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CANADA
LAW REPORTS

Exchequer Court of Canada

VACANT
OFFICIAL LAW REPORTER

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1932

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)

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF
CANADA

The Honourable ARCHER MARTIN, British Columbia Admiralty District—appointed
4th March, 1902.

do CHARLES D. MACAULAY, Yukon Admiralty District—appointed 6th
January, 1916.

do F. E. HODGINS—Toronto Admiralty District. (over)

do W. S. STEWART, Prince Edward Island Admiralty District—
appointed 26th July, 1917.

do SIR J. DOUGLAS HAZEN, New Brunswick Admiralty District—
appointed 9th November, 1917.

do HUMPHREY MELLISH, Nova Scotia Admiralty District—appointed
25th November, 1921.

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

DEPUTY LOCAL JUDGES:

do W. A. GALLIHER—British Columbia Admiralty District.

do J. A. CHISHOLM—Nova Scotia Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE HUGH GUTHRIE, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE MAURICE DUPRÉ, K.C.

The Honourable Frank Edgerton Hodgins, Local Judge in Admiralty for the Toronto Admiralty District, died on the 18th September, 1932.

CORRIGENDA

Page 14.—The name of C. P. Plaxton, K.C., should appear with that of A. E. Fripp, K.C., as joint counsel for the Respondent.

Pages 40 to 48.—Margin should read "Burt Business Forms Ltd. v. Autographic Register Systems, Ltd."

Page 70.—The name of "R. S. Cassels" should read "R. C. H. Cassels."

Page 79—L. 2, headnote—figures 69 to be added after the word "page."

Page 80.—The names "Eriksen-Brown & J. P. E. Brown" should read "J. E. Taylor."

ERRATUM

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

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A. To the Judicial Committee of the Privy Council:

1. *Holden v. Minister of National Revenue* (1931) Ex. C.R. 215. Appeal to the Supreme Court of Canada allowed. Leave to appeal to Privy Council granted; appeal pending.
2. *King, The v. Consolidated Distilleries Ltd.* (1931) Ex. C.R. 85. Appeal and cross appeal to the Supreme Court of Canada dismissed. (1932 S.C.R. 419). Leave to appeal to the Privy Council granted. Appeal pending.
3. *Spooner v. Minister of National Revenue* (1930) Ex. C.R. 229. Appeal to Supreme Court allowed. (1931) S.C.R. 399. Leave to appeal to the Privy Council granted. Appeal pending.

B. To the Supreme Court of Canada:

1. *Burt Business Forms Ltd. v. Autographic Register Systems Ltd.* (1932) Ex. C.R. 39. Pending.
2. *Gillette Safety Razor Co. of Canada, Ltd. v. Mailman* (1932) Ex. C.R. 54. Appeal allowed.
3. *Gillette Safety Razor Co. of Canada Ltd. v. Pal Blade Corporation Ltd.* (1932) Ex. C.R. 132. Pending.
4. *J. O. Ross Engineering Corp. v. Canada Paper Co. et al* (1932) Ex. C.R. 141. Pending.
5. *Ross Engineering Corp. et al v. Paper Machinery Co.* (1932) Ex. 238. Pending.
6. *King, The v. Capital Brewing Co.* (1932) Ex. C.R. 171. Pending.
7. *King, The v. Colgate-Palmolive Peet Co. et al* (1932) Ex. C.R. 120. Pending.
8. *King, The. v. Pickleman* (1932) Ex. C.R. 202. Pending.
9. *King, The v. Quebec Skating Club* (1931) Ex. C.R. 103. Appeal and cross appeal dismissed.
10. *Lightning Fastener Co. v. Colonial Fastener Co. Ltd.* (13145) (1932) Ex. C.R. 89. Pending.
11. *Lightning Fastener Co. v. Colonial Fastener Co. Ltd.* (13633) (1932) Ex. C.R. 101. Pending.
12. *Lightning Fastener Co. v. Colonial Fastener Co. Ltd.* (13298) (1932) Ex. C.R. 127. Pending.
13. *McClellan v. The King* (1932) Ex. C.R. 18. Appeal allowed and Petition dismissed.
14. *McLeod v. Minister of National Revenue*, (1925) Ex. C.R. 105; appeal dismissed without costs; cross appeal dismissed with costs. (1926 S.C.R. 457.) Leave to appeal to the Privy Council refused.
15. *Reilly v. The King* (1932) Ex. C.R. 14. Appeal dismissed.
16. *Watrous v. Minister of National Revenue* (1931) Ex. C.R. 108. Pending.
17. *Western Clock Co. v. Oris Watch Co.* (1931) Ex. C.R. 64. Appeal dismissed for want of jurisdiction.
18. *Bunge North American Grain Corp. v. The Str. Skarp et al* (1932) Ex. C.R. 212. Appeal from Local Judge in Admiralty to this court is pending.

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

JAMES BARBER McLEOD IN HIS }
 QUALITY OF TRUSTEE OF THE LAST WILL }
 AND TESTAMENT OF JOHN CURRY, DE- }
 CEASED } **APPELLANT;**

1931
 Nov. 20.
 Nov. 30.

AND

THE MINISTER OF NATIONAL }
 REVENUE } **RESPONDENT.**

Revenue—Income War Tax Act, Section 11, ss. 2—“Income accumulating”—Interpretation

Held that the word “accumulating” used with the word “income” in section 11, ss. 2 of the Income War Tax Act, 1917, and Amendments, is there used gerundially, that is as a verbal noun rather than as a verb; it is used just to earmark it as the fund for unascertained persons or persons with contingent interest and which is taxable in the hands of the Trustee.

APPEAL by the appellant herein from the decision of the Minister assessing, for the year 1928, the “income accumulating” in trust in the hands of the appellant as trustee.

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

A. C. McMaster, K.C., for the appellant.

C. Fraser Elliott, K.C., and *W. S. Fisher* for the respondent.

The facts and questions of law raised are stated in the Reasons for Judgment.

AUDETTE J., now (November 30, 1931), delivered the following judgment.

This is an appeal, under the provisions of The Income War Tax Act, 1917, and amendments thereto, from the assessment of the appellant, for the year 1928, in respect of

1931
 McLEOD
 v.
 THE
 MINISTER
 OF
 NATIONAL
 REVENUE.
 Audette J.

the income accumulating in trust in the hands of the appellant trustee, under the provisions of section 11 of the Act which reads as follows:—

11. The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.

2. Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of an unmarried person.

At the opening of the hearing of this appeal both parties, by their respective counsel, filed the following admission of facts, viz:—

STATEMENT OF FACTS AGREED UPON BY COUNSEL FOR THE APPELLANT AND RESPONDENT FOR THE PURPOSE OF THE TRIAL OF THIS ACTION.

1. The Appellant, residing in the City of Toronto, in the Province of Ontario, is the sole surviving executor and trustee of the last will and testament of John Curry, late of the City of Windsor in the County of Essex, in the Province of Ontario, who died domiciled in the said City of Windsor on the 11th day of May, 1912.

2. That the said executor and trustee was and is a "person" within the meaning of the Income War Tax Act and is resident in Canada.

3. That in determining the "income" for taxation purposes of the Appellant for the calendar year 1928 accumulating in his hands for the benefit of unascertained persons or persons with contingent interests there was disallowed as an expense the following items—

Dominion Income Tax:—

Paid Jan. 12th, 1928, balance of tax for years 1918, 1919 and 1920	\$	836	15
Paid May 21st, 1928, balance 1921 assessment.....		446	67
Paid Nov. 9th, 1928, balance 1923 and 1925 assessments		12,836	45
Paid April 30th, 1928, 1927 tax.....		11,588	36
Paid Dec. 4th, 1928, balance 1927 tax.....		10,164	46
			<hr/>
		\$35,872	09
United States Income Tax paid on income earned in the State of Michigan for the year 1928.....		431	18
			<hr/>
		\$36,303	27

It is well to be noticed that while the assessment appealed from comprises the sum of \$509.83 "for legal costs paid to McLeod and Bell and other solicitors," the respondent, both by the admission and its statement on defence, abandoned this amount and by paragraph 7 of the

defence admitted the amount as a proper deduction in arriving at the taxable income and to that extent the assessment is to be adjusted.

The determination of the income assessed is not in dispute, except as to the above mentioned items which the appellant claims should be deducted from the income in question before assessment thereof and which are set out, both in paragraph 12 of the appellant's statement of claim and in the above recited admission.

The question of the liability for these taxes is *res judicata* and is the result of litigation whereby the appellant was held liable therefor, by the Exchequer Court of Canada and Supreme Court of Canada in the case of *McLeod v. The Minister of Customs and Excise* (1). These Courts adjudicated on the principle that this was a fund within section 11 and the parties agreed as to the amount of the tax.

Now the only question to be here determined is not whether these amounts are payable, but whether or not they are a proper subject for deduction. It is contended by the appellant that these deductions should, under section 11, be made only from the fund which has been accumulated, that it is the fund accumulating which is subject to be taxed and not the fund or ascertained income received by the Trustee. That it should be the fund accumulating after being received.

The controversy turns upon the meaning of the word "*accumulating*" in subsection 2 of section 11. The total amount of the *income* is first received by the Trustee and divided into three separate parts. One part is paid to A, one part to B and the third part is set aside and is called and described as the "*income accumulating*."

The word "*accumulating*" is here used gerundially, that is as a verbal noun rather than as a verb; it is used just to earmark it as the fund for unascertained persons or persons with contingent interest and which is taxable in the hands of the Trustee. And the tax becomes due upon the same just as soon as it is so ascertained in respect of the three amounts and the Crown has, under the Act, the right to take, as the tax, its share of these ascertained amounts.

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(1) (1925) Ex. C.R. 105; (1926) S.C.R. 456.

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What is taxable is the ascertained amount of the income which comes into the hands of the Trustee for the purpose of accumulation. It is the income which is taxed and not the accumulation. The expression "income accumulating" is used only as a means of describing and designating that part of the income from the total and upon which the Trustee is liable to be taxed. And the application or use of the income is of no concern in determining the tax liability upon the same.

The exemption of \$1,500, as an unmarried person, is also ascertained at the time the income is ascertained and not upon the amount that will accumulate in the future.

It is the income of a person which is taxed, the tax is a personal tax, not upon the property, and the moment the amount of the income is earmarked and set aside for accumulation and goes into the hands of the person, the Trustee here, he becomes liable for the tax. It is the person who either owns or in whose hands it is legally, that is liable for the tax. He becomes the person assessable in respect of the income.

The mode of distribution of a person's or of an estate's income, as provided by the will in the present case, cannot affect the liability to taxation and cannot present or suggest any legal difficulty as to the incidence of the tax upon a particular portion of the ascertained income. The tax becomes payable the moment it is ascertained and is payable out and as part of that income, before it becomes a question of accumulating or not. *Dillon v. Corporation of Haverford west* (1); *Tennant v. Smith* (2); *Harris v. Corporation of Burgh Irvine* (3).

When an income has been ascertained, the use or destination of that income or of any part thereof, is immaterial. It is not the accumulation that is taxed, but that part of the ascertained income identified under that description of *income accumulative*. These words are a mere description of a part of the ascertained income which finds its way into the hands of the Trustee, under the provisions of the will.

The amount of this ascertained income cannot become the subject of deduction and exemption under the Act. This tax, now payable under a judgment of the Courts,

(1) (1891) 3 T.C. 31, at p. 36.

(2) (1892) 3 T.C. 158, at p. 165.

(3) (1900) 4 T.C. 221, at p. 232.

cannot become the subject of a reduction of the income of the next period,—it was not used wholly, exclusively and necessarily—or in any manner, for the purpose of earning the income (sec. 6). The tax is taken from the income itself and it is a share to the Crown of such income.

The income and the tax are confined to one year. The tax is the sharing of profits for one year and it is immaterial to consider what may or may not happen in the year or years following the year of assessment. *Attorney-General v. Metropolitan Water Board* (1).

A person may have an income one year and none the following years. The Crown is entitled to its share of the income, the profits and gain of the first year, although the tax is paid the following year.

The fallacy of the appellant's contention lies in an attempt to place upon these words "*income accumulating*" the narrowest possible construction to which they could be subjected and to ignore the plain grammatical meaning of these words as already above explained. The tax is ascertained the moment the income is ascertained, as it is a share of that income. Acquiescing in the appellant's contention—that is paying a tax for which the appellant has been found liable by the Courts—and be allowed to deduct that tax from the following years income, would let in a condition which would defeat the very purpose of the Act and lead to results absolutely foreign to the spirit and meaning of our Taxing Act. The tax must be either payable or not, and, if payable, not to be afterward returned or refunded.

Now, with respect to the amount of \$431.18 paid to the United States on income earned in the State of Michigan,—in view of my decision in the case of *Roensch v. Minister of National Revenue* (2)—it will be sufficient to say, for the reasons therein mentioned and among others, that the amount was not paid for the purpose of earning the income and should not be deducted. The exemption from taxation is a case of exception which must be strictly construed.

These amounts sought to be deducted have nothing to do with the income of 1928; these amounts of taxes must be taken out of the income earned in their respective years.

The appeal is dismissed with costs.

*Judgment accordingly.*

(1) (1927) 13 T.C. 294, at p. 311. (2) (1931) Ex. C.R. 1

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 Nov. 19.

IN THE MATTER OF

The Petition of The C. Turnbull Co. Limited for an order permitting it to register certain Trade-Marks;  
 Petitioner;

AND

IN THE MATTER OF

The specific Trade Mark consisting of the device of a sheep standing on grass as applied to cloths and stuffs of wool; and other trade-marks.

*Practice—Trade-marks—Joinder of demand to expunge in Petition to Register—Rules 299 and 300*

T. presented a petition for leave to register a trade-mark and joined with it in his petition a demand to expunge certain trade-marks alleged to stand in his way, objection being made that the two issues could not be so joined in such a petition;

*Held* that, inasmuch as the present case is not clearly covered by the Rules of the Court, that the rules in England are not applicable to this case, and that to force the petitioner to take a second action to expunge would only be multiplying actions to no purpose, contrary to the spirit of modern law, the Court availing itself of the power vested in it by rules 299 and 300, gave leave to the petitioner to present his petition as libelled. The rules not being quite definite upon the subject, the application was dismissed without costs.

MOTION by the Dominion Woollens and Worsteds Limited whose Trade-Mark it was sought to expunge, for an order to dismiss the above petition as against it.

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

*George F. Macdonnell, Esq.*, for Dominion Woollens and Worsteds Limited.

*W. L. Scott, K.C.*, for the petitioners.

The questions of law discussed and the facts are stated in the Reasons printed below.

AUDETTE J., now (November 19, 1931), delivered the following judgment.

I have no hesitation in coming to a conclusion upon this application, after having again looked over the rules. Rule 34 provides for a separate application for registration by Petition, and by Statement of Claim for expunging; and



rule 39, which provides for joining an infringement action and expunging, does not extend to the present case which is not provided for by any rule. Rule 42 provides that the practice and procedure not provided by statute or these rules shall be regulated by the English rule. There is no rule *consimili casu* in England because of the differences in the legislation of the two countries.

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There is no doubt rule 34 should be so amended as to allow the two questions to be tried together; because if I were to make an order to-day allowing the application it would result in the petitioner having to take a petition for registration and another action, by statement of claim to expunge; that would set up a multiplicity of actions which is against the very spirit of modern law. Furthermore, the result would be that these cases would have to be consolidated and tried together in order for the Court to be seized of the justice that should be done the parties.

Under the circumstances, and availing myself of rule 299 which says that no proceedings in the Exchequer Court shall be defeated by any merely formal objection, and rule 300 which vests the Court with power to excuse any party from complying with any of the provisions of these rules, which adds to the Judge's powers. Under such circumstances, I certainly will dismiss the application and by special leave the plaintiff or petitioner is hereby allowed to join in his application to register by petition a demand for expunging certain registered trade-marks which may stand in his way for such registration; but considering that the rule as it now stands lends itself to the construction placed upon it by the applicant, and it is a case of first impression, I will dismiss the application without costs to either party.

The Dominion Woollens and Worsteds Limited will have between this date and the 7th December next to file their objections or plea to the present case.

*Judgment accordingly.*

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Nov. 16.  
Nov. 25.

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

*Revenue—Personal Corporations—Section 21, Income War Tax Act—Deductions—Shareholder*

*Held* that section 21 of the Income War Tax Act, dealing with personal corporations, is to be construed as meaning that shareholders are to be assessed upon the company's income according to their several interests therein, and that shareholders of personal corporations thus assessed are entitled to any statutory exemptions or deductions to which ordinarily the corporation, or the shareholder, would be entitled.

APPEAL from the decision of the Minister of National Revenue, affirming an assessment made for the years 1927 and 1928, against the appellant.

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

*George H. Montgomery, K.C.*, for appellant.

*C. Fraser Elliott, K.C.*, and *W. S. Fisher* for respondent.

MONTGOMERY, K.C., for appellant argued that the personal corporation amendment was remedial and should receive such fair, large and liberal construction as will best ensure the attainment of the Act according to its true intent, meaning and spirit. He cited *Viscountess Rhondda's Claim* (1922) 2 A.C. 339 at pp. 349, 350 per Viscount Birkenhead, L.C. Maxwell on interpretation of Statutes, 7th Edition, p. 46. The intention was to ignore the corporate entity entirely and treat its income as if it had been received by the individual shareholders. He referred also to the quotation by Lord Halsbury in *Cox v. Hakes*, 15 A.C. 506 at p. 518.

ELLIOTT, K.C., for respondent argued that interest and dividends are income and liable to taxation unless expressly exempted. Dividends received by individuals are taxable in full. You cannot split up a dividend and see what it comes from—per Rowatt, J., in *Gimson v. Commissioners of Inland Revenue* (1930) 2 K.B. 246 at 251 and 252; *McNeil v. Federal Commissioner of Taxation* reported in Ratcliffe and McGrath's *Income Tax Decisions Australasia* p. 35 at p. 37. If the income of a commercial com-

pany be 50 per cent from commercial profits and 50 per cent from Tax Free Bond interest, nevertheless shareholders receiving a dividend from such company are taxable on the whole of the dividend. The words "shall . . . be deemed" "dividend" and "shall . . . constitute taxable income" as used in Section 21, are all imperative. "Deemed" as used in this context means "adjudged and determined"—*Hickey v. Stalker*, 53 O.L.R. 414 at p. 418, per Middleton J. "Deemed" has acquired no technical or peculiar significance when used in legislation but must be interpreted with reference to the whole of the Act. *The Queen v. Freeman* 22 N.S.R. 506 at 513. Subsections 2, 3, 4 and 5 of Section 21, are machinery provisions only and do not alter the principle to be followed when dealing with a dividend. As the text of the Act as passed by Parliament, is clear and unambiguous, the intention as expressed in Hansard Debates, cannot be considered. The statutory dividend from the personal corporation does not come into the hands of the shareholders under any circumstances flowing from the obligation of the Tax Free Bond or its interest, and, therefore, the shareholders cannot claim exemption. *Waterous v. Minister of National Revenue*, (1931) Ex. C.R. 108 at 111. The dividend is not derived from the Tax Free Bond; it is derived from the "income" of the company which the company received from all its sources of income.

The facts involved in this case and the questions of law are stated in the Reasons for Judgment.

THE PRESIDENT, now (November 25, 1931), delivered the following judgment.

This is an appeal from a decision of the Minister of National Revenue, affirming an assessment made for the years 1927 and 1928, against the appellant, a shareholder of a personal corporation, under the Income War Tax Act, Ch. 97, R.S.C., (1927). The appeal was heard upon the pleadings and upon an agreed statement of facts.

It may be convenient first, to refer to the provisions of the Act pertinent to the issue involved in this appeal. The statute defines a personal corporation as follows:—

S. 2 (i) 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

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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:—

(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;

The manner of assessing the income of a personal corporation is defined by s. 21 of the Act, which in part is as follows:—

21. The income of a personal corporation, in lieu of being assessed the tax prescribed by section nine 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.

(2) Each shareholder's taxable portion of the income of the corporation deemed to be distributed to him as above provided for, shall be such percentage of the income of the corporation, as the value of all property transferred or loaned by such shareholder or his predecessor in title to the corporation is of the total value of all property of the corporation acquired from the shareholders.

(3) The value of the property transferred by each shareholder or his predecessor in title shall be the fair value as at the date of the transfer of such property to the corporation, and the total value of the property of the corporation acquired from its shareholders shall, for the purpose of determining the percentage referred to in the last preceding subsection, be taken as at the date of acquisition thereof by the corporation; and in ascertaining values under this subsection, regard shall be had to all the facts and circumstances, and the decision of the Minister in that regard shall be final and conclusive.

Mr. Elliott, for the respondent suggested that s. 21 of the Act was enacted for the express purpose of circumventing those who might be inclined to escape income tax, by the transfer or loan of securities of one kind or another, to a private investment corporation, in exchange for shares in the corporation, and, who, controlling such a corporation might be willing to accept as annual income, interest or dividend therefrom, a return below what was normal in the ordinary practise of investors, assigning undistributed profits or income to some reserve account, in order to minimise their income which ordinarily would be taxable. With this the appellant's counsel, Mr. Montgomery, agreed. I am not of course accepting this statement of counsel as interpretative of this provision of the Act, though I must say

that the suggested explanation of the origin of this statutory provision respecting personal corporations, seems quite probable if not obvious.

A personal corporation is distinguishable from the ordinary corporation or joint stock company assessable under s. 9, ss. 2 of the Act; in respect of the former corporation special statutory provisions are enacted; its control must be in the hands of a specified class, and its business activities are limited; and special provisions are enacted prescribing how the income of such a corporation is to be assessed, and against whom. By s. 9 of the Act, ordinary corporations or joint stock companies shall pay income tax at the rate and subject to the exemptions set forth in the First Schedule of the Act.

The Dunkeld Securities Company is a company incorporated in the province of Quebec and carrying on business in Canada, and it is agreed between the parties that this company is a personal corporation within the meaning of s. 21 of the Income War Tax Act. The appellant is the holder of 7,850 shares out of an authorized issue of 10,000 shares, the balance, with the exception of 250 shares, being held by members of his family. The income of Dunkeld Securities Company, for 1927, was \$93,154.09 of which \$53,250 was interest derived from tax free bonds of the Dominion of Canada. In 1928, the income of the company was \$107,783.85, of which \$54,901.52 was interest derived from tax free bonds of the Dominion of Canada. The appellant's proportion of interest in the income of the company derived from the Dominion of Canada tax free bonds, under s. 21 of the Act, would be that fraction of the said income that 7,850 shares is of 10,000 shares; it is not necessary to state the result of a calculation upon that basis. The appellant was assessed upon that portion of the income of the company which was deemed to have been distributed to him in the years mentioned, and no deduction was allowed in respect of that portion of such income received by the company from the Dominion of Canada tax free bonds. The respondent claims that the full amount deemed to have been distributed to the appellant, was received by him "as dividend," and as such was liable to income tax. The appellant claims he is not liable to assessment upon that portion of the income of the company, deemed to be

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distributed to him, which was derived from Dominion of Canada tax free bonds. The question for decision therefore is whether income of a personal corporation derived from Dominion of Canada tax free bonds and deemed to be distributed to a shareholder, is subject to income tax.

As I have already stated, for the purposes of assessment under the Income War Tax Act, there is a distinction between corporations and joint stock companies, and a personal corporation. The former is assessable and taxable in the manner prescribed by section nine of the Act. Section 21 enacts that the income of a personal corporation "in lieu of being assessed the tax prescribed by section nine of this Act," shall be deemed to be distributed as a dividend to the shareholders thereof, and shall in their hands constitute taxable income, whether actually distributed by way of dividend or not. The evident purpose of this section of the Act was to ignore the personal corporation altogether and to assess the company's income as if in the hands of the shareholders, according to their several interests. In so far as assessable income was concerned, the Dunkeld Securities Company at the end of the calendar year possessed no income; it was deemed to have been distributed among its shareholders, whether in fact it was actually distributed by way of dividend or not; the liability to assessment was legislatively transferred from the company to its shareholders. The assessment was then to be made upon that constructive distribution, designated as a "dividend." I do not think any special significance is, or was intended, to be attached to the word "dividend," it might as well have been "income." It is merely descriptive of the company's income deemed to be distributed to shareholders, and was not intended to mean that the amounts distributed, however denominated, were necessarily taxable dividends or income. The total income of the company was deemed to be distributed to shareholders there to be assessed and taxed as income according to the provisions of the Act; that I think is what the language of section 21 means and what it was intended to mean. The word "dividend" here appears to be surplusage as the section would seem to be as complete and effective without the word as with it. Interest derived from a Dominion of Canada tax free bond is I apprehend a dividend, but is not a taxable dividend, in the hands of

the recipient. Income, under the Act does not necessarily mean "taxable income." S. 3 defines what is "income," and that includes interest received from Dominion of Canada tax free bonds, but such income is exempted from taxation by s. 4 of the Act, and is not therefore taxable income. Such income would not be taxable in the hands of a personal corporation, even if by it received and retained; there is nothing in the statute to indicate that this portion of the company's income was intended to be taxable in the hands of the shareholder to whom it is deemed to have been transferred. That view would accomplish the purpose of the Act as suggested by counsel, which was not, so far as I can see, designed to make taxable, income derived from tax free bonds. The purpose of the legislation was, for income tax purposes, to transfer to shareholders all the income of the personal corporation, so that for such purposes, the situation would be the same as if there never had been any transfer of securities to the corporation by the shareholders, and as if the personal corporation had never existed, and in which circumstances the amounts received as interest from the Dominion of Canada bonds in question would not be taxable, because by statute they were exempt from the income tax. Further, ss. 2 of s. 21 seems, by implication at least, to contemplate that not all the income received by the company and deemed to be distributed to the shareholder was to be taxable, because it expressly declares that "each shareholder's taxable portion of the income of the corporation deemed to be distributed to him, " shall be ascertained in the manner prescribed by this subsection. This, I think, implies that it was only the taxable portion of the corporation's income deemed to be distributed to the shareholder that was to be ascertained in the manner prescribed, and for the portion that was non-taxable no method of ascertainment is prescribed, as none was necessary.

I think the proper view of s. 21 of the Act is, that it was the purpose and intention of the legislature to ignore the corporation altogether, so far as income taxation was concerned, and to assess the shareholder upon the company's income according to their several interests, and to grant to the shareholders of personal corporations any statutory exemptions or deductions which ordinarily the corporation, or the shareholder itself, would be entitled to. This interpre-

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tation of s. 21, would, I think, secure the attainment of the purpose and intention of the statute. I am therefore of the opinion that the appeal must be allowed and costs will follow the event.

*Judgment accordingly.*

Maclean J.

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Nov. 27.

CLIFFORD B. REILLY.....SUPPLIANT;

vs.

HIS MAJESTY THE KING.....RESPONDENT.

*Crown—Contract—Dismissal of Civil or Military Officers*

R. was, by Order in Council, appointed a member of the former Federal Appeal Board, which was created by 13-14 Geo. V, c. 62. By 20-21 Geo. V, c. 25, the above statute was repealed, two new tribunals formed, and R's position in consequence abolished. R. now claims that, as he was re-appointed in 1928 for five years, he is entitled to recover from the respondent the balance of his salary for the unexpired term. No provision was made in the repealing statutes with regard to such payments.

*Held*, that, except where there is statutory provision for a higher tenure of office, or, that the power of the Crown is otherwise expressly restricted, the Crown has by law authority to dismiss at pleasure, either its civil or military officers, a condition to that effect being an implied term of the contract of service.

2. That it is a settled principle of law that public office is a distinctive thing and is not contractual in its nature.

PETITION OF RIGHT by the suppliant claiming damages due to loss of salary for the unexpired term of his alleged contract of employment.

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

*Redmond Quain, K.C.*, for suppliant.

*A. E. Fripp, K.C.*, for respondent.

The facts are stated in the Reasons for Judgment.

THE PRESIDENT, now (November 27, 1931), delivered the following judgment.

The petitioner here claims damages for breach of an alleged contract. The facts may be briefly stated. Chap. 62 of the Statutes of Canada, 1923, amending the Pension Act, authorized the creation of a Board, to be known as the



Federal Appeal Board, the members thereof to be appointed by the Governor in Council on the recommendation of the Minister of Justice. The function of the Board was to hear and determine certain appeals from decisions of the Board of Pension Commissioners refusing applications for pension under the provisions of The Pension Act. The statute provided that of the members first appointed to the Board, other than the Chairman, one half should be appointed for a term of two years, and the others for a term of three years; by an amending statute a member of the Board was eligible for re-appointment and for a term not exceeding five years. The Chairman was to hold office during pleasure, and any member might be removed for cause at any time. In August, 1923, by Order in Council, the petitioner was appointed a member of the Board for the term of three years, at a salary of \$6,000 per annum. Upon the expiration of this period the petitioner was re-appointed for a term of two years. By an Order in Council, dated August 16, 1928, the petitioner was again re-appointed a member of the Board, for the period of five years from August 17, 1928, and it is this period with which we are concerned. In the last mentioned Order in Council it was provided that the appointment of the petitioner and others therein named, might be terminated at any time "in the event of reduction in the Board's work to an extent sufficient to permit of its performance by fewer Commissioners." By Chap. 35 of the Statutes of Canada, 1930, the provisions of The Pension Act relating to the creation of the Federal Appeal Board were repealed, and provision was made for the establishment of two new tribunals to be respectively called a Pension Tribunal and a Pension Appeal Court, for the purpose of adjudicating upon applications for pensions refused by the Board of Pension Commissioners for Canada; the provisions of this statute came into force on the 1st of October, 1930, and thereupon the Federal Appeal Board ceased to exist. It is the salary for the unexpired term of the five year period which the petitioner claims as damages, amounting to \$17,000 or thereabouts.

While the petitioner may have grounds for feeling that he has not been justly dealt with, still I have come to the conclusion that he cannot succeed in this proceeding. The issue in this case has a somewhat ancient lineage; that is

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to say it raises the question whether, in the absence of legislation on the matter so clear and positive as to dispel reasonable doubt, an appointment to serve the State in a public capacity creates a contractual relationship between the Crown and the appointee; if there is not that relationship, actions of this nature are groundless. The cases both in England and the Dominions and also in the United States, on the question, are legion, because, as has been said, persons extruded from office are prone to wage their law against the Crown or State under which the office was held.

In British constitutional practice since 1689, and the date of the Act of Settlement, these appointments generally follow upon a statute requiring them to be made. Legislation of this sort is construed as not altering the settled law of the land unless it uses apt words for the purpose. The settled principle of law is that public office is a distinctive thing and is not contractual in its nature. Public offices are either judicial or ministerial. Judicial offices are now generally held during good behaviour, while ministerial offices are determinable at pleasure. See Chitty on Prerog. Chap VII. The Crown has by law authority to dismiss at pleasure, either its civil or military officers, because a condition to that effect is an implied term of the contract of service unless it be that there is some statutory provision for a higher tenure of office, or, that the power of the Crown is otherwise expressly restricted. *Gould v. Stuart* (1) and *Dunn v. The Queen* (2). In *De Dohsé v. The Queen* cited in *Dunn v. McDonald* (3) Lord Watson said that if a concluded contract had been made, it must have been held to have imported into it a condition that the Crown had the power to dismiss, and 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. See also *Nixon v. Attorney General* (4). Halsbury's Laws of England, Vol. 23, p. 352, lays down the law

(1) 1896 A.C. 575.

(2) 1896 1 Q.B.D. 116, at p. 117.

(3) 1897, 66 L.J.Q.B. 420 and at p. 423.

(4) 1930, 1 Ch. Div. 566 at p. 595.

in respect of the right of a public officer to compensation when his office has been abolished as follows:

At common law no public officer has any right to compensation for abolition of his office; but when such an office is abolished by statute it is not unusual for the legislature to grant the right. In such cases the extent of the right and the person entitled thereto must be ascertained from the particular statute;

in the case before me there is no such statutory provision. American law is to the same effect. Mechem on Public Offices and Officers, p. 4, says:

A public office is never conferred by contract, but finds its source and limitations in some act or expression of the governmental power. The same principle is exhaustively discussed in the case of *Connor v. The Mayor of the City of New York* (1). The fact that here the appointment purports to be for the term of five years does not make it any more a contract than one made to continue during good behaviour.

It is also to be observed that, on the part of the Crown, there is nothing suggestive of an agreement that the office in question here should continue for the full period for which the petitioner was appointed, or, that if the office was abolished the salary would continue for that period; in fact there could not be such an engagement, because the statute does not bestow authority upon the Governor in Council so to do. On the part of the petitioner there is nothing in the nature of a contract. He did not enter into any obligation to continue in office for the full term of the appointment; he was at liberty to resign at any time.

It is not necessary in the case before me to discuss the essentials of a public office, because the Commission under which the suppliant was empowered to act uses the word "office" as descriptive of the field of public duty to which he was appointed. There being no contract, there cannot be force in the contention of Mr. Quain for the petitioner, that the petitioner possessed a "right" which sec. 19, ss. "c" of the Interpretation Act preserves and which no repealing legislation could affect. There being no contract there can be no "right." As to the contention based upon the theory of a contract arising between the suppliant and the Crown, that the repealing Act of 1930 is *ultra vires* of the Parliament of Canada as interfering with property and civil rights in that it undertakes to vacate or determine the

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(1) (1849) 4 N.Y. Superior Court R. (2 Sandford), p. 355.

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suppliant's office, it, of course, fails of force when it is found that he is not before the Court on the basis of contract; but it is fairly obvious that the argument is a two-edged sword, for if Parliament was forbidden by the reason put forward from breaking the alleged contract, then it had no power or capacity to create a contract in the first instance. The contention that a subsequent Parliament cannot repeal a statute of a former Parliament does not require demonstration of its unsoundness: It offends an elementary doctrine of constitutional law.

The petition is therefore dismissed. In the circumstances of the case there will be no order as to costs, except, that the respondent will have the costs of and incidental to the application to re-open the argument.

*Judgment accordingly.*

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SHOLTO DOUGLAS McCLELLAN.....SUPPLIANT;

vs.

HIS MAJESTY THE KING.....RESPONDENT.

*Soldier's Settlement Act—Agreement to purchase—Tenancy at will—Sec. 22, ss. 6 and Sec. 31—Sec. 59, ss. (c)—“Orchard or fruit land”—Personal property.*

1. The Soldier's Settlement Board entered into an agreement with McC. for the sale of land to him as authorized by the Act. This Agreement, and the Act itself, provided that such agreement could only be cancelled for default by the settler to comply with the terms thereof, and in the case of land the same could only be re-possessioned upon and after the Board giving to the settler thirty days notice of its intention to rescind said agreement.

*Held*, that the tenancy at will, mentioned in section 22 (6) and section 31 of the Soldier's Settlement Act, is a special statutory tenancy at will, and is not the tenancy at will known to the common law; it is a modified or conditional tenancy at will. After the notice has been given, the settler, if he remains on the land, becomes merely a tenant at will. Section 31, by itself, is merely declaratory of the common law rule.

2. That the sale of “orchard or fruit lands,” mentioned in section 59 (c) of the Act, though providing for a valuation of the trees apart from the land, is nevertheless a sale of “orchard or fruit lands,” which is not personal property.

That an intention in a statute to depart from a common law rule would need to be expressed with the utmost clarity, and that section 59 (c) does not pretend to enact that planted and growing fruit trees are to be treated as chattels or personal property.

Action by the suppliant herein to recover certain lands and chattels of which he had been dispossessed, and for an order that he had been unlawfully dispossessed of the same and for damages suffered by reason of the eviction.

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

*H. Mason Drost* for suppliant.

*A. H. McNeill, K.C.*, for respondent.

The facts and questions of law raised are stated in the Reasons for Judgment.

The President now (December 14, 1931) delivered the following judgment.

This is a petition of right wherein the petitioner claims the return of certain lands and chattels of which he claims to have been unlawfully dispossessed by the respondent, and damages, which he claims to have suffered in consequence thereof. The case presents some unusual difficulties and it will be desirable to state quite fully all the facts.

It will first be convenient to refer to the Soldier Settlement Act, 1919, under which this proceeding arose, and which was particularly designed to assist in the settlement of returned soldiers—defined as “settler” in the Act—upon the land, and the Act was to be administered by a Board. The Board, by Sec. 16 was empowered to sell to settlers, land which it was authorized to acquire under the Act, the purchase price being payable in cash, or, at the option of the purchasers, in twenty-five or less equal instalments, but in no case was the unpaid balance of the purchase price to exceed \$5,000, in the case of land.

Section 18 empowered the Board to sell to settlers “any live stock or equipment” acquired under the authority of the Act, the sale price being cash, or, at the option of the settler, payable in four equal, consecutive annual instalments, commencing not later than three years from the date of the sale the amount owing to the Board on such a sale was to constitute a first charge on any land purchased by the settler from the Board, the title, ownership, and right of possession to remain in the Board until repayment of the sale price by the settler. Section 18 (c) provides that the balance of the sale price left unpaid to the Board at the time of sale shall not exceed \$2,000.

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By Sec. 59, certain wide powers there enumerated were conferred upon the Board, notwithstanding anything to the contrary in the Act. For example the Board was empowered to estimate the value of any land, for any purposes of the Act, apart from the value of buildings thereon, but this apparently was not done in this case; it might vary the provisions of sections sixteen to nineteen, so that live stock and equipment to a value not exceeding three thousand dollars might be sold to a settler, but so that the total amount of balance of price and advances remaining unpaid by the settler as the result of the exercise by the Board of any of its powers under the Act, should not exceed seven thousand five hundred dollars. Section 59 (c) is important here and may be recited in full:—

in all cases of sales of orchard or fruit lands, to apply the provisions of section eighteen of this Act, with such other provisions thereof as may depend upon or have relation to those of said section, as if for the words "live stock or equipment," or "live stock and equipment acquired under authority of this Act," or words to the same effect in said section or in any of said sections appearing, there were substituted the words "fruit trees, already planted or growing on any land sold by the Board to the settler," and, for any purpose of this Act, to estimate the value of the trees and shrubs already planted or growing on any land being sold by the Board to the settler apart from the value of such land;

Section 22 of the Act provides that all sales of property made pursuant to the provisions of the Act, and whereon any balance of the sale price shall remain payable by instalments or otherwise, shall be evidenced by agreement of sale, and which shall fully set forth the terms of sale. Sec. 22 (2) provides as follows:—

If any instalment mentioned in any such agreement of sale is not punctually made or if the settler makes any other default in performance of the terms of such agreement the Board may without any formal re-entry or retaking and without resort to proceedings in equity or at law, rescind such agreement and resell or otherwise deal with the property as authorized by this Act.

And S. 22 (6) enacts as follows:—

Before exercising as against land the rights by this section given, the Board shall give to the settler notice of its intention so to do, which notice shall be deemed duly given if mailed in any post office by registered letter addressed to the settler at his last address known to the Board thirty clear days before the Board acts hereunder.

In July, 1919, the petitioner applied to the Board for a loan of \$7,500, for the purchase of the property here in question and upon the printed form prescribed by the Board; as I understand it, the Board purchased the property

which the settler had selected, and the purchase price was treated as a loan or advance to the settler. The application for loan was to the effect that \$5,000 was required for acquiring the land in question, and \$2,500 for the purchase of stock, machinery and equipment. The land desired to be acquired by the petitioner consisted of 8.84 acres of cultivated land, situate at Oyama, B.C. The improvements upon the land were stated by the petitioner, in his application for the loan, to consist of certain named buildings, 560 fruit trees, chiefly apple trees, and some growing crops. The application form contains no further particulars; the portion of the printed form designated as "Supplementary Form C," wherein was to be set forth clearly and in detail what "stock, machinery and equipment" the applicant desired to purchase, was left blank. The application for the loan of \$7,500 was in due course approved of by the Board, and in the approval by an officer of the Board, it is stated that \$5,000 was for the land, and \$2,500 "for Fruit Trees and Stock, etc."

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Thereupon, an Agreement for Sale of Land, was entered into on the 7th day of August, 1919, between the Board and the petitioner; the Board agreed to sell and the petitioner agreed to purchase the parcel of land already mentioned. The purchase price was \$5,000, the purchaser agreeing to pay \$500 at the time of the execution of the agreement, the balance in twenty-five equal consecutive annual instalments with interest. The agreement, I would point out, states that the land included all "buildings and other improvements thereon, and the appurtenances thereto belonging and appertaining." The purchaser was to have the right of possession of the land upon the execution of the agreement, and he agreed therein to enter into occupation of the land within three months of the date of the execution of the agreement, and to reside on the land during the continuance of the agreement. The purchaser was to cultivate and crop the land in a good and husbandmanlike manner; he agreed to be guided by any duly authorized officer of the Board in the conduct of his farm operations; if the purchaser neglected to be so guided, and if the Board believed that without such guidance the purchaser would be unable successfully to operate the said land and that his management thereof was likely to prove unsuccessful, the

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Board might, after service of notice on the purchaser, so advise him, and thereupon the farming operations, etc., should be subject at all times and in all respects to the suggestions, advice and approval, of any duly authorized officer of the Board, and the purchaser agreed at all times to afford such officer full and free access to all portions of said lands and improvements thereon, etc. It was a provision of the agreement that should the purchaser fail to make prompt payment of any instalment when the same fell due, or to comply with other conditions mentioned in the agreement, the Board might upon giving the purchaser a thirty clear days' notice of intention to do so, rescind the agreement without any formal re-entry or retaking, or and without resort to proceedings in equity or at law to rescind the agreement, and the effect of such rescission would be to vest the said land in the Board absolutely free and discharged of all rights and claims of the purchaser.

On the same date as the Agreement for Sale of Land was executed, August 7, 1919, the Board and the petitioner entered into another agreement, under the caption, Agreement for Sale of Stock and Equipment. By this agreement the Board agreed to sell, and the purchaser agreed to buy, "All the goods and chattels enumerated in the purchaser's application, or as are more particularly described in the purchaser's requisition, hereinafter referred to as the 'chattels,' etc." The property agreed to be sold under this agreement was intended, I think, to relate only to the fruit trees. The purchase price, \$2,500, was payable in four equal instalments, and was to be a first lien upon the right, title or interest of the purchaser in the land described in the first-mentioned agreement. The agreement also provided that the "title, ownership and possession of the chattels shall remain in the Board until the total amount of the purchase price together with interest as aforesaid has been paid," and that the purchaser should have the use and possession of the chattels during the continuance of the agreement, provided he was not in default under the agreement, and provided the property had not been retaken by the Board in the manner provided. The agreement contained the following provision which sets forth the grounds upon which the Board might enter into possession of the property agreed to be sold, and resell the same:—



It is agreed between the Board and the Purchaser that if the Purchaser fails to make payment of any instalment hereinbefore mentioned when the same falls due, or fails to comply with any of the other conditions of this agreement or with respect to any other agreement, entered between him and the Board, or if the Board considers that the security furnished hereby has become impaired through the fault of the purchaser then and in such case the said amount, with accrued interest, if any, shall become due and payable in like manner and to all intent and purposes as if the time herein mentioned for the payment of such money had fully come and expired, and the Board may, without any formal re-entry or retaking and without resort to proceedings in equity or in law repossess and resell the said chattels, the proceeds thereof to be applied in reducing the amount unpaid thereon, and if deficiency arises, the deficiency shall be paid by the purchaser to the Board which shall have a right of action against him therefor.

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Under the agreement, it will be observed that no notice was required to be given to the purchaser by the Board, of its intention to enter into possession of the chattels, in the event of default of any nature.

On or about March 10, 1929, an authorized officer of the Board, Mr. Sinclair, visited the property in question, but observed no person on or in charge of the farm during his brief visit there. It appears from the evidence that the petitioner had gone to Vancouver in the month of December, 1928, for the purpose of there disposing of his apple crop of the season of 1928, and, I think, he had shipped his apple crop of that year, to Vancouver, for that purpose. The petitioner testified that he became ill while in Vancouver, and was unable to return to his farm until April, 1929, but he states that he left during his absence a person in charge of the premises, and in occupation of the dwelling house which was on the land in question. I have no doubt but that the witness Sinclair was correct in stating, that at the time he visited the property, he believed the property was unoccupied and perhaps abandoned, and also I believe that the petitioner's servant or agent was in occupation of the dwelling house. Sinclair stated that upon examination he found that no attention whatever was being given to the orchard, the trees had not been pruned for about three years, nor was the land being properly cultivated. He concluded that if any normal crop was to be obtained in 1929 from the apple trees, and if the Board's equity in the property was to be preserved, it was imperative that some competent person be put in charge of the property at once; if this point be of importance, I believe

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and find that the petitioner was in default in this respect. Mr. Sinclair accordingly recommended to the Board that some arrangement be made with one Lowe, an experienced and competent orchardist, living in the same locality. Accordingly, on or about March 25, the land, inclusive of the fruit trees and other improvements on the property, was leased to Lowe, until December 31 following, at a rental of \$145. He was not to have possession of the buildings until the petitioner had been given an opportunity to remove his personal effects. The lease provided that if the Board desired to sell the premises during the term of the lease, the same might be terminated upon one month's notice, and Lowe would in that event be entitled to reasonable compensation; and the lease states how that compensation was to be reached. Lowe had no option of purchase of the property, and it is quite evident, I think, that the property was leased to Lowe, so as to ensure the proper cultivation and care of the fruit trees during that season. Lowe forthwith entered into possession of the leased property, and proceeded to cultivate and care for the same, but he did not procure possession of the dwelling house until the month of August following, when the petitioner vacated the same.

The Board thereupon decided to rescind the agreements made with the petitioner and to dispossess him of all the property, and in pursuance of the terms of the first mentioned agreement, and the statute, it served notice upon the petitioner of its intention to rescind the first agreement and that it had rescinded the second agreement.

The notice recites the agreement to purchase the land, and then it proceeds to state, that the amount due on account of principal and interest in respect of the said purchase, and also the indebtedness due on account of advances for "stock and equipment" and otherwise had been consolidated and made payable in stated instalments; that the petitioner had abandoned the land and failed to farm the same in a good and husbandmanlike manner; that he had failed to make payment of the amounts stipulated at the time of the consolidation of the amounts due under the two agreements; and that he had failed to protect the Board's security. The notice stated that upon the expiry of thirty days after the mailing of the notice to the petitioner, the

Board would rescind the agreement for the sale of land and vest the same in itself; and that the Board had rescinded the second agreement and had taken possession of the "stock and equipment" and was proceeding to resell the same, because the petitioner had abandoned such property, and because the Board's security therein had been impaired by reason of such default. The agreement for the sale of the land was formally rescinded by resolution of the Board on August 8, 1929.

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According to the terms of this notice, it would appear that the Board deemed it sufficient to notify the petitioner of its intention, after thirty days notice, to rescind the agreement respecting the purchase of land, and that it had rescinded the second agreement and entered into possession of the stock and equipment. I should doubt very much, if, upon the facts disclosed, it could be properly alleged that the land, or the chattels so called, had been abandoned by the petitioner; it is true that he was absent from the property for a few months, but he left a person in occupation of the premises and there was not, I think, any intention of abandoning the property. But I do not propose discussing this point, because the petitioner was undoubtedly in default upon his payments under both agreements, or under the new arrangement made when the two advances were consolidated, and in any event this was a sufficient default to terminate both agreements.

I perhaps should point out, because it may be important later upon the question of damages, that on April 17, the District Solicitor of the Board, Mr. Morrow, wrote the petitioner stating that the action to rescind the agreement became necessary so that immediate arrangements might be made to have some one care for the property, in order to prevent depreciation, and he stated that "unless you are prepared to place your agreement with the Board in good standing same will be duly rescinded when the 30 day notice expires." In another letter, following a day or so later, the solicitor stated: "If it is your intention to place your account in good standing I will be glad if you will attend to the matter at the earliest possible date." Officers of the Board stated in evidence that had instalments past due under the agreement, been paid before the expiration of the thirty day notice, the petitioner would have been

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restored to the property. The occupation by Lowe would not be an impediment so far as the Board was concerned, it was said, except that Lowe, if he insisted, might require thirty days notice of the termination of the lease, and compensation. The petitioner, so far as I know, made no tender to the Board of past due instalments, at any time subsequent to the receipt of the notice which I have mentioned.

For the respondent, Mr. McNeill, advanced the very ingenious argument that the petitioner was merely a tenant at will so far as possession of the land under the first agreement was concerned, and that the agreement to sell the land was entirely another matter, that is to say, the agreement could not be terminated without a thirty day notice to the petitioner, but that the petitioner might be dispossessed of the land because he was a tenant at will. In so far as the second agreement is concerned, the defence substantially is, that no notice was required by the terms of the agreement, or by the statute, and that the respondent could without notice rescind the agreement and enter into possession of the fruit trees, or whatever property was sold and purchased under the second agreement, and that such property in this respect was in the same position as "stock and equipment," under Sec. 18.

Section 31 of the Act is to the effect that every settler occupying land sold by the Board, shall, until the Board conveys the land to him, be deemed a tenant at will. On the other hand, S. 22 enacts that if a settler is in default in the payment of any instalment mentioned in any agreement of sale, or makes any other default, the agreement may be rescinded by the Board, but ss. 6 of the same section states, that before the Board, may exercise any rights given it by this section as against land, the Board shall give the settler thirty clear days notice of its intention so to do, which in this case means, that before any agreement relating to the sale of land could be rescinded the petitioner must have thirty days notice. These two sections of the Act would appear to be in conflict, but I think their meaning and the intendment of the legislature, is rather evident. The interpretation to be placed upon s. 22 (6) and s. 31, I think, is that the tenancy at will therein mentioned, is a special statutory tenancy at will, and is not the tenancy at will

known to the common law; it is a modified or conditional tenancy at will, that is to say, the settler, in the case of land, must have thirty days notice of the Board's intention to rescind the agreement, before the agreement may be rescinded and the Board repossesses the land. After the notice has been given and the agreement is rescinded, the settler, if remaining on the land, becomes merely a tenant at will. S. 31, by itself, is merely declaratory of the common law rule. (See *Doe. d. Stanway v. Rock* (1), and Woodfall on Landlord and Tenant, 22nd Ed., p. 282). I cannot place any other interpretation upon the statutory provisions to which I have just referred. The agreement in the case of the sale of land is in conformity with the statute, and both required that the purchaser be given thirty days notice of the Board's intention to rescind the agreement, before rescinding the same. I am of the opinion therefore, that the petitioner could not be dispossessed of the lands agreed to be purchased by him until the notice required by the statute was given him, and the agreement rescinded.

Leasing the land in question, with the improvements thereon, to Lowe, and putting him into possession of the same, without giving the required notice of thirty days to the petitioner of the Board's intention to rescind the agreement, was an interference with the petitioner's right of possession to the land, and in law operated as an overt act dispossessing the petitioner of the property. I think the petitioner was at liberty to so construe it, even though he may have had a cause of action against Lowe personally. There was a breach of duty on the part of the Board in dispossessing the petitioner of the land and improvements without first giving the notice required by the statute, and consequently there was a tortious breach of contract. The fact that the petitioner was temporarily permitted to remain in occupation of the buildings, or some of them, must be treated as a mere indulgence and not involving any legal consequences either in the petitioner's behalf, or against the Board. Therefore, I think, the petitioner is entitled to any damage he may have suffered between the time Lowe entered into possession of the property and the

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date of expiry of the thirty days notice required by the statute to be given by the Board. It would seem that upon this notice being given the right of possession would inevitably revert to the Board without any entry or other formal act of taking possession.

The question also arises, assuming it was fruit trees that were sold under the second agreement, whether they are to be treated as chattels or as land, and whether, in the latter event, a separate and additional notice should have been given by the Board of its intention to rescind that agreement. This point, I think, calls for some discussion. If the property sold under the second agreement was not realty, but chattels, then upon any default, the Board might enter into possession of the property or chattels, without notice that is the contention of the Crown. Sec. 59 (c) of the Act was, I think, enacted for the purpose of enabling the Board in the case of the sale of orchard or fruit lands, to make a greater advance to the settler than it otherwise could under the statute, or possibly, because in the case of the sale of orchard lands, the portion of the total loan made on the security of the fruit trees, should be earlier repaid than that portion of the loan deemed to be made on the security of the land alone, upon the ground that the security afforded by the fruit trees was less secure, and always liable for one cause or another, to deterioration or even extinction. So then, in the case of the sale of orchard lands, when the fruit trees were to be separately valued, the Board had to look to S. 18 in order to ascertain the total amount that might be advanced and the terms of repayment; it was only the provisions of s. 18 respecting advances and repayment of advances that was to be applied, or that was applicable. That could be done without any fictitious severance of the fruit trees from the land. Section 59 (c) states that in the case of the sale of "orchard or fruit lands," the fruit trees may be valued apart from the land, but the sale is still one of "orchard or fruit lands," not fruit trees. In fact the first agreement described the property sold, as being a particular parcel of land with all the buildings and improvements thereon, which would include the fruit trees. Section 59 (c) does not pretend to enact that planted and growing fruit trees are to be treated as chattels, and clothed with the

legal quality of personal property; if it was intended so to change the common law it would need to have been expressed with the utmost clarity. In order to apply the provisions of s. 18, in the case of the sale of orchard lands, it was not necessary to say that the fruit trees became personal property just because they were to be valued apart from the land. S. 59 (c) is not, I think, to be construed as literally enacting that fruit trees are to be treated as personal property just because "live stock or equipment" was personal property. I might parenthetically say that neither of the agreements appear to be entirely appropriate to the circumstances of the case. The form of agreement suitable to the case where the property agreed to be sold is live stock, or farm equipment, is hardly suitable in the case where the property sold consists of fruit trees growing on land, sold by the Board to settler as orchard lands. The whole contract, I think, might have been expressed in the first agreement. It is even difficult to say, in the first place, what property was sold under the second agreement; I am assuming however that the agreement was intended to have reference to the fruit trees; it was intended, I think, to mean that the fruit trees had been valued at \$2,500, and that this amount was to be paid to the Board in the manner there indicated. Then, for example, the condition in the first agreement that the land was to be farmed in a husbandmanlike manner was, I have no doubt a condition intended to relate to the cultivation of the fruit trees, because primarily it was lands to be cultivated as orchard lands, that was sold to the petitioner. There was not a similar condition in the other agreement, and yet it is the default of such a condition that is charged, inter alia, against the petitioner as a reason for terminating the second agreement. This all goes to show how inadequately the agreements express the contract and how difficult it is to give an entirely satisfactory interpretation to the agreements. Departing from these parenthetical observations, which although not necessary to the determination of the case, I felt it useful to make, I would also point out, that the advance made under the second agreement became a first charge or lien on the land; this charge or lien is, by the interpretation clause of the Act, defined as "land." If it be correct that a charge or lien on the

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land, is "land" under the statute, then it would seem that both transactions involved "land" as contemplated by S. 22 (6). The petitioner being in default under both agreements, it is conceded he was liable to be dispossessed, providing that notice was given him as required by S. 22 (6), in the case of land. It seems to me that both agreements are to be treated as one contract for the sale and purchase of orchard lands with all improvements thereon, and I think that is what the statute contemplated, in the case of a sale of orchard lands. I am of the opinion that the notice the petitioner received was a sufficient compliance with the statute in respect of the two agreements, and it is a sufficient answer to the claim of the petitioner for damages if he relies upon the necessity of such a notice in the case of the second agreement; that notice related to the parcel of land agreed to be sold by the Board under the first agreement together with all buildings and improvements thereon. The rescission of this agreement divested the petitioner of any interest he had in the land, and everything appertaining to it. What I have said in the preceding paragraph as to the failure of the Board to give the required notice, and the matter of damages, is I think, applicable to the contract as a whole, which as I have pointed out, was really one for the sale and purchase of orchard lands notwithstanding the contract was expressed in two agreements. In any event, if I am correct in the view that the rescission of the first agreement divested the petitioner of all interest in the lands and all improvements thereon, then, the petitioner could not have suffered damages by reason of the failure to give the statutory notice in connection with the second agreement, assuming the property therein agreed to be sold was land; the first agreement was rescinded and this dispossessed him of everything which he had agreed to purchase, the land and all improvements, and he could not be injured by the failure of the Board to give notice of intention to dispossess him of something of which he had already been dispossessed. It matters not, I think, that the Board purported to act as if no notice was required under the second agreement, or that it may have considered the fruit trees growing on the orchard lands, as personal property.



My conclusion is that both agreements are to be treated as relating to lands, and really represent but one transaction, as I think the statute contemplates, because the purchase of the lands and the fruit trees is to be by one and the same person. This conclusion best harmonizes, I think, with the statute. It never could have been intended that one agreement might be rescinded while at the same time the other was in full force and effect; this might conceivably occur, for a short period at least. Treating all the property sold to the petitioner as land, then the notice served upon and received by the petitioner was, I think, a sufficient compliance with the statute, but as I have already stated the notice was not given sufficiently early to deprive the petitioner of damages, if he can successfully establish damages.

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The petitioner will be at liberty to apply for an order directing a reference, to ascertain such damages as he may have suffered, within the period already mentioned.

The question of the costs of the action will be reserved until the reference, if any, is executed.

*Judgment accordingly.*

HIS MAJESTY THE KING.....PLAINTIFF;  
 vs.  
 BELL LUMBER COMPANY.....DEFENDANT.

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 Dec. 24.

*Waters and streams—Riparian properties—British Columbia law—Non-navigable stream—Right of owner to bridge on same—Floatation of logs—Right to recovery for damage to bridge—“Obstruction”—Water Act B.C., sec. 84.*

*Held*, that where a person is the owner of land in the province of British Columbia through which a non-navigable stream flows, he may legally build a bridge across the stream from one part of his property to the other without the necessity of obtaining the permission or authority of the Provincial Government. That such a bridge, though built with a pier in the centre of the stream, leaving a passage of 50 feet and over on each side thereof, is not an “obstruction” within the meaning of the Water Act of British Columbia.

2. That anyone floating logs or poles down such a stream must take the necessary precautions to avoid causing damage to such a bridge by the floatation operations; and the Court in this case finding defendant negligent, condemned it to pay damages.

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INFORMATION by the Attorney-General for Canada to recover damages caused to certain lands belonging to plaintiff and to a bridge built across a stream flowing through it and caused by the floatation of poles down the stream in question.

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

*T. Todrick* for plaintiff.

*Gordon Lindsay* for defendant.

The facts and questions of law raised are stated in the Reasons for Judgment.

THE PRESIDENT, now (December 24, 1931), delivered the following judgment.

The Crown, in the right of the Dominion of Canada, represented by the Soldier Settlement Board, is the owner of certain lands in the Osoyoos Division of Yale District, British Columbia. One Sturn, a settler under the Soldier Settlement Act, is the occupant of the lands under an agreement of sale and purchase, made and entered into under the provisions of that Act. Through these lands flows the Shuswap River. The portion of such lands as are material in this proceeding, is an island, dividing the river into two channels known as the east and west channels respectively; the land comprising the island is partially cleared and cultivated, and there Sturn resides. Across the east channel, Sturn had constructed a bridge which afforded him the means of going on and off the island portion of the lands occupied by him. The bridge was of wooden construction, and besides the abutment piers on the land at either end, there was a central pier located near the centre of the stream, there being on one side of the pier a clear passage of about fifty feet between it and the shore line, and a clear passage of about sixty feet on the other side. The central pier was constructed of piles driven vertically into the bed of the river, or possibly just resting on the bed of the river, then boxed in, and filled with stone. This central pier was, I am inclined to think from the evidence, quite substantial and strong.

In May 1927, the respondents proposed driving logs down the river. It was in contemplation that the drive

would proceed down the west channel of the river, and with this in view that channel had been improved for driving purposes, and a sheer was constructed some distance up the stream to divert the logs down the west channel, in order to prevent their going down the east channel. When the log drive came down the river the sheer broke, and the logs floated down the east channel, causing damage to the bridge, it is claimed, and also erosion of part of the plaintiff's lands along the west channel, some 400 yards in length and seventy yards in width. This damage to the bridge and the land, it is claimed, was due to a jam of logs at the bridge and extending up-stream for some distance. In September following a considerable quantity of cedar poles belonging to the defendant came down the river, and another jam occurred at the bridge, remaining there for a week, and further injuring it. This jam, it is claimed, caused an erosion of a portion of the land contiguous to the east channel, and altogether about three and a half acres were, it is alleged, washed away. The defendant alleges that it was not its intention to drive these poles down the river, but that owing to a freshet the poles escaped from a boom some distance up the river. The distinction between logs and poles as I understand it, is, that the latter are of much longer lengths than logs, and are liable to come down stream as a "sweeper," that is, broad-side the stream, and thus more liable, particularly if striking any obstruction, to stop the forward movement of the drive and cause a jam.

