the usual way.

After listening to the carefully prepared arguments of counsel for the appellant and also for the Commissioner, I am of opinion that the Commissioner has erred in the view he takes limiting the meaning of the Order in Council merely to section 8. I think it should equally apply to section 7,—and if I am correct in the view I have formed, then the time between the first August and the 20th July, 1920, should be eliminated from the consideration of the case, and if

this view is correct, at the time of the application for the patent the year had not elapsed as provided for by section 7 of the Patent Act.

The statute of the Dominion, 10 Geo. V, cap., 30, was assented to on the 10th November, 1919. It provides: "I. (i) The Governor in Council may make such appointments, establish such offices, make such orders in council, and do such things as appear to him to be necessary for carrying out the said treaties and for giving effect to any of the provisions of the said treaties."

The order in council bears date the 14th April, 1920. It recites the fact that whereas at Versailles, on the 20th June, 1919, the Treaty of Peace, etc., between the allied and associate powers and Germany, was signed on behalf of His Majesty acting for Canada by plenipotentiaries. The important sections of this order in council are to be found in part IV—they are sections 81, 82, 83 and 84. The main section, and which is the one in question here, is section 83, which reads as follows:

"83. The rights of priority, provided by Article 4 of the International Convention of Paris for the Protection of Industrial Property, of March 20, 1883, revised at Washington in 1911, or by any other Convention or Statute, for the filing of registration of applications for patents or models of utility, and for the registration of trade marks, designs and models which had not expired on the first day of August, 1914, and those which have arisen during the war, or would have arisen but for the war, shall be extended in favour of all nationals of Germany, and of the powers allied or associated during the war with His Majesty, until the eleventh day of July, 1920."

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In re APPEAL OF THE LOCOMOTIVE STOKER CORPORATION *v.* THE COMMISSIONER OF PATENTS.

Reasons for Judgment.

The words "rights of priority" evidently mean that the status of the applicant should not be lost by any act of omission or commission, if the right had not expired on the 1st August, 1914.

The first international convention, as far as I can ascertain, for the protection of industrial property; was signed at Paris on the 20th March, 1883. A copy is to be found in the 4th edition of Frost, on Patents, Vol. 2, commencing at page 308. There was an additional convention which modified the industrial property convention of March 20th, 1883, signed at Brussels on December 14th, 1900. The original French text commences in Frost, at page 328, and the English translation at page 329.

It may be of importance, as pointed out by Mr. Anglin, that the words in this latter convention omit in the new article IV the words "par un tiers." If these words had not been omitted, an argument would be raised that this clause of the convention or treaty, if read as in the former convention of 1883, would limit this application to public use by a third party, and not by the applicant for the patent.

By Article IV of the International Convention signed at Washington on the 2nd June, 1911, and ratified by Great Britain on April 1st, 1913, the words "par un tiers" (by a third party) are carried into the English translation of this convention, although in the French copy of the convention the words "par un tiers" are omitted, translating the section in the French text as if similar to the previous text of the convention of 1883. I think the contention put forward by Mr. Anglin is correct that the reaty is the treaty as set out in the French version, and the translator has in the English translation of it inserted these words "by a third party" by mistake.

This may be of importance. The question of whether or not Canada was bound by this Convention of 1911, is one of interest but not material for the consideration of this case. It is a debatable question whether or not when His Majesty the King of Great Britain and Ireland and of the British Dominions entered into a treaty, Canada is not bound by the terms of the treaty. That is a question which has been very much debated both for and against the view that Canada is bound. It is not, however, of importance at present.

Section 83, which I have quoted, refers to the rights of priority provided by Article 4 of the International Convention of Paris of 1883, as revised in 1911. It is unquestioned that the United States were allied or associated during the war with His Majesty.

I fail to see why the Commissioner should have held that the effect of this section 83, or the order in council should be limited so as to apply to section 8 of the Patent Act, and not to section 7. I think the matter should be referred back to the Patent Office for consideration of the applications.

There should be no order for costs.