It is conceded that the bridge was damaged in consequence of the jams of logs and poles at the bridge, and while it is not conceded by the defendant that a certain quantity of land contiguous to the east and west channel was washed away in consequence of flooding caused by these jams, still I have no difficulty in concluding that the alleged erosion did occur at the time alleged and as a consequence of the jams of logs and poles at the bridge. The bridge was very substantially damaged. A very large hole was formed in front of the central pier, and it was undermined, the base shifting about four feet down the stream thrusting the top of the pier upwards the stream, thus causing the bridge structure to sag and to be put out of alignment, and for a time it was out of use. The evidence

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as to the estimated acreage of land washed away is necessarily based on the opinion of Sturn, who alone would have accurate knowledge of the shore line surrounding the island prior to the erosion. I think Sturn was a credible witness, not inclined to exaggerate the damage done, and I have no doubt his statement of the bounds of his lands in relation to the east and west channel before the erosion occurred, is to be relied upon. Furthermore, I accept the computation made by several of the plaintiff's witnesses as to the quantity of soil washed away. There is no evidence to displace the effect of the evidence given upon behalf of the plaintiff upon this point.

Counsel for the defendant submitted that the bridge was an unlawful obstruction under the statute law of British Columbia, or alternatively a nuisance at common law, and that the defendant consequently would not be liable for damages thereto; and the defendant in part relies on s. 84 of the Water Act being Chap. 271, R.S.B.C. (1924). The plaintiff contended that the banks and the bed of the stream belonged to the plaintiff,—but not the water, by virtue of a provision of the Water Act—and that therefore the bridge was lawfully erected.

It is agreed that the civil and criminal law of England, as the same existed on November 19, 1858, became the law of British Columbia (R.S.B.C. 1924, Chap. 80), and is still the law of British Columbia, save as affected by statutory enactment.

By the law of England, as of 1858, riparian owners, whose lands bordered upon non-tidal streams, whether navigable or not, owned the bed and the banks of such stream and the waters thereof "ad medium filum aquae". Whatever judicial doubt may have been expressed in Canada as to the application of this doctrine to navigable waters, it seems to be an accepted doctrine in respect of unnavigable waters, in all the provinces of Canada, except where restricted by statute. It is conceded that the Shuswap river is not navigable. There is no statute of British Columbia which restricts the application of the doctrine, which I have just mentioned, except that the right to the use of the water of any stream is declared by the Water Act, to be vested in the Crown in the right of the Province. Therefore it would follow, I think, as con-

tended by plaintiff's counsel, that in respect to non-navigable waters at least, the banks and the bed of the stream belong to the person through whose land the stream flows, or if the stream divides two properties, then to the riparian proprietors, the right of each extending to the centre of the stream; and were it not for the Water Act, the waters of such streams would belong to the proprietary owners. As I understand it, the case turns, as a matter of law, upon the right of the settler—a tenant at will of the Crown—to erect the bridge, without obtaining any authority or permission therefor from the Provincial Government. The stream is non-navigable under the common law of England and the Canadian cases in the Courts of last resort. In this country non-navigable waters are affected by the common law right of the owner in possession of the land on both sides of the body of water; he has the right to erect structures thereon or over for the convenient use of his property subject to any statutory limitation of the common law rule, and subject to any statutory enactment by the provincial legislature in respect of the use of the water as a means of transportation of logs, etc. It would seem therefore, that the bridge was lawfully constructed unless there be some statutory enactment to the contrary.

The bridge apparently was constructed without obtaining any authority from any provincial authority; the plaintiff contended that there was no provincial statute requiring governmental authority before erecting the bridge, and my attention was not directed to any specific statutory enactment requiring such authorization, except it be S. 84 of the Water Act, which enacts that no person shall obstruct any stream without lawful authority. In the absence of any statute specifically requiring authority or permission to erect a bridge over any stream, it seems to me that Sec. 84 of the Water Act, was intended to mean just what it says, that no person shall obstruct any stream, and that it is always a question of fact, whether or not there is an "obstruction". In a sense any bridge pier in a stream is an obstruction, but the statutory "obstruction" must I think be reasonably construed. Here, there was a clear passage of water of about 50 feet on one side of the central pier, and 60 feet on the other side. It was possible of course to construct a bridge across the stream without a

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central pier, but this would be more expensive and hardly to be expected of one in Sturn's position, who had to have a bridge, and who probably had to build it himself. It is true, I believe, that a bridge on the same site had been previously destroyed by a drive of logs, but I was not informed as to the circumstances of the occurrence. It seems to me that this pier was not an obstruction in the contemplation of the statute. There was sufficient room to drive logs on either side of the pier, entailing of course more care and supervision than if the pier had not been there at all, but still affording sufficient room for the passage of logs. There doubtless were many points on the stream in question where the passage of logs would be held up, and their continued passage would only be ensured by their being released by men engaged for that purpose; it is possible also—although I recall no evidence on the point—that at many points the stream was not more than fifty or sixty feet wide. Drives of logs had gone under the bridge before, and also there was the alternative route down the west channel of the stream. I think therefore that the stream pier did not constitute an "obstruction" within the statute. So far as the case turns upon fact established by the evidence, the bridge did not constitute an obstruction to the floating of logs and poles over the water.

The plaintiff contended that the defendant had no right to use the stream for driving logs and poles, and was therefore a trespasser and liable for damages caused thereby, without proof of negligence. Section 4 of Chap. 271, R.S. B.C. (1924), of the Water Act, vests in the Crown, in the right of the Province, the unrecorded water in any stream, and it enacts that no person shall divert or appropriate any water except under the provisions of the Water Act. By the interpretation clause "Divert or diversion" means any taking or removing of water from any stream and shall include a retardation or acceleration of the flow thereof. A licence is apparently required before one can use the water, and one of the purposes for which licences may issue is for "clearing-streams purpose"; this is defined as meaning "clearing and improving of the bed and banks of streams for the better driving and booming of logs, and other timber products, and the use of the water of the streams for such driving and booming." Section 122 enacts that a licensee

shall not have the exclusive right to the use of that portion of the stream to which his licence extends, but that all persons shall have the right to float and transmit sawlogs, and other timber down the stream, subject however to the payment of tolls to the licensee, and the section provides how the tolls are to be ascertained. It appears from this, that if a licensee cleared and improved the bed and the banks of a stream for the better driving and booming of logs, he was permitted by the statute in consideration of such work, to exact tolls from other users of that same portion of the stream. Section 120 provides that the licensee shall not interfere with any bridge already lawfully erected over any stream. The defendant it seems was unlicensed. Subsequent to the hearing and on motion I allowed the defendant to put in evidence a licence issued to the Spalumchen Development Company Limited, dated March, 1922, for clearing-stream purposes, and to cover the period of twenty years from July, 1921, and this licence is referable to that portion of the Shuswap river here in question. It is my interpretation of the statutory clauses to which I have referred that the defendant was at liberty to drive logs down the stream, but whether it paid tolls or tolls were exacted of it, to or by the licensee, is of no importance here; neither is it of importance that the licence was voidable but not voided. I think therefore the defendant had a right by statute to drive logs down the stream, and in the area to which the licence mentioned was appurtenant.

Further, I am inclined to think that if the bridge was constructed by Sturn—the tenant of the Crown—in excess of his right and really constituted a nuisance at common law, it sounds in tort, and the Crown can only be held liable for tort under Dominion legislation. The Provincial legislature would not have authority to take away the prerogative of the Crown in the right of the Dominion to immunity in an action of such a nature, and the Dominion statute creating a liability against the Crown for torts in respect of public works is not applicable here. At the present time, it would appear that the Dominion Crown is only liable for the acts of its officers on or about a public work, and of course the bridge in question is not a public work within the Public Works Act, R.S.C. Chap. 166.

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I think there is sufficient evidence to establish negligence on the part of the defendant. We may start with the fact that it was admitted by Livland, the defendant's foreman, that had the sheer been constructed with sufficient strength it would not have broken, and the log drive would have gone down the western channel. Logs were permitted to pile against the bridge sometimes six or more logs high, sometimes right across the stream, and extending up the stream a considerable distance, this lasting sometimes four or five days or more. In the western channel there was a log jam some sixteen or eighteen feet high and which had to be removed by blasting. It seems to me no serious effort was made to prevent these jams, and the defendant did not assign sufficient man-power to prevent the jams, or minimize their effect upon the bridge and the normal flow of water. There never was more than one man at the bridge to prevent jams forming. Some of the defendant's own witnesses testified that it was possible to prevent such jams. I am inclined to believe the evidence of Mrs. Sturn who stated that in September, the pole drive was allowed to collect at the bridge and there remain for a week, and that Livland took away men who had been trying to break the jam, remarking that the bridge would go anyway and he would have to repair it; this Livland did not deny. I cannot escape the conviction that the defendant might have avoided the jams of logs or poles at the bridge by employment of sufficient men, thus ensuring a normal flow of the logs down the stream and thus also avoiding any flooding. The defendant's employees seem to have acted in a casual and indifferent manner, contrasting greatly with the conduct of Sturn who with other men worked strenuously in attempting to break the jams, and thus avoid damage to the property he occupied. I would refer to the case of *Ward v. Grenville* (1). The defendant knew of the effect of the central bridge pier upon the width of the waterway for transporting logs, before using the water on the occasion in question. He therefore took his chances and must be held liable for any damage occasioned to the bridge and the land.

(1) (1902) 32 S.C.R. 510.



There remains for consideration the quantum of damage. The plaintiff, at the trial, claimed that the cost of restoring the bridge was \$377.50; that the value of the three and a half acres of land washed away on the east side of the island was \$50 per acre; and that \$15 per acre was the value of the seven acres of land contiguous to the west channel that was washed away. The defendant paid into Court \$125 in respect of damages and \$75 in respect of costs, which it pleads is sufficient to cover any damages suffered by the plaintiff.

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Upon the evidence I think I must find the plaintiff entitled to damages in the amount claimed in his Information \$600. The reconstruction of the bridge might have been accomplished more cheaply by others than by Sturn, but there is no evidence upon which I might safely proceed to reduce the amount which Sturn says it cost to restore the bridge. The defendant's estimate of the cost of reconstruction is not, in my opinion, at all reasonable or sufficient. Respecting the matter of the amount of damage done to the land, the evidence tendered on behalf of the defendant, does not afford sufficient grounds for declining to give effect to the plaintiff's evidence upon this point. Altogether I allow the plaintiff damages in the amount of \$600; and costs will follow the event.

*Judgment accordingly.*

BURT BUSINESS FORMS, LIMITED... PLAINTIFF;

vs.

AUTOGRAPHIC REGISTER SYSTEMS, }  
 LIMITED ..... } DEFENDANT.

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 Jan. 21.

*Patents—Infringement—Invalidity—Anticipation—General commercial adoption—Evidence of invention*

Plaintiff's patent No. 246,547 issued in 1925, on application filed in 1923 relates to Manifolded Books, and claim 8, which is typical, claims:—

“A supply pad for manifolded machines including, in combination, a plurality of record strips folded zig-zag, the folds of one interengaged with those of the others so as to provide superposed sets of superposed leaves connected end-to-end, each strip having a longitudinal series of printed forms and a series of form-registering apertures in fixed relation to said forms, respectively, there being a form and a form-registering aperture in each leaf of a set, and between the forms.”

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Held that to manufacture or assemble a paper supply with apertures or holes that co-operate with a particular manifolding machine did not require inventive skill.

2. Held further that, on the facts, plaintiff's Patent 246,547 was invalid by reason of anticipation.
3. That although evidence of a general commercial adoption of a certain device may assist in the determination of the question as to whether or not there is invention, invention cannot be presumed from such a fact. Such evidence is of little assistance to the Court in determining whether or not there is invention, and evidence of that nature must be considered with caution.
4. The Court also held that defendant's machine did not infringe plaintiff's patent, No. 237,913.

ACTION by plaintiff to have it ordered and adjudged that defendant is infringing its patents, No. 246,547 and No. 237,913.

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

A. J. Thompson, K.C., for plaintiff.

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

The facts are stated in the reasons for judgment.

THE PRESIDENT now (January 21, 1932) delivered the following judgment:

In this action, the plaintiff claims infringement of two patents, by the defendant. One patent, being No. 246,547 issued in February, 1925, upon an application made in May, 1923, and relates to a Manifolding Book; the other is patent No. 237,913, which issued in February, 1924, upon an application made in August, 1921, and relates to improvements in Manifolding Devices. The plaintiff's patentee in the case of each patent, is one William J. Wiswall.

Briefly, in the manifolding machine in use to-day, superposed continuous sheets or strips of paper, usually two or more, are fed by suitable mechanical means from a roll or rolls, or a pad or pads, contained in a compartment of the manifolding device, over a writing tablet, where sheets of carbon paper are inserted transversely between the superposed strips so as to secure a plurality of copies of the matter written on the top sheet. Generally, upon each of these strips of paper are printed a series of forms of account, consecutively numbered, whereon a record of sales may be

recorded, the idea being that the form upon one of the superposed strips of paper is for delivery to the customer, the corresponding numbered form upon another strip being intended as an office record of the transaction; there may be a third form, which is automatically fed into a chamber in front of the machine, which is available later for audit or reference purposes. If required, more than three strips of paper may be used in a manifolding machine. By a revolution of a crank in the manifolding device, or some such similar means, the forms are advanced in the machine to the writing tablet and are torn off when a transaction has been recorded on the top sheet; then fresh forms are similarly advanced for the registry of further transactions; the forms on the audit strip are not torn off but the strip is fed intact through the machine, as already mentioned, into a compartment specially provided therefor. It is necessary that the strips of paper in the manifolding machine be in perfect alignment, that is to say, the forms upon the underlying strips of paper bearing the same number as the top form, must be in alignment or registration, the one to the other, so that any inscription made on the upper form upon the writing tablet will be transferred with exactness in all respects to the same numbered underlying forms. This sufficiently describes the purpose and manner of use of a manifolding machine, and its paper supply.

Prior to 1923, it is said, that in the use of manifolding machines the paper supply was usually in the form of rolls, that is to say, two or more separate rolls of paper with printed forms thereon, were placed in a specially provided chamber in the manifolding machine, and the paper from each of such rolls was by appropriate means unwound from the rolls during the operation of the machine. The manifolding machines were constructed having in mind this form of paper supply. It is claimed that the roll form of paper supply frequently developed undesirable consequences, chiefly, that the paper in being fed from separate rolls into and through the machine would frequently jam, crush or break, and that the forms upon the strips were liable to be out of alignment on reaching the writing tablet. In the plaintiff's alleged invention relating to a Manifolding Book, the paper strips are interleaved and folded flat in zig zag

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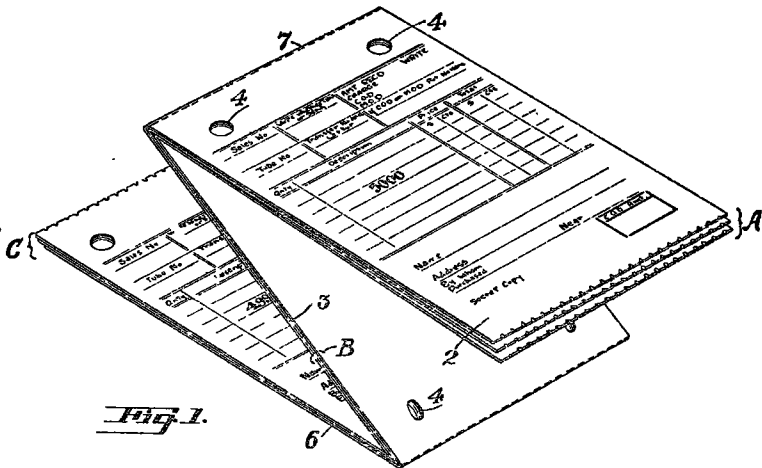
fashion in one packet, and fed into the manifolding machine from that packet; and that flat packet is the major subject of controversy in both of the patents in suit.

It will be more convenient and satisfactory to consider, first, the plaintiff's alleged invention relating to a Manifolding Book. The object of the invention is stated in the first two paragraphs of the specification and they are as follows:—

This invention relates to record supply devices for use with manifolding machines, and with respect to its more specific features to manifolding book or pad for use in manifolding autographic registers and other machines which are adapted for the feeding of paper strips into position for the making of two or more records simultaneously by impression transfer to a lower strip of a record made on an upper strip.

An object of the invention is the provision of a supply pad or book for the use referred to in which the manifolding sets are effectively retained initially in such relation as to conduce to perfect registration, at manifolding position, of their printed matter or forms, the leaves of the pad being so retained and so constructed as positively to co-operate with each other and with the feeding and registering elements of the machine to further the important end in view; to wit, perfect registration. Supplementing the object just mentioned is the object of providing such a pad adapted to be increased in copy capacity to the extent of any practical requirements without detracting from its adaptability to accomplish the object heretofore mentioned, especially the perfection of registration. The pad, provided by the present invention, is of simple form, readily made, free from mechanical features, except such as may be found in the paper itself; required no specially constructed support, and lends itself readily, not only to the production of inscribed slips or leaves adapted to be torn therefrom, but also to the production of a compact filing pad which may be progressively formed in the machine itself, and if desired, in a locked compartment of the machine, the filing pad so formed being adapted for convenient inspection when desired.

The specification refers to the invention as a pad. Fig. 1 shown in the drawings, is below reproduced:



Referring to this drawing the specification states:—

The pad illustrated in Fig. 1 is composed of three superposed sets of leaves, the sets being indicated respectively by the letters A, B, and C, each set comprising three leaves 2, 3, and 6. It will be understood that as many sets as desired may be employed, the drawing being restricted to three sets as sufficient for illustrative purposes. The pad is composed of a plurality of similar continuous strips one such strip being shown in Fig. 2, each strip being reversely folded, as clearly illustrated in Fig. 1, the folds of one strip interengaged with those of the others so as to provide the superposed sets of leaves A, B, and C, the leaves of the superposed sets being connected end-to-end, as also clearly illustrated in Fig. 1. At the fold-lines the paper strips are weakened, as indicated at 7, so that the successive leaves of the strip are separated by these weakened lines which facilitate tearing the leaves apart and minimize the thickness of the apex of the fold, in this wise reducing the thickness of the pad at the ends. In the embodiment illustrated, the fold-lines are perforated, that is, small openings, as slits, penetrate the full thickness of the strip along the line 7.

I will quote freely from the specification because it will explain more clearly than I could possibly do, the alleged invention. The specification continues:—

The superposed leaves of each of the sets A, B, and C have each a form, the forms on one strip being clearly illustrated in Fig. 2. It will be understood that the forms on the underlying leaves of the other strips are similar to the forms on the top strip so that, when the forms are superposed and in registry, an inscription made on the upper form will be transferred in the same relation to the underlying forms. The transfer material may be provided in any manner customary in machines of the character for which it has been explained the pad is adopted. Usually separate carbon transfer sheets are employed at writing position between each pair of superposed forms.

Each strip is provided with one or more apertures 4. The position of these apertures relative to the forms is of great importance. In the embodiment illustrated sets of these apertures are employed, one set for each leaf, the respective apertures of a set being adjacent the longitudinal margins of the leaf and in transverse alignment. The relation between any aperture or set of apertures 4 to its respective form on the leaf is such that when the apertures of superposed leaves are in registry the superposed forms are also in registry. The apertures 4 are therefore form-registering apertures and the registry relation between the apertures 4 in a leaf and the form in that leaf is the same as the registry relation between the form on the underlying leaf and its aperture. The apertures in the leaves 4 may be produced in any efficient manner, but it is found to conduce to accuracy of the registry relation mentioned to print the forms in a press which is equipped with a suitable punch which will punch the apertures at the same time that the forms are printed.

In the pad (Fig. 1) it will be seen that the apertures of any set are in substantial registry depthwise of the pad, being displaced from each other by only a small amount because of the folding of the strip; which amount is the same for all sets, being constant throughout the pad. These apertures are also clear of the fold-lines 7, the apertures in the successive superposed sets of leaves being adjacent opposite ends of the pad formed by the folds of the strips. As hereinafter explained the apertures 4 serve

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not only as form-registering apertures but also as feed-control apertures, and are made of sufficient diameter to accommodate the feeding and registering mechanism of the machine with which the pad is used as will appear hereinafter. The weakened lines 7 are, in practice, provided by perforations, the perforations being usually smaller than the apertures 4. The perforations on the line 7 should be so disposed as to provide strip material at the fold-lines which strip material is in longitudinal alignment between immediately succeeding apertures for engagement by a feeding mechanism. Inasmuch as it will be desired to tear simultaneously two or more of the leaves from each other, this may be conveniently effected by tearing along the weakened fold-lines 7 of each leaf when these lines are in registry. Accordingly the apertures 4 of superposed leaves are arranged equidistant from the proximate fold-line so that they may serve to register the fold-lines for such purpose.

It will be observed that taken depthwise of the pad the forms on one set, for instance, the forms on the set A, facing in the opposite direction from the forms on the next succeeding set B. In the embodiment illustrated the several forms are similarly disposed on each of the strips 2, 3 and 6 so that the foot of one form is followed by the head of the next form. In the pad, however, such forms are reversed, end for end, relative to each other in the succeeding sets so that the immediately superposed sets are not in operative manifolding relation relative to each other. On each strip the forms are longitudinally spaced apart, both the apertures and the weakened lines coming between successive sets on each strip, each of the leaves of the pad being of the same length, with the fold-lines occurring at the head and foot of the pad. Inasmuch as each leaf has but one form thereon, it will be noted that there is but one aperture or set of apertures 4, for each leaf. Should single apertures be employed they should preferably be disposed along the longitudinal central line of the respective leaves.

\* \* \* \* \*

The pad above described is of a convenient shape, being rectangular, suitable for manipulation and for application to the machine to which it is to be applied. The folds interengage with each other so that the leaves are efficiently held together in manifolding sets with the apertures of the leaves of either set in alignment with each other depthwise of the pad, the registering apertures 4 being in the same registry relation to the form in each leaf and also to the fold-lines. When a set has been inscribed and fed forward so as to occupy a position at the left of the feed roller 12, with the next succeeding set of apertures between the feed roller 12 and the discs 13, the weakened line 7 just ahead of the last mentioned apertures will also be in alignment, and the inscribed leaves at the left of the roller may be simultaneously torn off on a straight line.

As illustrated in Fig. 3 the two inscribed upper leaves pass out of the machine and may be torn off as just explained. The lowermost inscribed leaf passes into the compartment 20 and refolds, on the original fold lines, into pad form which pad may be denominated a filing pad, inasmuch as it may be removed from the machine and filed for record. It will be noted that this filing pad is single-ply, that is, it is composed of but one continuous strip and that it is in leaf form so as to be adapted for ready inspection of all or any of its leaves.

By placing the apertures clear of the weakened lines at the folds, the tearing off of the leaves does not affect the apertures, and hence the succeeding set of leaves will be retained with their apertures in engagement with the discs and consequently with their forms in registry relation. If

the tearing line intersected the apertures the engagement of the latter with the discs would be broken and permit the succeeding set of leaves to move or be accidentally forced from registry relation because they would be no longer held by the discs. The apertures being spaced clear of the ends of the pad, such ends are included in the substantially plane face or end of the pad whereas otherwise they would have reentrant portions or recesses caused by the presence of aperture walls. Inasmuch as in the present embodiment the leaves are of the same length and the apertures are equidistant from the fold lines at the ends of the leaves, many of the apertures are in registry depthwise of the pad, alternating, however, with the material of certain of the leaves. For filing purposes this is a great convenience because a pointed filing pin may be readily thrust through the interrupting leaf material whereas it would be more difficult to thrust such a pin through the thickness of the pad were there no apertures. By providing forms on successive sets, facing in opposite directions respectively, successive forms may be printed on the same face of each strip and follow each other closely, lending themselves at the same time for proper association on the leaves of reversely folded strips. Thus paper is saved by arranging the forms in this manner.

Claim 8 is typical of other claims and is as follows:—

A supply pad for manifolding machines including, in combination, a plurality of record strips folded zig-zag, the folds of one interengaged with those of the others so as to provide superposed sets of superposed leaves connected end-to-end, each strip having a longitudinal series of printed forms and a series of form-registering apertures in fixed relation to said forms, respectively, there being a form and a form-registering aperture in each leaf of a set, and between the forms.

The essence of the claim to invention in this patent is to be found, it will be seen, in a pad of several strips of paper, which are interleaved, and folded in zig zag fashion at the point of the transverse perforations dividing the several forms printed on the superposed strips of paper. Each form has apertures or holes adjacent the longitudinal margins of the form and in transverse alignment, and they are described as form-registering apertures, and feed-control apertures. The defence is that there is no invention in the manifolding book described by Wiswall, or in its use in any manifolding machine, and that in any event it had been long anticipated.

The matter of the apertures in the several forms printed on the strips of paper was the subject of considerable discussion at the trial, and that point may first be considered. These apertures, placed in each form of a set as described, co-operate with the feeding and registration mechanism of the manifolding machine. The apertures in the paper supply are there because the manifolding machine, described by Wiswall, requires them in order that it may consummate its real functions. The Shoup-Oliver manifolding machine

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which goes back to 1915, required apertures in the paper supply so that they might co-operate with the manifolding machine in performing certain definite functions, just as in Wiswall's manifolding machine. And there are other instances of substantially the same thing in the prior art. It is the manifolding machine that effectuates the alignment or registration of the forms, and the feed control, and in order that the machine may perform these functions, it is necessary that apertures, of a predetermined number and position, appear in the paper supply. They are found in the paper supply forms, not because they were invented, but because a certain type or types of manifolding machines made their presence necessary. To manufacture or assemble a paper supply with apertures or holes to co-operate with a particular manifolding machine could not possibly call for inventive skill, or anything approaching it. Therefore I say, that upon a consideration of the question of the patentability of Wiswall's paper supply pad, the matter of the apertures may be disregarded entirely; and in fact, as I understood it, the whole action proceeded upon the footing that the infringement, if any, was in the use of a paper supply that was folded in the manner described by Wiswall, and in which form of paper supply the lowermost or audit strip might be refolded in the same manner, after passing through the machine into a compartment specially provided for it.

Turning now to a consideration of the state of the prior art, I think that perhaps Sherman (U.S.A., 1922) might first be considered, not that it is as relevant as others, but because, I think, it in a limited sense disclosed the idea which is the claim to invention in Wiswall. This patentee in his specification states:—

In registers of this type there have been developed in the past what are known as recording autographic registers, wherein one of the plurality of strips is not fed out of the machine, but instead, is wound up or otherwise deposited within the casing of the machine thereby forming a complete record of transactions on such machine, this record available only to persons who can open the machine casing.

\* \* \* \* \*

In the autographic registers of the past the paper has generally been installed in the machines in roll form, and unwound from the rolls during the operation of the machine. The record strips have also been stored on rolls, by winding the strip containing the record over a core at the delivery end of the machine.



The result in general from using papers that have been rolled up just previous to delivery from the machine is that the sections torn therefrom will tend to curl and thus be hard to handle. This is particularly true where the paper has been stored for some months, in which case it is a great annoyance to try to file the detached sections.

In these machines the record strip is necessarily wound upon a roll, as above noted, and when the owner attempts to unroll the record strip, in such a machine he is involved in a great deal of difficulty in handling it. He can turn only with great difficulty to any desired transaction, and the paper will be long and unwieldy so as to make it hard to manage.

Moreover there is great difficulty in maintaining the proper feed and registration in registers of the pin wheel feed type, of a record strip which is wound in a roll, since all strips should be free from friction while being fed by the pins in order to maintain registry. In the record machines of the past there have been various devices for allowing for the difference in diameter between the storage roll of the record strip due to accumulation of paper on it, but this is of no assistance when it comes to the elimination of all friction from the record strip in order to maintain or establish registration between the record strip and the other strips in the machine.

Accordingly in my invention herein I provide the paper for use in the form of bundles made up of opposite flat folds whereby the slips delivered will be flat, and whereby the record bundle will naturally fall in place in its previous folded condition in a receptacle located in the casing just beyond the feeding mechanism.

\* \* \* \* \*

The paper is furnished in bundles 11 (Figure 3) composed of reversely folded printed sections 12. In my preferred practice, the sections of each bundle will be correspondingly printed and perforated with marginal holes 13 and also consecutively numbered. The bundles, four in number, as shown, will be mounted in casings in any desired manner, such as permitting them to rest against sloping backs 14, or laying them on shelves 14a (Figure 4), both shelves and backs being shown to indicate a supporting means generally.

It will be seen that Sherman discloses the idea of employing a paper supply in the form of bundles made up of opposite flat folds, whereby the slips (forms) delivered would be flat, and whereby what has been called the audit sheet would fall into a compartment provided therefor, in its previous folded flat state; in other words, Sherman clearly suggested the idea of a flat pad or packet instead of rolls as the paper supply in a manifolding machine. Other advantages of the flat pads as compared with rolls the patentee points out, and these advantages are in effect mentioned by Wiswall. The specification further states:—

Due to the tendency of the strip D to fold, it will form in a neat pile in the chamber, therefore, as shown at 17. When the owner desires to get at the record, he will open the closure 7 and lift out the bundle, tearing off the dependent strip thereof. It will be comparatively easy for him to look at any portion of the record, or find any given consecutive number that he desires as the bundle will open like a book.

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It can be observed also that no friction or pull is applied to the record strip beyond the feed, as would be the case if the strip were rolled up on a core operated by gears from the feed device. Not only this, but the strips A, B, and C, which will be torn off in sections when they are fed from the machine, will show no tendency to curl. It will be seen also that the record sections can be of identical size to the removed sections since no problem is involved of winding them on a roll whose diameter varies with the amount of paper thereon.

It is apparent therefore that in so far as the use of a paper supply, folded flat in zig zag fashion, each form being transversely perforated and consecutively numbered, Sherman's disclosure was exactly the same as Wiswall, except, that Wiswall interleaves his strips of paper, that is to say, he folds his three or more strips of paper together in zig zag fashion into one pad, instead of folding each strip into a separate bundle and feeding the paper from each bundle to the writing tablet of the manifolding machine, as Sherman directs. The forms are marginally perforated so that the pin wheel feed will engage in the perforations thereby feeding them in registry; the feeding and registering mechanism is different from Wiswall, but the perforations in the paper supply are intended for substantially the same purpose as in Wiswall. Sherman is a complete anticipation of Wiswall so far as the method of folding the original paper supply is concerned, and also in respect of the re-folding of the audit or record strip in the closure provided for it; and the advantages of the flat folded pad over the roll type of paper supply are apparently extolled by each for the very same reasons.

Holmes (1902, U.S.A.) relates to a multiple counter check or sales books for merchants. The check-sheets consist of an original and a duplicate, the sheets being divided off at regular intervals by transverse lines of perforations into spaces forming consecutively numbered checks, and with the required matter printed thereon. The sheets are then superposed so that the numbers on the duplicate check will lie directly under the corresponding numbers on the original check, with the lines of perforations being always directly above each other. Then, the patentee states, when the two sheets have thus been superposed, the two "are then folded together zig zag position as shown in Fig. 3", exactly as shown in Wiswall, except, that the folded pad comprises but two strips of paper, instead of three as in Wiswall. Holmes did not however limit himself to two strips of paper.

It is obviously of no importance that the Holmes disclosure refers only to a simple manifolding book or case cover, there being no mechanical device corresponding to a modern manifolding machine; the important thing is that the patent discloses an interleaved zig zag folded paper supply for use in a manifolding book.

Then there is Bentel (U.S.A., 1899). In this patent, the invention relates entirely to the paper supply for use in a simple manifolding holder; the holder may be disregarded because the invention relates only to the form of paper supply. This alleged invention is described by the patentee in the following language:—

My invention relates to a shipping system; and the objects of my improvement are to perforate and fold the bills in multiple and in such manner that they will maintain their registered position with each other and not crawl in being unfolded, to increase the durability of the carbon paper by reinforcing its edges, and to perforate the bills in a manner to adapt them to be placed on filing-pins separated more or less apart. These objects are obtained in the following described manner, as illustrated in the accompanying drawings, in which

He further states:

Said bills 21, preferably shipping bills, are prepared in long sheets and separated by transverse lines of perforation or indentation 22. The head of each bill is perforated near one side with a hole 23 and near the other side with a transverse slot 24 to adapt them when detached to be filed on pins more or less distant apart. Two or more long sheets are placed together and folded on the lines of perforation 22 back and forth into a compact pad or pile, as shown at 25 in Fig. 1. From this pile the bills may be unfolded without displacing the position of corresponding bills of the different sheets in relation to each other, i.e., they do not crawl longitudinally from their exact position over each other.

There would therefore seem to be a complete disclosure in Bentel, of everything in Wiswall in respect of the form of paper supply, or the method of folding the paper supply in zig zag fashion into a pad. The holes in the paper are not intended to co-operate with manifolding holder and therefore may be disregarded. The long sheets of paper, two or more in number, are interleaved and folded upon the transverse lines of perforation in zig zag fashion, into a pad, and then fed through the manifolding holder.

Shirek, et al (U.S.A., 1901), describing the form of paper supply to be used in a manifolding device, and by reference to a drawing, states:—

B. represents the paper, consisting of a plurality of superposed sheets piled in tablet form and arranged in zig zag folds.

This invention relates to improvements in autographic cash-register devices where multiple copies of checks are

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to be made. The manifolding feature of this patented device is quite a simple affair, but I refer to this patent merely to point out that so far as the paper supply is concerned, it discloses "a plurality of superposed sheets piled in tablet form and arranged in zig zag folds", and it is stated that the sheets may be perforated whereby the checks may be more readily torn, and in this case the checks were all to be torn off from the sheets as and when used. It matters not how the sheets of paper were to reach the writing tablet, whether the manifolding device itself was greatly inferior to others that followed it, or whether the manifolding device would generally meet to-day's commercial requirements; Shirek discloses the use of a plurality of superposed sheets piled in tablet form and arranged in zig zag folds for use in a manifolding device, just as was later suggested by Wiswall, and which form of paper supply is a matter entirely distinct from the particular manifolding device in which it may be used; and Shirek, like Wiswall, did not limit himself to the pad form of paper supply.

It would seem to me that the prior art which I have mentioned completely discloses the idea of the use of a plurality of superposed sheets, folded flat in zig zag form into a pad or tablet, for use in almost any form of manifolding device. If there could be invention in providing any particular form of paper supply for a manifolding device, it could only be found in the idea itself, and not in its practical application. When Wiswall had once settled upon his manifolding device, and was considering his form of paper supply, had he resorted to the prior art he could not have failed to there find disclosure and publication of the idea of the interleaved, and zig zag folded pad; he would have found that the idea was old and its application involved no difficulties whatever. Sherman carried the idea forward one stage, and others carried it to the stage disclosed by Wiswall. Whether the interleaved series of sheets of paper are fed from a roll, or from a flat pad—both of which Wiswall suggests—or whatever be the nature of the manifolding machine in which it is used, is immaterial in my opinion, because the alleged invention does not lie in the manner or means of feeding or conveying the paper into and through a manifolding machine, but in the idea of folding superposed strips of paper in zig zag fashion into

a single flat pad. A manifolding device or machine is one thing; the form of arrangement or assembly of the paper supply is entirely another thing, and there is no need, I think, for associating them together in view of the trend of the prior art in regard to each. There was no invention in providing for the separation of consecutively numbered forms by transverse lines of perforation, upon superposed strips of paper; that was an old practice and its purpose and value was of course known. Bentel suggested that the sheets of paper be collectively folded back and forth together on the lines of perforation in the form of a single pad, and although he did not in express language state that the folding would be more effectively accomplished if made upon the lines of perforation there can be no doubt, I think, that that was what he meant when he stated that if the sheets of paper were folded on the lines of perforation the sheets would maintain their registered position with each other and would not crawl when being unfolded. Treating the alleged invention as one relating only to the folding of superposed sheets in a zig zag form—and that is what the patent states it to be—disregarding the mechanism for feeding the paper from the pad into and through the manifolding device—and there is no reason for associating it with the manifolding book—then it seems to me that the idea said to constitute invention in this patent was anticipated by the prior art. I do not know whether the manifolding devices associated with the paper supply described in the prior art which I have mentioned, ever came into general use, there was no evidence upon the point; they may have been superseded by superior devices, but at any rate I do not think it is of importance. The form of paper supply to be used in a manifolding device may be fully published in the prior art, without the manifolding device ever having come into use. In this particular art, it may be that the earlier manifolding devices were not sufficiently developed to encourage their immediate and general acceptance or use by the public, or, it may be that business needs at the time did not require or warrant the use of manifolding devices; all this would have the effect of postponing any expression of preference by the public for the form of paper supply to be used in any manifolding devices. In so far as the form of paper supply to be used in any manifolding device is concerned, there was always a very restricted field

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for invention, if such a field there ever was. If there be distinction between what Wiswall described and what other patentees had previously described and published, it is so slight as not to call for that degree of inventive genius, as to justify a monopoly.

I am not unmindful of the legal proposition advanced by Mr. Thompson, counsel for the plaintiff, that any prior art, invoked as being anticipatory of a later patent, should disclose as much as the subsequent patent before it can be held to be an anticipation of that other patent, and with that I agree. The plaintiff's folded flat pad merely represents an idea as to the form of paper supply that might be used in almost any manifolding device. That idea, in my opinion, was for all practical purposes as amply disclosed in the prior art as in Wiswall.

The general commercial adoption of the flat folded paper pad in manifolding machines, since 1923, was stressed by plaintiff's counsel as evidence of invention. That kind of evidence may sometimes assist in the determination of the question as to whether or not there is invention in any particular patent, but invention is not to be presumed from such a fact, and in my brief experience, I have found such evidence to be of little assistance to the Court in determining whether or not there is invention. In any event, evidence of that nature must be considered with caution. And that is true of this case. The success attending the sale of the plaintiff's manifolding book is due, I think, to the fact that its manifolding machine itself, is efficient, is attractively assembled and bears evidence of excellent workmanship; it is manufactured and sold by a large and successful business organization allied with other corporations having objects similar to the plaintiff corporation, and their joint business activities, as I understand it, extend over the whole continent; the growing sales of the plaintiff's manifolding book is likely more attributable to these circumstances than to the mere fact that use is made of a flat folded paper pad in its manifolding machine. I think it may be conceded that the flat interleaved paper pad has advantages over the rolled paper supply, but that, in my opinion, was not an invention of Wiswall.

Now referring to the second patent in suit, in which the alleged invention is designated as a Manifolding Device, and in which it is claimed that certain claims of this patent

have been infringed by the defendant. Whether this manifolding device has been infringed, I am not called upon to decide, that question not having been put in issue. But it is in some way claimed that there has been infringement because the Wiswall pad was used, not in the plaintiff's manifolding machine, but in a manifolding machine used by the defendant, and which is not in any way in issue here. In my view of the case the flat folded paper pad may be used in any manifolding machine designed for the reception of that form of paper supply.

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This patent very clearly relates only to a manifolding machine, because that is what the patentee states it to be. This manifolding machine is not intended solely for the use of the flat folded paper pad, but for the roll form of paper supply as well. The specification makes this clear; it states:—

The machine forming the subject matter of this invention is especially designed for the reception and handling of books or multiple forms of this character regardless of whether the several sheets are zig zag folded, interfolded, separately folded, rolled or otherwise. It is however necessary that the forms on the several sheets are identical, that they are interspaced, and that each sheet is punched at one or more predetermined fixed points with relation to each printed form.

The manifolding machine described in this patent does not lay claim to invention because it is capable of using the paper supply of the nature claimed as invention in the other patent, but because of the manifolding machine itself, which might use either the flat paper pad or the rolled paper, whether interfolded or separately folded, and it is only required that the forms on the several sheets be punched at one or more predetermined fixed points with relation to each form; this requirement, as I have already stated, is made necessary by the particular construction of the manifolding device, the validity of which is not in issue, and the defendant's manifolding machine is not said to infringe it. I fail to conceive of any ground upon which the plaintiff should succeed in its claim that there was infringement of this patent.

Accordingly, I think the plaintiff must fail and its action is therefore dismissed; and costs will follow the event.

*Judgment Accordingly.*

|                                                        |                                                                    |                     |
|--------------------------------------------------------|--------------------------------------------------------------------|---------------------|
| <p>1931<br/>Dec. 8.</p> <hr/> <p>1932<br/>Feb. 25.</p> | <p>GILLETTE SAFETY RAZOR COM-<br/>PANY OF CANADA, LIMITED.....</p> | <p>} PLAINTIFF;</p> |
|                                                        | <p>vs.</p>                                                         |                     |
|                                                        | <p>SAMUEL MAILMAN ET AL.....</p>                                   | <p>DEFENDANTS.</p>  |

*Patents—Validity—Subject-matter—Infringement—Sale of one element of combination—Anticipation—Publication.*

The plaintiff is the owner of a patent relating to improvements in blade holders, and means for retaining blades in the holder, in safety razors. The article made up of the blade-holder and blade, and the associated integers, is what is protected by the patent. The blade and holder in combination is described and claimed, as also the blade and holder separately. The defence is that the patent is null for want of subject-matter and anticipation and that the defendant does not infringe.

*Held* that the idea of employing a blade-holder of the type described, with projections in the upper plate of the holder to co-operate with apertures in the blade, for holding it in the required position, had not been previously suggested by anyone, and required some amount of ingenuity. That it was not a common idea, or a natural development of an old idea, or one which would readily occur to workers in that art, and was not anticipated.

2. That, as the invention produces no new result, it is protected only in respect of the particular means set forth in the Specification.
3. That the sale of the blade alone, in all respects the same as plaintiff's, without the holder, but manufactured for use in plaintiff's holder constitutes an infringement of plaintiff's patent.

[*Townsend v. Haworth* (1879) 48 L.J. Eq. 769, and *Dunlop Pneumatic Tyre Co. v. Moseley & Sons et al* (1904) 21 R.P.C. 274, discussed and distinguished.]

ACTION by plaintiff to have its patent for invention, for certain improvements on safety razors, declared valid and infringed by the defendants, for an injunction and for damages, etc.

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

*George F. Henderson, K.C.*, and *E. G. Gowling* for plaintiff.

*O. M. Biggar, K.C.*, for defendants.

The facts, and the material parts of the specification and claims of the patent in suit are given the reasons for judgment.

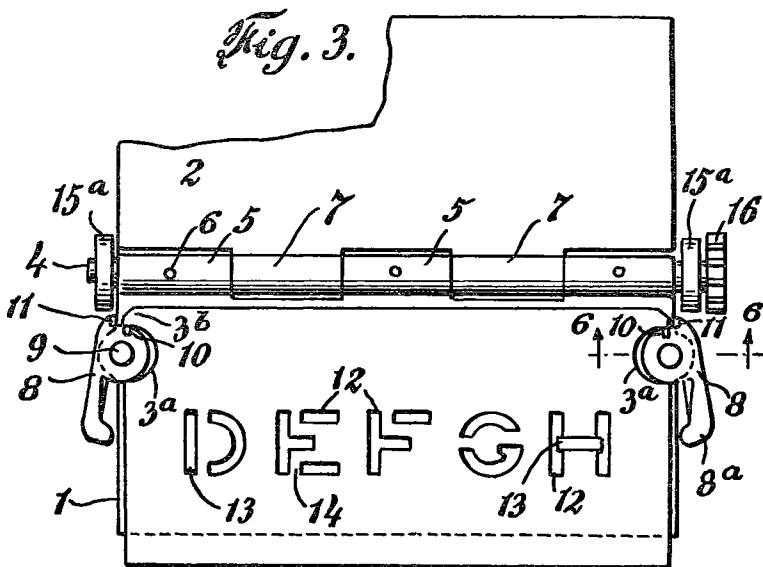
THE PRESIDENT, now (February 25, 1932), delivered the following judgment:



This is an action for infringement of a patent granted in March, 1929, to Auto Strop Patents Corporation, the assignee of Henry J. Caisman, the patentee, and by the former assigned to the plaintiff corporation. Another action for infringement of the same patent was brought by the plaintiff against Pal Blade Corporation Limited, a concern said to be closely allied to the defendants in this action; both actions were heard together and upon virtually the same evidence.

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Fig. 3 of the drawings, reproduced below, will assist in understanding the description of the alleged invention as set forth by the patentee in his specification, and from which I shall quote.



The patentee describes his invention generally in the following language:—

My invention relates to improvements in blade holders and is particularly applicable for detachably retaining blades in safety razors and blade stropping mechanism.

An object of my invention is to provide a blade holder provided with one or more projections adapted to co-operate with a corresponding opening or openings in the interior of the blade between its marginal edges to retain the blade in the holder.

A particular feature of my invention is that a word or symbol, such as a Trade-Mark, may be outlined in the blade by means of apertures therein and the said projection or projections on the holder may be arranged in such a manner as to enter one or more of said apertures to retain the blade in the holder for shaving or stropping purposes.

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In the form of my invention illustrated in the accompanying drawings the blade holder comprises a pair of hinged members adapted to receive a razor blade therebetween, means upon the holder to detachably retain its members in operative position against the blade, one of said members having the aforesaid projection or projections to co-operate with the aforesaid aperture or apertures in the blade to retain the latter in shaving or stropping position between the said members.

A further feature of my invention is that the means that retain the members of the holder together for use are provided with means in position to co-operate with the blade for positioning it in the holder when the members of the holder are separated to receive the blade, which last named means will release the blade when the retaining means is in position to retain the members of the holder against the blade, so that a blade that is not properly provided with apertures for the previously mentioned projections on the holder will not be retained therein for use.

The patentee describes the manner of inserting the blade in the holder as follows:—

When a blade is to be inserted in the holder the arms or latches 8 are moved to the position shown in fig. 3, to release the members 1, 2; the member 2 is swung away from member 1, and a blade may be laid upon the latter member in the position shown in fig. 3, so that the projections 10 will enter the recesses 3a and the projections 3b of the blade will be behind the projections 10. When the blade is to be retained member 2 is swung upon the blade and the arms or latches 8 are moved inwardly so that the jaws 8a will embrace or grip the members 1, 2 therebetween, whereupon the projections 10 are moved out of the recesses 3a and away from co-operation with the projections 3b of the blade, as indicated in fig. 2. In such position of the parts the blade would be loose between the members 1, 2, which is the operative position of the latter, and in order to retain the blade between said members when clamped against the blade I provide the blade with apertures, indicated at 12, to receive corresponding projections 13 extending inwardly from member 1. The projections 13 may be formed by embossing or pressing the metal of member 1, as indicated in fig. 4. The apertures 12 of the blade are shown related in such a manner to one another as to produce a designation, such as a work or symbol. In the example illustrated the symbol DEFGH is shown produced by means of the apertures 12 stamped in the blade, having different parts of the letters connected by intermediate material of the blade at 14, which serves to strengthen the blade at the apertures while the apertures 12 produce the appearance of the symbol DEFGH. Any other desired word or symbol may be stamped in the blade by means of the apertures 12. The arrangement of the apertures 12 is such with respect to projections 13 of member 1 that when the blade is laid upon said member certain of the apertures 12 of different letters will be in position to receive certain projections 13, whereby when the members 1, 2 are clamped upon the blade by means of the jaws 8a the blade will be prevented from sliding from the holder and will be retained in the desired position. As illustrated in figs. 2 and 3, viewing the holder from the top, the symbol DEFGH stamped in the blade reads correctly.

The specification describes as a feature of the invention, the fact that the position of the projections may be shifted from time to time, so as to engage in other of the apertures of the blade, and it is claimed that this would preclude the

use in a blade holder, of blades made by an unauthorized manufacturer having apertures corresponding in location to those made by the original manufacturer, at an earlier period.

In this connection the specification states:—

One of the features of my invention is that the projections 13 may be formed in holder member 1 at one period to engage certain of the apertures 12 of the blade, whereas at another period said projections 13 may be located in member 1 in a position to receive any other of the apertures 12 of the blade to retain the latter in the holder when the members 1, 2 are clamped together against the blade. By means of the arrangement described, in case an unauthorized manufacturer of the blades should produce blades having apertures that correspond in location to the projections 13 of member 1 that have been made by the original manufacturer at one period, the latter manufacturer, by shifting the position of the projections 13 on member 1 at another period would preclude the use in the holder of such unauthorized blades, because the apertures would not register with the last named projections 13 and the blade would not be retained in the holder because the projections 10 of the arms or latches 8 do not co-operate with the projections 3b of the blade when the latter is clamped between the members 1, 2, by the jaws 8a.

The concluding paragraph of the specification, which I think is self explanatory, might be referred to and is as follows:—

While I have particularly referred to my invention with utilizing a designation, such as a Trade-Mark, name or symbol in a safety razor blade, it will be understood that my invention is not limited to such use since the designation may be formed by apertures or depressions in any desired member to indicate the manufacture of the same, which apertures or designations are so located with reference to positioning means carried by another member as will cause said members to properly register with respect to each other when the apertures or depressions and the projections are in co-operation.

The two claims relied upon are nos. 1 and 2, and they are as follows:

1. A razor blade having apertures or depressions in the form of a designation to indicate the manufacture of the said blade, the said apertures or depressions being so shaped and located that they will co-operate with different holders, such holders having sets of projections differing inter se but such that any one of such sets will prevent such razor blade from sliding or turning on the said holder.

2. A variation of the invention claimed in Claim 1 in which the apertures or depressions in the blade are so shaped and located that they will co-operate with different holders, such holders having sets of projections which have some but not all of the projections in common as and for the purposes set out in the first claim.

It will thus be seen that the patent in question relates to improvements in blade holders, and means for retaining blades in blade holders, in what is generally known as safety razors. Briefly, two rectangular plates which are hinged

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together at one end, with means at the opposite end for clamping or locking the plates together, constitute the blade holder. We may then visualize the blade holder itself as being composed of two rectangular plates hinged together at one end, with locking means at the other, and comprising a space between the plates designed or adapted to embrace lengthwise a shaving blade. But it was of course necessary to provide means for retaining the holder in operative position against the blade; the patentees method of doing this is the following. From one of the plates constituting the holder, the top plate, the patentee suggests the pressing downwards of one or more small projections or lugs, and the blade is provided with apertures adapted to co-operate with these projections. The projections or lugs, when the razor is placed in position, will engage the blade apertures at the appropriate points and thus retain the blade in the holder, when the two plates are locked together. The blade apertures may be related in such a manner to one another as to produce a word or symbol, such as a trade-mark; and in the case of the plaintiff, the blade apertures are in fact so arranged as to indicate the word Valet, which also happens to be the plaintiff's trade-mark. The illustration mentioned in the specification, and shown in the drawings, shows the letters D.E.F.G.H. In the present practise of the plaintiff, the upper plate of the blade holder has etched or indented thereon the word Valet, and the projections referred to are usually punched through one or more of the etched or indented letters, or close thereto, though the position of the projections may be changed from time to time for the purpose mentioned by the patentee, providing the apertures in the blade are made to co-operate with the altered position of the projections. The perforations in the blade are so made, it is claimed, as not to weaken the material of the blade. It is not necessary to consider any other of the elements in the alleged invention.

Whether or not there is invention in Caisman may first be considered. During the course of the trial I formed the opinion that the patent lacked subject matter, but upon a more careful consideration of the case I have reached another conclusion. I think there is subject matter and that the patent should be sustained. The patented improvement, and it is only an improvement, is, I think,

novel; it cannot be said that the blade and blade holder combined in the manner described in the specification does not possess utility; there is no effective evidence of anticipation by prior publication. The general idea or principle of the alleged invention seems an ingenious one, and, I think, involved the exercise of the inventive mind. The means for holding the blade in position has advantages over the means formerly or presently employed in safety razors, for example, the well known Gillette safety razor, where the blade was pushed sidewise into a spring holder, and which, according to the evidence, was difficult at times to remove, and there was also the danger in so doing of the user cutting his hand. Frequently, it was stated in evidence, that safety razors of this type had to be returned to the manufacturer in order to have the blade removed. The plaintiff's blade is very easily inserted in and removed from the blade holder, and with safety, and in this one respect alone the combination is, I think, an improvement over other known methods of retaining a blade in a blade holder. The idea of employing a blade holder of the type described with projections in the upper plate of the holder to co-operate with apertures in the blade, for holding the blade in the required position, must have required some, if only a small amount, of ingenuity. It cannot be said to be a common idea, or a natural development of an old idea, or one which would readily occur to workers in this particular art. No one had previously suggested it. The invention may be slight, and the patent a narrow one, but that does not mean there is not subject matter for a patent. The invention of course produces no new result and, I think, is protected only in respect of the particular means set forth in the specification. The other feature of the invention, that is the provision of apertures in the blade by perforating a word or symbol, such as a trade-mark, may possess very practical merits, but that, I think, is but an optional method of using the invention the substance of which lies in the employment of a particular blade holder, with projections in the holder to co-operate with corresponding apertures or openings in the blade.

The next question for decision is whether the defendants have infringed the plaintiff's patent. The defendants, it is alleged, have sold blades manufactured in imitation of the

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plaintiff's blade and designed to fit the plaintiff's blade holder, but they do not sell the blade holder. The defendants' blade is in all respects the same as the plaintiff's; it is perforated with what is really the word Valet, but with certain distortions which disguise the letters of that word; to the eye the perforations appear as a meaningless series of apertures in the blade. However, the perforations in the defendants' blades, though disguised, enables the defendants' blades to be used in the plaintiff's blade holder, because the defendants' blade has all the apertures that the plaintiff's blade has, and they are positioned precisely as in the plaintiff's blade, but the defendants' blade has additional apertures which perform no function when used in the plaintiff's blade holder. The projections in the plaintiff's blade holder will therefore co-operate with the apertures in the defendants' blade because the exact apertures in the plaintiff's blade are found in the blade of the defendants, and in the same position, and both blades are of the same size and design. If we place the plaintiff's blade on top of the blade sold by the defendants one can plainly see the perforated word Valet in the latter, the additions to or distortions of the perforated letters being concealed by the plaintiff's blade. The defendants' blade was manufactured to be used in the plaintiff's blade holder, that for several reasons is quite obvious. The apertures which the plaintiff has selected for its blade happens to spell its trade-mark, but the real importance of such apertures, so far as this case is concerned, is, that the apertures—not the trade-mark—are definitely positioned to co-operate with the projections in the upper plate of the blade holder. It is the particular holder and the projections in the holder plate, and the apertures in the blade, designed to co-operate the one with the other, that constitutes the invention. If I am correct in holding that there is invention, then the sale of razor blades so apertured that they may co-operate with the projections of the plaintiff's blade holder, is in my opinion an act of infringement subject to the point of law which I shall at once discuss, I think the defendants have infringed the patent here in question.

The question arises whether the sale of the blade alone constitutes infringement of the patent. There is, so far as I know, no Canadian authority directly bearing upon the

point. In the United States, it would appear to be the settled law that if one makes and sells a part of an invention with the intent that it shall be united or used in connection with its other parts, that constitutes an act of infringement. In England, broadly speaking, the law would seem to be that it is not always infringement of a patent for one to make or sell one of the elements entering into the construction of a patent. That principle was laid down in *Townsend v. Haworth*, reported as a note in *Sykes v. Haworth* (1), and later confirmed by the Court of Appeal. But much would seem to depend upon the facts of the case. In the case of *Townsend v. Haworth*, upon appeal, Mellish L.J. stated:—

Selling materials for the purposes of infringing a patent to the man who is going to infringe it, even although the party who sells it knows that he is going to infringe it, and indemnifies him, does not by itself make the person who so sells an infringer. He must be a party with the man who so infringes, and actually infringes.

It is obvious that in many cases the selling of an article, which may constitute an element in the arrangement of something which infringes a patent, should not constitute infringement by the person selling such article. That was held in *Townsend v. Haworth*, and having in mind the facts alleged in the bill upon which that demurrer proceeding was heard, the conclusion would seem one to be expected. The point later arose in *Dunlop Pneumatic Tyre Co. Ltd. v. Moseley & Sons, and India-Rubber and Tyre Repairing Company* (2). In that case the plaintiff was the proprietor of two patents known as the Welch patent, and the Bartlett patent; these patents were for combinations. The first mentioned patent related to improvements in rubber tyres and metal rims or felloes of wheels for cycles and other light vehicles. The other patent was for improvements in tyres or rims for cycles and other vehicles. The plaintiff alleged that the defendants had infringed by selling tyres or parts thereof, and had manufactured and sold the outer tyre or cover (one of the elements of the combinations) with the intent that it should be used by the purchaser, not being a licensee, for the purpose of making one or other of the combinations. One cover sold by the defendants was adapted for use in the manner described in

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(1) (1879) 48 L.J. Eq. 769, at p. 770.      (2) (1904) 21 R.P.C. 274.

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Welch's specification, but not necessarily for use solely in that manner. The defendants also made and sold a cover which was capable of being used in the manner described in Bartlett's specification. In neither of the plaintiff's two patents was the cover separately claimed as an element in the combination. The learned trial judge, Mr. Justice Swinfen Eady, while of the opinion that the covers would probably be ultimately used in one or other of those methods, that is to say, the Welch or the Bartlett method, yet he was of the opinion that those were not exhaustive of the purposes to which the cover might be put and that they would be useful for other purposes in connection with other tyres. In the Court of Appeal, in the same case, Vaughan Williams L.J., adopted the doctrine laid down by Mellish L.J., in *Townsend v. Haworth*, and which I have already mentioned. Stirling L.J., concurred in that doctrine and said:—

The case of *Townsend v. Haworth*, before Sir George Jessel, when Master of the Rolls, and the Court of Appeal, decides that the sale of the covers does not become an infringement merely because the vendor knows the purchaser intends to use the article when sold for the purpose of infringing the patent. *It is necessary for the purpose of constituting the vendor an infringer to show that he has made himself a party to the infringement.*

In this case, the defendants were not the manufacturers of the blades sold by them, they were apparently imported from abroad. The plaintiff has however proven a sale by the defendants of the blade which I have described. This case differs in my opinion from the English cases to which I have referred, in that the defendants themselves sold the blade, I hold, solely for use in the plaintiff's blade holder, and it differs also in that the blade is separately claimed as an element in the combination. There is no evidence that the blade sold by the defendants might be used in blade holders other than the plaintiff's.

The specification and claims of Caisman bear the construction that it is the article made up of the blade holder and blade, and the associated integers, that is protected by the patent. I think the patentee has described and claimed the blade and blade holder in combination, and he has also separately claimed the blade, and the blade holder. While the plaintiff in this proceeding is relying only on claims numbered 1 and 2, still I think, I am permitted to look at the specification and all the claims, in order to ascertain



what it is the patent protects, and if this be done, it is clear, I think, that the patentee has claimed protection for the blade and blade holder in combination and separately. The razor blade was a material element in the invention and not a mere detail which might be varied or omitted. A patent for a combination is infringed by the sale or use of even subordinate parts, if that part is new and material and is the subject of a claim.

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It was suggested that the effect of the patent in question was to perpetuate a monopoly once granted but now expired, in connection with the well known Gillette safety razor. I do not think that contention is well founded. The answer is that the Gillette safety razor as once patented is now public property, and may lawfully be manufactured, used or sold, in its entirety by any person. The patent in issue here relates to a particular blade and blade holder, an improvement, which is altogether another thing; that improvement is not the Gillette safety razor. If it happens that the plaintiff's blade holder and blade is adaptable to the structure of the old Gillette safety razor, it would not follow that upon that ground there could not be invention in Caisman's improvement.

The case is a very difficult one, but it is my opinion that the patent in question contains subject matter and its validity must be sustained; I am also of the opinion that the defendants have infringed the patent. The plaintiff consequently succeeds in its action, and costs will follow the event.

*Judgment accordingly.*

CANADIAN WM. A. ROGERS, LIM- } PETITIONER;  
ITED ..... }  
vs.  
INTERNATIONAL SILVER COM- } RESPONDENT.  
PANY OF CANADA, LIMITED.... }

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Jan. 15.  
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*Industrial designs—Expunging—Trade Mark and Design Act—Meaning and requirement of a design.*

The respondent in its application for registration describes its design as follows:—

“The said industrial design consists of a knife wherein the handle is substantially three-fifths and the blade substantially the remaining two-fifths of the total length of the knife, the whole being of a shape substantially as shown.”

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Held that the registration in question being only for an outline of a table knife, distinguished by having the length of the handle and blade in the proportions mentioned, such design does not constitute a registerable design under the provisions of The Trade Mark and Design Act.

2. That an industrial design, under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture which is protected, and not the article of manufacture itself.

[*Kaufman Rubber Company, Ltd. v. Miner Rubber Company, Ltd.* (1926) Ex. C.R. 26 referred to.]

PETITION by the petitioners herein to have a certain industrial design, registered by the respondent in 1930, expunged.

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

*R. S. Smart, K.C.*, and *M. B. Gordon* for petitioner.

*R. C. H. Cassels, K.C.*, for respondent.

*Smart, K.C.*, cited the following authorities:—

*Kaufman Rubber Co. v. Miner Rubber Co.* (1926) Ex. C.R. 26; and *Chalworthy & Son, Limited, v. Dale Display Fixtures, Limited* (1928) Ex. C.R. 159, and (1929 S.C.R. 429).

*Cassels, K.C.*, cited the following:—

*Attwood v. National Radiator* (1928) 45 R.P.C. 71; *Tyler & Sons v. Sharpe Brothers & Co.*, 11 R.P.C. 35; *Mallards v. Gibbons Bros.* (1931) 48 R.P.C. at p. 315; *In re Bayer's Design* (1906) 25 R.P.C. 56; *Brompton's Application* (1926) 43 R.P.C. 55.

THE PRESIDENT, now (March 1, 1932), delivered the following judgment.

This is a petition to expunge from the Register of Industrial Designs, a design registered in February, 1930, by International Silver Company, and by it assigned to International Silver Company of Canada Ltd., in April, 1930.

In the application for registration, the industrial design is described by the applicant as follows:—

"The said industrial design consists of a knife wherein the handle is substantially three-fifths and the blade substantially the remaining two-fifths of the total length of the knife, the whole being of a shape substantially as shown."

The drawings accompanying the application simply indicate the outlines of a table knife, and the only feature peculiar to the design of the knife is that the handle and blade respectively are in the proportions, relative to the whole length of the knife, stated in the application for registration. There is no suggestion of any particular ornamentation, decoration, pattern, engraving, or anything of that nature, to be applied "to the ornamenting of any article of manufacture." In actual practice, the respondent does apply a variety of ornamental designs to the handle of the knife in question, but this does not appear in the registered design. So therefore, the sole question for determination is whether the outline of a table knife, distinguished only by having the length of the handle and blade in the proportions mentioned, constitutes a registerable design, under the provisions of The Trade Mark and Design Act. The only reference to the actual shape of the complete knife, in the application for registration, is in the use of the words, "the whole being of the shape substantially as shown"; these words have reference, I think, to the shape produced by the assembly of the handle and blade of the knife in the lengths designated in the application.

I think the registered design must be expunged. In *Kaufman Rubber Co. Ltd. v. Miner Rubber Co. Ltd.* (1) I discussed the very meagre provisions of the Trade Mark and Design Act, referable to industrial designs, and in this case I expressed the opinion that an "industrial design," under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture, which is protected, and not the article of manufacture itself. In the earlier English Design Acts it was the ornamental design only that was protected and not the article of manufacture to which it was applied, the incorporeal copyright in the design being always considered a separate entity from the corporeal substance to which it was applied. In Canada, we seem to have adhered always to this principle, at least, that is my construction of the statute. The words "for the ornamentation of" before "any article of manufacture"

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were long ago omitted from the English Acts, but we have continued them. I have no reason for departing from the opinion expressed in the case just mentioned. Even if the statute did not confine the registration of designs to ornamental designs applied to an article of manufacture, I would be of the opinion that the dimensions of the handle and blade of a table knife does not constitute subject matter for a design, and is not properly registerable as a design. Any manufacturer of table knives should be at liberty to fix the length of the blade and handle of his knife in whatever proportions he desired, and it was never intended, in my opinion, that the statute should prevent a manufacturer from so doing. I do not think the shape or conformation of the knife is claimed as the design, it is only a knife in which the handle is one-fifth longer than the blade, that is claimed as the design; any reference to "shape" in the application was merely to indicate this fact. It is true that a knife constructed in this fashion produces an effect, but an effect is not a design. The words "shape or configuration," as employed in the present English Design Act does not in my opinion relate to the shape or configuration produced by the dimensions of the different members constituting an article of manufacture; these words however are not found in our statute and English decisions based upon these words are not applicable here. The relative lengths of the blade and handle in a knife is altogether a matter of structural dimensions and not of "design," in the sense contemplated by the statute. The statutory industrial design is one thing, the dimensions of the handle and blade in a knife is another thing. The design in question is not, in my opinion, registerable as an industrial design, and should be expunged.

The petitioner therefore succeeds and costs will follow the event.

*Judgment accordingly.*

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1932  
Feb. 29.

LARKIN-WARREN REFRIGERATING }  
CORPORATION ..... } PLAINTIFF;

AND

FRIGIDAIRE CORPORATION ..... DEFENDANT.

*Patent of invention—Conflict action—Rule 32 of Practice—Statement of date of invention—Motion for Chambers Order to amend statement after disclosure made.*

As required by Rule 32, the parties after issues joined filed a sealed statement in writing of the respective dates on which the inventors claim to have made the invention mentioned in their applications. The sealed envelopes were opened on the 4th of January, 1932, by consent and in presence of solicitors of both parties. More than a month afterwards a motion in chambers was made by the plaintiff corporation for leave to amend the written statement of the date of the invention relied on by it, by substituting January 15, 1925, for July 25, 1927.

*Held*, that after disclosure made between the parties in conformity with Rule 32, an order in chambers should not be made allowing one of the parties to amend its statement of the date of the invention relied on in the action.

MOTION by plaintiff to amend its sealed statement of date of its alleged invention required under Rule 32, after such sealed statements had been opened and date disclosed.

The motion was argued before Charles Morse, K.C., Registrar of the Court, in Chambers.

*Mr. Gowling* for plaintiff.

*Mr. Gordon* for defendant.

The material facts are stated in a memorandum handed down by the Registrar, which is printed below.

THE REGISTRAR (February 29, 1932), delivered the following decision.

This was an application by way of notice of motion for an interlocutory order in a case of conflicting applications for a patent of invention. Lester U. Larkin is alleged to have been the inventor for the plaintiff, and Jesse G. King, the inventor for the defendant.

Mr. Gowling appeared for the plaintiff in support of the motion, and Mr. Gordon for the defendant, opposed it.

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 —

Under the provisions of Rule 32 of the practice of the Court each of the parties to the action had filed a sealed statement in writing of the respective dates on which the inventors severally made the invention mentioned in their applications for a patent. Furthermore, both the sealed statements so filed as aforesaid were opened by the Deputy Registrar in the presence of solicitors for both parties, as required by the said Rule, on the 4th January, 1932. Thus each party has had disclosure of the date relied on by his opponent in the action. More than a month after such disclosure the plaintiff applies to amend the written statement of the date of the invention by substituting the 15th day of January, 1925, for the 25th day of July, 1927. If this application were allowed, the plaintiff would stand of record as having anticipated the date relied on by the defendant by more than two years. As the record now stands the defendant's invention antedates that of the plaintiff by nearly five months.

The application for the amendment is grounded upon an alleged mistake as to the date of the invention made by Larkin's solicitor who prepared the statement. Larkin the plaintiff's assignor, avers in his affidavit filed in support of the plaintiff's application for amendment that his solicitor was in possession of all the records relating to the invention which disclosed the true date, and that the plaintiff read the prepared statement hurriedly and did not notice the error. But this does not remit Larkin from responsibility for the date assigned—*qui facit per alium, facit per se*. Moreover, the statement purports to be signed by Larkin personally.

Under such circumstances, even if I felt that I had jurisdiction in Chambers to order the amendment to be made, I would hesitate to disturb the probative value of so solemn a juristic act as the disclosure of the date of the invention made in compliance with Rule 32. I should be inclined to leave it to the trial Judge to find the power to dispense the plaintiff from any possible burden of estoppel attaching to a statement of fact of such vital importance in a conflict action. But I can find no power of amendment conferred upon me in such a case by the Rules of Practice. Obviously the statement in question is no part of the pleadings in the action. Rule 32 directs that "each applicant shall,

within ten days *after the issues are joined upon the pleadings*, make disclosure of the date of his invention by statement in writing, and, further, that "each party making disclosure, as aforesaid, *shall be bound by the date of his alleged invention so established.*" As I read the Rule its intendment is analogous to the rule concerning Preliminary Acts in collision actions in Admiralty, the object of which has been declared to be to prevent either party varying his version of fact so as to meet the allegations of his opponent. (See *The Vortigern*, (1859) 1. Swa. 518; *The Inflexible*, (1856) 1. Swa. 33). In *Williams & Bruce's Ad. Prac.* 3rd Ed., at p. 369 it is said:

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The Court will never allow a party to contradict his own preliminary act at the hearing, and an application on behalf of a party to amend a mistake in his preliminary act will not, if opposed, be entertained by the Court.

(See also *The Dorothy* (1906) 10 Ex. C.R. 163, at p. 170). Preliminary acts, according to the view of Fletcher Moulton, L.J., in *The Seacombe* (1912) P. at p. 59) "are not mere pleading allegations. They are statements of fact made under such circumstances that they rank as formal admissions of fact binding the party making them perhaps as strongly as any admissions of fact can do."

I must dismiss the plaintiff's application to amend the date of the invention as disclosed, with costs; and there will be an order accordingly.

*Judgment accordingly.*

LEVER BROTHERS, LIMITED.....PLAINTIFF;  
VS.  
BENJAMIN L. WILSON.....DEFENDANT.

1932  
Feb. 24.  
March 30.

*Trade-marks—Infringement—Expunging—Calculated to deceive—Person aggrieved*

The plaintiff is the owner of two trade-marks, one consisting of the word "Sunlight", to be applied to the sale of soaps and other laundry goods, and the other consisting of a rectangular box-lid label bearing the word "Sunlight", with scroll devices and other designs, to be used in the sale of candles, common soaps and other laundry and toilet preparations.

The defendant is the owner of the trade-mark consisting of the word "Sunbrite" used in the sale of Javel Water in bottles, the label thereon consisting of the word "Sunbrite" and the words "Javel Water" in certain colours and set in a certain design as described in the reasons below.

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The plaintiff contends that the defendant's mark is calculated to deceive the public and should be expunged. The defendant denies this and by counter-claim asks that the trade-mark of plaintiff be expunged, except in so far as applied to cake soap.

*Held*, that the trade-mark of the defendant does not so resemble the plaintiff's trade-mark in appearance, sound, or otherwise, as to be calculated to deceive or mislead the public into purchasing the goods of the defendant believing them to be those of the plaintiff. That moreover, the plaintiff's product and that of the defendant are not of the same class, the one being a cake soap, and the other a liquid, and that the action of the plaintiff should be dismissed.

2. Held further that the grievance of the applicant to expunge must be substantial; a fanciful or sentimental grievance is not sufficient; that the defendant is not a person aggrieved within the meaning of the Trade Mark and Design Act, and that the counter-claim of the defendant to expunge the plaintiff's trade-mark cannot be maintained.
3. That the plaintiff not having incurred any additional costs as a result of the defendant's counter-claim, which was brought up by plaintiff's unfounded action, the plaintiff should pay to the defendant the costs of the action, and there should be no costs against him upon the dismissal of his counter-claim.

*Note:* The question as to the party on whom falls the burden of proving that a mark is calculated to deceive and the application of Rules 34 and 39 discussed.

ACTION by plaintiff herein to have trade-mark of defendant expunged and counter-claim by defendant to have plaintiff's trade-mark expunged except as applied to cake soap.

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

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

*Ericksen Brown, K.C.*, and *J. P. E. Brown* for defendant.

The facts material to the understanding of the case, together with the points of law raised, are stated in the Reasons for Judgment.

ANGERS J., now (March 30, 1932), delivered the following judgment.

This is an action to expunge from the Trade Mark Register No. 237 a specific trade-mark registered on the 12th day of January, 1931, by the defendant, and consisting of the word "Sunbrite," to be applied to the sale of Javel Water, a washing, bleaching and disinfecting solution composed principally of sodium hypochlorite, on the ground that the said trade-mark is so similar to the plaintiff's



registered trade-mark "Sunlight" as to be calculated to deceive the public.

The action is brought under the provisions of section 45 of the Trade Mark and Design Act (R.S.C., 1927, ch. 201). The plaintiff is an incorporated company having its head office in the city of Toronto. The defendant carries on business at the city of Toronto under the firm name of Atlas Chemical Company.

In its statement of claim plaintiff sets out that it is the owner of two specific trade-marks, to wit:

1. A specific trade-mark consisting of the word "Sunlight" to be applied to the sale of soaps, detergents, starch, blue and other laundry goods, also fancy soaps, perfumery and other toilet preparations, the same having been registered on the 28 day of March, 1889, by Lever Brothers of Warrington, County of Lancaster, England, and subsequently assigned by Lever Brothers to Lever Brothers Limited, of Port Sunlight, Birkenhead, County of Chester, England, on the 17th day of July, 1894, and further assigned on the 12th day of December, 1899, by Lever Brothers Limited to the plaintiff, the registration of the said trade-mark having been renewed by the latter for a period of 25 years from the 28th day of March, 1914;

2. A specific trade-mark to be applied to the sale of all kinds of candles, common soap, detergents, matches, starch, blue and other preparations for laundry purposes, also perfumed soap, perfumery and other toilet preparations, consisting of a rectangular box-lid label bearing, essentially, the word "Sunlight" together with scroll devices, floral spray and the representation of a maid carrying a basket of clothes in her right hand and holding in her left a prop supporting a clothes line on which an article of clothing is suspended, the same having been registered on the 30th day of August, 1894, by Lever Brothers Limited, of Port Sunlight, England, and subsequently assigned by Lever Brothers Limited to the plaintiff on the 12th day of December, 1899, the registration of the said trade-mark having been renewed by the plaintiff for a period of 25 years from the 30th day of August, 1919.

The defendant's trade-mark, to be applied as aforesaid to the sale of Javel Water, is described as consisting of a rectangle on a yellow background outlined in dark blue; immediately at the top thereof is inscribed in big blue block letters the word: "Sunbrite"; below this in smaller similar letters appear the words: "Javel Water"; stretching horizontally from side to side there is a blue clothes line, with a white washing attached thereto, swaying as with a breeze; below this in the left hand corner is portrayed a house, with predominating blue colouring, save for its front windows and chimney and smoke emanating therefrom, which are shown in a yellowish white tinge; the house is fringed in the background by a dark blue shadow in the solid formation of foliage and trees; the house stands within a valley at the base of two hills which slope from either side of the rectangle towards its centre; the hills, which rise from the lower side of the rectangle are coloured with a blue-yellow check; in front of the house, and in the valley directly at the base of the two hills there is depicted the picture of a young woman outlined in blue, with white dress and white flowing apron;

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in outstretched arms, she is carrying a blue clothes basket, heaped with white contents; immediately to her right, creeping from behind the valley, there is described an arc outlined in blue, in the formation of the sun; radiating upwards from this arc and spreading across the top of the rectangle are clearly seen white fine rays of the sun; these dilate, become heavier as they ascend and finally burst into a mass of white, which forms a background for the above-mentioned firstly described word: "Sunbrite"; at the head of the rectangle.

In his statement in defence, the defendant avers that he commenced the manufacture and sale of Javel Water under the label and get-up now used by him in February, 1925, and that he has since continued the manufacture and sale of this article in Canada; that no objection was taken by plaintiff until May, 1929, following which date there ensued correspondence between the plaintiff and the defendant and their solicitors; that no action was taken by plaintiff for infringement or otherwise, although defendant categorically stated that he would not discontinue the use of his label "Sunbrite"; that defendant applied for and obtained his trade-mark under date of the 12th January, 1931, covering the label adopted by him in February, 1925.

The defendant denies the plaintiff's right of action on the grounds:

- (a) that the defendant's trade-mark is not calculated to deceive the public and is not so similar to the plaintiff's trade-mark as to be objectionable;
- (b) that the plaintiff, by neglecting to assert its rights before the civil courts and allowing the defendant to carry on business, was guilty of laches and is not entitled to the relief claimed.

The defendant alleges specifically that Javel Water is not soap and that no words in the plaintiff's trade-marks include the article sold by defendant.

In addition to praying for the dismissal of the action, the defendant asks that the plaintiff's trade-marks be cancelled and expunged, except in connection with cake soap. In support of his so-called counter-claim, the defendant submits:

- (a) that the plaintiff has not manufactured nor sold in Canada any of the articles mentioned in its trade-marks, save only soap in the form of a cake;
- (b) that the plaintiff is not entitled to retain the exclusive right to the word "Sunlight" except in connection with cake soap;

(c) that it is in the interests of the public and of the defendant that so much of the plaintiff's trade-marks as are expressed to be applicable to any articles other than cake soap should be expunged from the trade-mark register.

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The evidence discloses the following facts.

Lever Brothers (the partnership) commenced to sell "Sunlight" soap in Canada in 1889. The Canadian Company, i.e., the plaintiff, was incorporated in 1899. From that date it has continuously sold "Sunlight" soap in Canada. "Sunlight" soap is a yellow laundry bar soap and is sold in three different packages (exhibits A, B and 7). Several thousand tons are sold every year all over Canada. Approximately sixty per cent is sold in the form of exhibit A, fifteen per cent in the form of exhibit B (sold only in Toronto and Halifax) and twenty-five per cent in the form of exhibit 7 (a carton containing four bars sold exclusively in the West, i.e., Manitoba and Saskatchewan).

I may note here that only the label on the carton filed as exhibit 7 contains all the data of plaintiff's second trade-mark (exhibit No. 3). The labels on the cartons filed as exhibits A and B do not contain the representation of the "maid carrying a basket of clothes in her right hand and holding in her left a prop supporting a clothes line on which an article of clothing is suspended."

Soap is sold largely in grocery stores, in some drug stores, in departmental stores and in chain stores; seventy to eighty per cent is sold in grocery stores or grocery departments of departmental stores.

Millar, Secretary and Director of the plaintiff company, says he bought a bottle of "Sunbrite" Javel Water in an A. & P. shop, which is a grocery store, and another bottle in a Stop & Shop store (presumably also a grocery store). In both places, "Sunbrite" Javel Water was displayed within a shelf or two of the soap department.

The witness goes on to say that the word "Sunlight" is not applied by the plaintiff to any product other than soap, at least in Canada; the plaintiff is not producing and has never produced any Javel Water in Canada; witness cannot tell if plaintiff ever produced Javel Water elsewhere; plaintiff puts out and sells other products, including Rinso

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(a soap powder), Life Buoy soap (a fancy soap), Lux in the form of toilet soap and flakes and Panshine (a cleanser).

Plaintiff first found out that the defendant was putting out "Sunbrite" Javel Water some three or four years ago. There was some correspondence at that time between plaintiff and defendant. In May, 1929, the plaintiff objected to the sale of Javel Water under the name "Sunbrite" and the defendant refused to discontinue selling his product. No proceedings were taken by the plaintiff against the defendant apart from the action now pending.

Millar admits that his company did not lose any business by reason of the defendant selling his "Sunbrite" Javel Water; he adds that he cannot say what the future may bring forth, which is a wise and prudent statement. Another point in Millar's deposition which is of some interest is that a soap always contains fat of some description, that with water it will emulsify the oil that may be found in the fabric and remove it, that it is not a bleach, that, on the other hand, Javel Water contains no fat and has a breaching effect.

Examined on his own behalf, the defendant states that Javel Water is used for cleaning crockery, sinks, drain boards, enamelled ware, wash basins, wooden utensils, drain pipes, garbage cans and other articles, for washing hardwood floors and destroying odours; it is a disinfectant. Javel Water is composed of ninety-seven and a half per cent of water and two and a half per cent of sodium chloride. It is essentially a bleach. Javel Water has been on the market for a very long time. The defendant has been selling his Javel Water with the "Sunbrite" label since 1925; for two years previous he had sold it under the name of "Chloro."

There is no question of infringement nor of passing-off in the present case. The question arising is whether the trade-mark of the defendant is identical with the trade-marks of plaintiff or so resembles them that it may be considered as calculated to deceive or mislead the public. If the answer is in the affirmative, the defendant's trade-mark must be expunged from the register; if in the negative, the action must be dismissed. In the latter alternative, there will remain for the Court to pass on the defendant's

counter-claim to have the plaintiff's trade-marks expunged, except in connection with cake soap.

There is really no dispute as to the material facts and the summary I have made of the pleadings and of the evidence will dispense me with having to deal with them any further.

Counsel for plaintiff first submitted that the *onus* is on the defendant to establish that there is no likelihood of confusion arising. Assuming that the plaintiff's contention is well founded, though expressing no opinion on this point which I deem unnecessary, I am still faced with the duty of weighing the evidence laid before me, both literal and verbal, on its merits. I may note however that the cases cited by counsel for plaintiff in respect of onus are cases in which the trade-mark had not yet been issued and in which, according to defendant's counsel's statement, discretion was still open (*Melchers & DeKuyper* (1); In the matter of *McDowell's Application for a Trade-Mark* (2); *Eno & Dunn* (3)). Has the registration of a trade-mark the effect of shifting the onus, as submitted by counsel for defendant? It is quite possible I am inclined to think so; but again I may repeat that I see no necessity to express an opinion on this point.

The second proposition which counsel for plaintiff submitted to the Court is that the trade-mark of the defendant so resembles its own that it is calculated to deceive or mislead the public. That is the only point in the case, at least as far as plaintiff's action is concerned.

Article 11 of the Act says:

11. The Minister may refuse to register any trade-mark. . . .

(a)

(b) if the trade-mark . . . is identical with or resembles a trade-mark . . . already registered;

(c) if it appears that the trade-mark . . . is calculated to deceive or mislead the public.

It is quite obvious that the trade-marks of the parties herein are not identical. The plaintiff, in fact, does not invoke identity, but, in his statement of claim, he merely alleges that "the name 'Sunbrite' is so similar to the plaintiff's registered trade-mark 'Sunlight' as to be calculated to deceive the public."

(1) (1898) 6 Ex. C.R., 82.

(2) (1927) 44 R.P.C., 335.

(3) (1890) L.R., 15 A.C., 252.

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It is argued on behalf of the plaintiff that there is similarity both in appearance and in sound and that this similarity is sufficient to deceive or mislead the public. Counsel for plaintiff, at the hearing, did not pretend that there was any likelihood of deception as to the article itself—it is difficult indeed to conceive that a customer wanting to buy a cake of soap would go away satisfied if handed a bottle of Javel Water—but he submitted that there might be confusion as to the origin of the product. The witness Millar, heard on behalf of the plaintiff, adopted the same view. I must say that I cannot agree with this contention. It seems to me that a glance at the two labels will suffice to convince anyone that there is no likelihood, not to say possibility, of confusion. The whole get-up is different: the nature of the goods, the colour of the labels, their appearance, the lettering, the subject matter and its disposition vary. The only point of similitude in the trade-marks consists of the word “Sun” which in both cases constitutes the first syllable of the two names. One cannot claim the ownership of a common word of the English language and monopolize it. There remain the suffixes which added to the word “Sun” differentiate the marks. The suffixes “light” and “brite” are not similar in appearance, although they may sound somewhat alike, particularly when carelessly pronounced. The similarity however is not such as to create confusion, especially in a case where the general appearance of the articles differs widely.

Distinctiveness, of course, is of the essence of a trade-mark, the object whereof is to distinguish the goods of a trader from those of other traders, but I fail to see, after a careful examination of the labels, how a purchaser, however incautious and unwary he may be, can be led to believe that the soap of the plaintiff and the Javel Water of the defendant are the products of the same manufacturer.

Apart from the other dissimilarities already alluded to, I may note that plaintiff's label bears the name “Lever Brothers Limited” and that there appears on defendant's label the following indication: “Manufactured by Atlas Chemical Company, Toronto, Ont., Canada.” It has been held that little importance may be attributed to matter printed on the back or the sides of a container. I do not think however that it ought to be entirely disregarded.

The above mentioned inscription on the defendant's label, although not forming part of the trade-mark proper, is printed on the right side of the label itself—not on a separate label, as is sometimes the case—and it indicates clearly the origin of the article. I may state, although it is not essential in an action of this kind to establish the intention to deceive, that it is clearly manifest that the defendant never entertained such an intention.

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Summing up, I may repeat that, in my opinion the trade-mark of the defendant does not so resemble the plaintiff's trade-mark in appearance, sound or otherwise, as to be calculated to deceive or mislead the public. On this ground alone the action must fail.

I may add as a further reason for the dismissal of the action that I do not consider that the product of the plaintiff and that of the defendant are of the same class, if perhaps they are in the same line of business. One is a cake soap; the other a liquid. The first is a cleanser; the second a bleach. True it is that to some extent Javel Water may be used for laundry purposes, as defendant's product almost exclusively is, but, this is not sufficient to bring plaintiff's soap and defendant's Javel Water into one and the same class.

In view of the reasons hereinabove set forth, for which I consider that the action cannot be maintained, I deem it unnecessary to deal with the question of laches on the part of plaintiff raised by the defendant and allegedly resulting from the plaintiff's neglect to object to the use by defendant of his mark during a period of over four years.

I will now proceed to examine the defendant's demand, contained in his statement of defence, that the plaintiff's trade-marks be cancelled and expunged from the register, save and except in connection with and limited to the cake soap manufactured and sold by plaintiff under the name of "Sunlight Soap."

I shall first consider the question of procedure. Counsel for plaintiff submits that the defendant should have proceeded by way of statement of claim under Rule 34 and that an application to expunge can only be made by way of defence in an action for infringement; counsel for plaintiff relies on Rule 39. In the Matter of the Petition of *The C.*

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Turnbull Co. Limited for an order permitting it to register certain trade-marks (1) a petition was presented asking for an order to be allowed to register certain trade-marks and in the petition was added a demand to expunge other trade-marks alleged to stand in the way of the petitioner; a motion was presented on behalf of the party whose trade-marks were sought to be expunged praying for the dismissal of the aforesaid petition in so far as the demand to expunge was concerned. The Honourable Mr. Justice Audette, availing himself of Rules 299 and 300, dismissed the motion and gave leave to the petitioner to join in his petition to register its trade-marks a demand to expunge. I find in the learned Judge's reasons for judgment the following:

There is no doubt rule 34 should be so amended as to allow the two questions to be tried together; because if I were to make an order to-day allowing the application it would result in the petitioner having to take a petition for registration and another action, by statement of claim to expunge; that would set up a multiplicity of actions which is against the very spirit of modern law.

The case now under advisement is somewhat different, inasmuch as the demand to expunge is contained in the defence. The only Rules applicable are Rules 34 and 39. The latter does not extend to actions to expunge. I would hesitate to dismiss the defendant's demand to expunge on a mere question of procedure; I quite agree with the Honourable Mr. Justice Audette that the multiplicity of actions should be avoided and are against the spirit of modern law. On the other hand, I would feel myself bound by the text of Rules 34 and 39.

I will not rest my decision on this point however. I have reached the conclusion that the defendant's demand to expunge cannot be maintained for the reason that the defendant is not a person aggrieved in the eyes of the law. I cannot see how the defendant is liable to suffer damage if plaintiff's mark remains on the register as it now stands.

The grievance of the applicant to expunge must be substantial; a fanciful or a mere sentimental grievance is not sufficient: *In re Wright, Crossley & Co.'s trade-mark* (2); *In re Ellis & Co.'s trade-mark* (3).

Had I come to the conclusion that the defendant was aggrieved by the registration of plaintiff's trade-marks, I

(1) (1932) Ex. C.R. 6.

(2) (1898) 15 R.P.C. 131.

(3) (1904) 21 R.P.C. 617.

would have hesitated in granting his demand to have them expunged from the register on the ground that there had been abandonment on the part of plaintiff of his trade-marks save and except in connection with cake soap.

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Mere disuse of a trade-mark does not amount to abandonment. The intention to abandon has to be clearly established. Such intent may derive from the circumstances of the case. I do not think that the proof nor the circumstances in the present case warrant the expunging of plaintiff's trade-marks. See *Madame Irene v. Schweinburg* (1); *Western Clock Coy. v. Oris Watch Co. Ltd.* (2).

There will be judgment dismissing plaintiff's action, with costs in favour of the defendant.

There will also be judgment dismissing defendant's demand to expunge, but without costs. Under Section 45 of the Trade Mark and Design Act, the question of costs is left to the discretion of the Court. Plaintiff has not incurred any additional costs as a result of defendant's demand, which was brought about by plaintiff's unfounded action, and I think that in equity the defendant ought not to be called upon to pay costs.

Judgment accordingly.

LEVER BROTHERS, LIMITED.....PLAINTIFF;

VS.

UMBERTO PIZZUTI ET AL.....DEFENDANTS.

1932
Feb. 24.
March. 30.

Trade-marks—Infringement—Expunging—Calculated to deceive

Plaintiff's trade-marks in this suit are the same as those described in the case of *Lever Brothers v. Wilson* printed herein at page 71. The defendant's mark consists of the word "Sunrise" used in connection with the sale of washing fluid.

Held, that even if the defendant's product could be said to belong to the same class of goods as that of the plaintiff, defendant's label being so different in appearance, colour, lettering and subject matter from that of plaintiff's label, and bearing on its face, in large type, the words "Sunrise Company, 711 Langlois Ave., Windsor, Ont.", it cannot be said to be "calculated to deceive," within the meaning of the Trade Mark and Design Act.

(1) (1912) U.S. Patent Office Gazette, Vol. 177, 1043. (2) (1931) Ex. C.R. 64, at p. 69.

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ACTION by the plaintiff to have the trade-mark of the defendants consisting of the word "Sunrise," etc., expunged.

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

R. S. Cassels, K.C., for plaintiff.

Ericksen Brown, K.C., and *J. P. E. Brown* for defendants.

The facts of this case are stated in the Reasons for Judgment.

ANGERS J., now (March 30, 1932), delivered the following judgment.

This is an action to expunge from the Trade Mark Register No. 238 a specific trade-mark registered on the 16th day of February, 1931, by the defendants, to be applied to the sale of a Washing Fluid and consisting of "the word 'Sunrise' and the representation of the Sun rising on the horizon with the rays of the Sun spread above it," on the ground that the said trade-mark is so similar to the plaintiff's registered trade-mark "Sunlight" as to be calculated to deceive the public.

The action is brought under the provisions of section 45 of the Trade Mark and Design Act (R.S.C., 1927, ch. 201). The plaintiff is an incorporated company having its head office in the City of Toronto. The defendants reside and carry on business in partnership in the City of Windsor, in the Province of Ontario.

In its statement of claim plaintiff sets out that it is the owner of two specific trade-marks: the first one registered on the 28th day of March, 1889, by Lever Brothers, of Warrington, England, subsequently assigned by the latter to Lever Brothers Limited, of Port Sunlight, England, and further assigned by Lever Brothers Limited to the plaintiff, the registration of the said trade-mark having been renewed for a period of 25 years from the 28th day of March, 1914; the second one registered on the 30th day of August, 1894, by Lever Brothers Limited, of Port Sunlight, England, and subsequently assigned by the latter to the plaintiff, the registration of the said trade-mark having been renewed for a period of 25 years from the 30th day of August, 1919. The first of plaintiff's trade-marks consists

merely of the word "Sunlight" to be applied to the sale of soap, detergents, starch, blue and other laundry goods, also fancy soaps, perfumery and other toilet preparations; the second one which is to apply to the same goods and, in addition, to candles and matches, is described as consisting of "a rectangular box-lid label bearing, essentially, the word 'Sunlight' together with scroll devices, floral spray and the representation of a maid carrying a basket of clothes in her right hand and holding in her left a prop supporting a clothes line on which an article of clothing is suspended."

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On the 16th day of February, 1931, the defendants caused to be registered a specific trade-mark to be applied to the sale of a washing fluid and consisting of "the word 'Sunrise' and the representation of the sun rising on the horizon with the rays of the sun spread above it."

The plaintiff alleges that it is aggrieved by the registration of the defendants' trade-mark by reason of the fact that the name "Sunrise" is so similar to the plaintiff's registered trade-mark "Sunlight" as to be calculated to deceive the public, and the plaintiff accordingly prays for an order expunging the registration of the defendants' trade mark containing the word "Sunrise."

The defendants, in their statement of defence, deny the main allegations of the plaintiff's statement of claim and aver that they did not infringe on the rights of the plaintiff and they pray for the dismissal of the action with costs.

By consent the examination in chief of John Millar, Secretary and Director of the plaintiff company, in the case of Lever Brothers Limited vs. Benjamin L. Wilson (Atlas Chemical Co.), No. 13436, heard before me on the same day as the present case, forms part of the evidence herein.

The evidence discloses the following facts.

Lever Brothers (the partnership) commenced to sell "Sunlight" soap in Canada in 1889. The Canadian Company, i.e., the plaintiff, was incorporated in 1899. From that date it has continuously sold "Sunlight" soap in Canada. "Sunlight" soap is a yellow laundry bar soap. Several thousand tons are sold every year throughout Canada.

Soap is sold largely in grocery stores, in some drug stores, in departmental stores and in chain stores; seventy to eighty per cent is sold in grocery stores or grocery depart-

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ments of departmental stores. Javel Water is sold in the same stores and in the same departments.

The name "Sunlight" is used by plaintiff solely in connection with the laundry bar soap.

A salesman in the employ of the plaintiff, named Glen, purchased two bottles of "Sunrise" washing fluid, the product of the defendants, in two grocery stores in the city of Windsor; the bottles were displayed in the vicinity of the soap section.

Innicello, one of the defendants, heard as a witness, states that he and his partner (Pizzuti) have sold "Sunrise" washing fluid since the beginning of February, 1931. The defendants' business is the manufacture of bleaching water. The witness did not know that the "Sunlight" trade-mark was registered when he applied for the registration of the mark "Sunrise."

For the reasons set out in the case of Lever Brothers Limited vs. Benjamin L. Wilson above referred to, which I need not repeat here, I have reached the conclusion that there is no likelihood of confusion.

Counsel for plaintiff pointed out that the defendants' product is called a washing fluid (and not Javel Water as in the case of Lever Brothers vs. Wilson) and that the label indicates that it is used for washing clothes and he draws the conclusion that this brings it within the same class of goods as soap. I cannot share this opinion; but even if the defendants' product could be said to belong to the same class of goods as the plaintiff's soap, the label is so different in appearance, colour, lettering and subject matter from the plaintiff's label that it cannot be considered as calculated to deceive. I may add that the defendants' label bears on its face, in large type, the following indication: "Sunrise Company, 711 Langlois Ave., Windsor, Ont." There is obviously no attempt whatever to deceive and there is no probability of deception.

There will be judgment dismissing plaintiff's action, with costs in favour of defendants.

Judgment accordingly.

BETWEEN:—

WILLIAM J. McCRACKEN AND CON-
CRETE PIPE LIMITED } PLAINTIFFS;

AND

THOMAS WATSON, CARRYING ON THE
BUSINESS AS WATSON MACHINERY
COMPANY } DEFENDANT.

1932

Mar. 21.
April 4.

*Patents—Infringement—Licences—Breach of contracts—Property and
Civil Rights—Jurisdiction*

Plaintiff W. J. McC. was the owner of a patent relating to improvements in tile making machines. In 1919, he granted to the defendant and one B. the sole and exclusive right of manufacturing and selling the machines in question throughout Canada. In 1922, the defendant and B. granted to Independent Concrete Pipe Co. Ltd., the sole right to manufacture tile on the patented machine within a limited area, on certain stated terms and conditions, the machine to be supplied by the defendant and B. To this agreement the owner of the patent was a party. In 1930, the I.C.P. Co. Ltd. assigned all its rights under the last mentioned agreement to C.P. Co., the other plaintiff. Plaintiffs now claim that the defendant has infringed the patent in question by constructing the machine and selling the same in the territory defined in the second agreement, and they pray for injunction, etc.

Held that, as the issue between the parties was one relating to an alleged breach of contract or contracts, affecting property and civil rights, this Court had no jurisdiction to hear or entertain such an action.

2. That subsection (c) of section 22 of the Exchequer Court Act means that where the subject matter of the action primarily, but not incidentally, concerns a patent of invention, trade-mark or copyright, the Court may grant any appropriate remedy known to the common law or equity.

This action came on before the Court upon the question raised by motion of the defendant that the Court had no jurisdiction to hear and entertain the action, and for judgment dismissing the action.

The question of law so raised was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

H. A. Ayles for plaintiffs.

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

The questions of law and the issues raised by the pleadings on the motion are stated in the Reasons for Judgment.

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 McCracken v. Watson. THE PRESIDENT, now (April 4, 1932), delivered the following judgment.

This is a motion to dismiss this action on the ground that the statement of claim does not disclose any cause of action which this Court has jurisdiction to entertain; the real substance of the controversy here is of importance from the standpoint of procedure.

The relevant facts which must be stated, are as follows. The plaintiff McCracken was the owner of a Canadian patent relating to improvements in Tile Making Machines, and in August, 1919, he, by an agreement in writing, and upon terms therein stated, granted to Thomas Watson the defendant, and one Bertrand Blair, the sole and exclusive right of manufacturing and selling in the Dominion of Canada what is described in the agreement as the McCracken Drain Tile Machine, and the McCracken Sewer Pipe Machine, the subject matter of the patent mentioned, together with repairs and attachments of such machines. This agreement is still in full force and effect except as modified by another agreement which I shall at once explain.

In February, 1922, an agreement was entered into between Watson and Blair of the first part, McCracken of the second part, and The Independent Concrete Pipe Co., Ltd., the assignor of Concrete Pipe Ltd., one of the plaintiffs herein, and which I shall for the time being refer to as the company, of the third part, wherein it was agreed by the company, in consideration of being given the sole right to manufacture concrete sewer pipes on the McCracken patented machines—two of which it had already purchased—within a described territory in the provinces of Ontario and Quebec, to pay to Watson and Blair for the joint account of themselves and McCracken, in lieu of royalties, a principal sum stated in the agreement and which was payable in instalments. The company also agreed to pay to the same parties a specified sum as the estimated profits to which they were entitled in connection with what is designated in the agreement as a No. 3 machine, and which Watson and Blair agreed to construct and deliver to the company. In consideration of these payments Watson and Blair, and McCracken, agreed that they would not “lease,

sell or allow to be used," the McCracken Sewer Pipe Machine within the territory defined in the agreement, and they agreed to waive and cancel all royalties or licence fees on a machine designated as No. 1 machine, then operated by the company at Woodstock, Ont., and to cancel all royalties accrued under past agreements. The company agreed not to move or use the machines acquired by them outside the described territory without the consent of Watson and Blair, and McCracken, and to purchase all repair parts from Watson and Blair. It will be seen therefore that Watson and Blair to start with had the sole and exclusive right or licence to manufacture and sell the McCracken machines anywhere within Canada, but this was limited by the second agreement in so far as the sale of the machines was concerned, but not their manufacture. By the terms of the second agreement the company was given the exclusive right to manufacture within the defined territory concrete sewer pipe on the patented McCracken machines, to be supplied it by Watson and Blair, but the company was not authorized to manufacture the machines. Watson and Blair were not obligated to refrain from manufacturing the McCracken machines within the defined territory, they merely agreed not "to lease, sell or allow to be used" these machines within that territory. I assume that means that Watson and Blair could not sell or lease machines for use within the defined territory, but they might make and sell within that territory machines that were to be used outside that territory. McCracken became a party to the agreement of February, 1922, only I think, because it varied the financial terms mentioned in the prior agreement with Watson and Blair, and also the terms upon which two machines had been already sold to the company, and he had therefore to be a consenting party to such variation of the terms of the first agreement. In December, 1930, the company sold and transferred to Concrete Pipe Limited, one of the plaintiffs, its business and undertaking, and also purported to assign its right, title, interest and demand in the agreement of February, 1922. I shall hereafter refer to Concrete Pipe Limited as the company.

The statement of claim pleads the granting of the patent to McCracken, the licensing agreement to Watson and Blair, the agreement of February, 1922, and then alleges

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that the defendant Watson without the licence or permission of the plaintiffs had "made use of and sold to others to be used in the Dominion of Canada tile making machines, which embody the invention" described in the McCracken patent; it also pleads that the defendant is estopped from denying or disputing the validity of the letters patent—because he was a licensee, I assume. The statement of claim also defines the territory within which the company's predecessor was to have the right of manufacturing and selling concrete sewer pipe made on the McCracken machines. The particulars of breaches allege, (1) that the defendant had constructed at his factory at Woodstock, Ont., tile making machines which infringed certain claims of the McCracken patent, and (2) had sold such machines among others to parties named residing in Kitchener and Ottawa in the province of Ontario, and Montreal in the province of Quebec, all within the territory defined in the second agreement. The whole of the statement of claim with the exception of the paragraph alleging infringement, suggests an action based upon a breach of contract. The statement of defence admits the agreements of 1919 and 1922 but denies that the latter agreement conferred upon The Independent Concrete Pipe Company Limited any right to make or sell the subject matter of the McCracken patent within the territory mentioned in the second agreement, and further denies that the defendant used, or sold to others to be used, machines embodying the invention described in the patent to McCracken, except with the licence of the plaintiff. McCracken. There is no denial of the validity of the patent.

It is clear, I think, from the agreements that defendant Watson could lawfully manufacture the McCracken tile making machines anywhere in Canada, and could sell or lease the same anywhere in Canada except within the territory defined in the second agreement. To say that the defendant has manufactured machines in the city of Woodstock, Ontario, which infringe certain claims of the patent, as does paragraph one of the particulars of breaches, is to deny the existence of the licence to Watson and Blair,—which the plaintiffs plead—who, under that licence were authorized to manufacture such machines strictly in con-

formity with the specification of the patent, anywhere in Canada. There could not possibly be infringement so long as the agreements mentioned continue in force, but there might be a breach of contract. Then to say, as does the second paragraph of the particulars of breaches, that the defendant had sold three machines to persons within the prohibited territory, does not suggest infringement but possibly a breach of contract. No issue was raised upon the hearing of the application as to the respective interests of Watson and Blair under the licence, or the right of Watson alone to manufacture and sell the McCracken machine. I understood Mr. Aylen, for the plaintiffs, to say that the acts complained of consisted in the sale of McCracken machines by the defendant for use within the defined territory mentioned in the agreement of 1922.

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The issue between the parties is therefore, in my opinion, one relating to an alleged breach of contract, or contracts, affecting property and civil rights, and this court, I think, has not jurisdiction to entertain such an action, and the issue between the parties must be determined, if at all, in the Provincial Courts. But Mr. Aylen contended to the contrary and urged that Chap. 23, sec. 3, ss. (c) of the Stat. of Canada, 1928, amending sec. 22 of the Exchequer Court Act, bestowed jurisdiction upon this Court to entertain an action of this nature, and that raises an important point. Sec. 22 of the Act as amended reads as follows:

The Exchequer Court shall have jurisdiction as well between subject and subject as otherwise,

(a) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade-mark or industrial design;

(b) in all cases in which it is sought to impeach or annul any patent of invention, or to have any entry in any register of copyrights, trade-marks or industrial designs made, expunged, varied or rectified; and

(c) in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at Common Law or in Equity, respecting any patent of invention, copyright, trade-mark, or industrial design.

Subsection (c), the one under consideration, prior to the amendments appeared as follows in the Revised Statutes of Canada, 1927:

(c) in all other cases in which a remedy is sought respecting the infringement of any patent of invention, copyright, trade-mark or industrial design.

The amended sec. 22 (c) of the Exchequer Court Act, which is claimed to give jurisdiction to the court in this

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case, seems rather confusing when one is obliged to apply it, particularly having in mind the legislative powers assigned to the provinces, and those assigned to the Dominion, under the British North America Act. The preceding subsections of sec. 22 of the Act, relate to cases specifically bearing upon any patent of invention, trade-mark, copyright or industrial design. If sec. 22, ss. (c) of the Act is to be construed so broadly as to give this court jurisdiction in a case of contract between subject and subject, just because the contract incidentally relates to something which is a patented invention, then my view would be that the legislation is ultra vires, because it invades the jurisdiction of the provincial legislatures in respect of property and civil rights. Construing the subsection literally, I think, it means that where the subject matter of the action primarily, but not incidentally, concerns a patent of invention, trade-mark or copyrights, the court may grant any appropriate remedy known to the common law or equity. That, I do not think is this case, which primarily has to do with a contract and its alleged breach, at least that is my view of the case. If, upon a trial, a breach of contract was proven, or failed to be proven, the judgment of the court could not confirm the validity of the patent, or annul it, or find that there was or was not infringement, it could only construe the contract, or contracts, and ascertain whether or not there was a breach of the same. The fact that the McCracken machine was patented, was the cause the contract was entered into, but the patent is not the subject matter of the contract; it is the use of the invention described in the patent, which is another thing altogether. Nothing here arises under the patent law of Canada. The issue arises out of a contract. The contract may be rescinded by mutual agreement or by a decree of the courts, but until it is so rescinded or set aside, it is a subsisting agreement, which, whatever it is, or may be shown to be, must be the foundation of any relief sought from the courts. There is no denial of the force or validity of McCracken's patent nor of his right to the monopoly, except in so far as he has parted with that right by contract. In this case, where the defendant admits validity and his use of the patent granted to McCracken, and a subsisting contract is shown governing the rights of the parties in the use of the

invention, then the issue is upon the contract and not upon the letters patent, and consequently I do not think the provision of the statute relied on by the plaintiff is here applicable.

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The application to dismiss the action, upon the pleadings and the documentary evidence adduced on the application, is granted with costs of the action to the defendant to the date of the application, and the costs of the application.

Judgment accordingly.

LIGHTNING FASTENER COMPANY, }
LIMITED

PLAINTIFF;

AND

COLONIAL FASTENER COMPANY, }
LIMITED ET AL

DEFENDANTS.

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Patents—Infringement—Anticipation—Subject matter

Held that the proper principle to be applied in testing anticipation is that the specification which is relied upon as an anticipation must give the same knowledge as the specification of the invention itself.

Pope Appliance Corporation v. Spanish River Pulp and Paper Co. (1929) A.C. 275 referred to.

2. That much of the merit of a new combination depends on the result produced. If a slight alteration turns that which was practically useless into what is useful and important, though the invention may be small yet the result being the difference between success and failure, there is proper subject matter for invention. The art of combining two or more parts, whether they be new or old, or partly new or partly old, so as to obtain a new result in a better, cheaper or more expeditious manner, is valid subject matter, if it is presumable that invention in the sense of thought, design or skilful ingenuity was necessary to make the combination.
3. In determining the question of infringement it is necessary to distinguish between the case where an invention is for a mere improvement of an old machine which has been in use for producing a certain result and where the only novelty which could be claimed in the improvement was in the use of certain mechanical means in order to produce in a known machine the same result which had been produced by other mechanical means, and the case where there is novelty in the machine and novelty in the effect and result to be produced thereby. In the latter case the doctrine of infringement by substitution of equivalents applies, and one must look very narrowly upon any other machines for effecting the same object to see whether or not they are merely colourably different contrivances for evading that which has been done before.

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4. That the question is not whether the substantial part of a machine or method has been taken from the specification, but whether what has been done by the alleged infringer takes from the patentee the substance of his invention.

The Court found the patent in suit was not anticipated, had subject matter and was valid and infringed.

ACTION by plaintiff for judgment declaring Canadian patent, no. 212,202, granted to it, good and valid and infringed by the defendants, and for an order of injunction, etc.

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

O. M. Biggar, K.C., and *R. S. Smart, K.C.*, for plaintiff.
D. L. McCarthy, K.C., and *S. A. Hayden* for defendants.

The facts are stated in the Reasons for Judgment.

THE PRESIDENT, now (April 4, 1932), delivered the following judgment.

The plaintiff, by assignment, is the owner of Canadian patent no. 212,202, which issued in April, 1921, upon an application filed in 1918, the patentee being one Gideon Sundback of Meadville, Penn., U.S.A.; the patentee filed an application for a patent in the United States, covering the same subject matter, in 1916. The plaintiff claims that the defendants have infringed its patent, and the defendants plead the defences usual in infringement actions.

The invention, it is stated in the specification, relates to new and useful improvements in a machine and method of producing straight and curved fastener stringers. It will not be necessary to distinguish between straight and curved fastener stringers; it will be sufficient, I think, for the purposes of the case to have in mind only the straight fastener stringer, and I shall directly explain what that is. Before attempting to explain in detail the construction and operation of the patentee's machine, and the alleged infringing machine, it might be convenient first to state in general terms the purpose of the Sundback machine, and just what it does in actual practice. From a thin flat strip of metal which is fed into the machine, there is automatically formed these small interlocking elements which we see used for

closing apertures in articles of footwear, clothing, etc., frequently referred to as sliding fasteners, and which are made to interlock and unlock by means of a sliding element. I shall hereafter refer to the individual interlocking element as a "unit." The units are, one by one, after being punched out of the metal strip, automatically fastened upon a corded tape, a strip of fabric, which is automatically fed into the machine from a tape supply roll or spool. When a given section of tape is fitted with the required number of units, it can be cut apart to provide stringers of the desired length, according to the purpose for which it was intended, and this completed and separated section of the tape I shall hereafter refer to as a "stringer," to distinguish it from the "tape" while passing through the machine and being fitted with the units. The unit when punched from the metal strip is of U shape, the sides of which I will refer to as "jaws" because they are eventually compressed around the corded tape; the rounded section of the unit, where is located the locking means of the unit, has on one side a small socket or depression, and on the other side a projection or pin, both formed by an operation of the machine prior to the units being attached to the tape. In the result, the machine produces a stringer with identical units attached thereto in predetermined space relation the one to the other, and in predetermined groups, so that the units of one stringer will co-operate with corresponding units in an opposing stringer. A sliding fastener is necessary to put the units in and out of engagement, but with that we are not concerned in this case. The stringers are of course intended to be incorporated one on each side of the aperture in any article to which this method of opening and closing is adaptable. The alleged invention described in the patent in question therefore had for its object, the formation of the unit, its compression on the corded tape, and the production of stringers, by one automatic machine; a further object of the alleged invention was to enable the machine to set the units on the corded tape in predetermined numbers and spacing, and in spaced groups.

I shall now attempt to explain more particularly the construction and operation of the plaintiff's machine, but without attempting to describe all its mechanical details. The

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machine is of course power driven. A flat metal strip is fed from a roll or coil at the back of the machine, first into a guide and then through a pair of feed rollers which are brought together under spring pressure. The metal strip is then advanced, step by step, by means of operating mechanisms, until it comes to the front of the machine where, mounted on a shaft, is a die head to which punches are attached. There the unit is first punched out of the metal strip and pressed down into the die plate where there is a hole the shape of the unit. Then a spring pressed punch, located beneath the hole in the die plate, forces the unit upwards and back into the strip from which it was punched out, and wherein now it is securely held during further operations. The metal strip with the restored unit is then advanced until it comes under another punch which stamps out the small loose piece between the jaws of the unit, and this passes out through a hole in the die plate as scrap. The metal strip is then further advanced a step or two when a third punch comes down and forms a small depression or socket on the top of the unit at the rounded portion; just below that point there is a depression in the die plate, and when the punch forms the socket on the top of the unit it forces the metal down into the depression on the lower plate, thus forming a projection or pin on the other side of the unit. It is this socket and pin which forms the meshing means in a pair of stringers. The unit is then complete but is still firmly held between the edges of the original metal strip. The metal strip is then advanced to a position opposite the tape so that the jaws of the unit encircle the edge of the tape, the tape being fed in the path of the jaws of the unit, under tension, from a roll below. When the jaws of the unit, which diverge at quite an angle, straddle the tape, they are then firmly set on the tape by side pressing tools or pressure members, which are brought into action by means of cranks, etc.; the edges of the side tools contact with the sides of the metal strip with the result that the jaws are securely pressed around the edge of the tape without coming in direct contact with the side tools, thus avoiding it is claimed any tool injury to this portion of the unit. In the same manner other units are formed and attached to the tape. After the jaws are affixed to the tape, the residue of the metal strip is fed out

in one place, and the tape with the units in another place. The tape when fitted with units may be cut off in the pre-determined lengths, as I have already explained. I perhaps should add that the tape is fed upwards from a roll at the side of the machine by mechanical devices, into position between the jaws of the unit as already stated. The tape feed wheel is corrugated or of knurled surface, to give friction contact with the tape. By operating mechanisms the movements of the tape, and of the metal strip are made to synchronize; other mechanisms provide for the spacing of the units and the grouping of the units, but all this, I think, does not call for any description in detail.

The defendants' machine, alleged to infringe Sundback, which I shall hereinafter refer to as Prentice, is in its general make up, similar to Sundback. Prentice employs the ordinary commercial power press into which is built special tools and mechanical movements. The metal strip is fed from a roll into the machine at the left hand side and then passes across the front of the machine, instead of feeding from the back to the front, as in Sundback. In Prentice, the socket and pin, the interlocking means, are first formed in the metal strip before the unit is punched out of the strip, the reverse of the operation in Sundback. The metal strip is then stepped forward the necessary distance when the unit is cut out of the metal strip by a cutting punch, and is pressed right through the die plate to a lower level, into a small cavity in a transverse slide moving from the back to the front of the machine. The means employed in this operation, and the next mentioned, are claimed by the defendants to differentiate Prentice from Sundback so greatly as to eliminate the question of infringement, but this will be discussed later. The unit now being out of the metal strip and held in the transverse slide or platform below, it is pushed by an auxiliary slide, transversely to the path of the metal strip, and thus advanced to the point where it may be attached to the tape. The sliding carrier is advanced until the jaws encircle the edge of the tape, bending the tape outwards somewhat in the advancement. The compressing or fastening of the units on the tape is a somewhat different operation in Prentice from that employed in Sundback. The side tools used to press the jaws about the tape are mounted on vertical axes, one on

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each side of the tape, and they do not move in and out as in Sundback, but rotate in a horizontal plane about their vertical axes, and are so set that their working ends slope in towards the machine where they are held by small springs. They are so spaced apart that, when in their normal position, the working or front edges just come in contact with the outer end of the transverse slide, then, as the unit is moved forward on the slide, the ends of the side tools in effect come together due to their rotation upon their axes and this presses the jaws around the edge of the tape, but lightly it is said. In other words, the transverse sliding member holding the unit, in its forward movement, pushes outwards the side tools until they come in contact with the jaws of the unit, and presses them upon the tape; how firmly the units are attached to the tape I think is not of importance. The method of feeding the tape, generally speaking, is not materially different from that employed in Sundback; by operating mechanisms much as in Sundback, the tape is automatically fed into the desired position from a roll in the front of the machine. Prentice also provides for spacing between the units, and groups of units, but this need not be enlarged upon. After the stringer is removed from Prentice, it is claimed that a further operation takes place in another machine, sizing and aligning the units, but I do not think this is of importance in the controversy. Some further operation is also performed upon the Sundback stringer after it leaves the machine.

The utility of the plaintiff's machine is not susceptible of serious questioning. The machine functions automatically, with great speed yet with accuracy, and its daily capacity and production costs appear to have proven satisfactory. In the result, the machine has been eminently successful in the practical and commercial sense, and as many as 40,000,000 matched pieces of stringers were sold throughout the world, in one year. The machine is an extremely useful one for its purpose. The utility of Sundback was not, I think, questioned during the trial, but its alleged novelty was attacked.

It will be convenient at this stage to refer to the defence of anticipation. In point of time, Sundback is undoubtedly prior to Prentice. Now was Sundback anticipated by the

published prior art, or by any prior user? I think not. I find nothing in the prior art relied upon by the defendants that is at all relevant to the controversy here on the point of anticipation. Subject to what I shall say regarding the Aronson patent, the cited prior art relates to alleged inventions, the object of which was to produce results totally unlike that intended to be produced by Sundback. One can hardly read the cited prior art and conclude that any of them would assist in producing Sundback. The proper principle to be applied in testing anticipation is, that the specification which is relied upon as the anticipation of an invention must give the same knowledge as the specification of the invention itself. *Pope Appliance Corporation v. Spanish River Pulp and Paper Co.* (1). No one confronted with the problem of producing a machine like Sundback could turn to the prior art cited in this case, and there find its solution. And that is the test. The prior art relied upon has to do with machines for the making of carding hooks and eyes, metallic strip fencing, barbed wire, etc. To take something from one patent and then something from other patents, and say "there is Sundback," is to make a mosaic which is not legitimate in law. I feel quite satisfied that no anticipation of Sundback is disclosed in the published art put in evidence by the defendants, unless it be in Aronson. Machines were constructed in conformity with the specification of the Aronson patent (1907) and they were in use prior to Sundback. The object of Aronson was to set channels (units), of the hook and eye type, on tape, but the units were fed into the machine by means of a special carrier, or magazine, where they had been placed and spaced manually, having been separately formed in another machine, or by special tools, or both. The hooks were placed in one magazine, and the eyes in another. After the units were lightly attached to the stringer in the machine, considerable manual work was necessary to finish the stringer which was costly, and the daily production of the machine was small. Aronson was a machine intended only to fasten the units on the tape, and it is said not to have been very successful; it has since, I think, gone out of use altogether. It seems quite clear to me that Aronson

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(1) (1929) A.C. 269, at pp. 275-276.

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does not in any sense constitute anticipation or a prior user of Sundback which automatically performed all the operations I have described, the one machine producing automatically the finished stringer from beginning to end, from the metal strip and tape material.

The next question for determination is whether or not there was invention in Sundback at the date of the patent. The merit of a new combination much depends on the result produced. If a slight alteration turns that which was practically useless into what is useful and important, the courts consider that, though the invention was small yet the result being the difference between success and failure, it is proper subject matter. The art of combining two or more parts, whether they be new or old, or partly new and partly old, so as to obtain a new result, or a known result in a better, cheaper, or more expeditious manner, is valid subject matter, if it is presumable that invention in the sense of thought, design, or skilful ingenuity was necessary to make the combination. This has time and again been held as sufficient to uphold a patent. Many of the most important inventions are inventions which are merely the combination in a new way, of new or old, or partly new or partly old, parts. In this case, some parts of the combination may be old, some, I think, are new, but if they were all old, yet it was a novel combination which produced a new and useful result, and substantial skilful ingenuity was required to produce the combination. I have been using the language of text writers, and the Courts, in discussing combination patents. To describe, as I have done, the result which Sundback produces, and the method by which that result is produced, is alone sufficient in my opinion to hold that there was invention in Sundback and that the patent should be upheld. There is not disclosed in the prior art, as I have already stated, any anticipation of Sundback. It was the first machine to produce the same or similar results, by the method and means described in the specification. I have no difficulty whatever in reaching this conclusion.

In determining the question of infringement it is necessary to distinguish between the case where an invention is for a mere improvement of an old machine which has been in use for producing a certain result and where the only

CORRIGENDA

Page 70: The name R. S. Cassels should read R. C. H. Cassels, and the name Erichsen Brown should read F. Erichsen-Brown.

Page 80: The name R. S. Cassels should read R. C. H. Cassels, and the names Erichsen Brown K.C. and J. P. E. Brown should read J. E. Taylor.



novelty which could be claimed in the improvement, was in the use of certain mechanical means in order to produce in a known machine the same result which in that machine had been produced by other mechanical means, and the case, where there is novelty in the machine, and novelty in the effect and result to be produced by that machine. The invention in question here, in my opinion falls within the last type of cases. See Cotton L.J., in *Proctor v. Bennis* (1). Sundback was a new and useful machine producing automatically a finished stringer, and nothing of the kind had been done before. In such a case the doctrine of infringement by the substitution of equivalents applies, and as it has often been said, one looks very narrowly upon any other machine for effecting the same object, to see whether or not they are merely colourable contrivances for evading that which has been done before, while in the other case the patentee is substantially tied down to the invention which he claims, and the mode of effecting the improvement which he describes in his invention, and there, one cannot largely extend the interpretation of the means adopted for carrying the invention into effect. Further, the state of public knowledge at the date of the invention of Sundback is also to be considered when dealing with the question of infringement, or in construing the specification and claims. I think I may safely say that the state of public knowledge at the date of Sundback's invention, in respect of an automatic machine for producing stringers, was such, that it required substantial invention to make the step to Sundback. Upon a fair construction of the specification and claims, the monopoly claimed is, I think, for the attainment of a new result, and it was a novel achievement, and the claim therefore covers mechanical equivalents for the mechanism described. The specification states that "the broad principles of the invention can be carried out otherwise than as herein shown and the invention is not to be limited except as required by the scope of the claims." In the claims relied upon by the plaintiff, I do not think the patentee limits himself to the precise mechanism described; it is in the principle or method of construction and operation, in the broad idea of the utiliza-

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(1) (1887) 4 R.P.C. 333, at p. 354.

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tion and arrangement of means substantially as described which automatically produce a finished stringer, wherein lies the essence of the invention, the claim to monopoly, and not in the precise operating mechanisms or means that are described.

In each case the substance, or principle, of the invention and not the mere form is to be looked to. It has been stated in many cases that if an infringer takes the principle and alters the details, and yet it is obvious that he has taken the substance of the idea which is the subject matter of the invention, and has simply altered the details, the Court is justified in looking through the variation of details and see that the substance of the invention has been infringed and consequently can protect the inventor. And the question is not whether the substantial part of the machine or method has been taken from the specification, but the very different one, whether what is done by the alleged infringer takes from the patentee the substance of his invention.

Prentice, it seems to me, is Sundback with some variations, substantially they are the same though not exactly the same. In construction and operation they seem to be in principle substantially the same. I do not think Prentice can be said to be in principle, a new or another combination. Prentice feeds the metal strip into the machine from the left side of the machine instead of from the back to the front, as does Sundback, but that is merely a matter of choice and is unimportant; but having once decided to locate the metal strip feed at the side of the machine and the tape feed in the front of the machine, it became necessary to drop the fastening element when punched out of the metal strip to a lower level, and carry it forward transversely to the path of the metal strip, to the point where it might be attached to the tape. There was nothing to prevent Prentice from feeding the unit to the tape along the plane the metal strip was moving by changing the position of the die plate, or by feeding the metal strip from the back to the front of the machine, but that would be to do exactly what Sundback did, and the two machines would then be practically alike in form. Prentice, having positioned his metal strip feed and tape feed means in the way he did, was obliged to drop the unit when cut out, down

to a lower level; that I think is obvious, and it involved no practical difficulty whatever. Therefore in Prentice the unit is pressed through the die plate upon a movable slide or platform below, and thereon it is automatically fed to the tape. Prentice carries the unit to the tape on the sliding element, while Sundback carries the unit to the tape within the moving metal strip; the former, I think, is but the mechanical equivalent of the latter; even if it was an improvement that would not negative infringement. Other points incidental to the structure of the different parts of Prentice were pointed out differentiating it from Sundback. It was urged that in Prentice, the jaws are lightly attached to the tape, while in Sundback they are firmly attached; and that in Prentice the pin and socket is first formed and then punched out, the reverse order of Sundback. It seems to me that these points of distinction are not of substance and do not call for any discussion. Then it was pointed out that in Prentice the units are cut out of the metal strip with the jaws extending transversely on the metal strip, whereas in Sundback they are lengthwise of the strip; there is no substance in this contention either. Prentice could not do otherwise on account of the direction of the metal strip feed, and the position of the tape feed. In Prentice, what is called the side tools, that is the means for pressing the jaws of the units around the corded edge of the tape, differ somewhat from Sundback; the latter employs what was described by one of the defendants' witnesses as punchers or plungers, which press on either side of the metal strip after the unit encircles the tape, thus in effect pressing against the jaws of the unit, while the former employs what was described by the same witness as swinging pinchers, and which I have already described. They are different arrangements of course, but they each serve the purpose of pressing the jaws of the unit around the tape by a side pressure, directly or indirectly applied to the jaws of the unit. This arrangement of Prentice is plainly, I think, the mechanical equivalent of Sundback; and again I say that even if the arrangement of Prentice possessed advantages over that of Sundback, that would not negative infringement if the substance of Sundback has been taken. It is very easy to alter the details of a machine when once its general construction and purpose is known

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and understood. Other distinctions between the structures of the two machines were pointed out, but any discussion of them is, I think, unnecessary.

The law protects a patented combination machine even if the infringing machine possesses improvements, patentable improvements; that is immaterial, because if one has taken the substance of the invention, or if the essence or substance of the plaintiff's invention is present in the defendants' combination, there is infringement. It is stated by a text writer on the law of patents that it is a very common delusion of infringers that because the infringing article presents some advantages or improvements over the patented article, and is perhaps itself the subject of a patent, this fact negatives infringement; but that is not so. The question still remains, does the alleged infringing article embody the substance of the invention claimed by the plaintiff? The emphasis laid upon the variations in Prentice really strengthens my conviction that they are the mechanical equivalents of Sundback. In substance the two machines are the same, every step in the operation of Prentice is substantially the same as in Sundback and is made for the same purpose. It seems to me that the whole principle, method and arrangement of Sundback is plainly evident in Prentice, and while the machines are not exactly alike, yet they are in substance alike; they are designed to produce the same result, and substantially by the same means or method. Prentice, in my opinion, cannot be said to be a new combination. If I am correct in this, then it follows, and it is my opinion, that the means employed in the combination of Prentice are the mechanical equivalents of those used in the Sundback combination, and there has been infringement.

I am of the opinion therefore that infringement of the plaintiff's patent by the defendants has been established; the plaintiff therefore succeeds and will have its costs of the action.

Judgment accordingly.

BETWEEN:—

LIGHTNING FASTENER COMPANY }
 LIMITED } PLAINTIFF;

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AND

COLONIAL FASTENER COMPANY, }
 LIMITED, AND G. E. PRENTICE } DEFENDANTS.
 MANUFACTURING COMPANY ... }

(No. 13633)

Patents—Infringement—Subject-matter

The invention here relates to separable fasteners of a type disclosed in a former Canadian Patent granted to Sundback. It is claimed that the plaintiff was entitled to a patent because of his discovery that if the projection in the unit was made smaller than the recess in the other unit which co-operates with it, it would give increased flexibility.

Held, that inasmuch as the general form of interlocking members and of the recesses and projections thereon, as described in the patent in suit, had long been anticipated and used, the mere fact of making the projection smaller than the recess, thereby giving increased flexibility and allowing for shrinkage of the tape to which it was attached, did not constitute invention.

2. Every trifling improvement is not invention, and the industrial public should not be embarrassed by patents for every small improvement. A slightly more efficient way of doing a thing, small changes in size, shape, degree, or quality in a manufacture or machine, even assuming novelty, is not invention. More is necessary to justify a monopoly.

ACTION by the plaintiff herein to have the patent of invention granted to Sundback, and assigned to it in November, 1926, declared good and valid and infringed by the defendants.

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

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

D. L. McCarthy and *S. A. Hayden* for defendants.

The facts and parts of the Specification material to the issue are stated in the Reasons for Judgment.

THE PRESIDENT, now (April 4, 1932), delivered the following judgment.

This is an action for the alleged infringement of a patent of invention granted in November, 1926, to Gideon Sundback, upon an application made in September, 1925.

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The invention relates to separable fasteners, and has particular reference to that type of fastener for garments, footwear and other purposes, where two flexible stringers, carrying similar members are locked and unlocked by a sliding device, the locking being effected by movement in one direction and unlocking by an opposite movement. Each interlocking member is provided with a projection on one side thereof and a recess on the opposite side for co-operation with the projection of the adjacent interlocking member.

The specification states:—

This invention relates to fasteners of the type disclosed in Canadian Patent No. 189,154 dated March 18, 1919, which shows a plurality of interlocking members disposed along the edges of stringers on opposite sides of a silt where the interlocking members are controlled by a slidable operating device. An object of this invention is to provide increased flexibility and reliability, reduced cost of production, and longer life of the fastener.

According to this invention, a clearance is provided between the projection of one interlocking member and the walls of the recess in its co-operating member so located relatively to the stringers and the heads and recesses as to adapt this fastener for use with washable articles such as overalls, children's clothing, etc., where difficulty has been encountered due to shrinkage of the tape stringers, or the fabric to which attached. This clearance results from a different contour of the sockets and projections shown in said patent and enables quite wide variations in stringer length and member spacing to exist without causing the members to jam, or to become so loose as not to stay interlocked. Also, where the members tend to jam, excessive wear is caused on the slider, or even distortion sufficient to render a new one necessary. Since the projections and co-operating sockets are not so nearly identical in fit, as in said patent, the dies and punches used in making the members need not be of such high precision, and may be used for a longer time when worn from their original contour because of the greater clearances permitted by this invention, thus cheapening the tool and labour cost of production.

The case was put to me on the footing that there was invention in making the recess of the member of considerably larger dimensions than the projection, the recess and projection being somewhat tapered, so as to permit lateral and longitudinal flexibility, the flexibility being of particular utility, it was said, in the case of shrinkage in washable articles. Mr. Ray, the plaintiff's expert witness, explained very fairly, I think, the scope of the alleged invention in his direct examination, in the following words:—

This patent has to do with a fastener consisting of two stringers with the elements fastened on it as shown in figure one of the drawing; and as seen on that drawing the recess is made of considerably larger dimensions than the projection on the co-acting elements. This permits flexi-

bility of the fastener in use without causing the projection to come out of the hole in the co-acting element or the recess in the co-acting element, I should say. It also permits of smoother interlocking of the elements when they are brought together by the slider. There is less tendency for the projection on the one element to interfere with the recess in the co-acting element, so that they come together more smoothly. Then the clearance allows for shrinkage in the tape, which occurs in washing articles to which the fastener is applied so that after such shrinkage takes place the fastener elements will not bind with each other. If the projection and the recess are made of substantially the same size as is shown in some of the earlier Sundback patents, there is a tendency, when shrinkage takes place through the washing, for the projection riding up on the walls of the recess; and that results in a binding between the fastener element on one of the stringers with the fastener element on the other stringer, so that the slide cannot readily be operated; and that in turn tends to either move the fastener element or cause breakage or spreading of the slide itself.

The evidence given by Mr. Ray, on cross-examination, would limit the invention to the fact that the recess was enough larger than the projection to permit a lateral and transverse movement. Mr. Smart, for the plaintiff, urged that the patent be sustained because of the discovery that if the projection was made smaller than the recess there was increased flexibility. The alleged invention was therefore rested upon this one point. Therefore it seems to me that the only question for decision is whether there is invention in making the projection smaller than recess, and tapered, so that there may be a margin of play to meet lateral and longitudinal stresses.

The general form of the interlocking members and of the recesses and projections thereon, described in the patent in suit, had long been anticipated and used. The recesses and projections had, prior to the Sundback patent here in question taken various shapes. They had been formed in shapes described as conical, pyramidal, cylindrical, semi-circular, and rounded but elongated transversely the member. In some cases at least, the recess and projection was tapered in some degree, and the utility of flexibility in sliding fasteners was understood. The rounded but transversely elongated recess and projection described in the patent in suit had been described in previous patents, but as I understand it, it is also claimed that the recess and projection should be tapered when the stringers are to be used in washable articles. Flexibility of the interlocking members being the admitted essence of the invention, I shall refer

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to two patents in the pleaded prior art, and they are patents issued to the same patentee as in this case. In Sundback's United States patent no. 1,219,881 (1917) relating to separable fasteners, the specification states that the recesses and projections are round but somewhat elongated transversely so that the outside of one member nests within the recess of an adjoining member when in locked relation, and it states that thereby a "snug fit is obtained and at the same time ample provision is given for movement of one or the other without coming out when the fastener is flexed transversely." It is also stated that "this construction gives facility for relative longitudinal movement without disengagement." The specification also states that

owing to the rounded and transversely elongated shape of the projections and recesses, the fastener is very flexible without being loose. Flexibility is also increased by reason of the relatively large number of locking members provided, which is possible because these members are thin and their projections and recesses can be proportioned so that one will not touch another when the fastener is bent transversely. This is an important consideration in fasteners of this type. Thus it will be seen that the shape of the projections and recesses is such that when engaged, the stringers have practically no movement of separation, but yet the engagement is secure without being stiff, because the locking members on one stringer can rock or oscillate freely relatively to those on the other stringer without disengagement.

Then, in Sundback's United States patent no. 1,243,458 (1917), also relating to separable fasteners, the patentee states that the invention while providing for a snug fitting of the socket (recess) and projection still ample provision is made for the movement of one member relative to the other without disengaging when the fastener is flexed transversely or longitudinally. The specification states that:

Practical success in a fastener of this character is largely dependent upon proper construction of the locking members. Not only must these members remain engaged when the fastener is flexed transversely or one stringer moved longitudinally relative to the other, but the locking members must guide smoothly into and out of each other without liability of jamming on the slider or on each other, and must always lock without objectionable looseness.

All this means, I think, that the recess described in each of these two patents was in fact larger than the projection, to ensure flexibility, and that substantially they were round in formation.

I think that in the use of fasteners of this kind, the projection must inevitably be smaller than the recess in order

to secure a certain amount of flexibility. Therefore, leaving out any other aspect of the case, there has been, I think, anticipation of the alleged invention in question here, by the same patentee. The only distinction of substance between the patent in suit, and the two prior patents to Sundback, is that in the former case the patentee seems to rely upon the fact that certain fabrics will shrink when washed, which of course he always knew, and he introduces this fact into his specification as a ground for building up a claim to invention of something which he had substantially described in earlier patents.

I do not however wish to rest my decision merely on the ground of anticipation. I do not think there can be invention in providing fastening members with rounded or tapered projections on one side, and a larger and rounded or tapered recess on the opposite side, wherein the recess is enough larger than the projection so as to permit the projection to oscillate or roll, within limits, laterally and longitudinally, without coming out of engagement or interfering with the control of the members by the slider? The unsatisfied demand, according to the patentee, for greater flexibility in fasteners, lies, it is said in the necessity of counteracting the effect of shrinkage in washable articles in which stringers are used. Mr. Ray only went so far as to say that there was "a tendency" in the earlier Sundback fasteners, when shrinkage had taken place, for the projection to ride up on the walls of the socket. Now it is the practice, according to the evidence, to pre-shrink stringers, before applying the members or fastening units to them, a very sensible and obvious practice I should say. I do not think that invention can be sustained when it rests upon the allegation that greater flexibility of the fastener is necessary when stringers are applied to washable goods. I think that is a difficulty more effectively disposed of by the pre-shrinking of the stringers. To say that the projection should be enough smaller than the socket but not too much smaller, is but repeating what was known and practised before, and something which is obviously self evident when it is considered that such fasteners are invariably used in articles of use that usually flex very considerably. That the projection should tightly fit the recess was never in the mind of those engaged in producing this type of fastener.

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It was imperative that the locking and unlocking of the members might be easily accomplished. There was flexibility in the interlocking members of the Kuhn-Moos fasteners; there the recess and projection when in engagement had a rolling effect, and the projection was longer than the recess was deep. There is not, in my opinion, any invention in the alleged improvement. Every trifling improvement is not invention and the industrial public should not be embarrassed by patents for every small improvement. A slightly more efficient way of doing a thing, small changes in size, shape, degree, or quality in a manufacture or machine, even assuming novelty, is not invention. Something further is necessary to justify a monopoly. If one could monopolize any variation of an existing method, process, manufacture or machine, simply because it had not been done before, industrial effort would intolerably be impeded because patents would exist and be supported for endless trivial details. There must be sufficient ingenuity to make a useful novelty into an invention. A small amount of ingenuity may be sufficient, but there must be some, but I do not think that there is sufficient ingenuity in this case to sustain the patent. The whole idea of Sundback was old, and the state of public knowledge at the date of the patent in suit was such, I think, as to make impossible the step described by Sundback, to be considered as proper subject matter for a patent. If one desires to alter slightly the shape, contour or proportions of recess and projection, or vary the degree of flexibility of the fastener, he should be permitted freely to do so, but to do so does not mean that there is invention. I should very much doubt if for many years, though of course I am not so deciding, that there was any field for invention in the locking features of the type of fasteners described and illustrated in the patent in suit. Once the principle or method of construction and operation of fasteners of this type with the recess and projection interlocking means was known, it was easy to make slight variations, but not patentable variations.

For the reasons which I have stated the plaintiff must fail, and I dismiss the action with costs to the defendants.

Judgment accordingly.

BETWEEN:—

CHIPMAN CHEMICALS LIMITED.....PLAINTIFF;

AND

FAIRVIEW CHEMICAL COMPANY }
 LIMITED } DEFENDANT.

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Patents—Infringement—Chemical patents—Equivalency—Discovery—Invention

The patents in suit relate to improvements in Weed Killers and Methods of Killing Weeds, which are fully described in the reasons for judgment. There was no suggestion that the defendant by experimental work had produced a new herbicidal preparation or that by the addition of a small amount of magnesium chloride it had produced a new result or compound or increased its utility or herbicidal effect. The Court held that the patents were valid and that the defendant's herbicidal mixture was substantially the same as the plaintiff's, and that by the mere addition of a small amount of magnesium chloride, which gave much the same results as calcium chloride, used by the plaintiff, the defendant could not escape infringement.

Held further, that though the action and properties of each constituent of a chemical composition or mixture was known, where a new formula has been made known and the constituents have been so combined as to overcome difficulties or disadvantages in known herbicides, such combination is patentable.

2. That a chemical compound intended for the accomplishment of a specific purpose, which has never before been known, used or published within the meaning of the Patent law, may be patented, provided one may assume some degree of skill and ingenuity, or the exercise of intelligent research and experiment successfully directed to a particular purpose or end.
3. That prior published documents cited as anticipating the patent in suit must be read without the knowledge of subsequent researches, especially those of the patentee, and the prior patents relied upon to establish anticipation must disclose as much as the subsequent patent.

ACTION by the plaintiff for an injunction against the defendant to restrain it from infringing certain Letters Patent of the plaintiff, relating to improvements in Weed Killers and the Method of Killing Weeds.

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

Sir Charles Tupper, K.C., and *W. C. Hamilton, K.C.*, for plaintiff.

E. K. Williams, K.C., and *R. E. Curran* for defendant.

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The facts and sections of the various specifications in the patents material to the issue herein are given in the reasons for judgment.

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THE PRESIDENT, now (May 16, 1932), delivered the following judgment:

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This is an action for infringement of three patents of invention owned by the plaintiff, the assignee of Chipman Chemicals Engineering Co. Inc., a United States concern, and which I may have occasion to refer to as the "parent company"; in each case the patentee was Ralph Nelson Chipman. Patent no. 287,002, issued in February, 1929, on an application filed in May, 1926, and is said to relate to certain new and useful improvements in Weed Killers and Methods of Killing Weeds; patent no. 287,332 issued in the same month and year on an application filed in June, 1927, and is said to relate to new and improved Herbicide Forming Methods; and patent no. 287,333 also issued in the same month and year on an application filed in June, 1928, and is said to relate to a new and improved Method of Killing Weeds. The alleged inventions described in these three patents formed the subject matter of a single application for patent, made by Chipman in 1926, but upon the direction of the Commissioner of Patents the application was divided, and hence the three patents. No point was raised concerning the division of the original application and the issuance of three patents, and any discussion of the fact is therefore unnecessary. Even if it were arguable that one of the patents covered the same subject matter as one other, it would not, I think, affect the result or the matter of costs.

The defendant, having its principal place of business at Regina, Sask., pleads the defences usual in infringement cases. Broadly speaking, it will be seen that the alleged inventions here in suit relate to a weed herbicide and the method and art of forming and applying the same. Before referring to the several specifications, it might be desirable to refer briefly to some of the herbicides in general use prior to Chipman, together with their composition and characteristics, the steps leading up to the alleged inventions in

question as developed in evidence, and in a very general way what is alleged to be the essence of the invention here claimed.

One of the earlier herbicides used, especially prior to 1923, was an arsenical compound, but while effective as a weed-killer—probably it is still used—it admittedly proved unsatisfactory largely because it was poisonous to animals. The parent company sold the compound quite extensively in the United States at one time, but it was obliged to pay from \$8,000 to \$20,000 annually, in settlement of claims for the death of cattle grazing on treated areas, it having been required to insure its customers against loss of this nature; in other respects it was not entirely satisfactory. The use of this herbicide was largely limited to the treatment of the trackage of railways upon which treated areas animals would frequently stray. Later, the parent company, perhaps others, adopted the use of a herbicide preparation containing sodium chlorate as its essential constituent and which was the subject matter of a patent to one Teppet. The sodium chlorate was simply dissolved in water and thus applied to weeds. While this preparation proved effective as a weed killer it disclosed some undesirable qualities. It is claimed that it stimulated rather than destroyed the growth of weeds of marine origin; being an electrolytic salt it was extremely combustible when brought into contact with organic matter, and evidence was given to the effect that it was responsible for the destruction of property, by fire, reaching very substantial sums; and it was most effective in localities which were subject to heavy dews or light rainfalls, otherwise it dried quickly after application as a dry crystal and for lack of the presence of moisture, blew away before it could act destructively upon the weeds. The parent company ultimately discontinued its use, but it still continued to be used by others as a herbicide, particularly in certain areas.

The patentee then commenced experimental and research work with the object of overcoming the disadvantages of the sodium chlorate mixture, that is to say, the fire hazard and the tendency of the sodium chlorate preparation to dry out and blow away after being applied and before it had completed its destruction of the undesired plants or weeds. In this research work Chipman decided to experiment with

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calcium chloride as a hygroscopic agent in combination with sodium chlorate, which former agent or ingredient it was hoped would draw sufficient moisture from the air to retard evaporation of the mixture and thus prolong the period of the activity of the weed killer upon plants, and also eliminate the fire hazard. Field experiments, which would require a full season, followed laboratory experiments, and altogether, as I understand it, two years of experimental and research work was carried on. The earlier experiments were not successful in obtaining the proportioned quantities of the constituents which would eliminate the fire hazard. Chipman also discovered in his experimental work, that whenever excess quantities were dissolved in a gallon of water crystals of salt would come out, which was disturbing it was said, because this would stop up the spraying apparatus, which would in practise be quite serious. Later, experimental work disclosed the fact that when calcium chloride and sodium chlorate were brought together in solution, and when evaporation commenced, crystals of sodium chloride, common salt, were formed, and from this disclosure, Chipman states it became evident that calcium chlorate had been formed in the mixture, so that there must be found, he concluded, present in the solution, not only sodium chlorate and calcium chloride, but also sodium chloride and calcium chlorate. Chipman states that he then decided to make a mixture of sodium chlorate and calcium chloride in such proportions as would result in a complete change from sodium chlorate to sodium chloride and obtain a maximum amount of hygroscopic element. Ultimately he succeeded in ascertaining the proportions of the constituents of such a mixture that would practically eliminate the fire hazard because it possessed the hygroscopic element which would keep the mixture from drying out on plants, thus also prolonging its herbicidal effect, and also avoiding the formation of salt crystals which would prevent or make difficult the application of the solution by a spraying apparatus, but yet a preparation that would act as an effective weed killer, and that is the substance of his claim to invention. In the result, it is claimed that the bringing together in an aqueous solution of sodium chlorate and calcium chloride, in certain ascertained proportions, all of the sodium chlorate by chemical combination, in accord-

ance with the chemical equation mentioned in the patents, with all but the excess of calcium chloride, was converted into sodium chloride and simultaneously yielded a solution of calcium chlorate, or, as one of the specifications states it, by metathesis, the sodium chemically combines with the chlorine of the calcium chloride, which may or may not precipitate out as a salt (NaCl) according to the regulation of the water content. As I understand it, with chemically proportioned quantities calcium chlorate alone with sodium chloride may be obtained, but the patentee takes an excess of calcium chloride so as to have some of that ingredient in the herbicidal liquor. The resultant liquor is practically a calcium-chlorate calcium-chloride liquor, if an excess of the calcium chloride has been used, but in any case the liquor may be sufficiently freed of salt in varying degrees according to the water content, when desirable, as it is said sometimes to be, when being used to destroy certain types of weeds. While the presence of sodium chloride pointed at first, according to Chipman, to act as a stimulant to the growth of certain weeds of marine origin, and for a time the sodium chloride was extracted, yet, further investigation showed that the calcium chlorate present nullified this. It was also found by Chipman that in most circumstances, 3 pounds of calcium chlorate had the same effect as 5 pounds of sodium chlorate in killing weeds, which alone meant a saving, and he states that while he would prefer to use ordinary calcium chlorate it was not on the market or produced commercially at a cost permitting its use in herbicidal preparations; by Chipman's method of producing it the cost was in keeping with his requirements, and it was even more hygroscopic than calcium chloride and would even absorb sufficient moisture to go into solution. It was stated in evidence by Prof. Parker that calcium chlorate, though known to the laboratory, had never been produced in commercial quantities, and even if it were procurable in commercial quantities, the price would prohibit its use as a commercial weed killer. Thus it is claimed that Chipman, from two commercially available and comparatively cheap compounds produced a herbicidal liquor composed of calcium chlorate as an essential element associated with as little or as much of a highly liquescent agent as might be desired, and either with but little, or with considerable salt,

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at a reasonable cost, and which even if associated with impurities was still satisfactory as a weed killer. This, imperfectly I have no doubt, sets forth the steps leading to Chipman's herbicidal preparation, or preparations of sodium chlorate and calcium chloride, and which in his patents he designates as calcium chlorate, because it had all the effects and characteristics of calcium chlorate. I shall now refer to the specifications at some length, because they will more fully and clearly describe the alleged inventions, and with more accuracy than I could possibly hope to do, and if I have fallen into any errors, the recital of their substance will serve to correct me.

I shall first refer to the specification of patent no. 287,332 because it emphasizes the method or means of producing calcium chlorate, an essential element in Chipman. I cannot do better, I think, than recite the whole of this specification.

This division of my parent application (No. 314,152 filed in the Dominion of Canada on May 21, 1926) deals with the method therein described of manufacturing the weed-killing agent to which said parent application has been devoted.

Through the aforesaid application it has been revealed that the chlorate of an alkaline earth base, such as calcium, when dissolved in considerable water constitutes a solution of great utility as a plant destroyer when sprayed on the foliage thereof. It has also been explained in said application that the utility of that compound is materially augmented by associating the chlorate with a highly liquescent agent; calcium chloride being instanced as especially advantageous.

Calcium chlorate, as such, at the date of this invention has not been available in commercial quantities for want of a satisfactory method, and as large amounts will be required for extensive herbicidal operations, some method of its production sufficiently simple for ordinary factory operations has been needed.

In seeking to take advantage of the fact that the chlorate of an alkali base, such as sodium chlorate, can readily be obtained in commercial quantities, and hence would be an economically suitable raw material, I have experimented to that end and thereby have ascertained that in simple solution the chlorate of sodium will react completely with as much chloride of calcium as may be available for that purpose; yielding chlorate of calcium either associated with sodium chloride or substantially free from it, depending upon the extent to which the operation is conducted, under "salting out" conditions.

I herein below set forth chemicals, and the approximate proportions thereof, which are severally and combinatively now preferred for forming an aqueous, herbicidal liquor representative of this invention; but it is to be understood that the proportions may be varied without departure from the invention and that I intend to cover all chemical equivalents.

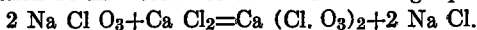
Preferably, but not necessarily, for the best results as now known to me, I mix together about:

3 to 4½ pounds avoirdupois of sodium chlorate (Na Cl O₃)

2 to 5 pounds avoirdupois of calcium chloride (Ca Cl₂)

Adding water to make one gallon of solution.

If there be used sufficient water and no excess of either of the chemicals, (molecular proportions) then will the conversion and the resultant solution be in accordance with the following equation:



In this case, all of the salt formed by the reaction would remain dissolved; yielding an herbicidal agent highly lethal to all such weeds as are not of marine ancestry. But, if it is desired to exterminate weeds largely or wholly of marine origin, it is preferable that no great proportion of salt shall be present.

By methathesis, in other words, the sodium chemically combines with the chlorine of the calcium chloride and may or may not, precipitate out as salt (Na Cl) according to the regulation of the water content, as may be preferred. The resultant liquor may be a calcium-chlorate calcium-chloride liquor, if an excess of the latter has been used, and in either case the liquor may be substantially freed of salt (Na Cl), as is sometimes desirable, because salt (Na Cl) is promotive of the growth of some weeds and plants of marine ancestry.

An excellent ratio, within the range of the permissible proportions, initially mentioned, is 3 pounds of sodium chlorate to 2.25 pounds of calcium chloride. This employs an original excess of calcium chloride and ensures the presence of the highly hygroscopic calcium chloride in the resultant liquor; rendering the non-poisonous agent distinctly liquescent under all natural weather conditions of temperature and humidity and consequently more active in its herbicidal effects and likewise altogether safe as to fire hazards.

By the above contrived method, it will be perceived that by a single, simple and easily performed operation, using two commercially available and comparatively cheap compounds, it becomes possible forthwith to produce an herbicidal liquor composed of the chlorate of an alkaline earth base as an essential element associated with as little or as much of a highly liquescent agent as may be desired and either with but little or with considerable salt.

The next patent to which I shall refer is no. 287,002. The specification states:

This invention relates to a Weed Killer and Method of Killing Weeds. Its object is to produce a weed killer which, when in use on and within plants, has a much more intense, weed killing quality or property than has heretofore been known and which contains a hygroscopic ingredient that compatible with the herbicidal agent and which is co-active with constituents of the plants or vegetation to be killed, the hygroscopicity of the herbicide keeping it from drying out on and within plants and prolonging its herbicidal effect.

One substantial, material and crucial factor in my new conception of means to end is the incorporation in the weed killing liquor of an ingredient which constantly draws moisture from the air, during the period of the activity of the weed killer on and within plants, and of another ingredient which, at the same time effects a constant liberation of nascent oxygen.

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I hereinbelow set forth chemicals and the approximate proportions thereof which are severally and combinatively now preferred for forming an aqueous, herbicidal liquor containing this invention; but it is to be understood that the proportions may be varied without departure from the invention and that I intend to cover all chemical equivalents.

Preferably, but not necessarily, for the best results as now known to me for plants of marine origin, I mix together about

3 to 4½ lbs. avoirdupois of calcium chlorate  $\text{Ca}(\text{ClO}_3)_2$

2 to 3 lbs. avoirdupois of calcium chloride ( $\text{CaCl}_2$ )

Adding water to make one gallon of solution.

The foregoing ingredients result in about one gallon of liquor of about 29 per cent calcium chlorate and of about 16 per cent calcium chloride, whereby my new weed killer solution has about 45 per cent of active weed killing content, and being free from sodium chloride, is especially useful for regions teeming with marine growths.

The patentee then refers to another mixture the formula for which is to be found in the specification of the patent to which I have already referred. The specification continues:

It is to be noted particularly that, in each of the foregoing liquors (the one containing no and the other containing some sodium chloride) the calcium chloride is an element constantly acting to draw moisture from the atmosphere and it may be considered as an evaporation retarder compatible with a chlorate of an alkaline earth base; and in its behaviour in conjunction with the chlorates, materially adds to the destruction of the equilibrium of the plant processes, as hereinafter described.

\* \* \* \*

The described herbicidal liquors (containing the chemically active, water-drawing element) are the best of various types of slow-drying, aqueous herbicides known to me. They are non-poisonous to animal life, their constantly effective water-drawing content keeps them constantly moist and reduces the hazard of combustion when in contact with organic matter.

The specification then discusses the plant structure and the functions and effects of a slow-drying weed killer thereon. The last paragraph of the specification is as follows:

The calcium chlorate, by its continued contact with the organic material, will ultimately be deprived of all of its oxygen and will finally exist as a residue of calcium chloride. In that phase it forms, in co-operation with such sodium chloride as may concurrently be present, an effective agency for retarding germination of the various plant types. For example, sodium chloride is detrimental to some growths while stimulative to others but the calcium chloride, being a distinct retardant to germination, will in turn negative the stimulative tendency of the sodium chloride towards plants of marine ancestry.

The remaining patent is no. 287,333. The patentee in his specification states:

By my parent application no. 314,152, filed on May 21, 1926, in the Dominion of Canada, there was set forth a novel method of killing weeds to which the present divisional application is now devoted.

To invent an ideal method of eradicating weeds has been a problem with which those skilled in the art have long been engaged. It must be simple and readily performed. It must be distinctly destructive to grown weeds and retardive to secondary germinations thereof. It must neither be detrimental to railroad equipment or property, nor poisonous to users or animals. It must retain its chemical efficiency when applied in arid regions, and it must not involve fire hazards.

This invention accordingly relates to a Method of Killing Weeds. Its object is to produce a method which, when resorted to on and within plants, has a much more intense weed killing quality or property than has heretofore been known and which functions through a hygroscopic and herbicidal agency and which is co-active with constituents of the plants or vegetation to be killed, the hygroscopicity of the herbicide keeping it from drying out on and within plants and prolonging its herbicidal effect.

One substantial, material and crucial factor in my new conception is the utilization by a leaf-spraying operation, of a weed killing liquor incorporating an ingredient which constantly draws moisture from the air, during the period of the activity of the herbicidal method on and within plants; the composition being such as to, at the same time effect a constant liberation of nascent oxygen.

The remainder of this specification repeats matter appearing in the other two specifications.

Turning now to the question of invention. The law concerning chemical inventions, and I am treating this case as such, is the same as in any other invention. A chemical compound which has never been known or used, or published, in the sense required by the law of patents, for the accomplishment of a specific purpose is, I think, patentable, providing one may assume some degree of skill and ingenuity, or, perhaps I should say in a case of this kind, the exercise of intelligent research and experiment directed to a particular purpose or end. When two or more compounds are mixed or chemically combined, the product or method of producing the product, may or may not be patentable, because much, as in all other cases, depends upon the result obtained, and the properties of the product. "There is no prevision in chemistry" is an observation attributed to Sir James Dewar. One cannot always predicate the results that may be obtained from chemical substances in combination, as in a combination of mechanical devices. The trained mechanical man can readily calculate the effect or result of the combination of certain mechanical devices, but that is not so in chemistry which is an experimental science, predictions are liable to failure without experiment, and results are obtained only by concentrated experiment and research. Where chemical action is in-

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volved analogy does not carry one far. The experimental chemist is perhaps therefore entitled to more favourable consideration than one working in the mechanical field, in the matter of invention. The discovery of a new principle, natural law, or a new chemical principle, cannot be patented unless it can be put to some new and useful use in the form of a described process, composition of matter, or apparatus. When that is done, there is then a patentable invention even though it embraces a discovery. The herbicidal preparation disclosed by Chipman, now known under the trade name of Altacide, is undoubtedly, I think, a new and useful herbicide compound. It is superior as a weed killer to arsenical compounds in the respect that it is non-poisonous to animals. It is superior to the sodium chlorate preparation because the fire hazard has been practically eliminated in Chipman. It is undoubtedly an effective weed killer. All these favourable features of Chipman were not, so far as I recall, seriously controverted. Chipman discloses a process or method of obtaining in commercial quantities, calcium chlorate, something previously known only to the laboratory. Then, Chipman has been well received by the interested public and has gone into very substantial use in Canada and the United States, production and sales expanding with the years. It meets other requirements, availability of raw materials, cheapness, capacity for concentration thus affecting favourably freight charges, all desirable in producing and marketing any herbicide. There can be no doubt, I think, but that Chipman accomplishes new and useful results, more than was inferable from the prior art. But more than novelty and bare utility is required to constitute invention. Some evidence of ingenuity and skill is required by the Courts in order to constitute invention. There is, I think, in Chipman sufficient evidence of skill, research and experiment to hold that there is subject matter for a patent or patents as claimed here. To say that sodium chlorate as a weed destroyer was known, and that calcium chloride was known as an absorbent of moisture or as a hygroscopic agent, and therefore there was no invention in combining them together to overcome a specific difficulty, to avoid disadvantages in sodium chlorate as a herbicide, is not of substance. That contention is not supported by authority and it has been held time and



again, that if a new combination of well known things bring about new and useful results, there is invention. The combination of substances disclosed by Chipman had not been done before for the purpose of a herbicide, and new results were produced by that combination. New properties and results may be produced by a change in the proportions of ingredients and that, I think, is true of this case. Chipman seems to have accomplished something more than might reasonably be expected of the hypothetical person skilled in the art, and all, I think, required of him is that he do more than is to be inferred from prior publications or known usages in that particular field, and this I think Chipman has done. Unless there has been anticipation, which I shall next deal with, I hold there is invention.

I do not think there has been anticipation of Chipman. A prior published document must be read as it would be read without the knowledge of subsequent researches, especially those of the patentee; the prior patents relied upon to establish anticipation must disclose as much as the subsequent patent. Three prior patents have been cited as an anticipation of Chipman, but I do not think that any person to whom they are addressed could without experiment and research, equivalent to invention, find therein Chipman's method or process for producing his herbicidal product. The patent to Teppet does not seem at all relevant. The herbicide there described is essentially sodium chlorate in solution in water, and while it has been shown to be effective as a weed killer, yet it disclosed serious disadvantages which I have already mentioned. It is altogether a different herbicidal preparation from Chipman. The French patent to Truffant is next to be considered. This patent may describe a useful herbicidal product but it does not seem to me to anticipate anything that Chipman describes or claims in any of his patents in question here. Then there is the patent to Pradourat, and applying the same test, one cannot, I think, read Chipman out of the very general specification of this patent. The invention claimed in this patent is for the use of all chemicals or products liberating under the action of moisture, a heavy chlorous gas, destructive of weeds. The patent does not point out how the ingredients named are to be compounded. Whatever the specification, if followed, might or might not

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bring about in the hands of a skilled chemist, it seems to me that any such person attempting to understand it, practise it, or produce a herbicide from its directions, would require to do so much research and experimental work that it would not be just or proper to hold that it is a published document in terms anticipating Chipman. Concerning all these prior patents, I think it cannot be said, that any of the patentees had in mind just what Chipman has done; Chipman had a very definite thing in mind, which by experiment he demonstrated to be practical, he plainly describes the various steps to be taken, the functioning relations of each ingredient in his herbicidal preparation, and no point is made against Chipman for insufficiency or inaccuracy of description. Whatever be the merit of the herbicides described in these patents, not one of them is Chipman, and the result, the product or products procurable by Chipman's process or method is not, in my opinion, described in or to be inferred from the cited prior patents. I therefore think there has been no anticipation by prior publication, and the defence of prior user has not been seriously advanced if at all.

The next point and frequently the most difficult one for decision in a patent case, is that of infringement. It is admitted that the defendant has manufactured and sold a weed killer consisting of a mixture of 250 pounds of sodium chlorate, 120 pounds of calcium chloride and 20 pounds of magnesium chloride, with 100 to 120 gallons of water, and it is claimed by the plaintiff that magnesium chloride is the equivalent of calcium chloride for the purpose of this mixture, that is to say, it is a hygroscopic agent, just as calcium chloride. The proportions are, it is admitted, sodium chlorate sixty-five per cent, and calcium chloride twenty-five per cent, and magnesium chloride ten per cent. The proportions of the chemical ingredients and water in the plaintiff's mixture are substantially the same as the defendant's, if magnesium chloride, is to be treated substantially as an equivalent of calcium chloride. Professor Parker testified that, assuming the substances to be pure, that 250 pounds of sodium chlorate would theoretically require 130 pounds of calcium chloride to complete the reaction, and he stated that the inclusion of magnesium chloride was but the substitution of the chemical equivalent

of calcium chloride; and that in effect the defendant's mixture would contain 140 pounds of calcium chloride, which would be an excess of the amount of calcium chloride required to make the conversion exact, but that slight excess would not prevent the complete conversion of all the sodium chlorate into calcium chlorate, and there would be an excess of calcium chloride or magnesium chlorate, and this statement I accept as being correct. Professor Parker also stated that calcium and magnesium chloride are closely related, chemically similar, similar in chemical behaviour, and in the classification of elements calcium and magnesium are in the same family and are often referred to as alkaline metals. They both absorb moisture but generally magnesium chloride not so readily as calcium chloride. If the presence of magnesium chloride is the equivalent of calcium chloride when used for the purpose in which we are here interested, and there being invention in Chipman, infringement would follow. Mr. Job, one of the defendant's expert witnesses stated that magnesium chloride was a hygroscopic agent. Again he said that it was well known that calcium chloride and magnesium chloride were used to remove moisture from the air. Professor Parker I understood to say, that you might replace calcium chloride by magnesium chloride provided the correct equivalent proportions were maintained, and get the same result, or without making any considerable alteration in the result. With the two leading expert witnesses of the parties so much in agreement upon the point that magnesium chloride is hygroscopic, and accepting as I do the statement of Professor Parker, that with the addition of a small amount of magnesium chloride the same result is obtained, I have no difficulty in reaching the conclusion that the defendant has infringed the plaintiff's patent and does not escape infringement by the addition of magnesium chloride in its herbicidal mixture. In the matter of equivalency in chemistry one must of course have in mind the problem involved, or the purpose to be attained, because obviously one chemical, or a combination of chemicals, might in certain circumstances produce one result, but under other conditions, or for other purposes, would fail to produce the desired result. There may be a difference of opinion among chemists as to the classification of calcium and magnesium, but I am not disposed

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to think that any such difference is of prime importance in the controversy here. I am satisfied that the defendant's herbicidal mixture is substantially the same as Chipman, and is practically a mixture of the same chemical constituents, intended to effect the same result in the same way. There is no suggestion on the part of the defendant that by any experimental work of its own or on its behalf, it has produced a new herbicidal preparation, or that by the addition of a small amount of magnesium chloride it has produced any new change or result, or brought to light any new property in the compound, or increased its utility or herbicidal effect.

If there is invention in Chipman, and I have already stated that in my opinion there is, then, I think this is a case where infringement has been established, and the plaintiff is entitled to the relief claimed, with the usual result as to costs.

Judgment accordingly.

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 April 25.
 May 12.

BETWEEN:—

HIS MAJESTY THE KING, on the Information of the Attorney-General of Canada } PLAINTIFF;

AND

COLGATE-PALMOLIVE-PEET COMPANY, LIMITED, and THE PALMOLIVE MANUFACTURING COMPANY (Ontario) LIMITED..... } DEFENDANTS.

Revenue—Sales Tax—Market Price—Special War Revenue Act

The shares of both the defendant companies, outside of qualifying shares, were owned and held by Palmolive Company of Delaware, U.S.A. Previous to 1924, Colgate-Palmolive-Peet Co., Ltd., manufactured and sold soap and toilet articles at Toronto and in that year Palmolive Manufacturing Co. (Ontario) Limited, was organized to take over the manufacturing end of the business. The business of both companies was carried on in the same premises and the officers of both were the same. The manufacturing company sells the major portion of its products to the selling company on the basis of costs plus 15 per cent profit. The Crown claims that the manufacturing, or alternatively both companies, are liable for the sales tax upon the basis of the sales price to the public by the selling company, namely, the market price.

Held, that the selling price arranged between the two defendant companies is not the sale price within the meaning of the statute.

2. That in a taxing statute where the tax is based on the selling price of goods, sale price can only mean the market price unless there are express words saying it is some other kind of price.

ACTION by the Crown to recover a certain amount alleged to be due by the defendants for sales tax.

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

H. H. Davis, K.C., and *D. Guthrie* for plaintiff.

W. N. Tilley, K.C., *G. M. Clark, K.C.*, and *R. W. Hart* for defendants.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (May 12, 1932), delivered the following judgment:

This is an action for the recovery of sales tax under sec. 19BBB of the Special War Revenue Act, 1915, which in part reads as follows:—

19BBB. 1. In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of five per cent on the sale price of all goods produced or manufactured in Canada, including the amount of excise duties when the goods are sold in bond, which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him; and in the case of imported goods the like tax upon the duty paid value of the goods imported payable by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption.

The facts of the case may be briefly stated. In 1914 a corporation known as B. J. Johnson Soap Co. Ltd., was engaged in the manufacturing of soap and toilet preparations at Toronto. In 1917 the name of the company was changed to Palmolive Company of Canada Ltd., and in 1928 it was again changed to Colgate-Palmolive-Peet Co. Ltd., the first named defendant. In January, 1924, there was organized The Palmolive Manufacturing Company (Ontario) Ltd., one of the defendant companies, for the purpose of manufacturing goods similar to that which had been both manufactured and sold by Palmolive Company of Canada, Ltd., and thereafter the former named company, which I shall hereafter refer to as the manufacturing company, manufactured very largely if not entirely, the pro-

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ducts sold by the latter company, later to be known as Colgate-Palmolive-Peet Company, Ltd., and which I shall hereafter refer to as the selling company. The shares of both defendant companies, outside of qualifying shares, are owned by the Palmolive Company of Delaware, a United States company, holding, I understand the capital shares of similar companies throughout the world. The business of the manufacturing company and the selling company is carried on in the same premises, at Toronto, the President, the Vice-President, and the General Manager of each company are the same persons. The manufacturing company sells the major portion of its products, about seventy per cent, to the selling company, on the basis of cost plus fifteen per cent profit, the remaining products are sold to the public directly by the manufacturing company in the ordinary way. The manufacturing company has accounted for the sales tax in respect of its sales to the public, and also in respect of its sales to the selling company upon the basis of cost plus fifteen per cent profit, as already mentioned. The Crown claims that the manufacturing company, or alternatively both companies, are liable for the sales tax upon the basis of the sale price to the public by the selling company, otherwise the market price, less the amounts already paid by the manufacturing company, the difference amounting to something over \$100,000. And that is the controversy here. The amount here claimed as sales tax relates to sales made between January, 1924, and April, 1927. The defendant manufacturing company claims that it is only liable for the sales tax upon the selling price of its goods to the selling company, in respect of the period mentioned, but beyond that it is contended that the statute fails the revenue; the other defendant, the selling company, claims it is not liable for any sales tax because the statute, it contends, imposes such a tax upon the producer or manufacturer only.

It may be that the selling company was created partially for the purpose of preventing the full blow of the sales tax falling upon the manufacturing company, but the creation of the former was within the law, and the point in issue cannot well be determined upon the motives prompting the trading arrangement reached between the two companies, and which I have described. In the end we are driven to

an enquiry as to the meaning and construction of the statute in question, and whether the amount of the tax sought to be recovered is one imposed by the statute. The tax is leviable on the "sale price of all goods produced or manufactured in Canada," and the question is, against which sale price is the tax to be levied, the sale price arranged between the manufacturing company and the selling company, or the sale price to the public by the latter company. The tax is imposed upon the producer or manufacturer of goods; it was plainly the intention of the statute, in the case of a producer or manufacturer, that the tax was to be captured at the point of production of any goods subject to the sales tax, when sold. Here, the sale price of the manufacturing company to the selling company was fixed by the managing director of both companies, being the same person, after consultation with the management of the parent company which, as I have stated, owned all but the qualifying shares of the manufacturing and the selling companies. While the invoicing of goods, accounting, banking, etc., may appear in the records of each company just as if they were utter strangers to each other, still the relations of the one to the other were so close that for the purposes of the statute in question they might be regarded as partners in the joint enterprise of producing and selling certain goods, even though they were distinct beings in contemplation of the law, or the selling company might be regarded merely as the selling agent or representative of the manufacturing company, just as if it was an individual salesman appointed upon terms by the manufacturing company to sell its goods to the purchasing public. But, I think, the revenue is not concerned with the question as to how a manufacturer's goods reaches the public, it is concerned only with the matter of the quantity of taxable goods produced and sold by the manufacturer and the market price of such goods. The sale of goods from a manufacturing company to an allied selling company is perfectly permissible, if upon any grounds whatever, it is deemed desirable or prudent by such companies so to do. That arrangement might well continue indefinitely, but yet, I think, the manufacturing company would still be liable for the sales tax upon all taxable goods sold by it, at the current market price; the liability to the sales tax com-

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mences immediately upon the sale of goods by the producer, and the sale price for the purposes of the taxing statute in question, is the fair market value of the goods sold. I do not think that the selling price arranged between the two defendant companies is the "sale price" referred to in the statute, which in the circumstances could not be called free sales, nor sales made at the fair market prices in the ordinary course of trade. It is rather clear to me that the statute is not designed to permit the manufacturing company to avoid the sales tax, to defeat the policy of the taxing statute, by the arrangement entered into with the selling company. In a taxing statute, where the tax is based on the selling price of goods, sale price can only mean the market price, unless there are express words saying it is some other kind of price, otherwise all producers of goods could make arrangements with second parties, similar to that made between the defendants, and the statute would utterly fail the revenue. The sale price of any thing means the bona fide price at which that thing is sold to the wholesale trade, the retail trade, or to the individual consuming purchaser. I think, therefore, that the words "sale price," as used in the statute, means the price normally charged, in this case by a producer or manufacturer, to a wholesaler or a large retailer for his goods, and if I am correct in this, then the producer must pay the sales tax upon the wholesale price, or the retail price, as the case might be, current at the time and place of sale, and that obligation cannot be avoided by introducing an intermediate distribution agency between the producer and the purchaser. If the manufacturing company sells some of its goods at the market price to the public, and some to an allied company at an arbitrary price and below the market price as here, that does not relieve it of its liability to pay the sales tax upon the latter goods at the fair market price prevailing at the place and time of sale. That is the sale price which, I think, the statute speaks of. If that is not so, then as I have already stated, the provisions of the statute relevant here would be rendered nugatory and of no effect.

My interpretation of section 19BBB of the Act, is, that it is the producer or manufacturer who is to pay the sales tax; that the "sale price" means the fair market price for

goods produced or manufactured in Canada and sold by the producer or manufacturer in his market. The manufacturing company, so far as the revenue is concerned, is in the same position as if its goods were sold by a travelling salesman in the usual way. It was to the manufacturing company that the revenue looked for the payment of the sales tax, and that was to be calculated on sales at the current market prices in its usual market, subject to time and place fluctuations.

Furthermore, it will be seen from Sec. 19BBB of the Act that two classes of goods are liable for the sales tax, first, goods produced or manufactured and sold in Canada, secondly, goods imported into Canada; in the case of imported goods the tax is upon the "duty paid value" of the goods and is payable by the importer, or by the transferee who takes the goods out of bond for consumption at the time when the goods are imported or when taken out of warehouse for consumption. Sec. 18AA of Part IV of the Act states that the "duty paid value" of any article means the value of the article as it would be determined for the purpose of calculating an ad valorem duty upon importation of the same into Canada under the Customs Act, which would be chap. 48 R.S.C., 1906, whether such article was subject to ad valorem duty or not, and in addition the amount of the customs duties, if any, payable thereon. Turning now to the Customs Act. Section 40 of the Customs Act provides that when any duty ad valorem is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption in the principal markets of the country of origin at the time the goods were exported to Canada. Sec. 41 states that such market value shall be the fair market value of such goods, in the usual and ordinary commercial acceptance of the term, and as sold in the ordinary course of trade. The Customs Act then proceeds to prescribe means for determining the fair market value where particular and special difficulties arise; sec. 46, for instance, is practically the same as s. 13 of the Special War Revenue Act and from which the latter was doubtless taken.

Now it seems perfectly obvious that if imported goods are liable for the sales tax upon the duty paid value, that is the fair market value of the goods in the country of

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origin, plus the duty thereon, then the sales tax must be applied in the domestic market on the fair market value of goods there produced and sold. Part IV of the Act, or Sec. 19BBB thereof, could not be fairly administered if domestic goods liable to the sales tax were not taxable at the fair market value, but on a purely arbitrary price fixed by a producer or manufacturer. The domestic producer and the importer were to be impartially treated, the latter had to pay the tax on the market value of the imported goods in the country of origin regardless of what he paid for them there, and the tax was also payable on the duty, altogether upon the "duty paid value" of the goods. When goods are imported into Canada free of customs duty, the Minister is empowered in order to place the domestic producer on a parity with the importer, to grant a refund or reduction of the sales tax on similar goods manufactured in Canada, upon satisfactory evidence being produced that such Canadian goods are at a disadvantage with respect to similar imported goods. The intention of the statute was to place the domestic producer and the importer, of taxable goods, on a parity so far as was possible. If the statute means what the defendants contend it to mean, then any producer in Canada might make some such arrangement as exists between the two defendant companies, and thus escape or minimize the tax; importers, domestic manufacturers not able or desirous of organizing and maintaining a separate selling corporation, would be at a disadvantage, and the whole purpose of the taxing statute would be defeated. The provisions of the statute to which I have just referred support, I think, the conclusion I have already expressed.

My view of the case therefore is, that the defendant, The Palmolive Manufacturing Co. (Ontario) Ltd., the manufacturing company is liable for the sales tax upon any taxable goods produced and sold by it within the period material here, the selling price of such goods to be calculated at the fair market price as and when sold. The precise amount recoverable by the plaintiff under this judgment, I reserve, but I trust that the parties may be able to agree upon the amount without a further hearing or reference. The plaintiff will have his costs of the action.

Judgment accordingly.

LIGHTNING FASTENER COMPANY, }
LIMITED } PLAINTIFF;

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AND

COLONIAL FASTENER COMPANY }
LIMITED AND G. E. PRENTICE } DEFENDANTS.
MANUFACTURING COMPANY ... }

Patents—Infringement—Invention—Improvement on means known

The invention in question is for an improvement in locking devices, for use on separable slider fasteners. Held; That, as the essence of the invention was the production of an old result, even though there is invention, the patentee is only protected in respect of the particular means he sets forth in his specification, and in such circumstances it may not be infringement to achieve the same result by using other means, by a different device.

ACTION by plaintiff against the defendant asking that patent no. 288,925, owned by the plaintiff, be declared good, valid and infringed by the defendants.

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

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

D. L. McCarthy and *S. A. Hayden* for defendants.

The facts of this case are stated in the Reasons for Judgment.

THE PRESIDENT, now (April 18, 1932), delivered the following judgment.

This is an action for infringement of patent, no. 288,925 owned by the plaintiff, the patentee being Noel J. Poux. The patent was applied for in January, 1928, and issued in April, 1929. The invention relates to a separable fastener slider and has for its object to provide a locking device therefor, at any point on its travel along the stringer.

The second and third paragraphs of the specification read as follows:—

Previous suggestions for locking a slider have included cumbersome pins projecting through both wings and unduly thickening the slider, a slidable plate presenting too many parts and too complicated a construction to be made cheaply, or some locking device projecting beyond the end of a slider where the locking members are in engagement, making the device of inconvenient length.

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According to this invention, a slider pull is provided adjacent its pivot with one or more fingers or lugs shaped to extend through a recess in the slider wing for direct engagement between locking members on one stringer or the lug may indirectly co-operate with said members through the aid of some other part of the slider. Preferably these lugs are spaced longitudinally and laterally to be engaged between locking members on each stringer.

It will be seen that essentially the Poux locking device comprises one or more lugs or fingers on a pivoted "pull" or "tab" on the slider and that the lug goes through a hole in the front wing of the slider, between the units, thus locking the same. I use the word "hole" instead of "recess" because I think the former term more accurately expresses what the patentee had in mind. In the alleged infringing device, which I shall call Prentice, the pull or tab has two small lugs on its upper edge, bent at right angles to the face of the pull, one of which is longer than the other, the longer one being intended to go between the units, the other being intended simply as a support. The pull is not pivoted on the front wing of the slider but travels on a longitudinal slide the full length of the slider, and falls below the slider where the longer lug enters between the units, thus preventing any sliding of the fasteners. There is no hole extending through any portion of the wing of the slider. There are two slight recesses, not holes, at the bottom of the slider, on either side of the longitudinal slide, against which the lugs or fingers rest when in a locking position; it is really at the end of the front wing of the slider that the lug enters between the units. It would be as correct to say that the outer and lower edges of the slider are elongated as to say that there is a recess in the slider. The device would lock, it seems to me, without the recess, just as in Exhibit B, where Prentice used the same device but with the spiral type of fasteners, although possibly the longitudinal slide or travel would require to be slightly lengthened; it is simply a matter of construction and nothing else. At any rate the recess in Prentice has not the same function as the hole in the slider of Poux, because there the lug went through the hole, the hole was made for the lug, and that is what Poux says he invented.

As one of the paragraphs of the specification, which I have quoted states, there had been previous suggestions for locking a slider, many of them, including, the specifica-

tion states, a cumbersome pin projecting through the wings of the slider, and also a locking device projecting beyond the end of the slider which the patentee states was objectionable because it was of inconvenient length. The essence of the invention then being the production of an old result, the patentee is protected, if there be invention, only in respect of the particular means he sets forth in his specification, and in such circumstances it may not be infringement to achieve the same result by the use of other means, by a different device, perhaps by a slightly different device. It cannot be said that the lug in the defendant's device projects through the slider, for it distinctly drops between the units below the slider element, but not through a hole in the slider. Moreover, Poux in effect stated in his evidence that in his invention the pull was pivoted on the slider element, whereas in Prentice the pull is not pivoted, but moves longitudinally the full length of the slider. Poux, taking the alleged invention to be what the patentee himself says it is, it seems to me, would not be successful in operation if the pull were not pivoted on the slider. Prentice discloses a conception of functioning different from Poux and represents an entirely different idea. There was nothing new in the idea that a lug or finger, if placed between the units, would cause a locking of the fasteners, the invention if any, would be in the particular means or method of bringing a lug or something of that sort between the units. Assuming that there is invention in Poux, still the patentee must be held to the specific device which he says he has invented. Poux did not claim to have invented in 1923 or 1925 all the types of locking devices appearing in the drawings. It does not seem to me that Prentice infringes the locking means or method orally described by Poux as his invention, or that used by the plaintiff and put in evidence as representing the invention, Exhibit 7. It was argued by Mr. Biggar that Prentice infringes the device shown in fig. 11 of the patent. Fig. 11 is referred to in the specification as being a "modified slider" of the type shown in fig. 5, and fig. 5 shows a slider which is a modification of that shown in fig. 4, and so on. Fig. 11, which discloses a locking device quite similar to Prentice, does not fall within what Poux himself described as his invention made in 1923 or 1925; it seems to be a new idea in-

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incorporated into the specification and drawings when the application was made in 1928. But even if the same is now properly there as a part of an alleged invention of Poux, application for this patent was only made in 1928 and there is no evidence of any earlier application, yet the defendants, or one of them, had commenced manufacturing and selling Prentice in 1925. So that the particular method or mode of locking down in fig. 11 would be anticipated by the use of Prentice in 1925. It cannot be claimed that the device shown in fig. 11 was invented by Poux in 1923 or in 1925. The evidence of Poux and of Sundback, shows that all the invention which Poux claims to have made in 1923, or in 1925, was in the idea of a lug or pin pivoted on the pull that would penetrate a hole in the slider and thus enter between the units, as shown in exhibit 7. There is nothing in the evidence indicating that Poux ever had the slightest idea of a locking device such as shown in fig. 11, and I do not believe his mind was ever directed to such an idea, so that the date of any alleged invention of a locking device described in the specification and corresponding to fig. 11, or anything outside of obvious equivalents to that which he has described as his invention, must be taken to be of the date of the application for patent, January, 1928; if I am correct in this, then the device shown in fig. 11 was anticipated by Prentice.

Looking at some of the drawings accompanying the specification, and after hearing the evidence of Poux, one cannot but suspect that the specification was designed to include much that was not in the mind of Poux at the date when he is said to have made his invention. Poux states that he conceived his invention in 1923, and that he revived it or completed it in 1925. The application for patent was not made until January, 1928, and it was not till 1929 that the plaintiff or its allied company, commenced the manufacture of the device said to be infringed. In the meanwhile, in 1925, Prentice came on the market, and also the locking device used by the United States Rubber Company which is almost identical with the plaintiff's Exhibit no. 7; and the producers of such locking devices could not possibly have heard of or seen Poux, because it had not been made public. It is probable that Poux conceived the idea described by him, in a rough fashion, at the time

stated, but whether this constituted invention, it is not necessary to decide, inasmuch as I find there is no infringement.

Mr. McCarthy for the defendants argued that there was no assignment of the patent in suit to the plaintiff. The plaintiff pleaded an assignment made in December, 1926, from Poux to Canadian Lightning Fastener Company, the plaintiff's predecessor. This assignment purports to grant an assignment of a certain invention relating to new and useful improvements in Separable Fastener Sliders, and it is there set forth that Poux had applied for a patent of the alleged invention in the United States, and he therein assigns all his right title and interest in the alleged invention for the Continent of America, excepting the United States, to the assignee. The nature of the invention is not described except as I have stated. Mr. Biggar contended that having put in evidence an assignment certified by the Patent Office to be an assignment of the patent in suit, and there registered, that he had discharged the burden of proving the assignment, and that if such an assignment was attacked by the defendants the onus was upon them to show that it did not cover the patent in question. The defendants did not in their pleadings attack the assignment beyond a general denial of several paragraphs of the plaintiff's statement of claim, inclusive of the one pleading the assignment. I am inclined to think that Mr. Biggar's contention is the correct one. If the defendants intended to seriously raise such an issue, it should have been pleaded and the issue distinctly raised. An agreement to assign may be made prior to the grant of a patent, or even prior to application for the patent concerned. Sec. 29 of the Patent Act, I think, contemplates an assignment even before the patent is granted. I think therefore I am bound to assume that the assignment pleaded, and put in evidence, places the title to the patent in suit in the plaintiff; the assignment is not questioned by either the assignor or the assignee and I should doubt very much if the defendants are in a position to challenge the force or validity of the assignment.

Therefore, in my opinion, the plaintiff's patent has not been infringed and the action is dismissed with costs to the defendants.

Judgment accordingly.

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AND G. E.
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MFG. Co.

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1932 April 29, 30. May 2. — May 27. —	GILLETTE SAFETY RAZOR CO. OF } CANADA, LIMITED }	PLAINTIFF;
AND		
	PAL BLADE CORPORATION, LIM- } ITED AND METROPOLITAN } STORES, LIMITED }	DEFENDANTS.

Patents—Infringement—Anticipation—Factory Improvements

The invention claimed is for a blade to be used in safety razors, and it is claimed it is so perforated as to co-operate with the guard member of a handle to retain it in shaving relation thereto and that it also co-operates with the backing member so as to retain the latter in proper relation to the blade for shaving. It was held that the alleged invention was not new and did not denote invention.

2. It was held further that factory improvements, the little improvements and betterments in technique that skilled workmen devise, because they are skilled, should not be the subject of monopoly and do not constitute subject matter for a patent.

ACTION by the plaintiff to have a certain patent issued to one Caisman and assigned to it, declared valid and infringed by the defendants, and for damages and costs.

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

George F. Henderson, K.C., and *E. G. Gowling* for plaintiff.

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

The facts of the case together with the parts of the specification and claims material to the understanding of the case are cited in the Reasons for Judgment.

THE PRESIDENT, now (May 27, 1932), delivered the following judgment.

This is an action for infringement of a patent issued in February, 1932, application for which was filed in June, 1924, by the patentee Henry J. Caisman. The action against the second named defendant was abandoned at the trial. The patentee in his specification states:—

My invention relates to safety razors and is particularly applicable to the class of safety razors comprising a guard, a backing and a thin flexible blade clamped between the guard and the backing to retain the cutting edge of the blade in shaving relation to the guard teeth. In the class of razors described it has been customary, so far as I am aware, to provide the backing member with pins that project through holes in the blade and into holes in the guard member, whereby the blade and the

backing are retained from rotation on the guard by the co-operation of said pins with the guard and the clamping of the blade between the guard member and the backing member, so that the blade performs no function in retaining any of said parts with relation one to another.

The object of my invention is to provide a safety razor wherein a blade will co-operate with a guard member to retain the blade in shaving relation thereto and the blade will also co-operate with a backing member to retain the latter in proper relation to the blade for shaving purposes, so that the position of the backing member with regard to the guard member is maintained by the blade and not by the co-operation of said members together in the well known manner I have described above. In carrying out my invention I provide a guard member and a blade having co-operative means to retain the blade in shaving position on the guard, a backing member for the blade, means co-operative between the blade and the backing member whereby the blade retains the backing member in operative relation to the blade and the guard, and means to cause the guard member and backing member to clamp the blade, therebetween.

These paragraphs of the specification describe the alleged invention here in issue about as clearly as it can be done. Mr. Gowling, for the plaintiff, rested the claim to invention upon the grounds that the blade will co-operate with the guard member to retain the blade in shaving relation thereto, that it will also co-operate with what the patentee calls the backing member to retain the latter in proper relation to the blade for shaving purposes, that the patentee had demonstrated after much experimental work that $\frac{1}{1000}$ -ths of an inch was the proper blade exposure, and that the blade lessened the variation of exposure by forty per cent. Mr. Gowling also urged that the object of the patentee was to leave the cap and guard members free to move in relation to each other independently until such time as the blade is positioned.

It is the first five claims of the patent that are said to be infringed and they are as follows:—

1. A blade having the means to co-operate with clamping members located on opposite sides of the blade to retain said members and blade in shaving relation.
2. A blade having means to position it on a clamping member, and having means to co-operate with another clamping member to retain the latter member in relation to the blade.
3. A blade provided with means to position itself on a clamping member, and having means independent of the first named means for positioning another clamping member on the blade.
4. A blade having a non-circular opening substantially centrally disposed to retain the blade in shaving relation to a guard member, said blade having means spaced from said opening to co-operate with a clamping member to retain the latter in shaving relation to the blade independent of the guard member.

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5. A blade having an angularly shaped opening disposed substantially centrally in the blade to co-operate with a guard member to retain the blade in shaving position thereon, and said blade being provided with means spaced from said opening to co-operate with a backing member to retain the latter in shaving relation to the blade and to the guard member.

The issue is therefore limited to whether or not there is invention in the blade. The combination of the blade with the other parts of the razor is not before the Court, but it is impossible, I think, to discuss the former without reference to the latter, and while this may tend to confuse the issue, yet, I think, it is unavoidable.

In what is known as a safety razor there is, what was called during the trial, the cap member or outer member, and the inner or guard member which is provided with teeth on both sides,—the nearer member being convex and the other concave—and between them is positioned a thin, flexible and slotted blade, ground to a cutting edge on both sides; means of one kind or other are provided for holding them together. Ordinarily there is a screw pin which goes through both the cap and guard members and the blade, upon which the razor handle is screwed, and when the handle is tightly secured the blade is forced by the curved cap and guard members to assume a curved form and this causes the cutting edge to be drawn back relatively to the edges of the teeth of the guard member; in construction, allowance is made for this distortion of the blade. In what is called the old Gillette razor, the patent for which I understand has expired, there are three pins on the cap member the central one being a screw pin, and these three pins go through openings provided in the blade and then through the guard member, and when the handle is screwed on the central screw pin, the blade is clamped securely between these two members. In the patent described in the specification, there is a central screw pin on the cap member designed to go through the blade and guard member and whereon the razor handle is screwed. Instead of the two pins on the cap member and extending through the blade and guard member, as in the old Gillette, we have in this case two small projections stamped inwardly from the guard member, one on each side of the central screw pin, diamond in shape, which extend through diamond shaped openings in the blade and then into re-

cesses formed to receive the projections in the cap member, that is, when the blade is clamped between the cap and guard members. So really what has been done in this case is that instead of the two pins projecting from the cap member on either side of the central screw pin through the blade and guard member, as in the old Gillette, the patentee provides two pins or projections formed on the inside of the guard member which co-operate with appropriate openings in the blade, and with appropriate recesses in the cap member. So that structurally we find in the patent in question in a slightly modified form, everything found in the old Gillette razor.

Now, is there anything in the blade which denotes invention? The blade it is claimed, is retained in shaving relation in the cap member by shoulders placed at each corner on the inner face of the cap member, the four corners of the blade being notched to position the blade within the four shoulders, and thus the blade is said to co-operate with the cap member. But that feature of the blade, or the razor, was not new, it was old in the art. Ballreich (U.S.A. 1917) showed the same thing. To make a blade that fits within the four corner shoulders of the cap member is hardly invention. Then the blade is said to co-operate with the guard member because certain perforations in the blade will fit the two diamond shaped lugs or projections on the guard member; but these diamond shaped perforations co-operate with the same shaped projections on the guard member just as the perforations in the old Gillette blade co-operated with the two pins on each side of the central screw in the cap member. The fact that the projections are on the guard member instead of the cap member, or that the perforations in the blade are of a particular shape, is of no consequence. It may be said that the blade does co-operate with both members in the manner stated by the patentee, but it would be equally true to say that the two members co-operate with the blade, as they did in the old Gillette razor; in fact the blade is not operable until the cap and guard members, the blade, and the handle, are all in co-operation at the same time. I cannot think that there is invention in providing perforations in the blade to co-operate with the projections on the guard member, or in notching the blade so

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that it will fit within the four shoulders on the cap member; there is not visible to me that degree of ingenuity which is necessary to constitute subject matter for a patent. I am unable to appreciate the contention that it is the blade alone that keeps the guard member and blade in shaving relation, or that the blade retains the cap member in operative relation to the blade and the guard; it plays its part in the co-operation of several elements, but the co-operation of other elements of the razor with the blade is equally necessary. The diminution of possible variations in blade exposure is not subject matter for a patent in my opinion, even if it is a fact; in any event I should doubt if that virtue is the consequence of the blade alone. Factory improvement, the little improvements and betterments in technique that skilled workmen devise, just because they are skilled, should not be the subject of monopoly and do not constitute subject matter for a patent. Notwithstanding the very ingenious presentment of the plaintiff's case, and the very ingenious specification of the patentee, I do not think there was invention in the razor blade in question at the rate of the plaintiff's Letters Patent.

Accordingly the plaintiff must fail in its action with the usual consequences as to costs.

Judgment accordingly.

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 May 5
 June 1.

CONTINENTAL OIL COMPANY.....PETITIONER;
 vs.
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 ITED } RESPONDENT.

Trade-mark—Expunging—Use by importer of exporter's mark—Knowledge of name of proprietor of mark not necessary

Held that an importer of goods may have a mark of his own for use in the sale of such goods and disregard the exporter's mark, but he cannot register or appropriate to himself the exporter's mark, the mark of the producer of the goods which he imported, though he may use it in connection with such goods imported with such mark.

2. It is not necessary for the validity of a trade-mark that the public should know the name of the proprietor of a trade-mark, but that, in the public mind such mark meant a particular manufacture.

PETITION by petitioner herein to expunge two registered trade-marks "Conoco."

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

O. M. Biggar, K.C., and *M. B. Gordon* for petitioner.

R. S. Robertson, K.C., and *L. Davis* for respondent.

The facts material to the decision of the case are stated in the Reasons for Judgment.

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THE PRESIDENT, now (June 1, 1932), delivered the following judgment.

The petitioner seeks to expunge two registrations of the trade-mark "Conoco" registered by respondent's assignor, Consumers Oil Co., Ltd., the first registration being applicable to gasoline, the second, to petroleum and all petroleum products except gasoline; the first registration was made in February, 1930, and the second in May following. The respondent company is engaged in the sale and distribution of oils, gasoline, etc., for motor cars, in both a wholesale and retail way. The respondent claims that it commenced to sell motor gas and oil under the name of Conoco in the last days of December, 1929. The petitioner claims to have sold similar products in Canada under the same trade name some months prior to the date of the adoption of this word mark by the respondent.

The petitioner is a United States corporation, and is engaged in a very large way in the production of motor gas and oil for the domestic and many foreign markets. For many years prior to 1929 a company known as Continental Oil Company was engaged in the production and sale of motor gas, oil, etc., and such products were marketed under the name of Conoco; in 1929 this company was merged with another well known company in the United States, Marland Oil Company, which was engaged in the same class of business, and this company had been selling motor oil and gas in Canada. In the merger of these two companies, it would seem according to the evidence, that the procedure adopted in effecting the amalgamation was that Continental Oil Company was absorbed by Marland Oil Co., and then Marland Oil Company changed its name to Continental Oil Company, the petitioner in this case. I have no doubt that in the end any trade-marks owned by either company were assigned to the petitioner, though

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there is no evidence of this; at any rate the petitioner company continued the use of the word Conoco as a trade-mark, or part of a trade-mark. It is not really necessary however to consider the business activities of the petitioner prior to July, 1929.

In the last half of 1929, a corporation known as Visco Gas and Oil Co., Ltd., which I shall hereafter refer to as Visco, sold and distributed to customers, in Toronto and adjacent territory, motor oil purchased from the petitioner under the name of Conoco, and during the same period Visco also purchased gasoline from the petitioner, but apparently it sold this gas in 1929, as it might do, under the name of Visco; prior to July, 1929, Visco was a customer of Marland Oil Co. About one hundred drums of oil, of forty-five gallons each, were purchased by Visco from the petitioner in 1929, and these drums bore the word mark Conoco associated with a red triangle. Signs, standards, bulletin boards, some of which I think were provided by the petitioner, were used by Visco to advertise the sale by it of Conoco oil; it advertised the sale of Conoco oil in a Toronto paper; cabinets or metal boxes for holding bottles of oil were furnished by Visco to some of its customers and the name of Conoco was applied to the same. Trucks used by Visco for delivering oil also displayed the name of Conoco oil. At the Canadian National Exhibition held in Toronto in September, 1929, at the joint expense of the petitioner and Visco, both Conoco oil and gasoline were prominently advertised in many ways, though in fact neither was there sold, that is on the exhibition grounds. A United States hydroplane at this time visiting Toronto, in consequence of this display concerning Conoco gas and oil, purchased from Visco a quantity of Conoco gasoline, it having a supply on hand at one of its service stations in Toronto, and which was purchased from the plaintiff as Conoco gasoline. Apparently this sale of Conoco gasoline occurred because the person in charge of the hydroplane knew of Conoco gasoline in the United States. At St. Boniface, Manitoba, a Mr. McKay doing business under the name of McKay Oil Co., purchased and imported from the petitioner some fifty thousand gallons of gasoline and a quantity of motor oil, under the trade name of Conoco, and sold the same under that name, during the months of

July, August, September, October, and part of November, 1929, when McKay went out of business. When McKay commenced importing Conoco gas and oil the petitioner supplied him with globes which were attached to pumps connected with gasoline tanks, and these globes which bore the word Conoco were continuously displayed at McKay's service stations, and also, I think, by some customers of McKay. Standards and signs were erected, and printed matter, supplied I think by the petitioner, was distributed to make known the fact that McKay was selling Conoco motor gas and oil. Then what is known as decalcomanias, a form of adhesive label, displaying the name Conoco, in association with the figure of a triangle, were placed on oil containers which McKay used in making deliveries of oil. The application of a trade-mark to cabinets, containers, bottles, and on globes, drums, etc., is, I think, a sufficient compliance with the statute.

The following facts are clearly established. McKay sold both gas and oil under the name of Conoco for several months in 1929, at St. Boniface and Winnipeg, and this was purchased from the petitioner under that name. Visco sold motor oil under the name of Conoco, in Toronto, for several months in 1929, and this motor oil was purchased from the petitioner under that trade name. Visco made one sale of Conoco gasoline in September, 1929, and while by itself this might not be important, yet, I think it is important when considered along with other facts disclosed in the case. The petitioner assisted both Visco and McKay in identifying the name of Conoco, and putting it before the public, as a manufacture known by that name. The petitioner has continued since 1929, according to the evidence, the sale of motor gas and oil in Canada under the name of Conoco; this would indicate that there was no intention of abandoning the use of that trade-mark in the Canadian market. There is no assertion of claim by Visco or McKay, to the word mark Conoco, in fact their course of conduct would indicate that they were using the petitioner's mark to denote the petitioner's manufacture. By reasons of advertisements in standard trade journals, such as National Petroleum News, and otherwise, the petitioner's trade-mark Conoco must have become known to many, to dealers particularly, as the mark of the manufacturer of gas and oil

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sold under that name, but I do not rest my decision upon this point.

An importer may have a mark of his own, and disregard the exporter's mark—as Visco did for a time in respect of gasoline purchased from the petitioner,—but he cannot register or appropriate to himself the exporter's mark, the mark of the producer of the goods which he imported, though he may use it I assume in disposing of such goods imported with such mark. In the case of *European Blair Camera Co's Trade-Mark* (1), it was held that where a manufacturer abroad sold and sent goods bearing the words Bull's-eye, his trade-mark, to a person in England, the importation of such goods into that country, coupled with the circulation of certain pamphlets containing the words, was such a use of those words by the manufacturer as to prevent the importer setting up a claim to the exclusive use of them, although the words were only known to the public in connection with goods sold by the importer. And the registration of the words by the importer was ordered to be expunged; it seems to me that the grounds for removing the marks in question from the register are much stronger. It is not necessary that the public should know the name of the proprietor of the trade-mark. In *Powell v. Birmingham Vinegar Brewing Co.* (2), there was evidence that many purchasers of "Yorkshire Relish" knew nothing of the plaintiff, but in reference to this Lord Hershell said, "in the present case, it seems to me that 'Yorkshire Relish' means the manufacture of a particular person. I do not mean that in the minds of the public the name of the manufacturer was identified, but that it meant a particular manufacture and that when a person sold 'Yorkshire Relish' as the appellants did, by selling it as 'Yorkshire Relish' and calling it 'Yorkshire Relish,' they represented to the public that it was that manufacture which was known as and by the name of 'Yorkshire Relish.'" In the case before me, Visco and McKay, I think, represented that the goods which they sold under the name of Conoco was that manufacture which was known as and by the name of Conoco, and upon the evidence, I should say that the petitioner was acting in co-

(1) (1896) 13 R.P.C. 600.

(2) (1897) A.C. 710, at p. 715.

operation with such parties in the use in Canada of the name of that manufacture.

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The respondent was not the first to use the mark Conoco in Canada. In such circumstances I do not think it is proper to permit the respondent to use the marks in question, because it is calculated to mislead the public, and the respondent's use of them would hardly fail to lead some people to mistake the goods of the respondent for that of the petitioner. Further, these marks are not properly on the register because they were in use in Canada prior to the time of the respondent's adoption of the marks, and in connection with the same commodities. Whoever is entitled to the registration of these words it is not the respondent.

I am of the opinion, therefore, that the trade-marks in question should be expunged from the register. The petitioner will have its costs of the proceeding.

Judgment accordingly.

BETWEEN:—

J. O. ROSS ENGINEERING CORPORATION AND C.L.W. PATENTS CORPORATION } PLAINTIFFS;

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Jan. 7, 8.
11 to 15.
May 27.

AND

CANADA PAPER COMPANY AND HOWARD SMITH PAPER MILLS LIMITED } DEFENDANTS.

Patents—Infringement—Specification

The patent in suit granted to Wagner, and assigned to plaintiffs, is for a method and apparatus for the recovery of chemicals and of heat from the waste liquors used in the chemical pulp industry. The plaintiffs' apparatus is a self-sustaining process, a unitary structure capable of complete recovery of the active reagents from the waste liquors, stress being laid upon the fact that the upper chamber must be kept at a high temperature, and that the liquor must be sprayed in so that destructive distillation takes place in the upper zone. The defendants' alleged infringing apparatus is for the same purpose but in the defendants' case the liquor is projected into the furnace without atomizing and onto the walls of the furnace where it adheres and from which, after a certain quantity of the water has been removed, it drops to the hearth of the furnace, in lumps of varying sizes, where it burns by the action of the organic matter contents not consumed

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in the upper zone or intended to be so consumed. A boiler is placed at the top to prevent the upper zone becoming overheated and thus minimize the possibility of combustion of the materials in that zone.

Held, that the essence of the alleged invention rested on what the patentee describes as a process of destructive distillation of waste liquors, the evaporation of all water and combustion of nearly all the consumable products in the liquor, i.e., woody or ligneous matter, in its downward flight in the upper zone of the furnace, leaving nothing but a carbon residue and non-volatile salts reaching the floor of the furnace, and that the method employed by the defendants where recovery takes place on the hearth and not by distillation in the upper zone, was not Wagner and was not inferable from Wagner, but was radically different, was based on an altogether different idea and principle and could not be said to be an infringement of plaintiffs' patent.

ACTION by plaintiffs to have their patent for a certain method and apparatus for the recovery of chemicals in waste liquors declared valid and infringed by the defendants.

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

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

Warren Chipman, K.C., and *H. Gerin-Lajoie, K.C.*, for defendants.

The facts of the case and parts of the Specification and patent material to the issue are stated in the Reasons for Judgment.

THE PRESIDENT, now (May 27, 1932), delivered the following judgment.

This is an action for the infringement of a patent granted to one Wagner in January, 1927, upon an application filed in January, 1925, and is alleged to relate to new and useful improvements in the Method and Apparatus for the Recovery of chemicals and heat from waste liquors resulting from the processes in industry.

It is claimed that the alleged invention finds ready adaptation in the process of waste liquor recovery in the chemical paper pulp industry. The main constituents of the digestant liquors in this industry are soda and sulphur, which reagents are used either separately or in combination to form the wood digestive liquors of the "soda," "sulphate" and "mono-sulphite" processes. In these sev-

eral processes the quantity of chemicals employed to digest the chipped wood, which is placed in a digester, is very considerable and the cost of the same per ton of pulp is quite substantial. After the wood is digested a black liquor remains, containing the chemicals employed and all the intercellular substances or ligneous matter dissolved from the wood, except any portion which was wasted during the completion of the process. Various methods have been employed in the past to recover the chemicals from this liquor so that the same might be used over again. In comparatively recent years a rotary furnace came into use, replacing, I think, a flat horizontal incinerator which had been previously used for the recovery of chemicals. The rotary furnace was apparently in use for many years but it is not necessary to describe the construction or operation of this type of furnace, and, I think, it may be conceded that for several reasons it was not as satisfactory as the stationary furnaces which later came into use, and which in general construction are of the same type as the Wagner furnace, and the alleged infringing furnace used by the defendant, Canada Paper Company.

The defendants plead the usual defences in infringement actions. It is always most important to ascertain from the specification what is the exact invention protected, and that point was much in controversy during the progress of the trial. It will be necessary therefore to refer at length to the specification.

The patentee states in his specification that in the chemical paper pulp industry the matter of the recovery of chemicals from the waste liquor had theretofore presented a difficult problem. He refers to the so called rotary process and he enumerates the difficulties of and objections to this method of recovery. The patentee then proceeds to state that among the objects of his alleged invention it was contemplated to provide a self-sustaining process and apparatus for recovering chemical waste liquors; to provide a unitary structure capable of complete recovery of the active reagents from the waste liquors in a one step continuous operation; to eliminate the use of a continuously operable heating medium for carrying out the combustion of the waste liquor; and to collaterally produce heat from the volatile constituents of the waste liquors,

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which might be used in outside heating units, such as steam boilers. The specification then proceeds to state:—

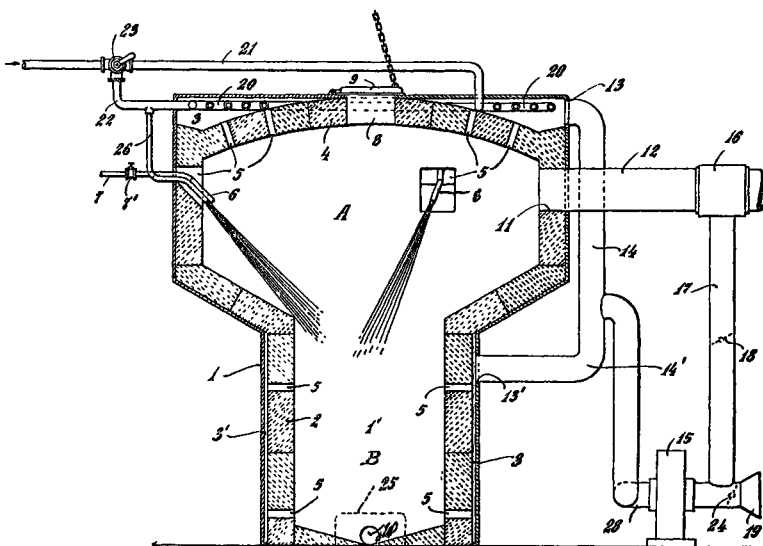
Broadly, my invention contemplates the destructive distillation of the waste liquors and the combustion of the consumable products of such distillation, the remaining solid residue or non-volatile salts being discharged as recovered reagents substantially free from carbonaceous matter. It has heretofore been proposed as in the United States patent to Atwood No. 418,265 to purify such wastes by discharging them under a boiler for consumption. Such processes, however, have not proven successful. The waste liquor itself is not in an inflammable condition and it is rendered inflammable only after being subjected to sufficient heat to effect its destructive distillation, and in the Atwood patent there was no adequate provision for maintaining the temperature at the point of admission of the liquors high enough to cause the destructive distillation satisfactorily. Also, by reason of the fact that the reagents were carried onwardly through the furnace, the heat generated by such consumption of the distilled products as would occur was not available for use at the point where the distillation was required. The subsequent combustion of the products of distillation, was incomplete and unsatisfactory by reason of the fact that insufficient air was provided to effect it. With the aforesaid proposed process, moreover, the heat absorbed by the presence of the boiler in the chamber where the reactions are intended to occur was so great that the necessary temperature could not be maintained and, moreover, the particles were sprayed into the chamber so close to the bottom that unaltered particles of liquor fell on to the bottom, resulting in a loss of heat from the process and a contamination of the reagents as they issued from the chamber. The process, therefore, was never operative.

It was thereafter proposed to maintain the temperature of the chamber artificially as in the United States patent to Moore No. 1,137,730. In this process the liquor is sprayed horizontally into a chamber, the temperature of which is maintained by the consumption of additional fuel at the point where destructive distillation should occur. For this purpose crude oil was used. The gases were thereupon carried outwardly in the expectation that they would be consumed. This process is unsatisfactory, not only because of the cost of the additional fuel which must be supplied to distil the liquor, but also by reason of the fact that the gases resulting from the destructive distillation are not consumed, due to an insufficient air supply, but are carried outwardly of the apparatus, the resultant heat being lost to the process. With this process the liquor is sprayed into the furnace in practice about six feet above the level of the floor of the furnace. The liquor, however, is of comparatively viscous nature and, when sprayed within so short a distance of the floor, much of it falls upon the floor of the chamber unaltered. It has been proposed to permit the addition of air to play upon the mass thus appearing upon the floor in the hope that its complete consumption could thereby be effected.

In accordance with present invention, it has been discovered that if the heat resulting from the consumption of the distilled products is returned to heat the distillation chamber, that no additional fuel is required. It has been further found that while the distillation products can be completely consumed if air be admitted after the distillation is commenced, that no amount of air admitted prior to distillation produces a satisfactory combustion, without such subsequent addition.

Fig. 1 is a longitudinal cross-sectional view of one of the several types of furnaces illustrating, it is said, "the principle of my invention," and it is reproduced below.

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The Wagner furnace, which is vertical, is a chamber of metal substantially air tight, with a refractory lining constructed close to and along the entire interior walls, with the exception of Section 3 along the top of the chamber and annular section 3' along the lower or base portion of the chamber, wherein air spaces are provided to serve as pre-heating areas for air entering under pressure. Within section 3 is provided a coil 20, in which air to be used in the atomizing of the fuel and the waste liquor, is pre-heated, and this coil is connected to a main air feed conduit 21, and an auxiliary feed conduit 22, control of the flow of air being obtained by means of a 3-way valve 23. A conduit 26, leading from the coil 20 discharges the air, which is pre-heated in chamber 3, into nozzles 6, which are inclined downwardly. Throughout the refractory lining 2, adjacent pre-heated sections 3 and 3', there are openings which serve for the accommodation of the waste liquor nozzles, or as passageways through which air being discharged from the pre-heated area may be distributed into the upper furnace chamber zone A, or the lower chamber zone B. The specification suggests the pre-heating of the waste liquor in the pre-heating area 3 and using air under

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pressure to atomize the pre-heated waste liquor entering into the nozzles. After some further description of the air feed system, the patentee states that the waste hot gases produced in the furnace chamber are discharged through a conduit to a boiler, not shown in the drawings. The specification then proceeds to state:—

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With the above construction, it has been found that the difficulty resulting from the falling of unaltered particles upon the floor of the chamber may be completely obviated by increasing the height of the chamber to permit a greater time for the reaction between the heated gases and the particles.

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As will be observed from the drawing the furnace proper is divided into two zones "A" and "B", in which the processes of destructive distillation of the waste liquor may be taking place simultaneously in two consecutive steps. It should be understood however that this invention is not limited to a two step process taking place in two zones in a single furnace, it being within the contemplation of the inventor to carry out the operations in one step if desired.

The operation is started by forcing oil and air through nozzles 6, whereby the atomized oil is burned until the temperature within the upper zone "A" of the furnace is between 1,200° F. and 2,500° F. at which time the oil supply is shut off at 7', and the waste liquor supply tank connected with nozzles 6 through the conduit 7. The waste liquor on passing through the nozzle, together with the pre-heated air fed through the coil 20 becomes atomized as it emerges into the zone "A", and the volatile gases distil on account of high temperature previously produced by the oil. This combustion in zone "A" of the chamber is carried on in an atmosphere of pre-heated air distributed from the heating area 3, through the openings 5 and into the combustion chamber. The combustion, or destructive distillation in zone "A" results in the liberation of the volatile constituents in the waste liquor, leaving only non-volatile salts and carbon which drop toward zone "B." The volatile constituents evaporated from the atomized waste liquor, when burned, are drawn through the opening 11 into the conduit 12 leading to the boiler or stack.

As the non-volatile salts and carbon pass by gravity into zone "B" of the furnace chamber, the pre-heated dry air being then discharged from the heating annular area 3', passes through the openings 5 and contacts therewith. This pre-heated air produced an incineration or combustion, of the residue dropping from zone "A," by which combustion the carbon is oxidized, and the resulting volatilized gases drawn into the conduit 12 leading to the boiler stack. The residual salts of course become fused and flow toward the tap hole 10, where they are removed intermittently or continuously as desired, by gravity or mechanically. To produce a positive flow of the fused salts through the tap hole, the pre-heated air being discharged into the combustion zone "B" is usually forced through the openings 5 under pressure.

As has been stated, the products of distillation pass through the conduit 12 into the boiler stack. These gaseous products serve as heating means for producing steam under the boiler (not shown). Consequently after the initial pre-heating of the chamber into which the waste liquor is to be destructively distilled, there is a continuous production of heat

in the form of distilled volatile gases which pass to an exterior unit, and serve as heat producing means in that unit. In general the process contemplates the reproduction or recovery of the original available constituents of the waste liquor, plus the utilization of the excess heat value of the combustible material originally in solution with the recovered constituents and separated therefrom by destructive distillation.

* * * * *

From the foregoing it will be evident that it is possible to so adjust the spray and the air supply to the size of the furnace and to the temperature maintained that the destructive distillation will be completed before the particles reach the floor of the furnace, but it is not usually desirable that the carbon content shall be completely consumed during transit. It has been found that usually the maximum recovery of reagents occurs when the inorganic salts fall to the bottom with the carbon residue so that the final reduction of the salts occur during the consumption of the residual carbon on the floor of the furnace. With this operation there is less tendency for the inorganic salts to be lost in the flue gases. With this operation there falls to the bottom of the vessel a flaky carbonaceous mass from which the carbon is gradually consumed by the entering air, and as the carbon is consumed the inorganic matter becomes fused upon the bottom.

It seems to me that the true construction of the specification is, that the essence of the alleged invention rests in what the patentee describes as a process of destructive distillation of waste liquors, the evaporation of all the water and the combustion of nearly all of the consumable products in the liquor, that is all woody or ligneous matter, in its downward flight through the upper furnace zone principally, leaving nothing but a carbon residue and non-volatile salts reaching the floor of the furnace. There is of course the return of heat resulting from the combustion of the distilled products to heat the distillation chamber so that no additional fuel is required, but that I think, is only of secondary importance and was not of itself new. The actual form of the furnace construction is not, I think, of the essence of the alleged invention. I cannot believe that anything else was in the mind of the patentee, but what he states, namely, that his invention contemplated the "destructive distillation of the waste liquors and the combustion of the consumable products of such distillation the remaining solid residue or non-volatile salts being discharged as recovered reagents substantially free from carbonaceous matter." He very definitely states that a very high temperature is required in the upper zone where the waste liquor is introduced; he states that the combustion in zone A is carried on in an atmosphere of pre-heated

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air, and every provision is made to secure this high temperature initially and to maintain it; he seems to require this temperature in that portion of the furnace where he expects certain reactions to take place. He is critical of Atwood for not making adequate provision for maintaining a sufficiently high temperature, at the point of admission of the waste liquors into the furnace, to cause destructive distillation satisfactorily. He is also critical of Atwood because of the presence of a boiler at the top of the furnace where the reactions are intended to occur, for the reason that "the heat absorbed by the presence of the boiler in the chamber where the reactions are intended to occur, was so great that the necessary temperature could not be maintained," that is to say, the presence of the boiler had the effect of lowering the temperature, by the absorption of heat in the upper portion of the furnace, where Wagner expected destructive distillation to occur. Moreover, the patentee states that in Atwood the particles were sprayed so close to the bottom of the furnace that "unaltered particles of liquor fell on to the bottom, resulting in a loss of heat from the process and a contamination of the reagents as they issued from the chamber." The patentee also states that if the heat resulting from the consumption of the distilled products is returned to heat the distillation chamber that no additional fuel is required and he states that if air be admitted after distillation is commenced, that the distilled products will be completely consumed, and that no amount of air admitted prior to distillation effects satisfactory results. All this shows very clearly, I think, that it was the avowed intention of the patentee to build up a high temperature in zone A of the chamber, as high as 2,500° F., while in zone B the temperature was to be considerably lower. This is further made manifest by the specification which states "the combustion or destructive distillation in zone A results in the liberation of the volatile constituents in the waste liquor, leaving only non-volatile salts and carbon which drop towards zone B." This can only be interpreted as meaning that all, or nearly all, the ligneous or combustible matter in the liquor sprayed into the furnace, not on the walls, was to be burned in zone A, and that the residue of carbon and non-volatile salts went to the floor of the furnace, where the final reduction of the

salts took place. And the patentee makes this rather clear by stating that what falls to the bottom of the furnace is a flaky carbonaceous mass from which the carbon is gradually consumed by reason of the entering air, and as the carbon is consumed the inorganic matter becomes fused upon the bottom of the furnace. Then the specification also states that if, with the furnace construction described, unaltered particles fall upon the floor of the chamber, this may be completely obviated by increasing the height of the chamber to permit a greater time for the reaction between the heated gases and the particles; this must have been intended to mean that given a longer flight for the sprayed liquor, the falling of unaltered particles upon the furnace floor would cease, and nothing but residual carbon and non-volatile salts would reach the furnace floor. All this, I think, makes it clear that the true construction of the specification is what I have already stated it to be.

Now, turning to the furnace installed at Windsor Mills by Canada Paper Company, one of the defendants, and the method there employed for recovering chemicals from waste liquor; and this is the alleged infringing furnace. At Windsor Mills the waste liquor is sprayed, it is claimed, downwards through two nozzles against the walls of the furnace, which, is of the standard type of furnace construction. No air is used in forming the spray, that is to say, the spray is not atomized, which if done, would likely cause fine particles of matter to be found in the spray. The only purpose, it is claimed, in spraying the waste liquor into the furnace is to evaporate the water out of it in its flight to the walls, and forty to fifty per cent of the waste liquor is made up of water. The defendants do not seek to completely evaporate the water out of the liquor, but arrange it so that somewhere from five to ten per cent still remains when it reaches the furnace walls as an insurance against combustion, which they seek to avoid at this stage in their process of chemical recovery. The liquor sprayed on the walls forms a spongy crust, comprising the original constituents of the liquor less the water evaporated, and it is claimed that it intermittently drops from the walls in dried lumps of varying sizes to the floor of the furnace where it burns by the action of the organic matter content which was not consumed, or intended to be consumed, while

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on the walls of the furnace nor while being sprayed there. In the Windsor Mills installation a boiler is placed directly at the top of the furnace to absorb heat, which would of course reduce the temperature in the upper portion of the furnace, and thus minimize the possibility of combustion of the consumable materials in the liquor in that section of the furnace. The defendants contend that in this respect they do the very thing which Wagner condemns in Atwood, although, as I understand it, in some installations made by Ross Engineering Corporation under the Wagner patent, a boiler or boiler tubes is to be found at the top of the furnace. Exhibit 5, illustrative of Wagner's invention, and put in evidence by the plaintiffs, shows boiler tubes under the ceiling of the furnace. When the recovery furnace installed by the Ross Engineering Corporation at Cornwall, Ont., according to the Wagner patent, was proving unsatisfactory and particularly destructive to the roof of the furnace, it was stated in evidence, and I believe the evidence of Tomlinson in that regard, that Wagner himself upon consultation opposed the suggested remedial measure of installing a boiler or boiler tubes at the top of the furnace and thus prevent destruction of the roof; this suggestion naturally would be in conflict with Wagner's theory of destructive distillation in the upper zone of his furnace. It was the deliberate and matured plan of the management of the Windsor Mills, it is claimed, that in their recovery process combustion of the woody or ligneous matter in the waste liquor should be avoided in the upper section of the furnace, and that it should take place on the floor of the furnace where it would function as fuel for the smelting or fusing of the chemicals, whereas the patentee intends that consumption of the products of destructive distillation should almost wholly take place in the downward flight of the liquor through the furnace, reduction taking place on the furnace floor by the burning of the carbon residue and the inorganic salts. The defendants also assert that they provide for the introduction of much more air coming in through the lower portion of the furnace, through ports, than through the upper portion, because, it is claimed, the oxygen of the air is required there to aid or accelerate combustion of the material which has fallen in lumps, and not in small particles, whereas at the top of the

furnace it is only evaporation of the greater portion of the water that is required and consequently a lower temperature is sufficient. It is also claimed that all or most of the combustible material passes to the bottom of the furnace in the Windsor Mills installation, because it is in lumps and not in fine particles as in the Wagner process where all the material does not reach the furnace floor but passes out elsewhere with the distilled gases, because it is in fine particles. There is a conflict between the parties as to the direction of the flow of the air in the lower section of the defendants' furnace, whether downwards or upwards, but, I think, from the evidence, it must be held that the air is directed and carried downwards upon the burning mass on the floor of the furnace by velocity and by gravity, as, I think, it was intended. The plaintiffs deny what the defendants allege as occurring in the Windsor Mills furnace and contend that the process of recovery there employed is one of destructive distillation the same as in Wagner.

Two of the plaintiffs' witnesses, Mr. Webster and Mr. Hunicke, examined the furnace at Windsor Mills, for a short time in July, 1930, by arrangement, and these witnesses testified that they could not see any waste liquor being sprayed against the walls of the furnace, but that it dropped through the upper and lower zones of the furnace and was consumed in its downward flight. This evidence is rather negative in its character. Any changes that were subsequently made in the wall construction of this furnace did not affect the operation of the furnace, Mr. Webster stated. Evidence of temperatures taken inside this furnace was given by Mr. Hazen, an expert witness for the defence, corroborated by Dr. Hibbert present at the same time, and the temperatures observed were 1,800° F. and 1,860° F. at the floor of the furnace, while at the top of the spray the temperatures observed were 1,500° F. and 1,510° F. So that in the case of the infringing furnace the higher temperature was at the bottom of the furnace and the lower at the top of the furnace, the reverse of that obtaining in Wagner. Then the witness Hazen, corroborated by the witness Hibbert, took from the floor of the Windsor Mills furnace samples of the material there found and upon analysis found that it comprised 42.7 per cent of unconsumed woody or ligneous matter, a very high pro-

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portion of the original organic matter in the liquor and which Wagner states should be consumed in zone A of his furnace, and these two witnesses also testified that they saw the sprayed matter dropping from the walls in lumps of varying sizes. The witness Hibbert stated that if the ligneous material was consumed in zone A, one would see only burning particles or drops falling, and not lumps. There is no reason why I should disbelieve this evidence. I am of the opinion that the ligneous material in the liquor was not consumed when being sprayed on the wall, or before it dropped off the wall, and that the combustion of this material occurred on the furnace floor where it served as a fuel for the smelting of the chemicals, and consequently it could not have been destructively distilled in the upper section of the furnace. And Mr. Tomlinson, the manager of the Windsor Mills plant, stated as a fact, what I think I have already mentioned, that what he intended to take place was that the ligneous material should be used for fusing purposes on the furnace floor and not consumed elsewhere, and apparently he had become convinced by reason of his experience with the Wagner installation at Cornwall that the Wagner chemical recovery furnace and the method of operation was fundamentally in error and unsound. But there is further and, I think, very cogent evidence as to the possibility of operating a chemical recovery furnace upon the alleged method or principle of operation of the Windsor Mills furnace. I think this evidence indubitably shows that the Windsor Mills chemical recovery furnace might be operated in the manner which three of the defendants' witnesses say it is operated. Since 1917 there has been in operation at La Tuque, P.Q., a stationary chemical recovery furnace under the direction or superintendence of Mr. Bjornlund, who gave evidence under subpoena. I feel I can thoroughly rely upon the testimony of this witness as being disinterested and reliable. The La Tuque Chemical recovery furnace is owned and operated by The Brown Corporation; the plant is not open to visitations by the public and consequently the principle of recovery there employed was unknown to the parties to this action, until a short time prior to the trial. The construction of that furnace is practically the same as that at Windsor Mills, but of course one would expect to find in almost any such

furnace structural variations. Bjornlund, quite unconcerned about the controversy between the parties here, or their respective methods or furnaces employed for the recovery of chemicals from waste liquors, testified that since 1917, in the La Tuque furnace, the waste liquor, which is pre-heated, is sprayed on the ceiling of the furnace, or the walls; that there is a boiler placed at the top of the furnace to carry away the heat from the furnace gases and to produce steam; that the sprayed liquor reached the walls where the particles gathered together without the ligneous material being consumed; and he testified that he thus got a mass of material clinging on the furnace walls, and as the water evaporated, pieces the size of one's head and smaller, fell to the furnace floor and acted as a fuel in the combustion and fluxing of the non-volatile salts. To me this is conclusive of the practicability of the defendants' method of chemical recovery. The La Tuque installation was made by one Moore, the Moore referred to in the patentee's specification, and it was charged against the defendants that they did not put in evidence the Moore patent, and certain scientific papers published by Moore. The obvious answer to that is that Moore was not obliged to follow the teaching of his patent or the preaching of his learned scientific papers. The La Tuque installation is what it is, and the Moore patent and scientific papers are irrelevant as to what in point of fact is the nature of the La Tuque installation. Another witness, Mr. Freeman, and I should have earlier stated this, testified that upon examination of the defendants' furnace in operation, he observed masses of sprayed material on the furnace wall and that he also observed large pieces falling off and dropping to the furnace floor; he also testified that cold air entering the lower part of the defendants' furnace, being seven times heavier than the inner air, would descend by force of gravity and momentum and mix with the burning material on the furnace floor and later would ascend into the upper portion of the furnace; this cold air, it will be remembered, as claimed by the defendants, is introduced to aid combustion of the material on the floor of the furnace. While the plaintiffs pressed the view that this air when introduced into the furnace ascended to the upper section of the furnace, yet I think I must accept the evi-

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dence for the defence upon the point. I am of the opinion that the Windsor Mills chemical recovery furnace is operated in the manner described by the defendants' witnesses. The fact that the Windsor Mills furnace is higher than the La Tuque furnace does not imply that it is operated after the method of Wagner.

The method of chemical recovery employed by the defendants is quite different to that of Wagner; the particular furnace construction for carrying out either method is not, I think, a serious element in the controversy. The method employed by the defendants for the recovery of chemicals is not Wagner, it is not inferable from Wagner, and it is based on a different idea and principle altogether. It is quite improbable that Wagner, in view of his specification, could have had in mind the principle underlying the method employed in the defendants' furnace, and which is quite unlike that described in the patent in suit. The distinction between the two is, I think, quite manifest. The Windsor Mills furnace embodies the same method of chemical recovery and the same furnace construction as the furnace at La Tuque, but La Tuque was in operation in its present form since 1917, and preceded Wagner by many years. The La Tuque installation could not possibly infringe Wagner, and it follows of course, that the Windsor Mills furnace could not infringe either.

The defendants contended that Wagner as described in the patent in suit was inoperable and therefore invalid, and that Wagner as exemplified by Exhibit 5 in the evidence was not truly illustrative of Wagner as described in the patent, but in view of the conclusion already expressed it is not necessary that I deal with these points.

For the reasons which I have stated the plaintiffs must, in my opinion, fail in their action for infringement with the usual consequences as to costs.

Judgment accordingly.

BETWEEN:—

HIS MAJESTY THE KING, ON THE INFORMATION
OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

AND

THE AUXILIARY FISHING SCHOONER *NATALIE S.*
DEFENDANT.1932
June 13.
July 8.*Revenue—Customs Act—Seizures—Forfeiture—Fisheries Treaty 1818—
Customs and Fisheries Protection Act*

The *Natalie S.* entered the port of North Sydney, from the fishing grounds off Ingonish, N.S., for the alleged purpose of effecting repairs to her engines. On the same day, after effecting certain repairs and after clearing outwards, her master purchased 5½ tons of ice from a local dealer, without licence or permit. The *Natalie S.* was shortly afterwards seized for an infraction of section 10 (c) of the Customs and Fisheries Protection Act. (R.S.C., 1927, c. 43.)

Held, that though an American vessel may, under the Fisheries Treaty, 1818, enter a Canadian port for the purpose of making repairs therein, this did not render lawful the act of her master in purchasing ice as aforesaid, contrary to the provision of the Customs and Fisheries Act, and that the vessel was lawfully seized and forfeited.

2. That section 10 (c) of the Customs and Fisheries Protection Act is *intra vires* of the Parliament of Canada, and is not a violation of the Fisheries Treaty of 1818.

INFORMATION exhibited by the Attorney-General of Canada asking that the forfeiture of the ship *Natalie S.* be declared valid and that the same be forfeited to the Crown.

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

J. W. Maddin, K.C., for the plaintiff.

J. G. Hackett for the defendant.

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

THE PRESIDENT, now (July 8, 1932), delivered the following judgment.

This is an Information exhibited by the Attorney-General of Canada wherein forfeiture is claimed of the auxiliary fishing schooner *Natalie S.*, a United States fishing schooner, registered at the port of New York, U.S.A., but sailing out of the port of Gloucester, U.S.A., and of 49 tons register. The *Natalie S.* owned by her master Joseph Mello, was seized at the port of North Sydney, N.S., because of an

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alleged infraction of sec. 10 (c) of the Customs and Fisheries Protection Act, R.S.C., 1927, Cap. 43.

There is practically no dispute concerning the facts and I find as follows: That on the 13th day of August, 1931, the *Natalie S.* entered the port of North Sydney from the fishing grounds off Ingonish, N.S., for the alleged purpose of effecting repairs to her engine; that the master of the *Natalie S.* when making his entry inwards at Customs, North Sydney, enquired of an Officer of Customs if he might obtain some ice and he was informed that if he required ice to prevent fish, which he had on board, from spoiling, he might obtain permission to do so by wiring the proper authorities at Ottawa, but otherwise he could not purchase ice while in port; the ice was required either for the protection of fish on board or for fish yet to be taken on that fishing voyage. On the same day, the 13th of August, 1931, after effecting repairs to his engine and after clearing outwards at North Sydney, the master purchased about five and a half tons of ice from a local dealer, without a licence or permit, and placed the same on board his schooner, at midnight, and he admitted while giving evidence that he knew this "was against the rules." Shortly afterwards the *Natalie S.* was seized by Customs Officers and is still under detention.

By the Fisheries Treaty of 1818, entered into between Great Britain and the United States, and which received legislative sanction, fishermen of the United States are not permitted to enter the bays or harbours of Canada or Newfoundland except in certain specified areas, but it is therein provided that they may enter such bays and harbours "for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatsoever." The Customs and Fisheries Protection Act, R.S.C., 1927, Cap. 43, sec. 10, provides as follows:

10. Every fishing ship, vessel or boat which is foreign or not navigated according to the laws of Great Britain or of Canada, which

(a) not being thereto permitted by any treaty or convention, or by any law of Great Britain, or of Canada for the time being in force, has been found fishing or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, bays, creeks or harbours of Canada, or in or upon the inland waters of Canada;

(b) has entered such waters for any purpose not permitted by treaty or convention, or by any law of Great Britain or of Canada for the time being in force; or

(c) having entered such waters for a purpose permitted by treaty or convention or by any law of Great Britain or of Canada for the time being in force, and not being thereto permitted by such treaty, convention or law, fishes or prepares to fish, purchases or obtains bait, ice, seines, lines or any other supplies or outfit, or tranships any supplies, outfit or catch, or ships or discharges any officer, seaman, fisherman or other part of her crew, or ships or lands any passengers; shall, together with the tackle, rigging, apparel, furniture, stores and cargo thereof, be forfeited.

The Customs and Fisheries Protection Act empowers the Governor in Council to authorize the issuance of licences to United States fishing vessels, enabling them to enter any port on the Atlantic Coast of Canada, for the purpose, inter alia, of purchasing ice, but no such licence ever issued to the defendant schooner.

Assuming that the *Natalie S.* entered the port of North Sydney for a purpose permitted by the Treaty of 1818, that is to effect repairs to her engine, yet, she as a fishing vessel was not permitted by that Treaty, or by the law of Canada, to purchase ice, within that port, and it seems abundantly clear that the master committed a breach of sec. 10 (c) of the Customs and Fisheries Protection Act by the purchase of ice and by placing the same on board his fishing schooner, and I am of the opinion therefore that the seizure of the *Natalie S.* was warranted by the statute. When vessels go into a foreign port they must respect the laws of that nation to which the port belongs; *The Queen v. Anderson* (1).

It was contended by Mr. Hackett, for the defendant schooner, that having entered port for a purpose permitted by treaty or by law, and that having completed her fishing voyage and being en route to Gloucester her home port (which may or may not be true), it was lawful for the master to purchase ice for the purpose stated. I do not think this contention is one of substance. The purpose of the statutory provision, said to be violated by the defendant schooner, was intended no doubt to prevent Canadian Atlantic Ports being used as a base by foreign vessels in prosecuting the fisheries. The purpose of the ice purchased in this case is admitted to have been to preserve the fish already on board, but it might well be used to preserve fish yet to be taken on the same fishing voyage, but in any event the ice was obtained by a United States fish-

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(1) (1868) L.R. 1 C.C., 161 at p. 166.

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ing vessel, on a fishing voyage, to be used in protecting the catch of that fishing voyage. If the contention made is sound then all sorts of expedients might be resorted to to evade the prohibition of the statute and its purpose would be utterly nullified. Being excluded by treaty, and by law, from the privilege of obtaining ice for fishing purposes in a Canadian port, the *Natalie S.* cannot, I think, be heard to say that because she lawfully entered port for a purpose permitted by treaty, that she was thereby entitled to other privileges which by treaty, and by law, she was barred from enjoying. I do not think that such a contention can prevail. Nor can it be argued, as it was, that because it is permissible for a United States fishing vessel to enter a Canadian port for "water," that therefore she may obtain frozen water, ice. The distinction is, that ice is intended to be used in the prosecution of the fisheries, just as bait, nets, etc., are used, and the purchase of the same in a Canadian port is prohibited by statute unless under licence, while the obtaining of water is permitted by treaty and is to be used for other purposes. I do not think that this contention can prevail either.

It is pleaded by the defendant that sec. 10 (c) of the Customs and Fisheries Act, supra, is ultra vires of the Parliament of Canada, and it was urged that this statute is in violation of the spirit of the Treaty of 1818, and as I understood Mr. Hackett's argument, that it virtually abrogates privileges accorded foreign ships under commercial treaties and by international law. It is a fundamental principle of international law that the jurisdiction of a nation within its own territory is necessarily exclusive and absolute. This is the logical corollary of the principle of the sovereignty of nations which has long been recognized at international law. Furthermore, it is equally well recognized that a State's territorial jurisdiction includes the sea within a three mile limit of its shores. Accordingly, the Parliament of Canada has an absolute right to exclude foreign vessels from any of its ports, and foreign fishing vessels possess no inherent right to enter Canadian ports for any purpose. There is however a general practice to admit foreign seagoing vessels to ports and to give them, on admission, equal treatment. This international practice is based, in part, on treaties, and in part upon a general

and tacit permission of access by countries concerned. It is, however, clearly recognized in international matters that a distinction may properly be drawn between fishing vessels and ordinary vessels of commerce. For example, in the Convention and Statute on the International Regime of Maritime Ports and Protocol of Signature, signed at Geneva on September 9, 1923, Article 14 provides: "This Statute does not in any way apply to fishing vessels, or to their catches." The general right of exclusion is qualified by the recognized principle of affording shelter in stress of weather and possibly a refuge for replenishing food and water under special circumstances. Is there, therefore, any treaty in force between Great Britain and the United States, or any law of Great Britain or Canada which qualifies this right of sovereignty? The Treaty of 1818 specifically defines the privileges which United States fishermen may enjoy within the territorial waters of Canada, and these privileges have been already mentioned and require no discussion. The particular statute in question is not in conflict with the Treaty of 1818. Under the Convention of Commerce and Navigation of 1815, entered into between Great Britain and the United States, no privileges are granted to foreign fishing vessels to carry on the fisheries, but permission is given to the inhabitants of either country "to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come . . . but subject always to the laws and statutes of the two countries, respectively." This convention relates only, I think, to trading or commercial ships. I entertain no doubt that as a result of the Treaty of 1818, and even upon the authorities cited by defendant's counsel, it was within the competence of the Dominion to enact in its entirety sec. 10 of the Customs and Fisheries Protection Act. See also Martin L.J.A. in the case of *The King v. The Ship North* (1).

I am of the opinion therefore that the *Natalie S.* purchased a quantity of ice at the port of North Sydney for a purpose not permitted by treaty or by law, and that she committed a breach of sec. 10 (c) of the Customs and Fisheries Protection Act and is therefore liable to seizure and forfeiture as by that statute provided.

(1) (1905) 11 B.C.R. at p. 479.

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Upon reference to the Customs and Fisheries Protection Act since the trial, it appears to me that this Information should have been exhibited in the Admiralty side of the Exchequer Court of Canada, but no objection to this was raised in the pleadings or at the trial. I assume that I have the power to direct that the cause be transferred to and intituled in the Nova Scotia Admiralty District, Exchequer Court of Canada, and that the pleadings be so amended that it will appear that this proceeding was launched in the Nova Scotia Admiralty District of the Exchequer Court of Canada, and I shall consider such amendments as having been made.

It was urged by Mr. Hackett for the defendant, that I should recommend a remission of the penalty of forfeiture, in the event of my finding the defendant schooner guilty of the offence alleged against her, chiefly on the ground that the magnitude of the penalty was entirely out of proportion to the gravity of the offence. The Court is without discretion in this matter and can only affirm or set aside the seizure. It is only the Governor in Council who can grant any relief from any penalty exacted, and any appeal for modification or remission of the penalty should be made to the Governor in Council before whom all the facts may be presented more fully perhaps than they were presented to me. I do not think this is a case where I should intervene with a recommendation for the remission or modification of the penalty.

Judgment will therefore be entered against the *Natalie S.*, and she together with her tackle, rigging, apparel, furniture, stores and cargo, are condemned and declared forfeited to the Crown, and with the usual consequences as to costs.

Judgment accordingly.

BETWEEN:

CYRILLE ROCHON SUPPLIANT;

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April 4, 5,
July 6.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Responsibility—Workmen’s Compensation Act—Application of same to the Crown—Provincial Laws—Exchequer Court Act—“Head of an enterprise”—“Owner of an industry.”

Mullin Brothers, Carters, with whom R. was employed as a teamster, contracted with the Department of Railways and Canals to move a winch weighing between three and four tons from one of their yards in Montreal to the Canal Bank, the loading to be done by the employees of the Department. In the course of moving the same, and when still in the yard, one of the wheels of the float stuck in the ground at a point where a trench had been recently dug and where the earth was accordingly softer, and the winch, by reason of the jerk and of the negligent loading, slid forward crushing R.’s leg, which had later to be amputated. R. recovered a certain sum under the Workmen’s Compensation Act of Quebec as against Mullin Brothers and now sues the Crown for damages alleged due to the negligence of its servants in the performance of their duty. The Crown contended that R. having exercised his recourse against his immediate employers under the said Act, has waived any claim against the Crown and that if any claim ever existed it would be one jointly and severally against the Crown and the employers under the Workmen’s Compensation Act.

Held, that there is no recourse against the Crown for injury to the person, except in cases coming within the ambit of subsection (c) of section 19 of the Exchequer Court Act (R.S.C., 1927, c. 34).

2. That the cause of action having arisen in the Province of Quebec, the case is governed by the laws of that Province.
3. That the provisions of the Workmen’s Compensation Act of Quebec do not apply to the Crown in right of the Dominion of Canada, the legislature of a Province having no authority to pass legislation purporting to modify the liability of the Crown in matters of injury to the person.
4. That even if the said Act did apply to the Crown, suppliant’s act in electing to claim and recover compensation from his employer, under the Act did not deprive him of his recourse against the Crown (respondent).
5. That the Crown, in right of the Dominion of Canada, is not the “head of an enterprise” or “the owner of an industry” within the meaning of subsection 2 of section 22 of 18 Geo. V, c. 79, Quebec.

ACTION by the suppliant to recover from the respondent \$8,180 damages alleged to result from the negligence of a servant of the Crown.

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

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Jean Martineau, K.C., for suppliant.

T. J. Coonan, K.C., and *M. C. Holt* for respondent.

The facts are stated in the reasons for judgment.

ANGERS J., now (July 6, 1932), delivered the following judgment.

The suppliant, by his petition of right, seeks to recover from the respondent the sum of \$8,180 representing damages which he alleges he suffered as the result of an accident.

On the 6th day of March, 1931, the suppliant was employed as teamster by Mullin Brothers, carters, of the city of Montreal.

On the morning of the said date, Rochon received instructions from his employers to take his team, consisting of two horses and a float, to the yard of the Department of Railways and Canals, at the corner of Mill and Riverside streets, in Montreal. Following his instructions the suppliant drove to the yard in question.

A winch, weighing between three and four tons, was loaded on the float by employees or servants of the Crown and the suppliant was instructed by them to take it to the bank of the Lachine canal, near Black Bridge, in Montreal. The winch was loaded on the float at a point indicated by letter A on the plan filed as exhibit 2.

The suppliant drove his float a short distance when the right rear wheel sank two or three inches in the ground. The suppliant however was able to proceed; he had only driven a few feet when his left rear wheel sank. The suppliant, this time, was unable to go any further. The employees of the Department of Railways and Canals were compelled to jack up the float, which was done whilst the suppliant was at lunch.

The suppliant came back after lunch with a second team of horses and a helper. The four horses were hitched to the float and the suppliant proceeded over a distance of 15 or 20 feet when the rear right wheel sank to the nave. As a result the winch slid sideways and forward and the suppliant's right leg was caught between the front skid of the winch and the front of his float and fractured. The suppliant was immediately taken to the hospital where he was under treatment until the 23rd of May, 1931. He had to have his right leg amputated above the knee.

The suppliant, who is 64 years of age, was earning at the time of the accident, a salary averaging \$15 a week.

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The sum of \$8,180 which he claims is made up as follows:	
for complete permanent incapacity.....	\$5,780
for doctor's and hospital bills, medicines and crutches	400
for pain, suffering and inconvenience.....	2,000

In his petition of right the suppliant alleges that, during the Fall of 1930, a trench had been dug by the employees of the Department of Railways and Canals in the said yard and a steam duct laid in the said trench; that the ground was softer where this trench had been dug, but that, as there was still snow and ice in the yard, it was impossible for anyone to know of this state of things, except for the employees in charge of the yard who were aware of the conditions; that this trench had been dug diagonally from right to left across the road in the yard, which explains why the left rear wheel sank about twenty feet before the right rear wheel did; that the accident is due solely to the negligence of the employees of the Department of Railways and Canals in charge of the yard and of the loading of the winch on the float, while engaged in a public work, because:

- (a) they did not securely tie the winch to the float;
- (b) they left a steel pipe, used as a roller, under the winch, thereby allowing it slide more easily;
- (c) they allowed the suppliant, unaware of the conditions, to drive his heavy float over a spot which they knew or should have known to be soft, especially after the float had sunk once before in the trench;
- (d) they took no precaution to prevent the right rear wheel from sinking after the left rear wheel had sunk.

In his statement of defence, the respondent prays acte of the admission that on the day of the accident the suppliant was in the employ of Mullin Brothers as teamster and that he received instructions from them to take his team to the yard of the Department of Railways and Canals where a winch was to be loaded on his float, admits that the accident occurred in the yard belonging to the said Department, denies or ignores the other allegations of the

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petition and especially pleads that the suppliant received his instructions from his employers, who in turn were under contract to remove the winch; that the suppliant recognized that his only recourse was against his employer by accepting payment from the Quebec Workmen's Compensation Commission, which compensation was from time to time paid by his employers; that the claim of the suppliant against his employers, Mullin Brothers, and United Provinces Insurance Company, insurer of said Mullin Brothers, was heard and decided on the 26th day of October, 1931, and suppliant was awarded a sum of \$1,607.31 payable at the rate of \$34.82 per month; that suppliant, in virtue of the Act 18 Geo. V, chapter 79, of the province of Quebec, is deprived of any recourse against third parties; that moreover the respondent was in the position of being the owner of the work employing a sub-contractor whose workman was injured and therefore the only recourse the latter has is under the Workmen's Compensation Act against the employer, the head of the enterprise or the owner.

The issues were joined by suppliant's answer and respondent's joinder of issue.

To have a recourse in damages against the Crown the suppliant must show that his case comes within the ambit of subsection (c) of section 19 of the Exchequer Court Act (R.S.C., 1927, ch. 34), which reads as follows:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

- (a)
- (b)

(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.

To bring the case within the provisions of subsection (c) of section 19 the injury must have been caused:

- (a) upon a public work;
- (b) through the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

That the accident occurred on a public work is established by the admission contained in paragraph 5 of the statement of defence and by the evidence adduced at trial.

The only question which remains to be decided is whether the injury to suppliant was the result of the negligence of

an officer or servant of the Crown acting within the scope of his duties or employment.

The respondent does not dispute the fact that the employees or servants in charge of the yard acted within the scope of their duties when they loaded the winch on the float and gave instructions to the suppliant to take the winch to the canal bank. Lapointe says he was "homme de confiance" in the yard on the day of the accident and was acting under the instructions of the foreman. It seems to me that there can be no doubt in the circumstances that the employees or servants of the Crown acted within the scope of their duties on the day of the accident and that, if the accident was caused by their negligence, the Crown must be held liable therefor.

It has been proven that, during the Fall of 1930, two trenches were dug diagonally across the yard where the accident happened, for the purpose of laying a steam duct. The plan (exhibit 2) indicates by means of a dotted line the position of this duct; it runs from point E to point F, between the blacksmith shop and the heating room, and from point E to point M, between the heating room and the garage. The float coming from a point indicated by letter A on the plan crossed over the trench between points E and F at point B. The rear right wheel sank in the ground a few inches at the point indicated by the letter B. The float proceeded however for a short distance and the left rear wheel sank at the point indicated by letter C on the same plan (exhibit 2). This time the wheel had sunk deeper and the plaintiff was unable to proceed. He went to lunch and came back in the afternoon with another team of horses and a helper. The evidence shows that in the meantime the respondent's employees had succeeded in jacking up the float. The new team of horses was hitched to the float with the other two horses and suppliant again started to drive his float in the direction of the place where the winch had to be carried. The suppliant had only proceeded a few feet when the rear right wheel sank in the ground to a much greater depth; witnesses say that it sank to the nave. As a result the winch moved sideways and forward; the right leg of the suppliant was caught between the front skid of the winch and the front part of the float and fractured.

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It may appear extraordinary that the winch slid forward when it is one of the rear wheels of the float which sank. The explanation given by the suppliant that this movement was caused by the pipe or roller left by the respondent's employees under the winch on the float is quite plausible. There is one thing certain in my mind and that is that the movement of the winch was due to the jerk caused by the sinking of the wheel. The evidence discloses no other cause to which the sliding could be attributed.

Can the respondent be held responsible for the sinking of the wheel and the consequential movement of the winch? Yes, if I come to the conclusion that the sinking and sliding were due to some negligence of the respondent's servants or employees. This is the crucial point which I have to determine. If I find negligence on the part of the defendant's servants or employees, there will remain for me to decide whether the suppliant himself is free of all blame or whether the accident is in part attributable to his negligence. In the latter alternative, I shall have to apportion the responsibility of each of the parties.

The employees of the respondent knew that a trench had been dug during the late Fall of 1930 and they should have known that the ground where the digging had taken place was softer: see the depositions of Fitzpatrick, machinist in charge of the machine shop, and of Lapointe, acting foreman on the day of the accident. The suppliant was not made aware of this fact; he should have been.

The winch was installed on the float and fastened thereto by the respondent's employees; the suppliant had nothing whatever to do with this work: see the depositions of Lapointe, Fitzpatrick and Rochon. A pipe used as a roller was left under the rear part of the winch at the points indicated by an X on the photograph filed as exhibit 3 (depositions of Lapointe and Rochon). It was argued on behalf of the respondent that the movement of the winch may have been due to the jerk caused by the four horses. This might have been the case had the accident occurred immediately when the float started from point C, i.e., the point where the rear left wheel had sunk. But this is not what happened; the rear right wheel sank at point D whilst the float was moving. It seems to me obvious that the jerk was caused by the sinking of the wheel. If there had

been no roller under the winch, it is possible that the jerk would not have caused the winch to slide; what seems probable however is that if it had slid, the sliding would have been backwards and there would have been no accident. Moreover whatever may have been the cause of the sliding of the winch, it could and would have been avoided had the winch been securely fastened to the float.

My conclusion is that the accident resulted from the negligence of the respondent's employees or servants consisting:

1. In not notifying the suppliant that the ground was soft at the points where a trench had been dug;
2. In not loading the winch on the float properly and in leaving under it a pipe or roller which caused it to slide;
3. In not fastening the winch to the float securely so as to prevent it from moving.

See *The King v. Canada Steamship Lines* (1).

See also *The Queen v. Filion* (2).

The suppliant on the other hand had nothing whatever to do with the loading nor the fastening of the winch on the float. His only duty was to drive his float from one point to another in accordance with the instructions given by the respondent's employees. I do not think that he can be held responsible by the fact that a roller was left under the winch or that the winch was not properly fastened to the float, although it might be said that he could have requested the respondent's employees to fasten the winch more securely and to remove the roller on which it rested. I cannot see however how his failure to notice that the roller had been left under the winch or that the winch had not been sufficiently fastened—the proof shows that it had been tied with chains (see deposition of Lapointe)—can constitute a negligence on his part. It has been argued on behalf of the respondent that the suppliant was negligent in standing behind the seat of his float. There is no doubt that the accident would not have occurred had the suppliant been either sitting on or standing in front of the seat of his float. It may be said in his favour that if the winch had been securely fastened it would not have slid and the accident would not have happened. This is no excuse

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(1) (1927) 1 D.L.R. 991.

(2) (1894) 4 Ex. C.R. 134 and
(1895) 24 S.C.R. 482.

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however for putting himself in a position which could be dangerous and which in fact proved to be dangerous. The suppliant is not entirely blameless and I think that in all fairness I can fix his liability at 25 per cent. The apportionment of the responsibility always offers some difficulty. Taking into consideration all the circumstances of the case, I believe that justice will be done if I decide that the damages shall be borne in the proportion of $\frac{3}{4}$ and $\frac{1}{4}$, three-fourths by the respondent and one-fourth by the suppliant.

The cause of action arose in the province of Quebec and the case is governed by the laws of that province: *The King v. Desrosiers* (1); *The King v. Armstrong* (2); *Sabourin v. The King* (3); *Lapointe v. The King* (4); *Nichols Chemicals Co. v. Lefebvre* (5).

It has been urged on behalf of the respondent that the suppliant, having exercised his recourse against his employers under the Workmen's Compensation Act of the province of Quebec (18 Geo. V, ch. 79), has thereby waived any claim he may have had against the Crown. It has been further contended that the suppliant's only recourse against the Crown, if there was any, was governed by section 21 of the Workmen's Compensation Act and that the suppliant should have enforced his claim both against the Crown and his employers, jointly and severally, under the provisions of said section. I cannot agree with either of these contentions. The legislature of a province has no authority to adopt legislation purporting to modify the liability of the Crown in such matters. There is no recourse against the Crown for injury to the person except in cases which come within the ambit of subsection (c) of section 19 of chap. 34 of the Revised Statutes of Canada, 1927, i.e., the Exchequer Court Act; the text of subsection (c) is quite clear and moreover there are numerous decisions to that effect, among which I may cite the following: *Joubert v. The King* (6); *Legault v. The King* (7); *Johnson v. The King* (8); *Manseau v. The King* (9).

See also *Fort Francis Pulp and Paper Co. v. Spanish Pulp and Paper Co.* (10), in which it was held that, where

(1) (1908) 41 S.C.R. 71.

(2) (1908) 40 S.C.R. 229.

(3) (1911) 13 Ex. C.R. 341.

(4) (1913) 14 Ex. C.R. 219.

(5) (1909) 42 S.C.R. 402.

(6) (1931) Ex. C.R. 113.

(7) (1931) Ex. C.R. 167.

(8) (1931) Ex. C.R. 163.

(9) (1923) Ex. C.R. 21.

(10) (1931) 2 D.L.R. 97.

a liability not existing at common law is created by statute and the statute provides a remedy, such remedy must be followed.

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But even if I came to the conclusion that the Workmen's Compensation Act does apply to the Crown, I would still see no foundation in the respondent's contention that the suppliant, having elected to claim and recover compensation from his employers under the Act, has thereby lost his recourse against the respondent. Subsection 2 of section 22 of the Act reads as follows:

1.

2. Apart from the rights granted under this act, the injured person or his representatives shall retain, against the authors of the accident, other than the employer or the head of the enterprise or the owner of the industry or his servants or agents, the right to claim compensation for the damage caused, in accordance with the rules of common law.

Subsection 3 of section 22 confers upon the employer the right of action against the third party responsible for the accident, in the event of the victim neglecting to exercise this right. I cannot, in the circumstances obtaining, consider the Crown as the "head of an enterprise" or "the owner of an industry," within the meaning of subsection 2 of section 22 above cited.

No jurisprudence was cited at hearing by either side; I must say that I found only one decision to the point, that is the one rendered by the Supreme Court of Canada in *Ryder v. The King* (1) where it was held that the Manitoba Workmen's Compensation Act does not apply to the Crown.

The case of *The Ship Catala & Martha Dagsland* (2) offers no similarity, inasmuch as the Crown was not a party to the suit and moreover the defendant in the action taken before this Court was the same party against whom the widow of the victim had exercised her recourse under the Workmen's Compensation Act of the province of British Columbia. In the case of *McClenaghan v. City of Edmonton* (3), in which also the Crown was not a party, it was held that an employee who has exercised his recourse against his employer under the Workmen's Compensation Act of Alberta (Accident Fund, R.S.A., 1922, ch. 177) cannot bring any action against other parties under the common law. This case is distinguishable from the present

(1) (1905) 36 S.C.R. 462.

(2) (1928) Ex. C.R. 83.

(3) (1926) 1 D.L.R. 1042.

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one: as already stated, the Crown was not a party to the action; furthermore the Workmen's Compensation Act of Alberta contains no clause similar to subsection 2 of section 22 of the Quebec Compensation Act.

The fact that the suppliant exercised his recourse against his employers, under the Workmen's Compensation Act of Quebec as he did (see exhibits D, E and F), does not, in my opinion, deprive him of his right of action against the Crown, if such right exists under the provisions of subsection (c) of section 19 of the Exchequer Court Act.

It was further argued that the contractual relationship between the Crown and the employers (Mullin Brothers) deprived the suppliant of his recourse against the respondent. I must admit that I fail to see on what basis the respondent rests this contention. Moreover I must say that there is no proof of any contractual relation between the Crown and Mullin Brothers: see deposition of Michael Mullin. This last argument invoked by counsel for the respondent is unfounded both in fact and in law.

I must now proceed to determine the amount of the damages.

At the time of the accident the suppliant was earning an average of \$15 a week. His total temporary disability lasted six months according to the reports of Doctor Demers (exhibits A and B). On this account the suppliant would be entitled to \$390 representing loss of wages for 26 weeks at the rate of \$15 a week.

Doctor Demers, at the trial, fixed the suppliant's partial permanent incapacity at 80 per cent. In his reports he estimated it at 50 per cent. He states in his first report that, if the victim had accepted the amputation when it was first suggested to him, he would have suffered a permanent disability of 44 per cent, but that the delay caused by his refusal to submit to an operation necessitated the amputation of the leg above the knee and that the permanent disability was thereby increased to 50 per cent. I do not think that the suppliant can be blamed for having delayed the amputation in the hope of saving his leg and I adopt the figure of 50 per cent as representing the partial permanent incapacity which the suppliant is suffering as a result of the accident. The figure of 80 per cent mentioned by Doctor Demers at the trial seems to me exagger-

ated. Considering the age of the suppliant, his expectancy of life, the nature of his employment, the wages he was earning, the possibility of unemployment, I consider that a sum of \$3,500 will be a fair compensation for the partial permanent disability.

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The suppliant is claiming \$400 for doctor's fees and hospital charges. The account filed as exhibit 7 shows a total of \$522.25. The suppliant is entitled to the amount of \$400.

The suppliant further claims a sum of \$2,000 for pain, suffering and inconvenience; I think that a sum of \$500 will be a fair and sufficient award on this ground.

The sums of \$390, \$3,500, \$400 and \$500 form a total of \$4,790 representing the damages suffered by the suppliant as a result of the accident.

As I have reached the conclusion that both parties were at fault, the proportion of the suppliant's negligence being fixed at 25 per cent, the above mentioned amount shall be reduced accordingly. The suppliant is accordingly entitled to recover from the respondent the sum of \$3,592.50.

There will be judgment in favour of the suppliant against the respondent for \$3,592.50 and costs.

Judgment accordingly.

HIS MAJESTY THE KING..... PLAINTIFF;
AND
CAPITAL BREWING COMPANY LIM- }
ITED } DEFENDANT.

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Contract—Crown—Leasehold—Interpretation—Estoppel

After expropriation of its property by the Crown in 1912 the Capital Brewing Company remained in occupation at a yearly rental of \$11,292.60 fixed by the judgment. In 1918 the rental was reduced to \$5,000, at the request of the defendant, owing to the enactment of the Ontario Temperance Act, one of the conditions of the lease being that "Should the Legislature of the Province of Ontario pass any Act amending or repealing the Ontario Temperance Act . . . so as to allow or facilitate the manufacture or sale of the products manufactured by the said Lessee, the Lessor shall have the right to increase the rent hereby reserved to the sum of Eleven Thousand Two Hundred and Ninety-Two Dollars and Sixty Cents (\$11,292.60) per annum," etc. At the expiry of this lease a new one was made at \$8,000 a year rental, with the same condition. On the termination of this lease the company continued in occupation, becoming a yearly

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tenant. The next year the Ontario Liquor Control Act came into force and the Crown increased the rent under the above mentioned condition.

- Held*, that from a comparison of the provisions of the two Acts, and the Regulations, the sale of the company's products was "facilitated" by the repeal of the Ontario Temperance Act and the enactment of the Ontario Liquor Control Act within the meaning of the provisions of the lease, and the defendant having failed to establish the contrary, the Crown was entitled to the increased rent under the lease, from the date claimed.
2. That the letter of the Chief Architect of the 13th June, 1927, that the rent would be increased pursuant to provision in the lease, being on instruction of the Deputy Minister, was a sufficient and valid notice to defendant, more especially as the defendant did not at the time question his authority but claimed that the change in the law did not facilitate the sale of its goods, and by reason thereof and of the correspondence and parleys had, the defendant is now estopped from raising such objection, and the action must be decided on the meaning of the lease and the effect of the change in the liquor laws.
  3. That even though the Crown had negotiated with the company, it could not be said to have abandoned its right to claim increased rent—negotiations being under reserve of all rights.
  4. That the Crown is not estopped by any statement of facts or any opinions set out in any departmental report or letter by any of its officers or servants.

INFORMATION exhibited by the Attorney-General of Canada to recover from the defendant \$13,478.56 balance of the rent of premises leased by the plaintiff to the defendant.

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

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

*J. Shirley Denison, K.C.*, and *A. M. Latchford* for defendant.

The facts are fully stated in the Reasons for Judgment.

ANGERS J., now (May 30, 1932), delivered the following judgment.

His Majesty the King, on the information of the Attorney-General of Canada, claims from the Capital Brewing Company Limited the sum of \$13,478.56 with interest representing a balance allegedly due on the rental of certain lands and premises situate on Wellington street, in the city of Ottawa, for a period of four years and seventy-one days extending from the first day of June, 1927, to the tenth day of August, 1931. This sum is made up of the difference



between a rental at the rate of \$11,292.60 per annum and a yearly rental of \$8,000.

On the 9th day of March, 1912, the plaintiff, under the provisions of Section (3) of the Expropriation Act, Chapter 143 of the Revised Statutes of Canada, 1906, expropriated the right, title and interest of the defendant in certain lands and premises situate in the city of Ottawa, fronting on Wellington street, and described at length in the information, and in the plant used in connection with the brewing business carried on by the defendant upon the said lands and premises.

Thereafter proceedings were instituted before this Court for the purpose of determining the compensation which the defendant was entitled to receive for the said lands, premises and plant and, by a judgment rendered on the 10th day of August, 1914, the amount of said compensation was fixed at \$233,852.83.

By the said judgment it was further adjudged that His Majesty the King was entitled to recover from the defendant a yearly rental for the said lands, premises and plant at the rate of five per cent on the said sum of \$233,852.83 or the annual sum of \$11,692.60 from the 9th day of March, 1912, to the date of the judgment.

The defendant occupied all the lands, premises and plant expropriated with the exception of lot number One (1) located on the east side of Bay street and the annual rental was accordingly reduced from \$11,692.60 to \$11,292.60.

On the 16th day of September, 1916, the Ontario Temperance Act (S.O. 1916, chapter 50) came into force.

The defendant having represented to the Government that the Ontario Temperance Act considerably curtailed the output of its products and that \$5,000 a year was the outside limit it could in the future afford to pay as rental, an Order in Council (exhibit A) was passed and approved by His Excellency the Governor General on the 28th day of December, 1916, giving authority to the Minister of Public Works, under Section 34 of the Expropriation Act (R.S.C., 1906, ch. 143), to lease to the defendant for a term of five years from the 10th day of August, 1916, at an annual rental of \$5,000 all the lands and premises expropriated, with the exception of lot number One (1) aforesaid.

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The lease made pursuant to this Order in Council, a duplicate whereof was filed as exhibit B, was signed on the 18th day of January, 1918; it contains the following clause:

3. Should the Legislature of the Province of Ontario pass any act amending or repealing the Ontario Temperance Act, Chapter 50 of Provincial Statutes of Ontario, 1916, so as to allow or facilitate the manufacture or sale of the products manufactured by the said Lessee, the Lessor shall have the right to increase the rent hereby reserved to the sum of eleven thousand, two hundred and ninety-two dollars and sixty cents (\$11,292.60) per annum or to any such figure which may then be agreed upon by the parties to these presents, the increased rental to become due from the date the said act is repealed or the amending act is passed and goes into effect whichever first happens.

The defendant having, at the expiry of this lease, applied for a renewal thereof for another term of five years from the 10th day of August, 1921, and having offered to pay a rental of \$8,000 a year, an Order in Council was passed and approved by His Excellency the Governor General on the 29th day of June, 1922, authorizing the renewal of the lease for the said term at the annual rental aforementioned; a certified copy of the Order in Council was filed as exhibit 1.

A new lease was accordingly executed on the 27th day of July, 1922 (exhibit 2); it contains the same clause as the previous lease concerning the right for the lessor to increase the rent to \$11,292.60 in the event of the passing of an act repealing or amending the Ontario Temperance Act so as to allow or facilitate the manufacture or sale of the defendant's products.

This second lease expired on the 10th day of August, 1926. The lessee was allowed to continue to occupy and it did occupy the said lands, premises and plant after the said date, as a yearly tenant, at the annual rental of \$8,000.

On the first day of June, 1927, the Liquor Control Act came into force and the Ontario Temperance Act and the Amendments thereto were repealed as from that date.

On the 13th day of June, 1927, one T. W. Fuller, assistant chief architect in the Department of Public Works, acting under the authority of the Minister of Public Works (See memorandum exhibit 7), wrote to the defendant the following letter (exhibit 3):

Your Company leases from the Crown land and premises at the corner of Wellington and Bay streets, Ottawa, for use as a brewery. The lease covered a five year period from 10th August, 1921, to 10th August,

1926, and since the latter date you have been a yearly tenant on same terms. The lease contains the following clause:—

“Should the Legislature of the Province of Ontario pass any act amending or repealing the Ontario Temperance Act, Chapter 50 of Provincial Statutes of Ontario, 1916, so as to allow or facilitate the manufacture or sale of the products manufactured by the said Lessee, the Lessor shall have the right to increase the rent hereby reserved to the sum of eleven thousand two hundred and ninety-two dollars and sixty cents (\$11,292.60) per annum or to any such figure which may then be agreed upon by the parties to these presents, the increased rental to become due from the date the said act is repealed or the amending act is passed and goes into effect whichever first happens.”

As the Ontario Temperance Act has been repealed, your Company according to the above quoted clause is liable for rental from 1st June, 1927, at the annual rate of \$11,292.60.

The following day the defendant replied to Fuller as follows (exhibit J):

With reference to yours of the 13th inst. we beg to say that the new enactment by the Legislature of the Province of Ontario by no means allows or facilitates the manufacture or sale of our products as before the passing of the Ontario Temperance Act in 1916.

On the other hand it curtails our production at least seventy-five per cent of the output in the Province as at that date.

Hence, in all fairness the rental should not be increased on those grounds.

There followed an exchange of letters between Mr. Edward J. Daly, then solicitor for the Capital Brewing Company, and said Fuller (exhibits K (1), K (2) and K (3) ) regarding the proposed increase of the rental and following an interview between Mr. Daly and the Deputy Minister of Public Works, the assistant chief architect wrote to Mr. Daly on the 6th day of October, 1927, a letter which reads as follows (exhibit K (4) ):

With reference to your interview on the 3rd instant with Mr. J. B. Hunter, Deputy Minister of the Public Works regarding the rental of the above mentioned premises, I am directed to advise you that the present annual rental of \$8,000 is to remain in force until June 1, 1928, on which date you will furnish the Department with certain facts and figures pertaining to the business of the Company. The adjustment of the rental and proposed increase to \$11,292.60 will then be taken up, it being understood, *that any change or increase in the rental is to be retroactive to June 1, 1927, upon which date the Ontario Temperance Act was repealed.*

The defendant failed to furnish the Department of Public Works with the facts and figures pertaining to its business in compliance with the request contained in the letter exhibit K (4).

The matter was apparently left in abeyance until the 4th of July, 1929, when the chief architect of the Depart-

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ment of Public Works wrote to the defendant a letter, the second paragraph whereof reads as follows (exhibit L):

You will note that your Company was to furnish this Department with certain facts and figures pertaining to the business of the Company. These have never been received and I would request that you give this matter your immediate attention in order that the adjustment of rental from June 1, 1927, can be arrived at. Unless this is done the Department will understand that you acquiesce to the rental being \$11,292.60 as from June 1, 1927.

Naismith, managing director of the Capital Brewing Company Limited, heard as a witness on behalf of defendant, suggested an interview; this was agreed to but, for a reason or another not disclosed in the evidence, the interview did not take place until the 4th of November, 1929. On that date Naismith called at the Department of Public Works with certain statements, but no decision was reached. The memorandum for the chief architect from one Rogers in charge of leases for the Department of Public Works, filed as exhibit O, states that the defendant company was to advise the Department of its intention. The deposition of Naismith on this point is to the same effect (page 10):

Then it appears from Exhibit "O" that on November 4, 1929, the Manager of the Company called at the Department with statements, etc., but no decision regarding the increased rental was arrived at. The memorandum states that the company are to advise as to what they intend to do. Have you any recollection of this interview on the 4th November and if so please say what was done about the matter?

A. That would be the occasion on which Mr. Fuller said "make us an offer."

Q. You were evidently discussing facts and figures?

A. Yes, and when parting he said make us an offer.

No offer was made, notwithstanding Naismith's statement to the contrary (page 13):

Q. And you told us that at your final interview Mr. Fuller said "make us an offer?"

A. Yes.

Q. Did you?

A. Yes.

Q. Where is it?

A. It is Exhibit "J."

Exhibit J is a letter from defendant to Fuller; it contains no offer; it merely says that the rental should not be increased. Surely this cannot be construed as an offer. Moreover the letter is dated the 14th of June, 1927. The interview at which Naismith was asked to make an offer took place on the 4th day of November following.

On December 11, 1929, the defendant wrote a long letter to the chief architect: it sets forth at length the reasons why, in the writer's opinion, the rental should not be increased. These reasons I shall examine later on.

There seems to have been nothing further done in the matter until November 17, 1930, when the chief architect wrote to the defendant saying that the latter had not made out a case, in its letter of December 11, 1929 (exhibit P), "why the terms of the Court Order should not be insisted upon" and calling upon the defendant to pay the arrears of rental in accordance with the letter of June 13, 1927. As far as the evidence shows, this letter was not acted upon and the matter was allowed to remain in abeyance until March 4, 1931. I am not overlooking a letter dated January 13, 1931 (on a printed form) from the chief accountant of the Department of Public Works to the defendant, filed as exhibit R, stating that the rent was paid up to the 10th of November, 1930, and omitting to mention any arrears. This letter, in my opinion, cannot be construed as a waiver on the part of the Crown to claim from the defendant the increased rental as from the 1st day of June, 1927, in accordance with the terms of the letter of June 13, 1927. *Genelle v. The King* (1).

On the 4th day of March, 1931, the solicitor for the defendant wrote to the Deputy Minister of Public Works enclosing a memorandum setting out the reasons why the rental should not be increased: the letter and memorandum were filed as exhibit S. This letter brought a reply from the Deputy Minister, dated the 10th of March, 1931 (exhibit T); stating that this memorandum was but a rearrangement of the argument set out in a previous letter (evidently the letter exhibit P) and that the matter being in the hands of the Department of Justice, he was sending them the letter and memorandum with a copy of his reply.

On the 23rd day of March, 1931, the Deputy Minister of Justice wrote to the defendant claiming immediate payment of the balance due on account of rental at the rate of \$11,292.60 a year as from the 1st day of June, 1927, and adding that, unless compliance was made with this request, it would become necessary to institute an action to recover the amount owing: see exhibit U.

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(1) (1907) 10 Ex. C.R. 427 at p. 442.  
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On the 5th day of June, 1931, a notice was served on the defendant, signed by the Deputy Minister of Public Works, notifying the defendant that the lessor increased the rent reserved by the lease to the sum of \$11,292.60 from the 1st day of June, 1927, as in the said lease provided. The notice in question and an affidavit of service of the same upon the defendant were filed as exhibit 4. This notice was apparently a sequel to a letter (exhibit 6) sent by defendant to the Minister of Public Works the previous day notifying him that it intended to vacate the lands, premises and plant leased and to give possession thereof to the lessor as of the 10th day of August, 1931.

On June 12, 1931, the solicitor for the defendant wrote to the Deputy Minister of Public Works acknowledging receipt of the notice and setting forth that it was late and that the defendant had been prejudiced by the delay.

On the following day, the Deputy Minister of Public Works replied that the notice had been signed by him at the request of the Agent of the Department of Justice and that he was forwarding a copy of the letter to the Deputy Minister of Justice together with a copy of his reply.

This completes the review of the letters, memoranda and notices of record and the recital of the facts revealed by the documentary evidence, which may have some bearing on the issues. The letters which I omitted to mention are, in my opinion, either immaterial or irrelevant or both.

Proceedings were commenced on the 30th day of June, 1931. The defendant gave up possession of the lands, premises and plant leased on or about the 10th day of August, 1931.

Plaintiff submits that by the repeal of the Ontario Temperance Act and the enactment of the Liquor Control Act the manufacture or sale of the defendant's products are facilitated and, relying on clause 3 of the lease, contends that he is entitled to claim rental at the rate of \$11,292.60 a year as from the first day of June, 1927.

The defendant, on the other hand, submits:

(a) that, when the judgment fixing the rental of the lands, premises and plant expropriated at \$11,292.60 a year was rendered, there was in force in Ontario an Act respecting the sale of Fermented or Spirituous Liquors, which in 1914 became part of the Revised Statutes of Ontario, 1914,

as chapter 215, and that under the said act the sale of intoxicating liquors was permitted throughout the province of Ontario by all persons licensed for that purpose; that the premises then and since occupied by the defendant consisted of a brewery in operation and that the sales which the defendant made within the province of Ontario from 1912 to 1916 resulted in considerable profit to it;

(b) that as a consequence of the enactment of the Ontario Temperance Act in 1916 the defendant's previously profitable business in Ontario was brought to an end and on that account the rental was reduced by agreement to \$5,000 a year and a lease was passed on the 18th day of January, 1918, by which the property was demised to the defendant for a period of five years from the 10th day of August, 1916, at that figure; that the lease having terminated on the 10th day of August, 1921, another lease was executed on the 27th day of July, 1922, whereby the property was demised to the defendant for a further period of five years from the 10th day of August, 1921, at an annual rental of \$8,000;

(c) that by the repeal of the Ontario Temperance Act the manufacture or sale of the defendant's products, upon a true interpretation of the Liquor Control Act and according to the actual results obtained, were not allowed or facilitated in the ordinary meaning of the words, nor in the sense in which the terms had been employed between the parties when the lease was executed, but that such manufacture and sale were still prohibited;

(d) that the letter of the assistant chief architect of the Department of Public Works to the defendant of the 13th of June, 1927, did not constitute a notice in the terms of the clause contained in the lease and that it could not have any effect in increasing the rental from the sum of \$8,000 agreed upon to the sum of \$11,292.60 and that from the time of proclamation of the Liquor Control Act in 1927 until the 4th day of June, 1931, the plaintiff never exercised any right, if such right existed, to increase the rental;

(e) that, instead of electing to claim \$11,292.60 prior to the 4th day of June, 1921, the plaintiff elected to negotiate with the defendant with a view to endeavouring to agree upon a different rental, and that, the parties having failed to reach an agreement, the only rent exigible is the one fixed by the lease;

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(f) that the notice of the 4th of June, 1931, was given at a time when the parties had arranged to terminate the tenancy existing between them and that the plaintiff had no right by virtue of any notice then given to increase the rental because he had already elected not to do so except by mutual agreement and also because the time for giving such notice had elapsed.

As submitted by the defendant, when the judgment of the 10th of August, 1914, was rendered, there was in force in Ontario an act respecting the sale of Fermented or Spirituous Liquors. Under that Act the sale of intoxicating liquors was permitted by persons duly licensed for that purpose. The defendant operated a brewery and according to the testimony of Naismith, its managing director, the business was a profitable one; Naismith's evidence being uncontradicted, I must assume this to be true.

The defendant submits that, as a consequence of the enactment of the Ontario Temperance Act in 1916, its business, hitherto profitable in Ontario, was brought to an end and that on account of this the rental was reduced to \$5,000 a year. To say that the defendant's business in Ontario was annihilated is perhaps somewhat of an exaggeration but there is no doubt that the business was very considerably curtailed. For this reason the Crown agreed to give the defendant a lease for a period of five years at a reduced rental of \$5,000 a year: see Order in Council exhibit A.

I may note here that counsel for plaintiff objected to the filing of documents prior to the lease of the 27th of July, 1922; I allowed the production subject to the objection. I may say that after due consideration the objection appears to me unfounded. In the first place, the information itself refers to the proceedings in expropriation dating back to 1912 and to the judgment of the 10th of August, 1914, fixing the amount of the compensation as well as the yearly rental. Then the Order in Council (exhibit 1), on the strength of which the second lease was made, recites at some length the circumstances and conditions in which the expropriation was carried on and a first lease given to the defendant; this alone would warrant the admission of the evidence objected to. In addition to this, there is the long continued relationship between the parties as lessor and



lessee dating back to the time of the expropriation which cannot be overlooked. The facts disclosed by the documentary evidence adduced in this connection constitute surrounding circumstances apt to help in interpreting the clause dealing with the increase of the rental; for this additional reason I would feel justified in dismissing the objection and allowing the proof to remain in the record: see *Lamb v. Evans* (1); *The King v. Peat Fuels Limited* (2).

As already mentioned, the lease of the 18th of January, 1918, was followed by another one bearing date the 27th of July, 1922, for a further term of five years reckoning from the 10th day of August, 1921, at an increased rental of \$8,000 per annum. When this second lease expired, the defendant was allowed to continue to occupy the premises as a yearly tenant at the same annual rental of \$8,000.

During the occupancy of the premises by defendant as a yearly tenant, to wit on the first day of June, 1927, the Ontario Temperance Act was repealed and the Liquor Control Act came into force.

The defendant contends that the repeal of the Ontario Temperance Act and the enactment of the Liquor Control Act did not allow or facilitate the manufacture or sale of its products in the ordinary meaning of the words nor in the sense in which the terms had been used between the parties when the lease was executed, but that such manufacture and sale were still prohibited. This is the main, not to say the only, question to which narrows down the whole case. Before trying to solve this question however, I shall deal briefly with a few points of minor importance raised by the defence.

The defendant claims that the letter sent by the assistant chief architect of the Department of Public Works dated the 13th of June, 1927, does not constitute a proper notice to increase the rental from \$8,000 to \$11,292.60 a year and that, if the plaintiff had the right to so increase the rental, which is denied, the latter never exercised such right until the 4th day of June, 1931, when he caused a notice to be served upon the defendant; this is the notice exhibit 4. I must say that I cannot adopt this view. The assistant chief architect in writing to the defendant on the 13th of June, 1927, the letter filed as exhibit 3, did so on

(1). (1893) 1 Ch. D., 218, at p. 230. (2). (1930) Ex. C.R. 188, at p. 192.

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the instructions of the Deputy Minister of Public Works: see exhibit 7. The defendant did not challenge the authority of the assistant chief architect when it received the letter, exhibit 3, but merely averred that the new enactment did not by any means allow or facilitate the manufacture or sale of the defendant's products. And in the correspondence and interviews that followed, the defendant never invoked the lack of authority of the assistant chief architect to write the letter in question. The argument raised against the validity of the letter of the 13th of June, 1927, as a notice is the result of an afterthought brought about by the notice of the 4th of June, 1931, (exhibit 4), which, in my opinion, was unnecessary and even useless, except perhaps in so far as it put an end to the negotiations carried on between the parties with the object of agreeing, if possible, upon a different rental. The letter of the 13th of June, 1927, constituted a sufficient and valid notice of the plaintiff's decision to raise the rental to \$11,292.60, taking for granted that the plaintiff had the right to do it. I shall examine this question in a moment.

The defendant's contention that the plaintiff in electing to negotiate with the defendant abandoned his right to claim an increased rental appears to me entirely unfounded. The negotiations which took place between the plaintiff and the defendant were carried on under reserve of the parties' respective rights just as the rental at the rate of \$8,000 a year was paid and accepted without prejudice: see exhibit K, letter dated October 6, 1927. The cases of *Scarff v. Jardine* (1); *The King v. Paulson* (2), and *Hutchison v. Paxton* (3), cited by counsel for defendant, do not apply.

I may add here that the Crown is not estopped by any statement of facts or any opinions set out in any departmental report or letter by any of its officers or servants: *Robert v. The King* (4); *The King v. Dominion Building Corporation*, Supreme Court of Canada, March 15, 1932, unreported.

As to the last argument set forth by the defendant that the notice of the 4th of June, 1931, was tardy and that the

- (1) (1882) 7 App. Cas. 345, at p. 361.      (3) (1928) 62 O.L.R. 65.  
 (2) (1915) 52 S.C.R. 317 and      (4) (1904) 9 Ex. C.R. 22.  
 1921 L.R. App. Cas. 271.

plaintiff had no right in virtue of a notice then given to increase the rental because he had already elected not to do so and because the time to give such notice had elapsed, I have already disposed of it in dealing with the letter of the 13th of June, 1927. If no notice had been given of the plaintiff's intention to increase the rental, previous to the 4th of June, 1931, I doubt very much whether a notice given on that date could have had a retroactive effect; I rather feel inclined to say that it could not. But, as I have already said, the letter of the 13th of June, 1927, sent by the assistant chief architect, acting on the instructions of the Deputy Minister, was a formal and valid notification of the plaintiff's intention to claim the rental as from the first of June, 1927, at the rate of \$11,292.60.

The notice of the 13th of June, 1927, always remained in full force and, by the correspondence, interviews and parleys which followed, no rights were abandoned or waived either by the plaintiff or by the defendant.

Having reached this conclusion, there only remains for me to consider the question as to whether the manufacture or sale of the defendant's products was facilitated or not by the repeal of the Ontario Temperance Act and its replacement by the Liquor Control Act. I am purposely leaving out the word "allowed," inasmuch as the sale of the defendant's products was never entirely prohibited in the province of Ontario, if on the other hand it was noticeably restricted.

The case even narrows down to a finer point: I am only concerned with the facilitation of the sale, seeing that the Ontario Temperance Act and the Liquor Control Act never prohibited the manufacture of the defendant's products.

The whole case hinges on the interpretation of the clause hereinabove cited. It is clear and precise; it offers no ambiguity. It must be interpreted according to the ordinary meaning of the words. If the sale of the defendant's products was facilitated by the repeal of the Ontario Temperance Act and the enactment of the Liquor Control Act, the plaintiff is entitled to claim the additional rental which he seeks to recover by his action. "Facilitate" is a common word, frequently used and whose meaning is well known; it is hardly necessary to insist, but I may note the following definitions:

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In Murray's Oxford Dictionary, vol. 4, p. 10; Facilitate: To render easier the performance of an action, the attainment of a result; to afford facilities for; promote; help forward an action or process;

In the Imperial Dictionary, vol. 2, p. 236, Facilitate: To make easy or less difficult; to free from difficulty or impediment or to diminish it.

If I reach the conclusion that the sale of defendant's products has been rendered easier or less difficult or that the difficulties or impediments surrounding it have been removed or even diminished, I must find that the clause under dispute is applicable and hold that the claim for the increased rental as from the first day of June, 1927, is justified.

One must not overlook the fact that the rent had been fixed by the judgment at \$11,292.60 (\$11,692.60 including lot no. 1) per annum and the plaintiff could have claimed that amount during the whole period of the occupation by the defendant of the lands, premises and plant leased, had he chosen so to do. The rent was reduced to \$5,000 a year from the 10th day of August, 1916, to the 10th day of August, 1921, and then fixed at \$8,000 a year for the following five years by the Crown of its own free will and accord, at the request of the defendant. The Crown was in no way bound to grant a reduction of the rental as it did. It is true, on the other hand, that the defendant was under no obligation to remain in the expropriated premises and it is quite possible that, if the Crown had insisted upon keeping the rental at the figure fixed by the judgment, the defendant would have elected to move out. However the Crown consented to set the rental at \$5,000 per annum for a term of five years and at \$8,000 per annum for an additional similar term and it became bound by the leases entered into with the defendant. The Court must therefore be governed by clause 3 of the lease.

It has been argued on behalf of plaintiff that the lease and particularly the clause with respect to the legislation must be interpreted in accordance with the law in force at the time the lease was made and that accordingly, when this clause provides, as it does, that, if there should be legislation repealing or amending the Ontario Temperance Act so as to facilitate the sale of the lessee's products, it must

be construed as meaning the sale of the lessee's products which the lessee, at the time of the lease, could lawfully sell and that it has no relation to the products which the lessee had the right to sell under the Liquor License Act; I quite agree with this proposition. Counsel for plaintiff cited in support of his contention several decisions, among which I may note the following: *Newington Local Board v. Cottingham Local Board*. (1).

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To determine whether the sale of the defendant's products was facilitated by the repeal of the Ontario Temperance Act and the enactment of the Liquor Control Act, I must primarily be guided by the provisions of the two Acts and the rules and regulations pursuant thereto and secondarily by the evidence adduced at trial.

Under the Ontario Temperance Act, a brewer could only sell his products, in the province of Ontario, to a licensed vendor. He could sell his products to any person in another province or in a foreign country.

The licensed vendor could only sell to persons holding a prescription from a duly qualified medical practitioner, in quantities not exceeding one dozen bottles containing not more than three half pints each at any one time for strictly medicinal purposes. Taking for granted that the law was applied and that prescriptions were only issued for medicinal purposes, the sale of beer—I shall use the word beer to mean all the products of a brewery, including ale and porter as well as beer—was very rigidly controlled and restricted in the province of Ontario under the Ontario Temperance Act.

See 6 Geo. V, chap. 50, section 51, subsection (a).

The patient, if I may so call the purchaser, was entitled to only one dozen bottles at any one time. When his supply was exhausted, if he still needed another dozen for medicinal purposes, he was compelled to obtain another prescription.

There was no tariff for prescriptions; prices ranged from \$1 up, varying probably with the degree of seriousness of the ailment of the client. Besides constituting an inconvenience, the necessity of a prescription for every dozen of bottles of beer increased the price of the beverage or medicine considerably.

(1) (1879) L.R. 12 Ch. Div. 725.

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Under the Liquor Control Act, the brewer, who has a licence, is authorized to keep for sale and to sell beer, either personally or through a duly appointed agent, to the Liquor Control Board of Ontario or to deliver beer, on the order of the Board or of a vendor, to any person who is the holder of a permit to purchase beer under the Act: 17 Geo. V, chap. 70, section 45.

Any person who is the holder of a permit may buy from one of the stores of the Board or from a brewery or brewery warehouse on the order of the Board or of a vendor, under the supervision of an inspector of the Board, the quantity of beer he may desire, not exceeding however ten dozen quarts or one-half barrel at a time: 17 Geo. V, chap. 70, section 37; instructions to inspectors, exhibit Z2; circular letter to vendors and inspectors No. 333 included in exhibit Z4.

The fee for a permit for the purchase of liquor, including beer and wine, was fixed at \$2 a year (Regulation 31, 1927). Under the regulations of 1931, the fee for a permit for liquor was still \$2 a year, but a special permit for the purchase of beer and wine was issued for a fee of \$1. (Regulation 12, 1931.) See exhibits Z and Z1.

It is obvious that the purchase of beer is much less difficult under the Liquor Control Act than it was under the Ontario Temperance Act. The facilitation of the sale to the public cannot but be profitable to the brewer.

It has been argued on behalf of defendant that the enactment of the Liquor Control Act has not brought back the conditions prevailing under the Liquor Licence Act. That is most likely, but it is quite immaterial. The clause in the lease does not say that the plaintiff shall be entitled to raise the rental in case the Ontario Temperance Act is repealed or amended so as to revive the conditions prevailing under the Liquor Licence Act but merely so as to facilitate the sale of beer. As I have said, I have reached the conclusion that the sale of beer has been facilitated to a large extent by the repeal of the Ontario Temperance Act and the enactment of the Liquor Control Act. The Ontario Temperance Act was a prohibitive law in the full sense of the word; liquor, beer and wine could only be bought for strictly medicinal purposes, in small quantities, at a high cost. The Liquor Control Act, although its main

object is to control the sale of liquor, beer and wine, is a permissive act. It allows the sale of liquor, wine and beer to holders of permits costing a trifle, in sufficiently large quantities, without the necessity of a prescription; it aims only at restraining abuses. Any holder of a permit is able under the new act to obtain as much liquor, wine or beer as he may need, without having to go to a physician for a prescription. Under the Liquor Control Act, beer is considered rightly as a beverage, not as a medicinal preparation. The purchase of beer under the new act is undoubtedly easier than under the old one. There is no need to say that what facilitates the purchase facilitates the sale *ipso facto*.

I said that in deciding the question as to whether the sale of the defendant's products has been facilitated by the new legislation, I would be guided primarily by the comparison of the two acts and secondarily by the proof of record. I must say that the evidence adduced on the part of defendant is not very convincing. I am only concerned with the sales within the limits of the province of Ontario; neither the Ontario Temperance nor the Liquor Control Acts interfered with the export—and by export I mean the sales for consumption outside of the province of Ontario—of the defendant's products. As to the sales in Ontario, I expected the defendant would produce witnesses from other breweries in Ontario to show how their sales in the years posterior to the repeal of the Ontario Temperance Act compared with their sales in the years prior thereto. I expected that at least the defendant would exhibit its books to show what the amounts of its sales were in the two or three years preceding the repeal of the Ontario Temperance Act and in the years posterior to said repeal. Naismith contented himself with saying that the business of his company was curtailed under the new act to the same extent as under the old act; the curtailment he fixes at 75 per cent in both cases. On the other hand, he himself contradicted this statement when he mentioned figures concerning the output of his company's products before and after the repeal of the Ontario Temperance Act; I find in his deposition the following statements:

A. For two or three years previous to 1916 our output was something like 400,000 gallons.

Q. That is, the output in Ontario?—A. Yes.

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Q. And then after 1916 and between that and 1927, can you give us any idea of what your output in Ontario would be; say in 1925 for instance, in order to get a general idea?

A. As far as my memory serves me—from 70,000 to 80,000 gallons.

Q. In 1925 before the Liquor Control Act?—A. Yes.

Q. After 1927 what has been about your output?

A. From 73,000 to 84,000 gallons.

According to the witness' own admission, the output of the defendant's products in Ontario were from 3,000 to 4,000 gallons more a year after the repeal of the Ontario Temperance Act.

This evidence is absolutely unsatisfactory. The only conclusion I can draw from Naismith's testimony is that the output of beer in Ontario was increased after the repeal of the Ontario Temperance Act, though perhaps not to a considerable extent.

Even if the defendant had succeeded in establishing that the profits derived from its business were not larger after the repeal of the Ontario Temperance Act, I would not feel inclined to attach much importance to this fact: there are so many causes apart from the legislation, which could curtail profits, as for instance bad or indifferent management, lack of advertising, inferior quality of products, depression, etc., that it would be difficult to arrive at the conclusion that the law was alone to blame for the curtailment of one's business.

I must take the evidence as it is, and as I have already stated, it does not convince me that the sale of beer was not facilitated by the change in the law. I must therefore rest my decision on the dispositions of the two acts regulating the sale of beer. The comparison of the clauses in the Ontario Temperance Act and the Liquor Control Act on this point has led me to conclude that the sale of beer has been facilitated by the replacement of the former Act by the latter in the usual and common sense of the word, the only one I can adopt, seeing that there is no proof that the parties intended to give the word a special or particular meaning.

Having reached the conclusion that the sale of beer has been facilitated by the repeal of the Ontario Temperance Act and the enactment of the Liquor Control Act, it follows that plaintiff is entitled to recover from the defendant the rent at the rate of \$11,292.60 a year for the period from the first day of June, 1927, to the 10th day of August, 1931.



There will be judgment in favour of plaintiff against defendant for \$13,478.56 with interest as prayed for and costs.

*Judgment accordingly.*

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FRANÇOIS THIBOUTOT.....SUPPLIANT;

VS

HIS MAJESTY THE KING.....RESPONDENT.

1932  
Mar. 3.  
April 19.

*Crown—Responsibility—Public works—Negligence—Exchequer Court Act, Section 19, ss. (c)*

T., a carpenter, was engaged in doing certain carpentering on a building at the Experimental Farm, at St. Anne de la Pocatière, a public work of Canada. He and his co-employee were shown certain planks by the foreman in charge and told to build their own scaffold and to be careful in the selection of planks and to test them; and upon T. saying there were only old planks, he replied: there are some new and some old, but the old are good. T., in the course of scaffolding, was standing on that part of the scaffold across which the planks are placed on which to stand while working, and asked his co-employee B. to hand him a plank to put across. This B. did, and T. placed it across the support, and upon T.'s walking upon it, the plank snapped and T. fell to the ground and was injured. The plank had a knot in it running transversely, at which point it broke. The Crown claims T. was warned, and that being an expert carpenter he should have noticed the defect, and failing to do so, he was the victim of his own negligence.

*Held* that the injury to T. resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment on a public work, and that T. was entitled to recover from the Crown for the damage he had suffered.

2. That the question of responsibility is to be decided according to the law of the province where the cause of action arose:

(*The King v. Desrosiers*, 41 S.C.R. 71 and *The King v. Armstrong*, 40 S.C.R. 229 referred to.)

3. That the Crown was in law held to see that only competent and prudent foremen were engaged to see to the safety of the men, and that the fact of the foreman furnishing the defective plank in question and stating the used ones were good, coupled with the act of a co-employee in handing it to him, was negligence for which the Crown was responsible.

4. That, in the circumstances, there was no negligence on the part of T. in not noticing the defect.

PETITION of Right to recover from the Crown a certain sum for damages suffered by the petitioner due to a fall from a scaffold on which he was working making

1932. repairs to a building at an experimental farm, a public  
 THIBOUTOT work of Canada.

<sup>v.</sup>  
 THE KING. The action was tried before the Honourable Mr. Justice  
 Angers, at Quebec.

*Pierre de Guise* for suppliant.

*Leo Bérubé* for respondent.

The facts are stated in the reasons for judgment.

ANGERS J. *now* (April, 19, 1932) delivered the following judgment.

Le pétitionnaire, par sa pétition de droit, réclame, à titre de dommages-intérêts, la somme de \$8,512.60, \* \* \*

Le 14 novembre 1930, le pétitionnaire était à l'emploi du Ministère des travaux publics: le fait est admis (parag. 1 de la défense).

Le pétitionnaire, menuisier de son métier, travaillait à la Ferme Expérimentale de Sainte-Anne de la Pocatière, qui est sous la direction du Ministère fédéral de l'agriculture.

Le pétitionnaire, au cours de son travail, est monté sur ce qu'il appelle un "toquet", indiqué dans le croquis produit comme exhibit numéro 1 par la lettre "A"; son but était de placer sur ce "toquet" ou support un madrier traversant du point "A" au point "B" (un autre "toquet" ou support), lequel madrier devait servir d'échafaud. Il a reçu des mains d'un nommé Boucher, l'un de ses compagnons de travail et lui-même apprenti-menuisier à l'emploi du Ministère des travaux publics, le madrier qu'il devait poser et qu'il a de fait posé sur les toquets "A" et "B". Cela fait, le pétitionnaire est monté sur un échafaud supérieur pour y exécuter certains travaux selon les instructions qu'on lui avait données. Son ouvrage terminé sur cet échafaud, il en est descendu pour remonter sur l'échafaud inférieur, savoir celui construit avec le madrier que lui avait fourni Boucher.

Le pétitionnaire a dû traverser ce madrier dans l'exécution de son travail; en arrivant au milieu du madrier, celui-ci a cassé et le pétitionnaire a été précipité sur le sol d'une hauteur de 9 à 10 pieds. Il s'est fracturé deux os du pied gauche.

Immédiatement après l'accident, le pétitionnaire a reçu du docteur Pageau les traitements d'urgence, puis il a été, sur l'ordre de ce dernier, transporté à l'hôpital à Lévis, où

il est resté d'abord du 14 novembre au 31 décembre 1930, puis du 5 au 17 janvier 1931 et finalement du 11 au 21 février 1931. Le pétitionnaire dit qu'il lui a été impossible de faire quelque ouvrage que ce soit avant le commencement de septembre 1931. D'un autre côté, il est allé voir le docteur Roy vers le commencement de juillet 1931 et celui-ci a alors fixé à 18 p. 100 l'incapacité permanente partielle du pétitionnaire. A compter de cette date l'état physique du pétitionnaire, quant à ce qui concerne les conséquences de l'accident, doit être considéré comme définitif.

Aux dires du docteur Roy, le pétitionnaire souffrira d'une incapacité permanente partielle résultant d'une déchirure de certains ligaments; il est sujet à se renverser ou se tourner le pied fréquemment. La déchirure des ligaments est irrémédiable. De plus, le pétitionnaire est exposé à ressentir de la douleur dans le talon du pied gauche à cause de la présence d'une parcelle d'os brisé dans le talon.

Il incombe d'abord au pétitionnaire, pour pouvoir obtenir gain de cause, de démontrer que son cas tombe sous le coup du paragraphe (c) de l'article 19 du chapitre 34 des Statuts Révisés du Canada, 1927:

La cour de l'Exchiquier 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 doit donc être établi:

1° que l'accident est survenu dans un chantier public —*public work*—selon le texte anglais du Statut.

2° que les blessures subies par le pétitionnaire résultent de la négligence d'un employé ou serviteur de la Couronne, agissant dans l'exercice de ses fonctions ou de son emploi.

Il est prouvé hors de doute que l'accident est arrivé sur un chantier public, appartenant à la Couronne et exploité par elle.

Il reste à déterminer si l'accident est attribuable à la négligence d'un employé ou serviteur de la Couronne, commise pendant que cet employé ou serviteur agissait dans l'exercice de ses fonctions.

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Le pétitionnaire allègue dans sa pétition:

(a) que le madrier qui s'est brisé a été placé sur l'échafaud par un ouvrier à l'emploi du Gouvernement, sur les ordres d'un contremaître également à l'emploi du Gouvernement;

(b) que ce madrier était en mauvais état;

(c) que le Gouvernement, par lui-même ou ses employés, a manqué de prudence en ne fournissant pas au pétitionnaire un échafaud convenable.

L'intimé répond:

(a) que le madrier a été placé sur l'échafaud par le pétitionnaire lui-même, avec l'assistance d'un co-employé, mais en l'absence du contremaître;

(b) que, comme menuisier, le pétitionnaire était censé posséder la compétence nécessaire pour n'employer dans la construction d'un échafaud que des matériaux sains et que l'accident est dû uniquement à sa faute et négligence.

\* \* \*

La preuve démontre que le madrier, responsable de l'accident, a été placé sur l'échafaud par le pétitionnaire lui-même, contrairement à l'allégation 5 de sa pétition mais conformément à sa déposition en cour (p. 3):

J'ai monté sur ce toquet-là pour poser un madrier sur le toquet numéro A; Louis-Philippe Boucher m'a donné un madrier que j'ai mis sur le toquet en traversant de A à B.

Sur ce point, Thiboutot est corroboré par Boucher; celui-ci a pris le madrier, parmi d'autres, à terre, près de l'échafaudage, et l'a remis à Thiboutot qui l'a placé.

Boucher travaillait à la Ferme Expérimentale comme apprenti-menuisier, à l'emploi du Gouvernement.

Madore, menuisier de son métier depuis nombre d'années et le contremaître, sous les ordres de qui travaillait le pétitionnaire, déclare que Sainte-Marie qui était "foreman" et registraire (vraisemblablement régisseur), lui aurait donné ordre de voir aux travaux et de "fournir le bois voulu". Il ajoute que, lui (Madore), il a donné instructions à ses hommes de prendre garde en échafaudant et de sonder (les madriers) avant de monter les échafauds et que Thiboutot était présent quand il a donné ces instructions. Le pétitionnaire lui a dit qu'il y avait seulement de vieux madriers, ce à quoi il aurait répondu: "Il y a des vieux madriers mais

*ils sont bons*, en tous les cas, il y en a des neufs aussi. Vous les sonderez, ça se voit quand un madrier est bon.”

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Aux dires de ce témoin, il y avait, lors de l'accident, une dizaine de madriers, dont six neufs; voici, au surplus, le texte même de sa déposition sur ce sujet:

Q. Quelle quantité de madriers y avait-il là?

R. Il y avait encore une dizaine de madriers, je les ai comptés après l'accident.

Q. Parmi ces dix madriers-là, combien en avait-il qui pouvaient faire des bons échafaudages?

R. Il y avait six madriers neufs, et le restant était de vieux madriers, des vieux qui avaient servi à des échafauds avant. Des échafauds qu'on avait démontés.

Plus loin, l'on trouve dans son témoignage, la déclaration suivante:

Q. Vous avez dit à Thiboutot et aux autres que les vieux madriers étaient bons?

R. Il y en avait des bons, mon cher monsieur, on rachevait la bâtisse, on avait échafaudé tout le tour avec, il y en avait des vieux et des neufs, et cela n'a pas cassé.

Thiboutot, de son côté, affirme que Madore ne lui a pas dit de faire attention aux madriers.

C'était la coutume à la Ferme d'employer dans la construction des échafauds des madriers déjà utilisés: ceci ressort des témoignages du pétitionnaire, de Boucher et de Madore.

Que le madrier qui a causé l'accident n'était pas propre à l'usage pour lequel il a servi, cela s'infère de l'accident même: *res ipsa loquitur*. Inutile d'insister sur ce point.

En résumé, il me paraît avéré que le madrier en question a été posé par le pétitionnaire, à qui il a été remis par Boucher, un employé du Gouvernement; que ce madrier a été pris parmi plusieurs autres, dont quelques-uns neufs et quelques autres usagés, mis à la disposition des menuisiers par le Gouvernement ou ses employés ou serviteurs pour la construction des échafauds et utilisés à cette fin couramment, à la connaissance, voire même sur les instructions, du contremaître.

Notons en passant que la question de responsabilité doit être déterminée d'après les lois de la province où la cause d'action a pris naissance: *The King vs Desrosiers* (1); *The King vs Armstrong* (2).

(1) (1908) 41 S.C.R. 71.

(2) (1908) 40 S.C.R. 229.

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Les faits ci-dessus relatés suffiraient pour établir la responsabilité de l'intimé, à moins que j'en arriverais à la conclusion que le pétitionnaire, comme menuisier, aurait dû constater que le madrier que lui passait Boucher était en mauvais état et impropre à l'usage auquel on le destinait. Dans ce cas, il pourrait y avoir lieu au rejet de l'action, si la faute du pétitionnaire a été l'unique cause déterminante de l'accident, ou à un jugement de faute commune, si l'accident a été occasionné tant par la faute de l'intimé ou de ses employés ou serviteurs que par la faute du pétitionnaire lui-même.

Il n'y aurait pas de doute, il me semble, que, si le madrier fourni par Boucher eût été posé par un employé du Gouvernement autre que le pétitionnaire, l'intimé serait responsable des dommages causés à Thiboutot, en vertu des dispositions de l'article 1054 C.C., à moins que la preuve ne révélerait que l'accident est attribuable à la faute du pétitionnaire lui-même; il ne saurait être question, en l'espèce, d'un cas fortuit ou de force majeure.

Mais, comme il a été dit, le madrier a été placé sur l'échafaudage par le pétitionnaire lui-même. Le cas se trouve également régi par l'article 1054 C.C., et la responsabilité de l'intimé est engagée, à moins qu'il n'ait établi que l'accident a été causé par la négligence de la victime; la question de force majeure ou de cas fortuit ne se présente point, dans le cas qui nous occupe.

Mais il y a plus. Je crois que la preuve démontre qu'il y a eu négligence de la part d'employés et serviteurs de l'intimé. Si, comme le prétend l'intimé, et comme le déclarent deux témoins de la défense (Madore et Perrault), la défectuosité du madrier, i.e. le nœud qui l'affectait, était visible et facile à constater, sûrement elle l'était pour Sainte-Marie, le surintendant ou régisseur des travaux, pour Madore, le contremaître, et pour Boucher, tous trois employés ou serviteurs de la Couronne. Et ceux-ci étaient dans une meilleure position pour juger de la qualité du madrier que le pétitionnaire qui était dans une situation plutôt précaire et désavantageuse sur un "toquet" ou support de douze ou treize pouces de largeur.

Boucher dit bien qu'il ne se serait pas servi de ce madrier pour en faire un échafaud; pourquoi alors l'a-t-il passé à Thiboutot? Le contremaître Madore affirme que l'on pou-

vait constater que le madrier en question était défectueux; pourquoi l'a-t-il laissé à la disposition des ouvriers et menuisiers qu'il avait sous sa charge? Pourquoi a-t-il déclaré à Thiboutot qui lui faisait remarquer que c'était de vieux madriers, que ces madriers étaient bons?

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Devant la preuve au dossier, il semble difficile d'en arriver à une autre conclusion qu'il y a eu négligence: (a) de la part de Sainte-Marie et de Madore, de laisser à la disposition de leurs ouvriers des matériaux de mauvaise qualité; (b) de la part de Madore, de dire à Thiboutot que les vieux madriers étaient bons; (c) de la part de Boucher, de passer à Thiboutot un madrier qui n'était pas suffisamment sain et fort pour servir à un échafaudage.

Le Gouvernement était tenu de mettre à la direction des travaux un contremaître compétent et suffisamment prudent pour voir à la sécurité de ses ouvriers; ne l'ayant pas fait, il a engagé sa responsabilité: article 1053 C.C.

Il reste à examiner si le pétitionnaire a lui-même commis une faute. Dans l'affirmative, il s'agira de déterminer si cette faute a été l'unique cause déterminante de l'accident ou si elle y a simplement contribué.

La défense soutient qu'il y a eu faute de la part du pétitionnaire, alléguant que, vu sa qualité de menuisier, il aurait pu et dû constater que le madrier qu'on lui offrait était défectueux. Il ne faut pas perdre de vue que Thiboutot était sur un support ou "toquet" d'une douzaine de pouces de largeur à une hauteur de 9 ou 10 pieds du sol. Un de ses compagnons de travail lui a tendu, à bout de bras vraisemblablement, un madrier qui devait avoir—la preuve sur ce point, comme sur d'autres d'ailleurs, est malheureusement incomplète et peu satisfaisante—une douzaine de pieds de longueur et peut-être plus. Ce madrier avait déjà servi et n'était pas propre. Il était difficile, pour ne pas dire impossible, en pareilles circonstances, de constater l'existence d'un nœud. En fait Thiboutot affirme qu'il ne l'a pas vu. Et Madore lui-même, bien qu'il déclare qu'il n'aurait pas employé le madrier, n'ose pas affirmer que les défauts en étaient apparentes:

Q. Est-ce que pour un ouvrier connaissant son métier, les défauts de ce madrier étaient apparentes?

R. C'est malaisé à dire après qu'on le voit . . . quand on le voit après qu'il est cassé, c'est malaisé.

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D'un autre côté, Thiboutot avait raison de croire que le madrier que Boucher lui offrait était sain et solide; il était justifiable d'ajouter foi à l'assertion du contremaître Madore que les vieux madriers, laissés à la disposition des ouvriers pour fins d'échafaudage, étaient bons.

La preuve relative au moment où l'accident est arrivé n'est guère précise. D'après la version de Thiboutot, il se serait produit environ une heure après que le madrier a été installé; aux dires de Boucher il serait survenu le lendemain. La chose n'a peut-être guère d'importance, bien que l'on ait semblé vouloir suggérer que Thiboutot avait eu tout le temps voulu pour se rendre compte de l'état du madrier. D'abord je suis disposé à accepter la version catégorique de Thiboutot sur ce point de préférence à celle, plutôt hésitante, de Boucher. Celui-ci n'a pas affirmé catégoriquement que l'accident était arrivé le lendemain matin; il a simplement déclaré qu'il le croyait. Il n'y a d'ailleurs rien d'étonnant à ce que ce détail ne lui soit pas resté à la mémoire après le délai assez long qui s'est écoulé entre la date de l'accident et le jour où il a été entendu comme témoin; il n'avait aucune raison quelconque de noter ce fait particulier. Il est tout naturel, par contre, que le pétitionnaire se remémore les circonstances de l'accident dont il a été victime. La version qu'il a donnée relativement à l'emploi de son temps entre l'installation du madrier et sa chute semble bien indiquer que l'accident est arrivé peu de temps après l'érection de l'échafaud; le pétitionnaire est descendu de l'échafaud supérieur pour immédiatement remonter sur l'autre échafaud, d'où il est tombé. La descente de l'échafaud supérieur, l'ascension sur l'échafaud inférieur et la chute, trois faits concomitants, sont naturellement restées gravées dans la mémoire de Thiboutot. Encore une fois, je crois devoir adopter sa version.

En toute justice, cependant, j'ajouterai que les deux témoignages m'ont paru être de bonne foi et que cette divergence sur une question de détail n'offre rien d'insolite et ne peut affecter la crédibilité de l'un ou l'autre des témoins.

Au surplus, le fait que l'accident aurait pu avoir lieu le lendemain matin ne pourrait absoudre l'intimé de sa responsabilité, vu que le pétitionnaire, pour les raisons précitées, n'avait aucun motif de douter de la solidité du madrier.



Le procureur de l'intimé a appuyé quelque peu sur les instructions qu'aurait données le contremaître à ses hommes de faire attention aux matériaux qu'ils emploieraient dans la construction de leurs échafauds, pour en conclure que le pétitionnaire, ayant désobéi à ces instructions, s'est rendu coupable de négligence et qu'il est en conséquence seul blâmable pour l'accident dont il a été la victime. L'on ne m'a cité, de part ni d'autre, aucune autorité sur la question; j'ai cru devoir y consacrer une étude particulière.

Il est bon de noter d'abord que les instructions, que Madore prétend avoir données, sont en termes généraux, imprécises et nullement détaillées. Il recommande simplement de prendre garde en échafaudant, de sonder les madriers avant de monter les échafauds et, sur une remarque de Thiboutot, il ajoute que les vieux madriers sont bons. Il ne mentionne pas quels matériaux devront être utilisés, il n'indique pas la qualité ni la dimension des madriers dont on devra se servir, il n'exige même pas l'emploi de madriers neufs. Au contraire, comme je viens de le faire remarquer, il dit à Thiboutot que les madriers qui ont déjà servi sont bons, en autorisant ainsi et même en recommandant l'emploi.

Il ne faut pas perdre de vue qu'il ressort de la preuve que c'était une coutume établie et connue aussi bien du contremaître que des ouvriers de se servir de madriers usagés dans l'érection d'échafauds. La déclaration de Madore que ces madriers étaient bons ne faisait que confirmer cette coutume et ne pouvait avoir d'autre effet que d'en encourager la continuation.

Dans trois causes, à ma connaissance, ressortissant à ce tribunal—il en est probablement d'autres—la portée que peut avoir la désobéissance d'un ouvrier à des instructions données par un contremaître sur la responsabilité du patron résultant d'un accident a été discutée.

Il y a d'abord la cause de *Lamontagne et le Roi* (1): il s'agissait d'un accident survenu à un chauffeur (*stoker*) sur un bateau du Gouvernement. Ordre avait été donné par l'ingénieur en chef et communiqué au pétitionnaire "that no employee on board, including stoker or 'graisseur', was to touch the machinery without a special order from the chief engineer". Malgré cette défense absolue, le pétition-

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(1) (1909) 12 Ex. C.R. 284.

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naire, employé comme chauffeur, a, à la demande d'un ingénieur malade, jugé à propos de mettre la machine en opération; comme résultat il a été blessé. Sa pétition de droit a été rejetée, pour cause de désobéissance aux instructions reçues, équivalant à faute. La Cour a trouvé qu'il n'y avait eu aucune négligence de la part des employés de l'intimé.

Vient ensuite la cause de *Sabourin et le Roi* (1). Il s'agissait en l'espèce d'une réclamation de la part d'une veuve résultant de la mort de son mari, électrocuté, alors qu'il était à réparer une lampe électrique faisant partie du système d'éclairage du canal Soulanges, pour ne s'être pas servi de gants de caoutchouc qu'il avait à sa disposition, malgré des instructions formelles à cet effet. La cause a d'abord été entendue par un arbitre (*referee*) qui a rejeté la réclamation par le motif que l'accident était dû à la faute de la victime, et cette décision de l'arbitre a été maintenue par l'honorable juge Cassels.

Il y a enfin la cause de *Girard et le Roi* (2): un ouvrier, contrairement à une défense formelle de ce faire, ayant mis la main dans une machine pour en retirer une pièce qui y était tombée, s'est fait couper un doigt qui a dû être amputé. La pétition de droit en réclamation de dommages a été rejetée, le motif étant que la cause immédiate de l'accident était la désobéissance de la victime aux instructions reçues et qu'aucune négligence n'était imputable à la Couronne ou ses employés ou serviteurs.

Il y a une distinction à faire entre ces trois causes et celle qui nous occupe. Dans les causes précitées, il y avait eu des instructions explicites et formelles de ne pas faire une chose dangereuse déterminée ou de ne la pas faire sans adopter des mesures de précaution ou de sûreté précises et clairement indiquées et, dans chacun des cas, la désobéissance de la victime a été la cause déterminante de l'accident.

Le fait de se tenir sur un échafaud n'est pas en soi une chose dangereuse; il n'y a danger que si l'échafaud n'est pas solide ou n'est pas construit de matériaux suffisamment forts. Comme nous l'avons vu, le contremaître a recommandé à ses hommes de prendre garde, de faire attention, de sonder les madriers en érigeant leurs échafauds. Et, sur

(1) (1911) 13 Ex. C.R. 341.

(2) (1916) 16 Ex. C.R. 95.

une remarque du pétitionnaire que les madriers à sa disposition étaient de vieux madriers, le contremaître lui a répondu qu'ils étaient bons. En s'en servant Thiboutot n'allait pas à l'encontre des ordres de son contremaître; au contraire, il employait les matériaux qu'on lui recommandait. La position eût été bien différente si, par exemple, Madore avait dit aux ouvriers de n'employer que des madriers neufs dans l'érection des échafauds et que, passant outre à cette recommandation, le pétitionnaire aurait pris un vieux madrier dans un tas où il s'en serait trouvé de neufs et d'usagés. Mais il n'a nullement été question d'utiliser des madriers neufs; Madore a simplement dit à Thiboutot que les vieux madriers étaient bons. Je ne vois pas comment, dans les circonstances, le pétitionnaire pourrait être taxé de négligence pour avoir employé un madrier recommandé par son contremaître comme bon.

Le maître est responsable du dommage causé à ses employés par le mauvais état des outils ou machines mis à leur disposition ou par leur installation défectueuse. Il est tenu de prendre toutes les précautions possibles pour garantir la sécurité de ses ouvriers contre les accidents et même les protéger contre leur propre négligence. La doctrine et la jurisprudence sont d'accord sur ce point: *Cossette v. Leduc* (1); *Gingras v. Cadieux* (2); *Ross v. Langlois* (3); *Canadian Vickers et Smith* (4); D.P. 55.2.86; D.P. 68.1.13; D.P. 76.2.72; 20 Laurent, n° 474; 2 Sourdat, Traité de la responsabilité (sixième édition), n° 912 et note 3, au bas de la page 136; *St. Lawrence Sugar Refining Co. v. Campbell* (5); *St-Arnaud v. Gibson* (6); *Tremblay et Proulx* (7).

Le principe est le même lorsqu'il s'agit d'un chantier de construction. Il a été décidé que l'omission par le patron de fournir à ses employés des échafauds convenables et suffisamment solides constitue une négligence: *Côté v. Anglo Canadian Pulp and Paper Co.* (8), (confirmé par la Cour Suprême le 27 octobre 1930); *Bélanger v. Riopel* (9); *Pageau v. Quebec, Montreal & Southern Ry.* (10). Dans

(1) (1883) 6 L.N. 181.

(2) (1890) M.L.R. 6 C.S. 33.

(3) (1885) M.L.R. 1 B.R. 280.

(4) (1923) S.C.R. 203.

(5) (1885) M.L.R. 1 B.R. 290.

(6) (1890) R.J.Q. 13 C.S. 23.

(7) (1927) R.J.Q. 43 B.R. 504.

(8) (1930) R.J.Q. 50 B.R. 527.

(9) (1887) M.L.R. 3 C.S. 258.

(10) 1909) 15 R.L. n.s. 203.

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cette dernière cause, le juge Archibald en est arrivé à la conclusion qu'il y avait eu faute commune, le demandeur ayant admis qu'il avait lui-même, avec un compagnon, posé le poteau ou support central de l'échafaudage et qu'en ce faisant il avait des doutes au sujet de la suffisance de sa solidité. Rien de semblable ne se présente en l'espèce: Thiboutot croyait et avait raison de croire le madrier sain et solide. Je ne crois pas qu'il y ait lieu pour moi de conclure à faute commune et de tenir le pétitionnaire responsable de l'accident conjointement avec l'intimé.

Le procureur de l'intimé a soumis que le pétitionnaire a, de son plein gré, assumé le risque de l'accident dont il a été la victime et il conclut à la non-responsabilité de l'intimé en vertu de la maxime "Volenti nonfit injuria". Je pourrais me dispenser de toucher à cette question, vu que j'en suis venu à la conclusion que l'accident est uniquement attribuable à la négligence des employés et serviteurs de l'intimé. Je me contenterai de dire que la doctrine énoncée dans cette maxime a été exposée en divers arrêts et récemment discuté et résumée par le Conseil Privé, *in re Letang v. Ottawa Electric Railway* (1).

L'accident étant arrivé sur un chantier public, au sens du paragraphe (c) de l'article 19 du chapitre 34 des Statuts Révisés du Canada, 1927, et ayant été causé par la négligence d'employés et serviteurs du Gouvernement dans l'exercice de leurs fonctions, l'intimé doit être tenu responsable des dommages subis par le pétitionnaire.

Reste à déterminer le quantum de dommages.

Le pétitionnaire a payé pour frais d'hôpital \$231, et pour honoraires de médecin \$45 et \$30.35 pour dépenses diverses suivant compte produit. Il a droit à ces trois montants.

Le pétitionnaire réclame pour perte de salaire une somme de \$777, moins celle de 123.75 reçue du Gouvernement, soit une somme de \$653.25. Ce montant est excessif. Le pétitionnaire gagnait 27½c. de l'heure et travaillait dix heures par jour et six jours par semaine. Il n'a pu travailler du jour de l'accident (14 novembre 1930) au commencement de juillet 1931, date à laquelle le docteur Roy dit avoir déterminé définitivement le degré d'incapacité permanente du pétitionnaire. Ceci représente environ trente-trois

(1) (1926) R.J.Q. 41 B.R. 312, particulièrement aux pages 316 et 317.

semaines; le salaire hebdomadaire à raison de 27½c. de l'heure, de dix heures par jour et de six jours par semaine se chiffre à \$16.50. Trente-trois semaines à \$16.50 représentent un total de \$544.50, duquel il faut déduire la somme de \$123.75 reçue du Gouvernement, laissant un solde de \$420.75, auquel le pétitionnaire a droit.

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Le montant de l'indemnité pour incapacité permanente partielle est moins facile à déterminer; la preuve versée au dossier à ce sujet est peu satisfaisante. La diminution de capacité est fixée par le docteur Roy à 18 p. 100; il n'y a pas d'autre preuve médicale, sauf la déposition du docteur Pageau qui ne s'est pas prononcé sur ce point. Il y a lieu pour la Cour, dans les circonstances, d'accepter ce chiffre de 18 p. 100. Le montant du capital nécessaire pour constituer une rente équivalente au degré de l'incapacité permanente partielle ne peut servir de base de calcul dans une action pour dommages-intérêts résultant d'un quasi-délit, si elle constitue le mode de calcul en vertu des dispositions de la Loi des Accidents du Travail de Québec; elle peut tout au plus servir d'élément de preuve.

Le pétitionnaire peut travailler. Il pourra en toute probabilité continuer à exercer son métier, quoique peut-être avec moins de facilité qu'avant l'accident. Le chiffre de 18 p. 100 adopté par le docteur Roy comme représentant sa diminution de capacité permanente me paraît généreux. Prenant en considération l'âge du pétitionnaire, qui est encore jeune, les chances apparemment favorables qu'il a de se remettre de son accident de façon rapide et relativement satisfaisante, le fait qu'il est en mesure de reprendre le travail, son état de santé général, les risques de maladie et de chômage, un montant de \$1,000 serait une indemnité raisonnable et suffisante pour l'incapacité permanente partielle dont il pourra souffrir à l'avenir.

Le pétitionnaire réclame \$200 pour souffrances endurées; ce montant, qui ne paraît pas exagéré, doit lui être alloué.

Les sommes de \$231, \$45, \$30.35, \$420.75, \$1,000 et \$200 forment un montant total de \$1,927.10 auquel le pétitionnaire a droit.

Il y aura donc jugement en faveur du pétitionnaire pour \$1,927.10, avec dépens contre l'intimé.

*Jugement en conséquence.*

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BETWEEN:

Apr. 14, 15.  
 May 9.  
 July 30.

HIS MAJESTY THE KING..... PLAINTIFF;

AND

LOUIS PICKLEMAN ET AL ..... DEFENDANTS.

*Expropriation—Hypothec—Liability of Crown for Bonus due to Mortgagee  
 —Interest—Damages*

By a clause in the deed of hypothec affecting a property expropriated, the owner (mortgagor) was obliged to pay to the mortgagee a certain sum as bonus, in the event of the loan being paid before maturity.

*Held* that the expropriating party must assume the payment of such bonus, to the exoneration of the owner (mortgagor) as part of the compensation to be paid him for the lands taken under the Expropriation Act.

2. That, as no interest is allowable against the Crown except when made payable by statute or by contract; and as the Expropriation Act provides for the payment of interest on the compensation allowed at the rate of 5 per cent, though the owner may have to pay a higher rate to the holder of a mortgage, to free the property, such higher rate can neither be allowed as interest on any part of the compensation, nor as damages.

INFORMATION exhibited by the Attorney-General of Canada to have certain properties belonging to the defendant, Pickelman, which were expropriated by the Crown, valued by the Court.

*Mr. Gregor Barclay, K.C., and E. Languedoc, K.C.,* for the plaintiff.

*Mr. J. A. Prud'homme, K.C.,* for the defendant.

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

ANGERS J., now (July 30, 1932), delivered the following judgment.

This is an information exhibited by the Attorney-General of Canada whereby it appears that a certain emplacement consisting of lots Nos. 1,635 and 1,636 on the official plan and book of reference of St. Ann's Ward, in the city of Montreal, with the buildings thereon erected, situate at the corner of Dalhousie and Ottawa streets, belonging to the defendant Louis Pickleman, was expropriated for the purposes of a public work of Canada, to wit terminal facil-

ities for the Government Railways, by depositing, under the provisions of the Expropriation Act (R.S.C., 1906, chap. 143), on the 24th day of September, 1927, a plan and description of the same, in the Registry Office for the Registration Division of Montreal, in which the said land is situated.

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The defendant Pickleman became the owner of the above described emplacement by virtue of a deed of sale from the testamentary executors of the late Samuel Davis to him passed on the 5th day of July, 1906, before W. de M. Marler, N.P., whereof an authentic copy has been filed as exhibit A. The price paid was \$1 a square foot (\$18,412) plus a sum of \$800 representing approximately an additional 4½ cents per square foot.

The area of the land expropriated is 18,428 square feet. Counsel for the parties, at the opening of the case, declared that they had agreed upon this figure. The plan filed as exhibit C shows an area of 18,412 square feet. The difference is unimportant, but, in view of the agreement between the parties as to an area of 18,428 feet, I shall adopt this figure.

On the date of the expropriation there were on the emplacement in question a corrugated iron frame shed and the stone foundations of an old church a foot or so below the surface of the ground.

At the time of the expropriation neither the land nor the shed were utilized.

The district in which the defendant's property is situated used to be a residential district for the working class. In the last twenty-five or thirty years residents have been leaving the district, which is gradually becoming industrial. The few flats or dwellings remaining in the locality are small and obsolete; most of them are in poor condition; they have been termed slums by some of the witnesses. Rents in the neighbourhood vary between \$8 and \$15 a month. The district is still in the period of transition. The old houses which are demolished are replaced by factories and warehouses, but, if conditions remain what they are and have been in the past three or four years, it may take some time yet before the district becomes exclusively industrial. Some industries are moving to the north and east sections of the city, where there are railway facilities and

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where land is still comparatively cheap. However the locality where the defendant's property is situated is near the Lachine Canal and a railway and offers potentialities which are not to be overlooked.

The plaintiff, by the information, offers a sum of \$25,000 as compensation; the defendants, by their statement of defence, claim \$67,000 for the land and buildings, a further sum of \$700 if it is found that the Montreal Loan and Mortgage Company is entitled to recover this sum as a special indemnity under the mortgage deed affecting the defendants' property and in addition the difference between 7 per cent (conventional interest) and 5 per cent (legal interest) on \$10,000, amount of the first mortgage, and the difference between 6½ per cent (conventional interest) and 5 per cent (legal interest) on \$5,000, amount of the second mortgage, reckoning from the 24th day of September, 1927, until payment of the award by the plaintiff.

The proof adduced at trial is of two kinds: expert evidence and sales in the neighbourhood made during the few years previous or subsequent to the expropriation.

The experts are, as usual, far apart in their valuations, as regards buildings as well as land.

[The learned judge here discusses the evidence adduced on the matter of value, etc., and then proceeds.]

Taking into consideration the location of the property, its size, its adaptability as a warehouse or factory site, its potentialities at the time of the expropriation, its value to the owner and the sales effected in the district in the last fifteen years or so, I think that I shall do justice to both parties in fixing a value of \$1.90 a square foot for the land, which will mean for an area of 18,428 square feet a total of \$35,013.20.

As to the corrugated iron shed on the property, counsel for the defendant, at the opening of the trial, placed a value of \$4,000 on it and the defendant's son in his testimony stated that it had been built at a cost of \$6,000, but added that part of it had been destroyed by a tenant and that at the time of the expropriation it was worth \$4,000. To what extent was this shed damaged, I do not know; no one else spoke of the shed and I must say that the evidence on this point is not very precise nor definite. However there is no doubt that the defendant is entitled to a compensa-



tion for this shed and I think that a sum of \$3,000 will be a fair price for it.

As to the old stone foundations of a church, I consider that they constitute rather an inconvenience than an advantage to the owner as well as to the purchaser, particularly so since on all four sides these foundations are considerably distant from the boundary lines of the lot on which they are situated and their use would mean the loss of a considerable strip of land on all four sides for building purposes. I do not feel inclined to grant anything for these foundations.

The defendant Pickleman further seeks to recover a sum of \$700 which he says the Montreal Loan & Mortgage Company is claiming from him as a special indemnity for the reimbursement before maturity of the amount of \$10,000 due to it by the said defendant under a deed of obligation from the latter to the company passed on the 8th of June, 1927, affecting, among other properties, the lots and buildings expropriated; an authentic copy of the said deed has been filed as exhibit X. The claim is based on the following clause in said deed, to wit:

In the event of the said property or any part thereof being sold at forced sale, before payment of said amount advanced, or dealt with in any way that will require said Company to receive its claim judicially, said Company will be entitled to receive, and the said Borrower now obliges himself to pay an indemnity of seven per cent upon, and in addition to the amount of the loan then due in principal, interest and accessories, as liquidated damages not reducible for any reason whatever, and to secure the payment of said Indemnity, all Fines, Fees and Forfeitures, and any Insurance premiums and other accessories the said Borrower hereby specially hypothecates said above described property for a further sum of one thousand dollars.

If the amount of the loan was paid before maturity and the mortgagor was called upon to pay to the mortgagee the bonus of 7 per cent on the capital sum stipulated in the mortgage deed, to wit the sum of \$700, which the defendant Pickleman is claiming in addition to the value of the property, the Crown must, in my opinion, assume the payment of such bonus to the exoneration of the mortgagor, who should not be burdened with the same. It has been so decided by the late Mr. Justice Cassels in a case offering much similarity with the present one, namely: *The*

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*King v. Macpherson et al* (1). I find in the learned judge's reasons for judgment the following remarks (p. 234):

By the agreement entered into by the trustees of the late Sir David Lewis Macpherson and Mr. Holland, one of the defendants, there was a provision which enables the mortgagor to pay off the principal money secured by the mortgage at any time on payment of three months' interest by way of bonus. The Crown, through its agent, has paid in full the principal money due on the mortgage. The mortgagees claim that they are entitled to receive the bonus of three month's interest under the terms of their mortgage. I think they are entitled to this bonus. The question, however, arises as between the Crown who expropriated the lands and who paid off the mortgage and the mortgagor. The mortgagor claims that the Crown, having expropriated the lands including the mortgagees' interests and having paid the mortgagees, that the Crown should pay the bonus and that it should not be thrown as a burden on the mortgagor. I think that the contention of the mortgagor is correct. In the Lands Clauses Consolidation Act (1845) which is to be found in Brown & Allen's Law of Compensation (2nd Ed., p. 242), there is ample provision for securing the rights of the mortgagees. The promoter is obliged to secure the mortgagee against loss.

After quoting Sections 22 and 29 of the Expropriation Act, R.S.C., 1906, chap. 143, of which Sections 23 and 30 of the Expropriation Act of 1927 are a reproduction, Mr. Justice Cassels adds (p. 235):

It seems to me that if the Crown chooses to expropriate and get rid of the mortgage, the amount which is thrown as a burden on the mortgagor by reason of the expropriation should be added to the compensation allowed. It will be noticed that Sec. 22 of The Expropriation Act hereinbefore quoted only bars the right as between the Crown and the mortgagee. It leaves the relative rights as between mortgagor and the mortgagee as they were at the time of the expropriation. It could not be intended to take away the legal rights of the mortgagees. On the other hand, it would be unjust that the Crown availing itself of the privilege of paying off the mortgage should compel the mortgagor to suffer.

See also Cripps on Compensation, 6th Edition, p. 295, last paragraph.

The claim for the indemnity of \$700 is conditional upon the payment of the same by the mortgagor to the mortgagee; and the mortgagee can only recover it in the event of the amount of the loan being paid before maturity. Needless to say, if the defendant Pickleman did not pay off the mortgage before the date of its maturity, i.e., the 1st day of June, 1932, there can be no claim on the part of the mortgagee for the indemnity. It appears from the memorandum of claim filed by the mortgagee, the Montreal Loan and Mortgage Company, as part of exhibit X

that no reimbursement had been effected on the 5th day of May, 1931, and there is no evidence in the record to show that it was effected between that date and the 1st day of June, 1932. The payment by the plaintiff of the special indemnity of \$700 will therefore be conditional upon the defendant Pickleman showing that the capital sum of the mortgage was reimbursed before the 1st day of June, 1932, and that, as a consequence, the mortgagee demanded payment of said indemnity and received it.

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Should there be any difficulty in determining whether the indemnity is in fact exigible, the matter may be referred to me in chambers by counsel.

There remains the claim for the difference between the conventional interest on the two mortgages as stipulated in the mortgage deeds and the legal interest from the 24th day of September, 1927, to the date of the award by the plaintiff. I cannot entertain this claim: the rule is that the Crown is not liable to pay interest, except in cases where there is an express agreement to pay it or where the liability is fixed by statute; among the latter are expropriation cases, where the interest is recoverable from the time the land or property is acquired or taken by the Crown and then the rate of the interest is fixed at 5 per cent; R.S.C., 1906, chap. 143, s. 31; section 32 of chap. 64, R.S.C., 1927, contains a similar disposition. See *Algoma Central Railway Co. v. The King* (1); the judgment of the Exchequer Court was reversed by the Supreme Court (2) and the judgment of the latter affirmed by the Privy Council (3) on a different question. I do not think that the difference between the statutory interest and the conventional interest can be claimed as damages: see the case of *Algoma Central Railway Co. v. The King* above cited (at p. 270) and also *The London Chatham & Dover Railway Co. v. The South Eastern Railway Co.* therein cited (4).

(1) (1900) 7 Ex. C.R. 239, at pp. 269 and 270.

(2) 32 S.C.R. 277.

(3) (1903) A.C. 478.

(4) (1893) L.R., A.C. 429.

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I may add incidentally that the claim of the defendant for the difference between 7 per cent and 5 per cent on the sum of \$10,000 appears to me inconsistent with his claim for the special indemnity of \$700 relating to the same mortgage.

There will accordingly be judgment as follows:

1. The lands and real property herein expropriated are hereby declared vested in His Majesty the King;

2. The compensation for the lands and real property so expropriated, with all damages arising out or resulting from the expropriation, is hereby fixed at the total sum of \$38,013.20 with interest from the 24th day of September, 1927;

3. The defendant Pickleman is entitled to recover the said sum of \$38,013.20 with interest as aforesaid, upon giving to the Crown a good and valid title free from all mortgages and incumbrances whatsoever, and particularly of the mortgages in favour of The Montreal Loan and Mortgage Company and of the Trustees and Executors of the late James Benning or their assignees;

4. The defendant Pickleman will further be entitled to recover the sum of \$700 upon showing that the amount of the mortgage in favour of the Montreal Loan and Mortgage Company was reimbursed before maturity and that as a consequence he the said defendant had to pay to the said mortgagee the indemnity of 7 per cent amounting to \$700, provided for in the mortgage deed;

5. The defendant is entitled to his costs.

*Judgment accordingly.*

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(QUEBEC ADMIRALTY DISTRICT)

1932

June 14.

RED BARGE LINE LIMITED.....PLAINTIFF;

VS.

THE SS. "POPLARBAY".....DEFENDANT;

AND

POPLARBAY STEAMSHIP COMPANY LIMITED,  
COUNTER-CLAIMANT.*Shipping—Collision—Fog—Boat at anchor—Tug and tow—Responsibility  
—Improper lights on tow—Cause of accident*

Plaintiff's barge, the *R.* with her tug attached was on September 1, 1931, forced to anchor about 1,400 feet below Glengarry Point on the St. Lawrence, on account of heavy fog. Another ship the *S.M.* was also anchored near her. The *P.* knew these vessels were ahead but notwithstanding the fog came on without slowing, until her captain came on the bridge at Glengarry Point when he decided to anchor his vessel, and in manoeuvring to do so the collision in question occurred. The *S.M.* and the tug regularly sounded their bells, and the *R.* also carried her two mooring lights, but not quite disposed according to the rules, being on the same level. The *R.* did not sound her bell.

*Held*, that in the circumstances, and in view of the heavy fog, the *P.* should have stopped sooner, and that the collision was solely the result of her negligence.

2. That the *R.* being attached to her tug, which was her servant, was not required by the rules of the road to ring her bell; and that the ringing of the bell by the tug was sufficient compliance with the rules; and moreover, the fact that the lights on the *R.* were not placed in accordance with the rules, having had no bearing on the accident; the *R.* in no way contributed to the collision.

ACTION by the owners of the *Redcloud* to recover damages from the SS. *Poplarbay*, due to collision between the two vessels.

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

*Lucien Beaugard, K.C.*, for plaintiff.

*Errol Languedoc, K.C.*, for defendant.

The facts are stated in the reasons for judgment.

DEMERS L.J.A., now (June 14, 1932), delivered the following judgment.

These claims in damages are the result of a collision between the barge *Redcloud* and the *Poplarbay*, which occurred on the 1st of September, 1931, in the River St. Lawrence near a place known as Glengarry Point, at about

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3.51 a.m. daylight saving. There was no wind at the time of the accident. The state of the weather was foggy. There was a downstream current of about one mile and a half.

It appears by the evidence that the *Redcloud*, with her tug attached, had been obliged to anchor about fourteen hundred feet below Glengarry Point.

Another ship, the *Steel Motor*, was also at anchor a little below the *Redcloud*.

It is proved that the bell of the tug and the bell of the *Steel Motor* were regularly sounded. It is also proved that there were two lights on the *Redcloud*, though they do not seem to have been disposed according to the rules, they being on the same level.

The *Poplarbay* knew that those ships were ahead of her. It also appears that when the *Poplarbay* was at a distance of about one mile and a half from the place of collision, she could not see buoy No. 87.

The fact is that it was so foggy that she could not see her bow. About ten minutes seemed to have elapsed from the time she entered the fog and the time of the collision, and as her speed was seven and a half miles per hour, with a current of one and a half miles, it is the belief of the Assessor J. P. Dufour, and it is my own belief, that she did not moderate her speed until Captain Daneau came on the bridge at Glengarry Point.

It is not contended that anything prevented the ship from stopping sooner, as she should have done.

Marsden, 8th Edition, p. 357, says: In a fog so dense that it is not possible for a ship to see others in time to avoid them, she is not justified in being under way at all, except from necessity.

It is only after the Master of the *Poplarbay* was on the bridge that he decided to moor his vessel, and in the necessary movements, he struck the *Redcloud* which was anchored at fourteen hundred feet or more from buoy 80-F. It is proved that another vessel which was coming behind had been wiser and had anchored above Glengarry Point.

I have no doubt that this accident occurred through the neglect of the *Poplarbay*.

There rests the question—if the *Redcloud* had not contributed to this accident. She did not ring the bell but the tug, which was her servant, did it, and even gave occasional blasts.

I am inclined to think that the tug and the barge are not to be considered, under the circumstances, as separate vessels. See *The Sargasso* (1).

It has been contended in the Preliminary Act, that the *Redcloud* carried no lights, or if any, that they were undistinguishable. It is not alleged that they were not well placed. The lights on the barge were the ordinary lights.

I have put the Assessor the following question—

Could the lights on the barge be seen at a distance of one mile on a dark night with a clear atmosphere?

To that question, he has answered:

Those lights should be seen for one mile or more; for one good reason they have a bigger wick than an ordinary oil anchor light.

As a second question to the Assessor, I asked:

If the lights on the *Redcloud* had been placed according to the rules, is it likely that there would have been no collision?

To this he answered:

No. In this case the light had no bearing on the accident on account of thick fog at night and witnesses on the *Poplarbay* proved to the Court that the fog was so thick that it was impossible for them to see the bow of their own vessel.

As a third question to the Assessor, I have asked:

Was the bell on the tug farther from the *Poplarbay* than a bell on the barge would have been.

and he has answered:

No. The tug *Rival's* bell was nearer to the *Poplarbay* than that of the *Redcloud*.

(Explanation)—The tug *Rival's* bell is placed on fore part of the wheelhouse or bridge and it is only about 20 feet from the bow. The wheelhouse of the *Redcloud* is placed on the after end or the stern of the barge, about fifty feet from the stern. As the tug was tied up on the starboard side of the *Redcloud*, the bridge of the tug *Rival* must have been at least fifty feet ahead of the bridge on the *Redcloud*, as shown on the attached diagram 100' inch.

Being of the same opinion as the Assessor on these three points, I arrived at the conclusion that the *Redcloud* did not contribute to the accident, and, therefore, the action in damage against the *Poplarbay* and her bail shall be maintained, the amount of damages to be estimated by the Deputy Registrar of this Court assisted by merchants, and the counter-claim of the *Poplarbay Steamship Company Limited* is dismissed: the whole with costs.

*Judgment accordingly.*

(1) (1912) 12 Asp. R. 202, at p. 205.

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## QUEBEC ADMIRALTY DISTRICT

June 29.

BETWEEN:

|                                                                                          |   |             |
|------------------------------------------------------------------------------------------|---|-------------|
| BUNGE NORTH AMERICAN GRAIN<br>CORPORATION, AND FIRE ASSO-<br>CIATION OF PHILADELPHIA.... | } | PLAINTIFFS; |
|------------------------------------------------------------------------------------------|---|-------------|

AND

STEAMER "SKARP" AND OWNERS....DEFENDANTS;

AND

THE SAID DEFENDANTS.....COUNTER CLAIMANTS.

*Shipping—Contract of Carriage—Law applicable—Intention of the parties  
—Perils of Navigation—Jurisdiction—General Average*

The *S.*, a Norwegian vessel, entered into a contract of carriage with the B.N.A.G. Co., an American company, for the transport of a cargo of grain from Buffalo to Montreal. The contract was made at Buffalo and was evidenced by a bill of lading issued at Buffalo which contained a clause (the Jason Clause relating to General Average) which was necessary only under United States law. During the voyage the ship stranded twice, and cargo was damaged and salvage expenses were incurred. The strandings occurred at places which were well known by mariners to be dangerous. The plaintiffs claimed that the contract of carriage was not subject to the Harter Act (the law of the United States) and that the Law of the Flag (Norway) governed.

- Held:*
1. That perils of navigation are something fortuitous or unexpected and that damages which flow from the ordinary expected incidents of the voyage are not covered by the exception "perils of navigation."
  2. That the law applicable to a contract depends upon the intention of the parties, and where, as in this case, a contract was made in the United States in the form there used and which had become necessary by the jurisprudence of that country, the parties will be assumed to have submitted themselves to the law of the United States regarding the responsibilities of the parties under the contract.
  3. That the shipowner had exercised due diligence to make the ship seaworthy, and that the damage resulted from faults or errors in navigation, and that under the Harter Act of the United States the defendants were exempt from liability.
  4. That the Exchequer Court has no jurisdiction over claims for General Average contribution, and that the defendants' counter-claim should be dismissed.

ACTION by the plaintiffs to recover \$35,000 damages to their cargo of grain while in transit from Buffalo to Montreal.



The following are extracts from the bill of lading under which the cargo was shipped:—

LAKE CARRIERS' FORM GRAIN BILL OF LADING

BUFFALO, N.Y., August 30th, 1928.

Shipped, in apparent good order and condition by Western Elevating Ass'n., Inc., as agents and forwarders, for account and risk of whom it may concern, on board the Steamer Skarp, whereof..... is Master, now in the port of Buffalo and bound for Montreal, the following property as herein described, shippers' weight (weight, quality and value unknown to the undersigned), to be delivered in like good order and condition (the dangers of navigation, fire and collision excepted), as consigned herein or to his or their assigns or assignees upon paying the freight and charges as noted below.....

If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average or for any special charges incurred but with the Shipowner, shall contribute in General Average, and shall pay such special charges as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness.

The action and counter-claim were tried before the Honourable Mr. Justice Demers, Local Judge in Admiralty for the Quebec Admiralty District.

*Errol Languedoc, K.C.*, for the plaintiffs.

*R. C. Holden, K.C.*, for defendants.

The facts are given above and in the reasons for judgment.

DEMERS L.J.A., now (June 29, 1932), delivered the following judgment:

This is a claim for damages by the owners of the cargo and the Underwriters of the said cargo.

Plaintiffs allege that under the contract of carriage, Defendants were bound to deliver the said cargo in good order and condition at the port of Montreal; that on the 1st of September, 1928, during the course of her said voyage while rounding the breakwater at the entrance to the north channel off Johnstown, in the province of Ontario, the said vessel swung and sheered and struck heavily against the

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stone pile with her port bow and remained fast ashore; part of the cargo was discharged and approximately fifty bushels of her cargo were lost through lightering operations; that the defendant ship then proceeded on her way past Sparrowhawk Point, where she again became completely out of control, but was finally righted and some distance lower down, on the 2nd of September, after rounding Iroquois Point, she again became completely out of hand and took a violent sheer to port; she took ground hard and stranded, the said stranding resulting in the damage to the cargo.

Defendants plead first, that under the contract of carriage, which has been produced by plaintiffs, defendants were exempt from liability for loss or damage due to the dangers of navigation; that the waters in the vicinity of the places where the casualties referred to in the plaintiffs' action are alleged to have occurred, are dangerous, and vessels have frequently had difficulty and have stranded there; that any loss or damage which may have been sustained by the plaintiffs is due to the dangers of navigation.

As a second plea, they allege that the said contract of carriage was subject to all the terms, provisions and exemptions from liability contained in the United States Statute known as the Harter Act, and paragraph 16 specially; that if the loss and damage claimed by the plaintiffs were not due to the dangers of navigation, they resulted from faults or errors in navigation, or in the management of the vessel, and under the said Harter Act, the defendants are exempt from liability therefor; that by the Bill of Lading it was also so agreed in conformity with the United States practice, that in case of due diligence by the owners, in case of fault or negligence of navigation or management of the ship or unseaworthiness of the ship whether existing at the time of shipping or at the beginning of the voyage, but not discoverable by due diligence, the owners of the cargo would not be exempted from liability for contribution in General Average.

The defendants filed a counter-claim for contribution of General Average, for a sum of \$4,976.34.

Plaintiffs have answered to this plea, as to the perils of navigation, that the defendants were, or should have been, well aware of the nature and risks, whatever they might be,

of the voyage from Buffalo to Montreal, and, therefore, they deny that the loss was caused by perils of navigation.

As to the second point of the defence, plaintiffs, in answer to paragraph 16, do not deny the fact alleged therein, but, on the contrary, they "pray acte of the statement therein made that the damage was due to fault or error of navigation or management of the ship and they deny that the Harter Act has any application."

As to the counter-claim, plaintiffs specially urge that it is illegal and should be dismissed for reasons of law and practice; they also deny that it was duly proved.

It was conclusively proved that there are bad currents and eddies and that all ships sheer at the North Channel and at Iroquois Point, and also at Sparrowhawk Point, and that at the last place it is not unusual or improper to reverse the engines and let them turn right around. Many vessels have difficulty at the entrance to the North Channel and at Iroquois Point, and if they do not straighten up and recover from their sheer, "It is just too bad," to use the words of Captain Barrett.

Plaintiffs' witness Pilot Lindgren, who was examined on commission, says that he handled the *Skarp* exceptionally well, except where she took her one sheer at the entrance to the North Channel; that the *Skarp* had the usual type of extension rudder, and that the ship was in a seaworthy condition, but that the ship did not answer her rudder when she happened to take her bad sheer at the entrance to the North Channel. When a ship sheers, it is because she is not answering her helm at that particular moment.

That Pilot left immediately after the first accident, and was replaced by Pilot Murphy, who is also a witness for the plaintiffs. Pilot Murphy, who appears to have no interest whatever in the case since the *Skarp* is a boat which perhaps he will never again pilot, testifies that everything about the ship was in excellent condition; that she had ample steam, and everything else she needed and the impression to be derived from his testimony is that the stranding at Iroquois Point was due to the bad currents.

The plaintiffs' own surveyor, Mr. Crocker, surveyed the ship and cargo after the North Channel stranding and examined the steering gear and extension rudder and tried out the steering gear under steam, and he testified that

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everything was in excellent condition, and this witness for the plaintiffs testified positively that he considered the vessel seaworthy. This examination was made immediately after the first stranding.

It is proved by all witnesses that the extension rudder was the ordinary extension rudder for the vessels on the lake.

As to the evidence of what took place after the accident, I consider that it should be all disregarded, and that most of it, if not all, is illegal.

*As to the First Point—Perils of Navigation:*

The Court is of opinion that this plea is not founded.

Perils of navigation should be something fortuitous or unexpected. Damages which flow from the ordinary expected incidents of the voyage, for example, from merely being in water or from taking the ground in the ordinary way in a tidal harbour, are not covered by the exemption "perils of navigation."

*Carver, Carriage of Goods*, No. 87.

*Scrutton, Charter Parties*, 12th Edition, p. 260.

*As to the Second Point—we have to examine:*

- (a) if the Harter Act does apply; and
- (b) if the case falls under it.

This contract was made in Buffalo on behalf of the plaintiff company, which is an American company, with the Norwegian steamer *Skarp*.

It is contended by the plaintiffs that this contract is ruled by the law of the flag, and they reply principally on the case of *Lloyd v. Guibert* which is a different case. In that case, both parties were foreigners. It was for a voyage on the high seas. Here plaintiffs repudiate the law of their country and want to apply the law of Norway for a voyage from Buffalo to Montreal.

One must admit that it is quite unnatural. The plaintiffs and their insurer had made a contract of insurance for that cargo from Fort William to Montreal via Buffalo, in which they agreed that the insurance shall cover against all damage resulting from faults or errors in navigation or in the management of the vessels, from which vessels and

their owners . . . are relieved of responsibility by the clause in Section 3 of the so-called Harter Act.

It is pretty hard to imagine that the owners had the intention, when they made this contract in Buffalo, to be ruled by the laws of Norway.

Now, let us come to the intention of the Master of the ship. He made his contract in Buffalo in the form used in the United States, a form which has been rendered necessary by American jurisprudence.

Moreover, the clause concerning General Average in this contract presupposes the Harter Act, for if the owners of the ship were responsible for the loss of the cargo due to the negligence of the pilot, there could be no contribution. Contribution presupposes necessarily that the owners of the ship are not responsible.

*See Lowndes, General Average, 6th Edition, p. 35.*

It being admitted by all authorities that it is always the intention of the parties which should rule the contract, I am of the opinion that this contract is ruled by the Harter Act.

In their factum, plaintiffs contend that the loss was not caused by faults or errors of navigation, but as I have said, they have admitted this fact. Defendants, by their allegation 16, said that they did, and the plaintiffs, instead of denying the fact, on the contrary say—"we pray acte of the declaration that the loss occurred by fault and negligence in navigation."

It is useless for me to say that it is a rule of our Courts, as it is a rule in England, that a fact which is not denied is admitted. If there had been only one stranding in this case, I would have considered that it was a clear case, but the fact that there were two strandings by two different pilots is, I admit, of a nature to create doubt, but when we consider that plaintiffs' own surveyer surveyed the ship after the first stranding, and testified that everything, even the rudder, was in excellent condition, and that Pilot Murphy, who would be interested, it seems to me, to say that the accident occurred by the fault of the ship, does not say so, but, on the contrary, leaves a strong impression that it was by his own want of skill or carelessness.

The plaintiffs have drawn my attention to the fact that there is a difference between the English Act of 1924 and

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the Harter Act, Section 3; but the Bill of Lading in this case, in my opinion, goes further than the Harter Act, and it is provided therein that there is no warranty of seaworthiness, but only of diligence as to the seaworthiness, as under the English Law.

Being of the opinion that the defendants have proved that they had made due diligence to make their ship seaworthy, and that the stranding is due to some fault or error of the Pilot in these very dangerous places, I have come to the conclusion that the claim of the plaintiffs should be dismissed with costs.

As to the counter-claim, after examining the authorities of both parties, I arrive at the conclusion that the Court has no jurisdiction in the matter, and though the amount of claim for average has been proved to my satisfaction, I am of opinion that this counter-claim should be dismissed with costs, but without costs of enquete.

*Mayers*, pp. 2 and 3; *Lowndes*, 5th ed., p. 404.

*Judgment accordingly.*

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 Aug. 27.

EXCHEQUER COURT OF CANADA

BETWEEN:  
 THE C. TURNBULL COMPANY }  
 LIMITED ..... } PETITIONER;  
 AND  
 DOMINION WOOLLENS AND WOR- }  
 STEDS, LIMITED, ET AL. .... } RESPONDENTS.

*Trade-Mark—Expunging—Calculated to deceive—Prior adoption—General similarity*

The petitioner, long prior to the registration of respondents' mark, adopted for use a specific trade-mark consisting of the representation of a ram, across the centre of which appears the word "Ceetee," with under the word "Ceetee" the words "Pure Wool" and over the word "Ceetee" the words "Guaranteed Unshrinkable" and under the ram the phrase "Established 1859," as applied to woollen goods of all kinds. The respondents had registered a specific trade-mark consisting of the representation of a sheep arranged in front of the representation of radiating rays of light arranged under a rectangular figure, together with the name Dominion cutting through the rectangular figure and the words Woollens & Worsteds Limited flanked on either side, as applied to woollens, worsteds, knitted goods and

wearing apparel. The Court found that the petitioner adopted its trade-mark some time previous to the adoption by the respondents of their mark and the registration thereof, and held:

1. That inasmuch as the most conspicuous part of the two trade-marks and that which caught the eye, was the ram which was similar in general shape and appearance, the respondents' trade-mark was calculated to deceive and was registered without sufficient cause and should be expunged.
2. Where two persons apply for registration of their marks and such registration is refused by reason of other similar marks being on the register, and where subsequently, without notice to the other, one of said marks was registered, upon petition to the Court by the other person for the registration of its mark and for expunging the other marks cited against it, the Court is in the same position as the Commissioner of Patents and should deal with the same as if there were two co-pending applications for registration before it, and must decide whether both should be registered or, if only one, which one.
3. That there is nothing in the law prohibiting a party from adopting a particular representation of a sheep in connection with other designs for use as a trade-mark and that the same may be registered as such.

PETITION of petitioner herein to have its trade-mark registered and respondents' trade-mark, among others, expunged from the Register of Trade-Marks. Contestation was joined between The C. Turnbull Company Limited and the Dominion Woollens and Worsteds Limited, only.

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

*W. L. Scott, K.C.*, for the petitioner.

*A. J. Thomson, K.C.*, for the respondents.

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

ANGERS J., now (August 27, 1932), delivered the following judgment.

The petitioner is a manufacturer of woollen goods and underclothing, carrying on business at the city of Galt, in province of Ontario.

The name of the company was originally The C. Turnbull Company of Galt Limited. In December, 1930, The C. Turnbull Company of Galt, Limited, sold and transferred to The C. Turnbull Company, Limited, the present company and petitioner herein, all its assets, including present and future trade-marks, trade names and trade designs: see exhibit 12.

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The new company being the successor of the old one, for brevity's sake, I shall refer to either of them as the petitioner.

By its petition, the C. Turnbull Company, Limited, asks:

1. that its trade-mark consisting of the representation of a ram across the centre of which appears the word *Ceetee*, with the words *guaranteed unshrinkable* over the word *Ceetee* and the words *pure wool* under the word *Ceetee* and, under the representation of the ram, the words *established 1859*, be ordered to be registered as a specific trade-mark for woollen goods of all kinds;

2. That the entry in the Register of Trade-Marks, Register number 50, folio 12122, of the trade-mark of Morgans (Hereford) Limited, a conspicuous portion of which is a sheep, be expunged;

3. That the entry in the Register of Trade-Marks, Register number 209, folio 45736, of the trade-mark of L. W. Caldwell & Company, Limited, a conspicuous portion of which is a ram, be expunged;

4. That the entry in the Register of Trade-Marks, Register number 242, folio 52237, of the trade-mark of Dominion Woollens & Worsteds Limited, a conspicuous portion of which is the representation of a sheep, be expunged.

The trade-mark of the respondent, Dominion Woollens & Worsteds Limited, is described as consisting of the representation of a sheep (in fact a ram) arranged in front of the representation of radiating rays of light arranged upon a rectangular figure together with the name *Dominion* cutting through the rectangular figure and the words *Woollens & Worsteds Ltd.* flanked on either side.

The petition, together with a notice of its filing, was duly served upon L. W. Caldwell & Company, Limited, and Dominion Woollens & Worsteds, Limited; it was not served upon Morgans (Hereford) Limited, which, as the proof shows, is no longer in existence. I shall deal with the demand for expunging the Morgans (Hereford) Limited's trade-mark later.

A notice of the filing of the petition was duly published in the issues of the *Canada Gazette* of the 17th, 24th and 31st of October and 7th of November, 1931, as appears from the affidavit of publication filed herein.



L. W. Caldwell & Company Limited, through its solicitors, consented to judgment being given directing that the entry of its trade-mark in the Register of Trade-Marks, register number 209, at folio 45736, should be expunged: see exhibit 2.

The respondent Dominion Woollens & Worsteds Limited alone contested the petition.

In its statement of defence, Dominion Woollens & Worsteds, Limited, avers that it does not oppose the registration of the petitioner's trade-mark, but that it does oppose the demand to expunge from the register its own trade-mark. It admits that the word Ceetee used in conjunction with the representation of a ram is understood by the public and the trade to indicate goods manufactured by the petitioner, but it denies that the representation of a ram without the word Ceetee is so understood. Respondent adds that, before and after the adoption by petitioner of its trade-mark, the representation of a sheep has been commonly used by manufacturers of woollen goods and that such representation is not by itself the proper subject of a trade-mark, because it is descriptive of the goods to which it is applied. Respondent further alleges that the representation of a sheep constitutes part of the trade-marks set out in the particulars delivered with the Statement of Defence and of a large number of other trade-marks for woollen goods registered and unregistered which are in use in Canada and elsewhere. Respondent goes on to say that its trade-mark is a valid one and denies that its use constitutes an infringement of the petitioner's trade-mark. The respondent accordingly submits that the petition should be dismissed as far as it is concerned, with costs.

On the 10th of April, 1931, the petitioner filed an application for the registration of its above described trade-mark with the Commissioner of Patents. The Commissioner acknowledged receipt of this application, of the drawing attached thereto and of the registration fee on the 13th of April, 1931.

On the 28th of April, 1931, the Commissioner wrote to petitioner notifying it that Morgans (Hereford) Limited, of Hereford, England, had a trade-mark consisting of a device of a sheep standing on grass with the words *Wyeland selected wool* printed across its body, registered in connec-

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tion with cloths and stuffs of wool and articles of clothing made therefrom, since the 16th of July, 1907, and that L. W. Caldwell & Company, Limited, of Calgary, Alberta, had a trade-mark consisting of the representation of a shield on which appears a ram, registered in connection with textiles and textile products, since the 20th of February, 1929, and that the petitioner's application appeared to be in conflict with the registrations cited and must be refused.

On the 4th of April, 1931, the respondent filed an application for the registration of its above described trade-mark with the Commissioner of Patents. The latter acknowledged receipt of this application, together with the drawing and the registration fee accompanying it, on the 9th of April, 1931.

On the 28th of April, 1931, the same day on which he advised the petitioner that its application was refused, the Commissioner wrote to the respondent, referring to the same trade-marks as in his letter to the petitioner, namely those of Morgans (Hereford) Limited and of L. W. Caldwell & Company, Limited, and notifying it that its application was in conflict with the said trade-marks and must be refused.

The respondent was more insistent; it asked for the reconsideration of the Commissioner's decision and, after some correspondence, forming part of the Patent and Copyright Office file, which was produced as exhibit 9, it finally succeeded in having its trade-mark registered. The registration is dated the 19th of May, 1931.

I must say that I am at a loss to understand why the respondent's application should have been accepted and the petitioner's application refused. As Counsel for respondent put it:

possibly we were not so easily satisfied as my friend, and pursued the Registrar a little further and got him to change his original ruling, while my friend's clients were not persistent enough.

If Caldwell's and Morgan's registrations were in the way of the petitioner's mark, surely they were to the same extent in the way of the respondent's mark. However since L. W. Caldwell & Company Limited has consented to the expunging from the register of its trade-mark and since, for the reasons hereinafter set out, I am inclined to grant the demand for the expunging of Morgans (Hereford) Lim-

ited's trade-mark, I am not particularly interested in the reasons which induced the Commissioner to grant one trade-mark and refuse the other. I have cited these facts solely for the purpose of explaining why, in my opinion, I should deal with the matter as if I had before me two co-pending applications for the registration of trade-marks, and I had to decide whether both should be registered or, in the event of there being a conflict, adjudge which of the two ought to have priority and be allowed to go on the register.

The respondent's trade-mark and the petitioner's trade-mark, as covered by the application exhibit 8, are both very broad: they cover practically any kind of woollen articles.

The application of the petitioner states that the trade-mark which it seeks to register is to be used in connection with the sale of *woollen goods of all kinds*. The respondent's trade-mark is to be applied to the sale of *woollens, worsteds, knitted goods* and wearing apparel.

The petitioner has almost exclusively, at least during the last fifteen years or so, restricted its production to underwear; the respondent, on the other hand, has only manufactured outerwear. Admissions were filed in the record as exhibit 4, reading as follows:

The following facts are hereby admitted:

1. Neither the first trade-mark of the petitioner, consisting of the word "Ceetee" alone, nor the present trade-mark consisting of the representation of a ram bearing the word "Ceetee" has ever been applied by the petitioner to knitted outerwear.

2. Up to about the year 1917 The C. Turnbull Company of Galt Limited manufactured and sold certain classes of knitted outerwear, namely jerseys and sweater coats, and during the years 1927, 1928 and 1929 such Company sold sweater coats which it purchased from other manufacturers. None of such jerseys and sweater coats were sold under the trade-mark referred to in paragraph 5 of the petition, but were in all cases sold under the mark "Turnbull's."

3. Neither Dominion Woollens and Worsteds Limited nor any Company whose assets or shares it acquired ever manufactured knitted underwear. In one of the factories now owned by Dominion Woollens and Worsteds Limited there are a few machines which could be used, but have not been used, for the manufacture of knitted underwear.

The evidence discloses the following facts.

From 1900 to 1908 The C. Turnbull Company of Galt, Limited, used the mark Ceetee, without the ram, on all its woollen underwear. Since 1908 the company has made use of its present trade-mark consisting of the representation of a ram, across the centre of which appears the word

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*Ceetee*, with under the word *Ceetee* the words *pure wool* and over it the words *guaranteed unshrinkable*.

Approximately 95 per cent of its woollen underwear has, since 1908, been sold under the said trade-mark: see deposition Norwood.

Underwear with the mark above described has been extensively advertised throughout Canada since 1908, in newspapers, magazines, farm papers and other publications, as shown particularly by exhibits 13 and 18. From 1907 to 1931 inclusively, the petitioner spent \$357,640.66 on advertising; during the same period, sales amounted to \$18,175,069.72; these figures are taken from the summary of sales and advertising expenditures prepared by the company's auditors, filed as exhibit 13. I may note here that the parties agreed that proof with respect to sales and advertisements could be made by the production of certificates purporting to be signed by the respective auditors of the parties: see agreement exhibit 3. Approximately two-thirds of the goods mentioned in the Auditors' report (exhibit 13) bore the trade-mark (deposition Auld).

The evidence further shows that the goods manufactured by the petitioner are of a very high quality: McGiffin, who has been in the haberdashery business in Ottawa, as a retailer for 45 years and has handled the petitioner's underwear for the last 20 years, says that people who are looking for high grade underwear ask for the petitioner's goods; two witnesses, Norwood, a haberdasher of Toronto, and Holbrook, a retired haberdasher of Ottawa, both of whom are well acquainted with the petitioner's merchandise for having sold it for years, stated that it is the best made in Canada and equal to any British make. This is undoubtedly an excellent recommendation.

The petitioner's goods are sold extensively all over Canada. According to the evidence, some customers will ask for *Ceetee* underwear and others for the underwear with the sheep on it (depositions Cooper, Holbrook and McGiffin).

Dominion Woollens and Worsteds Limited, the respondent, has applied its trade-mark to woollen outerwear, as men's, women's and children's sweaters, pullovers and coats, mitts, cloths and yarns. From the first of May, 1931, to the second of April, 1932, sales aggregated \$2,258,038.64; during the same period, \$3,811.63 was spent on advertis-

ing (deposition Whitten). Whitten, secretary-treasurer of the respondent, stated that his company sells very little to retailers; the bulk of its sales is to wholesalers, jobbers and large departmental stores (same deposition). I must say that it seems to me quite indifferent that the respondent's goods be sold to the retailers direct or through intermediaries.

Considering the long prior use by the petitioner of its trade mark, I think that, in the event of a conflict between the applications of the petitioner and of the respondent, precedence should have been given to the petitioner's application: Kerly on Trade-Marks, 6th edition, p. 205, where he says:

Where any marks already in use are trade-marks, whether registered or unregistered, it is clear that they are obstacles to the registration of any mark which so closely resembles them as to be calculated to deceive, unless the applicant has an independent trade-mark right in the mark he puts forward. This is expressly enacted by section 19 in regard to registered trade-marks; and it follows, in the case of unregistered trade-marks, from the prohibition placed by section 11 upon the registration of any matter, the use of which, by reason of its being calculated to deceive or otherwise, would be deemed disentitled to protection in a Court of Justice.

I am convinced that if all the facts had been put before the Commissioner of Patents, he would have given precedence to the petitioner's application and allowed its mark to go on the register. I have no hesitation in saying that this is what I would have done. I may add that had there been any objection on the part of the respondent to the registration of the petitioner's trade-mark I would have felt bound to overrule it. However, as I have already remarked, the respondent says it has no objection to the registration of the petitioner's trade-mark and that settles the matter as far as this question is concerned.

I shall therefore direct the Commissioner of Patents to register the petitioner's trade-mark, in accordance with the provisions of the Trade-Mark and Design Act, as a specific trade-mark for woollen goods of all kinds.

There remains for me to examine the question as to whether I should grant the petitioner's demand for the expunging of the respondent's trade-mark from the register. To this end I must determine if the respondent's trade-mark is identical with the petitioner's trade-mark or so resembles it as to be calculated to deceive or mislead the public.

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The respondent naturally denies the similarity or resemblance and says that there is no likelihood of deception or confusion. The respondent further says that the sheep, or, in fact, any other animal, is descriptive and besides *publici juris* and therefore cannot constitute the feature or at least the main feature of a trade-mark.

Under Section 11 of the Trade-Mark and Design Act (R.S.C., 1927, ch. 201), the Minister may refuse to register any trade-mark:

- (a) if he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of the trade-mark;
- (b) if the trade-mark proposed for registration is identical with or resembles a trade-mark already registered;
- (c) if it appears that the trade-mark is calculated to deceive or mislead the public.

Section 45 of the Act says that the Exchequer Court may, at the suit of any person aggrieved by an entry made without sufficient cause in the register of trade-marks, make such order for expunging or varying it as the court may think fit.

There is obviously much similarity between the rams of the two marks; a mere glance at the drawings is sufficient to notice it. Both animals are represented standing, side-wise, with their heads pointing to the left of the picture. There is a very slight difference, hardly noticeable to the casual observer, in the position of the heads. The petitioner's ram is looking straight ahead, whereas the respondent's ram's head is slightly turned to the left. The petitioner's ram, as already mentioned, bears in the centre the word *Ceetee*, above which appear the words *guaranteed unshrinkable* and below the words *pure wool*; the respondent's ram bears no inscription; around it however appear, in triangular form, the name *Dominion Woollens & Worstedes Ltd.* I do not think that the words appearing on the petitioner's ram and the name inscribed around it in the respondent's trade-mark are sufficient to distinguish one mark from the other for the public in general. The dominant feature of both trade-marks is the ram; it is conspicuous and attracts the eye. The written matter is, in my opinion, secondary and much less attractive; I am inclined to believe that in many cases, it will escape the attention of the average purchaser. Probably the prudent and

cautious purchaser may not be misled, but the one whom I have to consider is the incautious and unwary purchaser, who will be more attracted by the representation of the ram and is prone to pay little attention, if any, to the words or phrases appearing on or around the animal. As a witness said, some customers come in a store and ask for underwear with the sheep; if offered underwear bearing the respondent's trade-mark, the customer is exposed to be misled and to believe that he is getting the petitioner's goods. Of course the purchaser who goes into a store with the intent of getting Ceetee underwear will ask for it and look for the word *Ceetee* on the goods offered to him; but I am inclined to think that this purchaser will be the exception. The witness Cooper said that six out of eight customers will ask for the underwear with the sheep; this statement causes me no surprise; the name apparently does not strike the ordinary unwary purchaser. A person who, for 10, 15 or 20 years, has been in the habit of buying the petitioner's underwear on the inducement of the representation of the ram thereon, is offered underwear bearing the respondent's trade-mark, of which the most conspicuous feature is the sheep, is liable to accept this merchandise under the impression that he is getting the same as he has been buying in the past.

It seems to me that, if the respondent had intended to copy—I must say that there is no proof to that effect—the petitioner's mark, it could not have done better. The choice of the ram instead of the common sheep appearing on most of the trade-marks filed as exhibits by the respondent, the representation of the animal in profile, in a standing position, with its head pointing to the left of the picture, every detail, except for the not very prominent obliquity of the respondent's ram's head, tends to create the impression that both rams are exactly alike. Probably the slight difference between the two animals would be noticed by most persons looking at the two marks at the same time; but I am sure that very few people, after looking at both animals on different occasions, could point out the dissimilarity between them. As Kerly (op. cit., p. 270) says:

Two marks, when placed side by side, may exhibit many and various differences, yet the main idea left on the mind by both may be the same; so that a person acquainted with the mark first registered, and not having the two side by side for comparison, might well be deceived, if the goods

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were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted. Take, for example, a mark representing a game of football; another mark may show players in a different dress, and in very different positions, and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trade-marked goods, and relying, as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing.

I can easily conceive an incautious purchaser mistaking one of the marks for the other and accepting the goods of the respondent for those of the petitioner. Such confusion would be unfair to the petitioner who has a long established business and has earned a well deserved reputation for the underwear it has been selling under its trade-mark for approximately 24 years.

What constitutes a deceptive resemblance or, in other words, what degree of resemblance is required to be calculated to deceive, is a matter incapable of definition *a priori*. Kerly (op. cit., 463) says:

No definite rule as to the amount of resemblance required can be formulated *a priori*, but the net impression produced and "the main idea left on the mind" by one mark must be compared with that left by the other, for marks may well be confused by purchasers, who see the defendant's mark when they have present in their memories only an indefinite recollection of the plaintiff's, in cases where the marks could not be mistaken for each other if they were seen side by side. So that the whole mark of the defendant may too nearly resemble that of the plaintiff, although all the essential particulars of the two are distinguishable.

In *Re Christiansen's Trade Mark*, often called the *Taendstikker Case* (1), where the Court of Appeal, reversing the decision of Chitty J., held that a label for match-boxes so resembled another label registered for the same goods as to be calculated to deceive, the judgment proceeded on the ground that the impression produced or the idea left on the mind by both labels was similar. At page 61 of the report, The Master of the Rolls says:

Now let us see what it is we are to consider. We are to consider whether the one trade-mark is so like the other trade-mark that it is calculated to deceive. What is the trade-mark? The trade-mark is not the distinguishing feature of the trade-mark. The trade-mark is not one part of the matter. The trade-mark is not in the one case "Medals" and in the other case "Nitedals." That is not the trade-mark. If you say that, you strike out all the rest. The trade-mark is the whole thing, the whole picture on each. You have, therefore, to consider the whole. Mr. Justice Chitty has looked at the distinguishing features. He, I think, only looked at it to see whether, with that distinction the whole was like



or unlike. That is what he did, but the argument raised by Mr. Romer, and which was not only shadowed but put plainly forward by his skilful cross-examination was this: the moment there is any distinction in any part the things are at once unlike. That is his point. Therefore he cross-examined the people thus: "The lamps or the medals are alike and they are common?" "Yes." "The two things in the middle are unlike?" "Yes." "The word at the bottom is common to the trade, and it is the same in both?" "Yes, but it is common to the trade." Therefore, he says, everything but the words "Medals" and "Nitedals" is common, and those two are different, and therefore the whole is different. It seems to me that he has fallen into this fallacy: he takes each thing by itself and says either it is common or it is the same, and leaves out altogether the mode in which the things are put together in the two pictures.

And, in the same case, Lindley, L.J., says (p. 63):

I think if we look at the two boxes as they are sold and issued in the trade the resemblances between the two are so great that, although there are differences which might be detected, yet those differences are not so obvious as to make the whole dissimilar. I am quite aware that there is a great mass of evidence to show that a great portion of what is on these boxes is common to the trade. That, to my mind, only makes it the more imperative that the distinguishing features shall be such as to make the dissimilarity obvious. If the dissimilarity is so small, and the common features are so numerous, that the two as a whole are similar, the dissimilarity goes for nothing; and the more there is that is common and similar, the more difficult it is to make the dissimilarity striking. I do not say it cannot be done, because, of course, it can be done. The difference here, looking at the boxes, is simply this, that the word "Medals" is used instead of the word "Nitedals," all the rest being, according to the evidence, common. Now I do not think that is a dissimilarity which is sufficient in this case, because, although I rather agree in the view taken by Mr. Justice *Chitty*, that the leading feature is the name at the top or the bottom of the label, one must not be misled by that. The question is, notwithstanding that, what is the effect of the use or introduction of that distinguishing character upon the whole? When you look at the wholes, then it appears to me, I confess, that the dissimilarity is not enough to make the wholes dissimilar. The wholes are, to my mind, on the evidence, similar, notwithstanding the dissimilarity.

See also *Re Barker's Trade-Mark* (1); *Re Worthington's Trade-Mark* (2).

In the *Worthington's Trade-Mark Case*, James, L.J., said (p. 565):

Now, in dealing with these words (calculated to deceive) in the Trade Marks Registration Act, it appears to me that the Act of Parliament is one to which one might apply the principle of liberal construction. I do not generally like to use general maxims or general principles in considering Acts of Parliament or any other instrument, but I think this is one in which we might fairly say the provisions of the statute ought to be construed liberally, so as to advance the remedy and repress the mischief. It appears to me the intention was to prevent a person, having a trade-mark, being liable to be injured by another trade-mark which might be used to imitate his or be passed off as his.

(1) (1885) 53 L.T.R. 23.

(2) (1880) 42 L.T.R. 563.

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The marks must be compared as they are seen in actual use: Kerly, op. cit., 463; *Wilkinson v. Griffith* (1); *Seixé v. Provezende* (2); *Orr Ewing v. Johnston* (3).

In the *Worthington's Trade-Mark Case* (*supra*) Brett, J., said (p. 565):

It seems to me the arguments in the present case have raised two questions—one of law and one of fact. The question of law is this, whether in construing this Act of Parliament you are to look only at the marks as printed in the advertisement, or whether you are to look at the marks as they will probably be used in the course of trade . . . There again there is nothing about form or outline; it is the trade-mark taken as a whole. That being so, and the mischief being a mischief which is to be done to one person by another in the course of trade, and in the use of these marks in trade, it seems to me that it would be a narrow construction of the statute to say that you are only to look at the mark as it is printed in the advertisements, and that the proper construction is to say you are to look at the trade-mark as it will be used in the course of trade.

The drawing annexed to the respondent's trade-mark is very large, much too large in fact to be used on any garment. On account of its size and of the contrast between the black and white of the photostat copy, the name Dominion Woollens & Worsteds Ltd., is very conspicuous. But when the mark is reduced to a normal size for use on a garment of underwear or outerwear and the contrast between the colour of the garment and of the sheep and lettering surrounding it is lessened, the name will not be so conspicuous, hence the danger of confusion.

I may further cite, on this particular point, the case of *Farrow's Trade-Mark* (4). In this case one Farrow applied to register a buffalo, described as a *charging buffalo*, as a trade-mark for mustard. The application was opposed by Colman, who had registered a bull's head also for mustard, on the ground of resemblance calculated to deceive. The Comptroller General refused the registration and Farrow appealed to the Board of Trade, who referred the appeal to the Court. Stirling, J., adopting the interpretation given to the words *calculated to deceive* in re *Worthington's Trade-Mark* and in re *Christiansen's Trade-Mark*, held that the applicant's mark so nearly resembled the opponent's mark as to be calculated to deceive and dismissed the application. See also: re *Speer's Trade-Mark* (5); re *Barker's Trade-Mark* (*supra*).

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|---------------------------------------|-----------------------------------|
| (1) (1891) 8 R.P.C., 370 at p. 375.   | (3) (1880) L.R. 13 Ch. D. 434 and |
| (2) (1866) L.R., 1 Ch. 192 at p. 196. | (1882) L.R., 7 A.C., 219.         |
|                                       | (4) (1890) 7 R.P.C. 260.          |
|                                       | (5) (1887) 4 R.P.C. 521.          |

It has been argued on behalf of the respondent that the lettering on the two marks is different and that the name of the respondent company appears prominently on its own. I do not think that this differentiates the respondent's trade-mark sufficiently from the petitioner's to save it from being, in the eyes of the law, calculated to deceive. In the matter of *Biegel's Trade-Mark* (1) a mark was ordered to be expunged for reason of its resemblance to another trade-mark, in circumstances which I consider more favourable to the respondent than in the present instance. Wm. Younger & Co. had registered in 1876 certain trade-marks for fermented liquors, such as beer, wine and whisky, of which a triangular device was a material portion. Biegel, in 1886, registered a trade-mark comprising a somewhat similar triangular device for the same class of goods. Younger & Co. moved to rectify the register by expunging so much of Biegel's mark as consisted of this triangular device. The lettering was quite different in the two trade-marks and moreover the name Wm. Younger & Co. appeared prominently on the latter's mark, while the respondent's mark bore the name of C. L. Wilh Brandt, Biegel's principal, with the words St. Pauli Brauerei. Chitty, J., found the mark too similar and granted the motion.

The trade-marks of Wm. Younger & Co. and of Biegel have been reproduced in the report and a look at them shows that the triangular devices in each of them are not as prominent as the rams on the marks of petitioner and respondent herein and that, on the whole, the marks had more distinguishable features than the marks with which I am now concerned; still the respondent's trade-mark was held to resemble too nearly the petitioner's trade-mark and to be objectionable.

Another case in which an application to register was refused on the ground that the mark too closely resembled another one and was likely to create confusion is that of *Currie & Co.'s Application* (2). The facts are briefly cited in the head-note as follows (p. 682):

C. applied to register a Trade-Mark for whisky in Class 43. The Comptroller refused registration on account of another Trade-Mark registered by B. for whisky in 1883. Both marks contained the device of a

(1) (1887) 4 R.P.C. 525.

(2) (1896) 13 R.P.C. 681.

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fighting-cock and the words "Cock o' the North," but in most other respects were dissimilar. C. appealed from the Comptroller's decision, and gave notice of a motion that the registration be proceeded with, which was served upon the Comptroller and also upon B. It appeared from the evidence filed on the motion that C.'s Trade-Mark had been in use, with a slight variation, for about 11 years, and that B.'s Trade-Mark had been in use since the early part of 1883.

In this case as in the previous one, the trade-marks were printed in the report and it is quite obvious that the two marks contain many more distinguishing features than the marks of the petitioner and of the respondent. *In re Currie & Co.'s Application*, the only feature in common was the cock, but this cock, similar in both marks, was held to be the thing that caught the eye. A glance at the two trade-marks (at pp. 682 and 683) will show that the cocks are far from being as dominant as the rams appearing on the marks which form the subject of the present litigation.

In this case of Currie & Co.'s application, Kekewich, J. (at p. 684) expressed the following opinion:

The Comptroller, in my opinion, has exercised his discretion wisely. That discretion is reviewable by the Court, but I affirm the discretion. He is asked to register this Trade-Mark of the Applicants, which is said to be "Prince Charlie" whisky, and he objects, and the Respondents object, on the ground that they have already registered a Trade-Mark for whisky—that is, in precisely the same class, referable to the same goods, and which is so near the proposed Trade-Mark that the latter is calculated to deceive. I have heard a considerable amount of evidence to show that they have been both carrying on business and both using these marks for some time, and that no deception has occurred; but that does not seem to me to be the question at all. The question is whether this mark applied for is calculated to deceive; and "deceive" being a verb active, one has to apply a noun substantive, and that is, "ordinary or unwary purchasers." In my opinion, deception is extremely likely to follow the second registration.

In the same sense, I may refer to the decision of Joyce, J., in the Matter of the *Application of Pomril Ltd.* (1).

Kerly (op. cit., 465) says that "it was held that the use of words taken from the plaintiff's mark by the defendant was an infringement, notwithstanding that he always added his own name" and he cites several cases in support of his contention. What he says about words is, by analogy, to the same extent applicable to other features of the mark; the use of the defendant's name on a trade-mark, which is a colourable imitation of the plaintiff's trade-mark, is not, in most instances, sufficient to distinguish the former from the latter; in some cases, however,

where the elements of the labels were for the most part common to the trade or where the plaintiff could have no exclusive right to a common word, it was held that the name of the manufacturer was an element which could suffice to identify the goods: *Blackwell v. Crabb* (1); *Jewsbury & Brown v. Andrew & Atkinson* (2); *Thorne & Co. v. Sandow* (3); *Beard v. Turner* (4). In my opinion, these cases, in view of the circumstances particular to each of them, are distinguishable from the present one and cannot have any bearing on its issue.

With regard to probability of deception, I may add to the decisions already alluded to, the following, in which devices were held to be calculated to deceive: In re *Sandow Ltd.'s Application* (5); *The Upper Assam Tea Company v. Herbert & Co.* (6); *Boord & Son v. Huddart* (7); *Boord & Son. v. Thom & Cameron* (8); re *The Australian Wine Importers Limited* (9); *Finlay v. Shamrock Co.* (10); re *The Distributing Corporation's Application* (11); re *Jelley's Application* (12); *Wright, Crossley & Co. v. Blezard* (13).

In the case of *Wright, Crossley & Co. v. Blezard*, where the two labels, reproduced in the report do not resemble one another more than the Turnbull's and Dominion Woolen Marks do, Leigh Clare, V.C. said (p. 303):

The real question I have got to try is, not whether people would be deceived if they carefully read and looked at the labels, but whether people who have not paid very much attention to what is on one label, and have bought what I may call "on the view," would be misled by the other label, not looking very carefully at the other label. It is the same test exactly that I remember was applied when I was engaged in *Grafton v. Watson* with regard to copyright of design. If you see a design of a lady's dress in Regent Street, and see another design of another lady's dress in Bond Street a couple of hours afterwards, you may think that the two designs are exactly the same; whereas in fact, if you came to compare them bit by bit, you might see a great deal of difference. In the same way with these two labels; a man who has bought in one town, or in one street in a town, something which strikes him as being yellow, with red and black printed on it, may not have paid very much attention to the particular name or the particular lettering; and if he sees a label that looks very much like the one he knows, he may say:

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| (1) (1867) 36 L.J., Ch. 504. | (7) (1904) 21 R.P.C., 149.    |
| (2) (1911) 28 R.P.C., 293.   | (8) (1907) 24 R.P.C., 697.    |
| (3) (1912) 29 R.P.C., 440.   | (9) (1889) 41 Ch.D., 278.     |
| (4) (1865-66) 13 L.T.R. 746. | (10) (1905) 22 R.P.C., 301.   |
| (5) (1914) 31 R.P.C., 196.   | (11) (1927) 44 R.P.C., 225.   |
| (6) (1890) 7 R.P.C., 183.    | (12) (1882) 51 L.J. Ch., 639. |
| (13) (1910) 27 R.P.C., 299.  |                               |

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"This is obviously the same stuff; I am going to buy it now, and I shall get the same stuff; that is, I shall get other stuff from the same source." Some questions are put about people who come into a shop—whether they come and ask for "*Crossley's Semolina*." Of course they do not. What they do is, they come in and see a package made up very much like the other. They do not discriminate, possibly, between the two. They ask for semolina, and they think that they are going to get the semolina they had before.

I might refer to other decisions in which marks or labels have been found to be too similar and calculated to deceive; they are very numerous; but the question under consideration is mostly one of fact; the cases upon which I relied are those which, in my opinion, come nearer to and have more points of similarity with the present one; I cannot see that any useful purpose would be attained by dwelling on this subject at any greater length.

Many of the above mentioned cases were infringement cases. The fact is worth noting, because, if the principle is the same, the rules applicable to an action for infringement or passing-off and to an application to expunge a mark from the register are different. A stronger case must be made out by the plaintiff in an infringement or passing-off action than by the owner of a mark opposing the registration of another mark or seeking its removal from the register. I shall again refer to Kerly (op. cit., p. 462):

It follows that the question to be answered, when an infringement without taking the actual mark is alleged, is the same question as arises when a mark tendered for registration is objected to, or, having been registered, is sought to be removed from the Register, on the ground that it so nearly resembles a trade-mark already on the Register as to be calculated to deceive, within the restriction of section 19. The principles governing the comparison of the marks, and determining what amount of resemblance is calculated to deceive, are the same in both cases, although a higher standard of resemblance must be conformed to in an action for infringement than that set up in cases of the other class.

It was incumbent upon the respondent, who adopted an important feature and distinctive characteristic of the petitioner's mark, to establish that there was no likelihood of deception. Kerly (op. cit., p. 457) says:

But the adoption of a single characteristic and distinctive particular from the plaintiffs' mark and its use alone, or with other matter, may well be an infringement of the entire mark. At any rate, it throws upon the defendant the onus of proving the contrary.

In the case of *Ford v. Foster* (1) Lord Justice James (at p. 623) says:

(1) (1872) L.R., 7 Ch. App., 611.

The Plaintiff makes this *primâ facie* case—that he has a plain trade-mark, a material and substantial part of which has been taken by the Defendants. Then the onus is, under those circumstances, cast upon the Defendants to relieve themselves from that *primâ facie* liability.

See also: *Orr Ewing v. Johnston* (1).

The respondent has failed to establish that there is no likelihood of confusion; as I have already said, I believe that the public may be deceived by the respondent's mark and be liable to accept the latter's goods as being the products of the petitioner.

It has been said and it is admitted (see exhibit 4) that the petitioner never applied its trade-mark to knitted outerwear and, on the other hand, that the respondent never manufactured knitted underwear. The admissions contained in exhibit 4 further mention that in one of the factories of the respondent there are machines which could be used, but have not been used, for the manufacture of knitted underwear. There is, as far as I can see, nothing to prevent the respondent from manufacturing underwear and applying its trade-mark thereto. On the other hand, the petitioner is not restricted, it seems to me, to the manufacture of underwear; it may, whenever it sees fit, make any kind of woollen outerwear, and sell it under its trade-mark. As I have said, both trade-marks are very broad; they apply to woollen goods of any description. The fact that the respondent has, up to the present time, deemed expedient to manufacture outerwear exclusively does not, in the circumstances, modify the situation; the respondent's trade-mark is to the same extent objectionable.

There is no proof of actual deception; perhaps it is due to the fact that the respondent's trade-mark had only been in use for a few months when the case came up for trial. However proof of deception is unnecessary, if the mark is, in opinion of the Court, calculated to deceive or if it comprises essential features of the mark infringed or is a colourable imitation thereof: *Kerly*, op. cit., pp. 455 and 460; *Ford v. Foster* (*supra*), at p. 623; *Orr Ewing v. Johnston* (*supra*).

It has been urged on behalf of the respondent that an animal, in this particular case a ram, cannot be monopolized by any individual because it is descriptive and is com-

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mon to the public or, in other words, *publici juris*. The petitioner admits that it cannot claim a monopoly of the sheep, but submits that there is nothing in the law prohibiting him from adopting a particular representation of a sheep and thereby preventing others from using it. The petitioner's contention is, in my opinion, well founded. In order to show that the representation of a sheep is common to the trade, the respondent has filed a number of trade-marks, Canadian, British and American, in most of which a sheep is a more or less prominent feature (exhibits B. to W. inclusive). None of these marks offer any striking resemblance with that of the petitioner; most of them are entirely different. After a careful examination of these marks, I am convinced that none of them could be mistaken for the petitioner's trade-mark. Moreover the evidence shows that the majority of these marks have never been used in Canada and are not known to the trade (see depositions Auld, Cooper and McGiffin).

On the question raised by the respondent that the sheep is descriptive and moreover common to the trade and for these reasons cannot be a proper subject of a trade-mark, I may refer to the following cases: *Boord & Son v. Huddart (supra)*; *Boord & Son v. Thom & Cameron (supra)*; *Upper Assam Tea Co. v. Herbert & Co. (supra)*; *Orr Ewing & Co. v. Johnston & Co. (supra)*; *Australian Wines Importers (Supra)*. See also re *Dexter's Application & re Wills's Trade-Mark (1)*; *Star Cycle Co. v. Frankenburgs (2)*.

The ram adopted by the petitioner is, I think, a proper subject for a trade-mark and the respondent's defence fails on this point as well as on the others.

For the reasons hereinabove set forth, I have reached the conclusion that the petitioner is entitled to have its trade-mark registered and that the respondent's trade-mark must be expunged. Seeing the consent of L. W. Caldwell & Co. Ltd. (exhibit 2), the latter's trade-mark shall also be expunged.

I must now deal with the demand to expunge Morgans (Hereford) Limited's trade-mark. Proof has been made

(1) (1893) 2 Ch., 262.

(2) 24 R.P.C., 46 and (in appeal) 405.



that the trade-mark has not been used in Canada and is unknown to the trade (depositions of Auld, Cooper and McGiffin). It has further been established by affidavits, with the consent of the respondent, that Morgans (Hereford) Limited went into voluntary liquidation in 1910 and is apparently out of existence. The affidavits further disclose that the company's trade-marks (2) were removed from the register in England on account of non-payment of the fees and that the records do not reveal any assignment of or other dealings with the said trade-marks. In the circumstances, I am satisfied that the Canadian Trade Marks of Morgans (Hereford) Limited must be expunged from the register as being baneful to the trade: Kerly (op. cit.) p. 354; *Pink v. Sharwood* (1); re *John Batt & Co.'s Trade-Mark* and re *Carter's Application* (2).

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In the latter case, Lindley, M.R. (at p. 441) says:

It remains only to consider whether s. 90 of the Act of 1883 (the rectification section) is applicable to this case. We are of opinion that it is. The applicants are parties aggrieved; for the trade-mark they desire to have registered is kept off the register by reason of the presence on it of the marks of J. Batt & Co. The entry of these marks is "an entry made without sufficient cause in the register." We are not disposed to put a narrow construction on this expression, nor to read it as if the word "made" were the all-important word, and as if the words "made without sufficient cause" were "made without sufficient cause at the time of registration," so as to be confined to that precise time. If any entry is at any time on the register without sufficient cause, however it got there, it ought in our opinion to be treated as covered by the words of the section. The continuance there can answer no legitimate purpose; its existence is purely baneful to trade, and in our opinion in the case supposed the Court has power to expunge or vary it.

There will be judgment as follows:

1. The entry in the Register of Trade-Marks, Register No. 50, at folio 12122, of the trade-mark of Morgans (Hereford) Limited, a conspicuous portion whereof is the representation of a sheep, is ordered to be expunged;

2. The entry in the Register of Trade-Marks, Register No. 209, at folio 45736, of the trade-mark of L. W. Caldwell & Company Limited, a conspicuous portion whereof is the representation of a ram, is ordered to be expunged;

3. The entry in the Register of Trade-Marks, Register No. 242, at folio 52237, of the trade-mark of Dominion Woollens & Worsteds Limited, a conspicuous portion of

(1) (1913) 30 R.P.C., 725.

(2) (1898) 2 Ch.D., 432.

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which is the representation of a sheep, is ordered to be expunged;

4. The petitioner's specific trade-mark consisting of the representation of a ram across the centre of which appears the word *Ceetee*, with under the word *Ceetee* the words *pure wool* and over the word *Ceetee* the words *guaranteed unshrinkable* and under the representation of the ram the phrase *established 1859*, as applied to woollen goods of all kinds, is ordered to be registered in the office of the Commissioner of Patents at Ottawa, in accordance with the provisions of the Trade-Mark and Design Act.

5. The petitioner will be entitled to its costs of action as against the respondent, the Dominion Woollens & Worsteds Limited.

*Judgment accordingly.*

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BETWEEN:—

J. O. ROSS ENGINEERING CORPORATION AND ROSS ENGINEERING OF CANADA LIMITED..... } PLAINTIFFS;

AND

PAPER MACHINERY LIMITED AND GUSTAF HELLSTROM ..... } DEFENDANTS.

*Patents—Combination—Aggregation—Patent Law—Infringement—Proof of Date of Invention*

*Held* (following the decision of the Supreme Court of Canada *In Re Christiani and Neilson v. Rice* (1930) S.C.R. 443), that by the date of discovery of the invention is meant the date at which the inventor can prove he 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. That he who first communicates an invention to "others," would be the true and first inventor in the eyes of the patent law of Canada, as it stood previous to September, 1932.

2. That where each element in a combination functions with all the other elements for the purpose of attaining a result, and when one of the elements is removed from the combination the usefulness of all disappears, then such a combination is a true combination within the meaning of patent law, whereas in a mere aggregation, if any one element is removed the remaining elements would continue to function.

The Court found that the claims relied upon by the plaintiffs herein were not anticipated, were valid and were infringed by the defendants.

ACTION by the plaintiffs to have it declared that their patent No. 219,224, issued to Emil A. Briner in 1922 was infringed by the defendants.

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

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

*W. F. Chipman, K.C.*, and *H. Gerin-Lajoie, K.C.*, for defendants.

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The facts of the case together with the parts of the specification and claims material to the discussion of the case are stated in the reasons for judgment.

THE PRESIDENT, now (October 7, 1932), delivered the following judgment:

This is an action for infringement of patent No. 219,224, issued to Emil A. Briner, in June, 1922, upon an application made in March, 1922, and is now owned or controlled by the plaintiffs.

The invention is said to relate to the art of heating and drying materials, and has special reference to the recovery of heat from the waste hot air, vapours, and gases, resulting from the drying of paper, textiles, etc., and the improvement of conditions in the room in which such drying operations are carried on. While the specification describes the method of operation and the improvements in the alleged invention as applied for use in connection with paper making machinery, yet it states that, in its broader aspects, the invention is capable of general application wherever used with drying processes from which vapour laden gases arise. I think I may usefully quote from the specification at some length because it will describe the alleged invention, its objects and uses, much better than I could do, and will at the same time reveal, correctly I think, the state of the art in question at the times material here.

Heretofore in nearly all processes of drying, the resultant hot moist air, gases, or vapours have been allowed to escape in a wasteful manner. The temperature has been raised to a high degree in order to permit the absorption of more vapour. The hot mixture has heat energy in the form of the sensible heat of the air and vapour and the latent heat of the vapour. In many processes the latent heat energy is greater than the sensible heat energy. Not only is this loss of heat energy an economic one which is considerable in some processes, but there is also an indirect

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loss to the plant on account of impaired working conditions generally heretofore unavoidable in rooms wherein drying processes were carried on.

As is well known, the present method for drying of paper web on a paper machine is effected by passing the web over a series of hot rolls which are heated internally by steam. This results in the formation of a large volume of water vapour which is absorbed by warm air near the machine and allowed to escape through openings in the roof, either by natural draft or by suction draft caused by any air moving device drawing the hot air and vapour through a hood placed immediately over the machine and discharging the moisture laden air outdoors.

The usual practice in the drying of paper in paper mills is to allow the vapour to be carried toward the roof by warm air near the machine. The roof being at a lower temperature than the vapours causes a condensation of part of the vapours on the under side of the roof and results in what is known as "drip." To prevent this condensation, hoods are often used and steam coils are placed under the roof to keep the air warm, or hot dry air is directed against the under side to warm the roof. But in so doing, these methods augmented by the drying process raise the temperature of the whole room to a point where conditions are not satisfactory for comfort of the operatives of the machine.

In nearly all processes of drying, the resultant hot air or gases or vapours are allowed to escape as waste. The purpose of this invention is to recover part of the heat of the hot air or gases or vapours and use it to heat fresh air for drying, or heating and ventilating purposes. The efficiency of the drying process is the ratio of amount of heat utilized to the total amount of heat supplied.

I increase this efficiency by increasing the amount of heat utilized in any given dryer or provide fresh warm air for various other purposes.

It is therefore an object of my invention to so process these vapours that their heat energy may be largely retained in the system, so that the economic loss is minimized. Such a process includes a subjection of the waste gases or vapours to an economizer where they are cooled to such an extent that the air cannot retain more than a small portion of the vapour with which it was first charged. The vapour is condensed in the economizer and forced to give up its latent heat energy, thereby raising the temperature of the economizing medium, generally fresh air. This warm fresh air has a much lower relative humidity than it had originally and is available in large quantities for heating, or for providing warm fresh air to absorb the vapours necessary for continuing the process. The condensate is returned as warm liquid ready to be used as such.

Another object of my invention is to remove the vapours from the room rapidly so that working conditions may be improved.

Another object of my invention is to improve conditions directly under the roof so that the objectionable drip is avoided without the use of auxiliary heaters.

Another object of my invention is to provide an economizer suitably arranged and associated with fans, ducts and ventilators, so that the waste vapour laden gases may be drawn through the economizer in one direction and exhausted to the atmosphere in a cooled condition, and so that fresh air may be drawn through the economizer wherein it is warmed and then directed into the room.

Another object of my invention is to provide suitable ducts for directing warmed air under the roof where it will raise the temperature sufficiently to keep the moisture from condensing.

Another object of my invention is to improve the conditions near the floor of the work room by providing an exhaust fan which takes the warm air from overhead and discharges it on to the drying rolls or into the drying machinery thereby preventing any great disturbance of a cooler layer of air near the floor. This cool air will be supplied generally through cracks, crevices and the opening of doors in the room.

Another object of my invention is to pass the heated and vapour laden air through passages in an economizer arranged to collect the condensed moisture and deliver this moisture to a drip, while the fresh air is drawn through other passages in the economizer and thoroughly agitated so that it becomes warmed.

What the patentee refers to as an "economizer" and sometimes as an "interchanger" is in principle a well known device. In this case it consists of a series of thin corrugated plates, placed parallel to each other and forming alternate spaces for carrying currents of cool air, and warm moist air, for the purpose of raising the temperature of the cool air. I shall adopt as the designation of this device, the term "economizer."

The plaintiffs rely upon claims Nos. 1, 3, 4, 9 and 22, which are as follows:—

1. In the drying art, an economizing process comprising exhausting heated vapour laden air at substantially atmospheric pressure through passages in a cooler to the atmosphere, drawing through other passages in the cooler atmospheric air, and using it in two states, first for ventilation, and second, for drying.

3. In the paper drying art, an economizing process comprising exhausting heated vapour laden air from the space above the dryer rolls of a paper-making machine in a drying room through passages in a cooler to the atmosphere, drawing through other passages in the cooler atmospheric air, and discharging the warmed air from the cooler into the drying room immediately underneath the roof.

4. In the drying art, an economizing process comprising exhausting heated vapour laden air from a drying room through passages in a cooler to the atmosphere, drawing through other passages in the cooler atmospheric air, collecting the condensate, and discharging the warmed air from the cooler into the drying room immediately underneath the roof.

9. In the drying art, wherein paper drying apparatus is used, the method of preventing drip from structures over the drying apparatus, comprising exhausting the heated vapours from the drying apparatus, and directing warm air against the structures, such warm air being heated by recovered latent heat.

22. The combination with a hood adapted to receive the vapour laden air above paper drying machines, of means for exhausting the vapour laden air from the hood, means for abstracting both latent and sensible heat of the vapour laden air and for absorbing the heat energy so abstracted, said means warming fresh air, and means for distributing the fresh warm air where it will absorb free vapour outside the hood.

So far as we are here concerned, the plaintiffs' claim to invention in Briner is therefore, first as a process, and, secondly as a combination of several elements, such as the

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drying rolls, the hoods over the paper machiner, the ducts, fans, economizer, etc. The defendants urge the usual defences of lack of subject matter, anticipation, prior user, and that Briner's apparatus is a mere aggregation of elements, each of which remains unchanged in function and effect.

The substance of Briner's claim to invention is that he was the first to conceive the idea of recovering the latent heat contained in the hot vapour arising from the steam heated rolls or cylinders in a paper making machine, and which had been absorbed by the air to the point of saturation, by condensing the waste hot air while being exhausted through one passage in an economizer and which is accomplished by cooling the same with air of a much lower temperature—even zero temperatures—which is introduced from outside and passed through an adjacent passage in the same economizer. By this process, the latent heat in the form of condensed vapour is released in sufficient quantities to heat automatically the incoming cool air, which, by suitable means, is then circulated throughout the machine room for the purpose of providing fresh warm air to absorb the hot vapour arising from the heated rolls under the hood which it does because it is less humid than it was originally, and this fresh warm air, after having absorbed to the point of saturation the hot vapour arising from the rolls, is exhausted through the economizer and this heats the incoming cool air as already explained. And thus the process goes on. In the specification of his corresponding United States patent, Briner explained that to ensure the success of his system the hot waste vapour had actually to be condensed because the temperature of the exhausted waste hot air was usually too low to be of any commercial value. In the older practice, preheated air of a high temperature, but in limited quantities, was introduced into the machine room, or steam coils were used, to prevent condensation, or "dripping," within the machine room. Briner was proposing to introduce fresh warm air in the manner mentioned, into the machine room, at a lower temperature than what was then the general practice, and because he was aiming to get the heat for warming the incoming cool air from a waste source, he proposed to increase the quantity of the incoming air for the purpose of more effectually

absorbing the vapour; his idea was to get the desired results by using a larger volume of air at a lower temperature, instead of a smaller volume at a higher temperature which was then the usual practice in paper making mills. Having once completely conceived the idea I think it may be said that no great engineering or structural difficulties were in the way in order to make the idea operable; the adoption or application of such well known means as hoods, ducts, fans, economizers, etc., would readily suggest themselves. There is no suggestion that the heating and ventilating system or process described by Briner was ever in use on this continent until he introduced it, and it is now apparently considered as standard equipment in most paper mills. It is claimed however that the same or a similar process was installed by one Ullgren in a paper mill in Orebro, Sweden, in 1918, and that Ullgren had described the same process in a Swedish patent issued to him in 1911; and the major issue developed at the trial was whether or not Ullgren had invented, made known, or used, the process or system in question here together with means of making it operable before Briner.

I think there was subject matter for a patent in a process and combination of elements, such as described by Briner, whoever was the first to invent, publish, or make use of the same. First, in the idea and its application to paper making machinery. I am of the opinion that the apparatus described by Briner, or its equivalent, falls within the definition of a combination patent as laid down by Lord Davey in *Klaber's Patent* (1):

A proper combination for a patent is the union of two or more integers, every one of which elements may be perfectly old, for the production of one object which is either new, or at any rate is for effecting an old object in a more convenient, cheaper, or more useful way. But the point in a combination patent must always be that the elements of which the combination is composed are combined together so as to produce one result.

The different elements entering into the combination here may have been well known, the theory and principle of the recovery of latent and sensible heat by means of an economizer or heat interchanger may also have been known, but the organization of such an apparatus as Briner describes was in some degree novel, it undoubtedly pos-

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(1) (1906) 23 R.P.C. 461 at p. 469.

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essed utility as its general adoption in paper mills in Canada and the United States shows, it was practical and useful, it effected economies, and it had the merit of simplicity and success; and I think there was invention, in the bringing of all this knowledge together, whoever was the first to do it. While Briner at first encountered difficulties in getting paper mill managers and engineers on this continent to adopt his idea for one reason or another, yet, when once its utility was demonstrated, it was apparently adopted rapidly by paper making concerns in Canada and the United States. Only two prior patents were really relied upon by the defence, a British patent issued to Braithwaite in 1897, and a Swedish patent issued to Ullgren in 1911. The invention claimed in the former patent was for an apparatus, an economizer or heat interchanger, for heating a current of fresh air by means of a warm or hot current of waste or exhaust air or vapour, but there is no suggestion in the patent of the utilization of the latent heat in exhausted air or vapour recovered by condensation. In the case of the patent to Ullgren, which was an arrangement for drying pulp and other material, there is mention of the patent heat of the moisture of the heated air in one chamber being transmitted to the air in another chamber, but there is no mention of the heating of outside fresh air, by condensing the latent heat in the exhausted hot air. Neither patent affords, in my opinion, a disclosure of a process and means such as described by Briner, and there is nothing in either which would enable the hypothetical person to construct or put into successful operation the process which Briner described. I think both of these patents may be discarded as anticipations. It was also urged that Briner is but an aggregation of elements each performing well known ends, but I do not consider there is force in this contention. As was urged by plaintiffs' counsel each element functions in combination with all the others for the purpose of attaining the result, and if any one element was removed from the combination the usefulness of all of them would disappear, whereas in a mere aggregation if any one element is removed the remaining elements would continue to function.

It will perhaps be convenient at this stage to refer to the law which the plaintiffs contend is applicable to the



facts of the case. The plaintiffs are relying chiefly upon certain memoranda made by Briner at Lafayette, Indiana, in January, 1917, and certain verbal disclosures made by Briner to one Carrier, early in January, 1918, all relating to the alleged invention of Briner. The defendants on the other hand rely chiefly, as I have already stated, upon an installation of a heating and ventilating system made by Ullgren in a paper mill constructed at Orebro, Sweden, in 1918, but the principle of which installation, it is said, had been disclosed by Ullgren to the proprietors of this paper mill early in 1918, and of which sketches had been made in June, 1918, and definite plans later on. Mr. Biggar for the plaintiff urged that the case of *Christiani and Neilson v. Rice* (1) was a controlling authority in the facts of the case under consideration. In that case the judgment of the Supreme Court of Canada was rendered by Rinfret, J., and he there laid down this principle:

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 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.

He also held that he who first communicates an invention to "others," would be the true and first inventor in the eyes of the patent law of Canada as it then stood. The judgment referred to the case of *Hickton's Patent Syndicate v. Patents, etc., Limited* (2). The invention there in question involved a conception by no means obvious, but once it had been conceived it could not be denied that the application was obvious and Swinfen Eady, J., had held the patent invalid on this ground. In the Court of Appeal, which sustained the validity of the patent, Moulton, L.J., discussing this point said:

The learned Judge says, "an idea may be new and original and very meritorious, but unless there is some invention necessary for putting the idea into practice it is not patentable." With the greatest respect for the learned Judge, that, in my opinion, is quite contrary to the principles of patent law, and would deprive of their reward a very large number of meritorious inventions that have been made. I may say that this dictum is to the best of my knowledge supported by no case, and no case has been quoted to us which would justify it. But let me give an example. Probably the most celebrated patent in the history of our law is that of Bolton and Watt, which had the unique distinction of being renewed for the whole fourteen years. The particular invention there was

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(1) (1930) S.C.R. 443

(2) (1909) 26 R.P.C. 339 at p. 347.

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the condensation of the steam, not in the cylinder itself, but in a separate vessel. That conception occurred to Watt, and it was for that that his patent was granted, and out of that grew the steam engine. Now can it be suggested that it required any invention whatever to carry out that idea when once you had got it? It could be done in a thousand ways and by any competent engineer, but the invention was in the idea, and when he had once got that idea, the carrying out of it was perfectly easy. To say that the conception may be meritorious and may involve invention and may be new and original, and simply because when you have once got the idea it is easy to carry it out, and that that deprives it of the title of being a new invention according to our patent law, is, I think, an extremely dangerous principle and justified neither by reason, nor authority. . . . In my opinion, invention may lie in the idea, . . . and it may lie in the combination of the two; but if there is invention in the idea plus the way of carrying it out, then it is good subject-matter for Letters Patent.

The plaintiffs contend that the facts disclosed in this case bring Briner within the rule laid down in *Christiana and Neilson v. Rice* (supra).

Coming now to a consideration of the date to be given to Briner's alleged invention, and the evidence applicable thereto. This point is perplexed by reason of the facts which I am about to state. An action between the plaintiffs in this action, and St. Lawrence Mills, Ltd., involving the question of the validity of Briner, was tried in 1925, but the case was settled by the parties before judgment was pronounced by the learned trial Judge. In that action Briner gave evidence as to the date of his invention and he stated it to be much subsequent to the date claimed in this action, which at once creates some confusion. It is now claimed by Briner's assignees, the plaintiffs, that the date of invention which was sought to be established in the former action was, on advice of counsel, that date when it was reduced to some practical shape, when it was first described in writing, or when some drawings were made of it, and that the evidence given in that action was directed to proof of the date of invention on that footing. Briner testified very clearly in that action that his invention was made after June, 1918, and that the first complete formulation of his invention was in May, 1919, when he described the same in writing to his United States patent attorney for the purpose of preparing an application for a patent therefor. In this action oral and documentary evidence was introduced by the plaintiffs to fix the date of invention as of either January, 1917, or January, 1918, and the plaintiffs particularly rely upon certain memoranda made

by Briner in a small note book at Lafayette, U.S.A., early in January, 1917, and verbal communications made by Briner to one Carrier, none of which was disclosed at the trial of the former action. There is no necessity I think for discussing in detail the evidence of Briner in the former action, or his evidence on discovery in that action. That evidence is obviously inconsistent and in conflict with the case which the plaintiffs seek to set up in this action. But Briner explains that his evidence in the former action was tendered, on the theory of law, upon which he was instructed by counsel, that reduction to practise, or some complete and comprehensive formulation of the same in writing was necessary, and that certain evidence introduced in this case was not thought in the former action to be relevant or of substance. I at once say that I have no reason to disbelieve this explanation of Briner. I think he was quite frank and truthful about the whole matter. I have no hesitation in finding that Briner made the Lafayette notes when he said he did, and that they were not manufactured for the purposes of this case. I equally accept the evidence of Briner and Carrier as to the interview said to have taken place between them relative to Briner's heating and ventilating system, the alleged invention, early in January, 1918, and to which I shall refer later. In any event, the question as to when invention is made is always one for the Court upon the facts before it, and it need not be concerned with what was the view held as to that by either the patentee or his counsel in the former action. I must upon the evidence before me, upon the facts and the law, determine what date of invention is to be given to Briner.

I will now narrate the principal facts upon which the plaintiffs rely to bring their case within the rules laid down in the authorities which I have mentioned. Briner, in January, 1917, and prior thereto, was in the employ of Carrier Engineering Corporation, in the United States, a concern having to do with the installation of heating and ventilating systems, particularly in paper mills, and he had for years specialized in that branch of engineering. In January, 1917, Briner, on behalf of his employer proceeded to Lafayette, Indiana, to make an estimate of the cost of a heating and ventilating system for a paper box mill oper-

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ated by the Lafayette Box Board Company, and while there he made an estimate for ventilating that mill, which also included a scheme for the utilization of the waste hot air arising from the drying rolls; and he states that he then designed a heat interchanger or economizer, and made an estimate of the quantity of surface that would be required in the economizer, together with the approximate cost of construction. In fact, however, no installation such as Briner was suggesting was then made at the Lafayette mill. However, Briner then recorded certain data concerning his scheme for the utilization of waste heat in a small book which was put in evidence. The first page of the book on which these notes appear bears the date of January 22, 1917, and with the heading "Interchanger." The notes contain a reference to the temperature of fresh air entering the economizer from outdoors, and the temperature of that fresh air leaving the interchanger. Then there is a notation of the temperature of the exhaust hot air, and he testified that he actually made tests of such temperature at the Lafayette mill and found it to be 110 degrees F., and completely saturated with vapour. Other notations are made as to moist air and dry air. Then a calculation is made of the number of square feet that would be required in an economizer and it is there stated that 17,550 square feet would be required and there follows an estimate of the cost of the same and the observation, "good enough to recover 100 H.P. from 200 H.P. actual heat in exhaust vent at 100 degrees saturated." Importance is attached by the plaintiffs to the use of the word "saturated" and it is suggested that it would have no significance if only sensible heat were in mind; it is claimed that this indicates that it must have been Briner's intention to make use of saturated air in an economizer and that saturated air could not lose any temperature without losing latent heat. Then on another page of the note book appear dimensions of an economizer; it is to be 12 feet by 12 feet in cross section, and about 12 feet high without counting the transformation pieces at the top and bottom, and this it states should be placed vertically. Then Briner again records the fact that the discharge air under the hood is at a temperature of 110 degrees F. when it leaves the exhaust fan, and he enters the humidity of the air at 100 per cent, so that

it could not go down in temperature without losing vapour and giving off latent heat. Several other statements and calculations are recorded in the book, but I do not think it is necessary to mention them. The memoranda contained in the note book, it was argued, indicates that Briner was then concerned with the recovery of latent heat from the vapour laden and saturated air withdrawn from the paper machine room, for the purposes already mentioned. I am satisfied from these notes that Briner had in January, 1917, worked out and understood the theory and principle of the heating and ventilating system that he much later described in the patent in suit, but there is no evidence that there was any disclosure of it to others at that time.

Early in January, 1918, Briner, still in the employ of Carrier Engineering Corporation, approached Mr. Carrier—the head of that corporation—who was by profession a heating and ventilating engineer, with the suggestion of the utilization of waste vapour for the heating and ventilating of the machine room of paper mills by the use of an economizer. Carrier testified that Briner had with him at the time, the notes or memoranda made at Lafayette and the plans of the Lafayette mill, and that he explained to him his idea of the utilization of the moist hot vapour exhausted from the hoods of paper machines by passing the same through an economizer in order to transfer the latent heat therein to the incoming fresh air, as a substitute for the use of live steam for heating the incoming fresh air and which, Briner stated, would prevent condensation in the machine room; Carrier stated that Briner stressed the savings which would thereby be effected. Briner showed Carrier the records he had made of tests showing the temperature and the humidity of air taken from the hood of the machine room at the Lafayette mill. Briner's readings showed, said Carrier, that the hot air before it was discharged varied from 105 to 110 degrees F., and that Briner proposed passing the fresh air from outdoors, it mattered not how low the temperature, through an economizer, transferring the latent heat from the air exhausted to the incoming air which would be delivered automatically into the machine room at somewhere between 80 and 90 degrees F. Carrier testified that he understood clearly the idea or process that Briner then had in mind. He checked Briner's

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various calculations, and while he thought that from an engineering standpoint Briner's idea was feasible still he thought the idea was not practical. Carrier did not think that with warm air at such low temperatures, as 80 to 85 degrees F., condensation in the machine room could be as successfully prevented as with steam heated air blown into the machine room at a temperature of 120 degrees F., which was then the general practice. He was otherwise sceptical of the idea and declined then to adopt the use of Briner's suggestion. Briner's scheme of heating and ventilating paper mills did not at once meet with a favourable reception from engineers or paper mill owners, and it was not until some time after such an installation was made in a paper mill in the State of Pennsylvania that his idea found favour with those interested in paper making mills. The plaintiffs contend that at least the disclosure to Carrier is sufficient to bring them within the rule laid down by Rinfret, J., in the case of *Christiana and Neilson v. Rice* (supra). Upon the evidence, I cannot avoid the conclusion that Briner, in January, 1917, conceived the idea or process which he later described in his patent. The Lafayette notes show this very clearly, I think, and really nothing more was to be done. The essence of the invention was in the idea which is expressed in the Lafayette notes. That however may not be sufficient to fix the date of invention as of January, 1917, but I am at least of the opinion, that under the authorities I have mentioned, it must be held that Briner's invention was complete when he communicated to Carrier, early in January, 1918, his scheme or method of heating and ventilating the machine room of paper making mills. Mr. Combe, one of the defendants' expert witnesses, testified that when once the idea of using an economizer for the purposes in question here was submitted to an engineer competent in the art, he would at once understand how to construct and install the system or process described by Briner in his patent. Once the idea was understood it was not difficult to convert the abstract into the concrete.

But it is alleged and pleaded by the defendants that a drying and ventilating system similar to Briner, was in use in a paper mill at Orebro, Sweden, in 1918, and since, and prior to any invention made by Briner. If the evidence of

Ullgren taken under Commission at Stockholm, is to be relied upon as giving a true description of the actual installation made at Orebro in 1918, then, I am unable to see how it is distinguishable from Briner. I think they must be regarded as being practically the same. There was, however, no user of Ullgren till late in 1918, and if I am correct in holding that Briner made his invention in January, 1918, the defence of prior user at Orebro fails. But I do not care to dispose of the evidence of Ullgren merely as it affects the question of prior user alone, but rather whether, prior to, or in January, 1918, Briner's process was known to Ullgren. In December of 1917, a paper mill at Orebro was destroyed by fire, and in January, 1918, Ullgren an engineer, who was in the employ of a concern manufacturing paper making machinery, was consulted by the proprietors of the destroyed mill regarding a drying and ventilating system for the machine room of a proposed new paper mill. Ullgren states that he made his first sketches of the drying and ventilating system which he installed at Orebro in May, 1918, the final drawings in September following, and that the mill was completed and in operation in December, 1918. This installation made at Orebro by Ullgren was the first of that type ever made by him. Ullgren testified that he had in 1916 and in 1917 spoken to others of his heating and ventilating system, that he had previously offered it for sale to others, that he had explained his system to the Orebro Mill proprietors when they first consulted him. He had never described his system in any technical journal or in writing in any form, nor did he ever make any sketch or drawing of it until 1918 as mentioned; at least there is no evidence of anything to the contrary. No person to whom he had communicated any explanation of his system was called to give evidence, and no one representing the owners of the Orebro mill was called to testify what disclosure Ullgren made in January, 1918, to that concern. There is no specific evidence as to when Ullgren first conceived of his heating and ventilating system for paper mills; he did say however that his patent of 1911 disclosed it, which, I think, is not at all maintainable. If the idea Ullgren had in mind in January of 1918, in connection with the Orebro installation, was that disclosed in his patent of 1911, then I say, he could not then have had in mind a system for

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heating and ventilating paper mills, similar to Briner, or similar to that which he describes as having been installed at Orebro. That described in the patent of 1911, and the Orebro installation, are different things. Now, I do not think that invention, or prior knowledge, in patent cases, can be established in this way, or upon evidence of this character. The testimony of Bergling who assisted Ullgren in the sketches and drawings of the Orebro installation, does not add weight to the evidence upon this aspect of the case. Except as to the description of the Orebro installation, the Stockholm evidence is inconclusive and unsatisfactory, which I can understand, because the examination was intended primarily to establish the fact of prior user of Briner in the Orebro mill, on the assumption that Briner's invention was much subsequent to January, 1918.

Upon the evidence before me, and under the authorities mentioned as to what was the law in Canada at the time material here, I feel justified in holding that Briner made his invention in January, 1918. If Ullgren independently invented the same thing at an earlier date, or had prior knowledge of Briner, or the Orebro installation, then there is not sufficient evidence to hold that the date of such invention, knowledge, or user, was prior to or in January, 1918. I do not think Briner should be deprived of his patent of invention upon the evidence before me, and therefore I hold that the claims of the patent here relied upon are valid.

If I am correct in holding that the patent to Briner is valid, then I think there can be no question but that the installation made at Cornwall by the defendants constitutes infringement. It is, in my opinion, practically the same thing as Briner. I am also of the opinion upon the facts disclosed, that Paper Machinery Ltd. was properly joined as a defendant in the action and I do not think that this point calls for any extended discussion.

The plaintiffs are therefore entitled to the relief claimed and will have their costs of the action.

*Judgment accordingly.*



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**CROWN—Contract — Dismissal of Civil or Military Officers.]** R. was, by Order in Council, appointed a member of the former Federal Appeal Board, which was created by 13-14 Geo. V, c. 62. By 20-21 Geo. V, c. 25, the above statute was repealed, two new tribunals formed, and R's position in consequence abolished. R. now claims that, as he was re-appointed in 1928 for five years, he is entitled to recover from the respondent the balance of his salary for the unexpired term. No provision was made in the repealing statutes with regard to such payments.—*Held*, that, except where there is statutory provision for a higher tenure of office, or, that the power of the Crown is otherwise expressly restricted, the Crown has by law authority to dismiss at pleasure, either its civil or military officers, a condition to that effect being an implied term of the contract of service.—2. That it is a settled principle of law that public office is a distinctive thing and is not contractual in its nature. C. B. REILLY *v.* THE KING..... 14

2 — *Responsibility — Workmen's Compensation Act—Application of same to the Crown — Provincial Laws — Exchequer Court Act — "Head of an enterprise" — "Owner of an industry."*] Mullin Brothers, Carters, with whom R. was employed as a teamster, contracted with the Department of Railways and Canals to move a winch weighing between three and four tons from one of their yards in Montreal to the Canal Bank, the loading to be done by the employees of the Department. In the course of moving the same, and when still in the yard, one of the wheels of the float stuck in the ground at a point where a trench had been recently dug and where the earth was accordingly softer, and the winch, by reason of the jerk and of the negligent loading, slid forward crushing R.'s leg, which had later to be amputated. R. recovered a certain sum under the Workmen's Compensation Act of Quebec as against Mullin Brothers and now sues the Crown for damages alleged due to the negligence of its servants in the performance of their duty. The Crown contended that R. having exercised his recourse against his immediate employers

## CROWN—Continued

under the said Act, has waived any claim against the Crown and that if any claim ever existed it would be one jointly and severally against the Crown and the employers under the Workmen's Compensation Act.—*Held*, that there is no recourse against the Crown for injury to the person, except in cases coming within the ambit of subsection (c) of section 19 of the Exchequer Court Act (R.S.C., 1927, c. 34).—2. That the cause of action having arisen in the Province of Quebec, the case was governed by the laws of that Province.—3. That the provisions of the Workmen's Compensation Act of Quebec do not apply to the Crown in right of the Dominion of Canada, the legislature of a Province having no authority to pass legislation purporting to modify the liability of the Crown in matters of injury to the person.—4. That even if the said Act did apply to the Crown, suppliant's act in electing to claim and recover compensation from his employer, under the Act did not deprive him of his recourse against the Crown (respondent).—5. That the Crown, in right of the Dominion of Canada, is not the "head of an enterprise" or "the owner of an industry" within the meaning of subsection 2 of section 22 of 18 Geo. V, c. 79, Quebec. *CYRILLE ROCHON v. THE KING*. . . . 161

3 — *Contract — Crown — Leasehold — Interpretation — Estoppel.*] After expropriation of its property by the Crown in 1912 the Capital Brewing Company remained in occupation at a yearly rental of \$11,292.60 fixed by the judgment. In 1918 the rental was reduced to \$5,000, at the request of the defendant, owing to the enactment of the Ontario Temperance Act, one of the conditions of the lease being that "Should the Legislature of the Province of Ontario pass any Act amending or repealing the Ontario Temperance Act . . . so as to allow or facilitate the manufacture or sale of the products manufactured by the said Lessee, the Lessor shall have the right to increase the rent hereby reserved to the sum of Eleven Thousand Two Hundred and Ninety-Two Dollars and Sixty Cents (\$11,292.60) per annum," etc. At the expiry of this lease a new one was made at \$8,000 a year rental, with the same condition. On the termination of this lease the company continued in occupation, becoming a yearly tenant. The next year the Ontario Liquor Control Act came into force and the Crown increased the rent under the above mentioned condition.—*Held*, that from a comparison of the provisions of the two Acts, and the Regulations, the sale of the company's products was "facilitated" by the repeal of the Ontario Temperance Act and the enactment of the Ontario Liquor Control Act within

## CROWN—Continued

the meaning of the provisions of the lease, and the defendant having failed to establish the contrary, the Crown was entitled to the increased rent under the lease, from the date claimed.—2. That the letter of the Chief Architect of the 13th June, 1927, that the rent would be increased pursuant to provision in the lease, being on instruction of the Deputy Minister, was a sufficient and valid notice to defendant, more especially as the defendant did not at the time question his authority but claimed that the change in the law did not facilitate the sale of its goods, and by reason thereof and of the correspondence and parleys had, the defendant is now estopped from raising such objection, and the action must be decided on the meaning of the lease and the effect of the change in the liquor laws.—3. That even though the Crown had negotiated with the company, it could not be said to have abandoned its right to claim increased rent—negotiations being under reserve of all rights.—4. That the Crown is not estopped by any statement of facts or any opinions set out in any departmental report or letter by any of its officers or servants. *THE KING v. CAPITAL BREWING COMPANY, LIMITED*. . . . . 171

4 — *Responsibility — Public works — Negligence — Exchequer Court Act, Section 19, ss. (c).*] T., a carpenter, was engaged in doing certain carpentering on a building at the Experimental Farm, at St. Anne de la Pocatiere, a public work of Canada. He and his co-employee were shown certain planks by the foreman in charge and told to build their own scaffold and to be careful in the selection of planks and to test them; and upon T. saying there were only old planks, he replied: there are some new and some old, but the old are good. T., in the course of scaffolding, was standing on that part of the scaffold across which the planks are placed on which to stand while working, and asked his co-employee B. to hand him a plank to put across. This B. did, and T., placed it across the support, and upon T.'s walking upon it, the plank snapped and T. fell to the ground and was injured. The plank had a knot in it running transversely, at which point it broke. The Crown claims T. was warned, and that being an expert carpenter he should have noticed the defect, and failing to do so, he was the victim of his own negligence.—*Held* that the injury to T. resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment on a public work, and that T. was entitled to recover from the Crown for the damage he had suffered.—2. That the question of responsibility is to be decided according to the law of the province where the cause of

**CROWN—Concluded**

action arose.—(*The King v. Desrosiers*, 41 S.C.R. 71 and *The King v. Armstrong*, 40 S.C.R. 229 referred to.)—3. That the Crown was in law held to see that only competent and prudent foremen were engaged to see to the safety of the men, and that the fact of the foreman furnishing the defective plank in question and stating the used ones were good, coupled with the act of a co-employee in handing it to him, was negligence for which the Crown was responsible.—4. That, in the circumstances, there was no negligence on the part of T. in not noticing the defect. *THIBOUTOT v. THE KING*. . . 189

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**EXPROPRIATION** — *Hypothec* — *Liability of Crown for Bonus due to Mortgagee* — *Interest* — *Damages*.] By a clause in the deed of hypothec affecting a property expropriated, the owner (mortgagor) was obliged to pay to the mortgagee a certain sum as bonus, in the event of the loan being paid before maturity.—*Held*, that the expropriating party must assume the payment of such bonus, to the exoneration of the owner (mortgagor) as part of the compensation to be paid him for the lands taken under the Expropriation Act.—2. That, as no interest is allowable against the Crown except when made payable by statute or by contract; and as the Expropriation Act provides for the payment of interest on the compensation allowed at the rate of 5 per cent, though the owner may have to pay a higher rate to the holder of a mortgage, to free the property, such higher rate can neither be allowed as interest on any part of the compensation, nor as damages. *THE KING v. PICKLEMAN ET AL*. . . . . 202

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**INDUSTRIAL DESIGN** — *Expunging* — *Trade Mark and Design Act*—*Meaning and requirement of a design*.] The respondent in its application for registration describes its design as follows:—“This said industrial design consists of a knife wherein the handle is substantially three-fifths and the blade substantially the remaining two-fifths of the total length of the knife, the whole being of a shape substantially as shown.”—*Held*, that the registration in question being only for an outline of a table knife, distinguished by having the length of the

**INDUSTRIAL DESIGNS—Concluded**

handle and blade in the proportions mentioned, such design does not constitute a registerable design under the provisions of The Trade Mark and Design Act.—2. That an industrial design, under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture which is protected, and not the article of manufacture itself. [*Kaufman Rubber Company, Ltd. v. Miner Rubber Company, Ltd.* (1926) Ex. C.R. 26 referred to.] **CANADIAN WM. A. ROGERS, LIMITED v. INTERNATIONAL SILVER COMPANY OF CANADA, LIMITED** ..... 63

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**JURISDICTION — Patents—Infringement — Licences — Breach of contracts — Property and Civil Rights—Jurisdiction.** Plaintiff **W. J. McC.** was the owner of a patent relating to improvements in tile making machines. In 1919, he granted to the defendant and one **B.** the sole and exclusive right of manufacturing and selling the machines in question throughout Canada. In 1922, the defendant and **B.** granted to Independent Concrete Pipe Co. Ltd., the sole right to manufacture tile on the patented machine within a limited area, on certain stated terms and conditions, the machine to be supplied by the defendant and **B.** To this agreement the owner of the patent was a party. In 1930, the **I.C.P. Co. Ltd.** assigned all its rights under the last mentioned agreement to **C.P. Co.**, the other plaintiff. Plaintiffs now claim that the defendant has infringed the patent in question by constructing the

**JURISDICTION—Concluded**

machine and selling the same in the territory defined in the second agreement, and they pray for injunction, etc.—*Held* that, as the issue between the parties was one relating to an alleged breach of contract or contracts, affecting property and civil rights, this Court had no jurisdiction to hear or entertain such an action.—2. That subsection (c) of section 22 of the Exchequer Court Act means that where the subject matter of the action primarily, but not incidentally, concerns a patent of invention, trade-mark or copyright, the Court may grant any appropriate remedy known to the common law or equity. **WILLIAM J. McCracken et al v. WATSON**..... 83

See also **SHIPPING AND SEAMEN**.  
See also **CROWN No. 2**.

**LEASEHOLD**

See **CROWN No. 3**.

**LICENCES**

See **JURISDICTION**.

**MARKET PRICE**

See **REVENUE**.

**MORTGAGE**

See **EXPROPRIATION**.

**NAVIGATION**

See **SHIPPING AND SEAMEN**.

**NEGLIGENCE**

of Crown's Servant:—See **CROWN NOS. 2, 4**.  
See **SHIPPING AND SEAMEN**.

**NON-NAVIGABLE STREAMS**

See **WATERS AND STREAMS**.

**OBSTRUCTION**

In Stream:—See **WATERS AND STREAMS**.

**OFFICERS OR SERVANTS OF CROWN**

Re power to bind Crown:—See **CROWN No. 3**.

**ORCHARD OR FRUIT LANDS**

See **SOLDIER'S SETTLEMENT ACT**.

**PATENTS FOR INVENTION**

1. *Aggregation*. No. 10.
2. *Amendment of Sealed Date*. No. 3.
3. *Anticipation*. Nos. 1, 2, 4 & 8.
4. *Chemical Patents*. No. 6.
5. *Combination*. Nos. 2 & 10.
6. *Conflict Action*. No. 3.
7. *Date of Invention*. No. 3.
8. *Discovery*. No. 6.
9. *Equivalency*. No. 6.
10. *Evidence of Date of Invention*. Nos. 1 & 10.
11. *Factory Improvements*. No. 8.
12. *Improvements*. No. 7.
13. *Infringement*. Nos. 1, 2, 4, 5, 6, 7, 8, 9 & 10.
14. *Invalidity*. Nos. 1 & 2.
15. *Invention*. Date of. Nos. 1 & 6.

## PATENTS FOR INVENTION

—Continued

16. *Patentability*. No. 2.  
 17. *Practice*. No. 3.  
 18. *Proof of Date of Invention*. Nos. 1 & 10.  
 19. *Rules*. No. 3.  
 20. *Specification*. No. 9.  
 21. *Statement of Date of Invention*. No. 3.  
 22. *Subject-Matter*. Nos. 2, 4 & 5.

*Infringement—Invalidity—Anticipation—General commercial adoption—Evidence of invention.*] Plaintiff's patent No. 246,547 issued in 1925, on application filed in 1923 relates to Manifolding Books, and claim 8, which is typical, claims:—"A supply pad for manifolding machines including, in combination, a plurality of record strips folded zig-zag, the folds of one interengaged with those of the others so as to provide superposed sets of superposed leaves connected end-to-end, each strip having a longitudinal series of printed forms and a series of form-registering apertures in fixed relation to said forms, respectively, there being a form and a form-registering aperture in each leaf of a set, and between the forms."—*Held*, that to manufacture or assemble a paper supply with apertures or holes that co-operate with a particular manifolding machine did not require inventive skill.—2. *Held further that*, on the facts, plaintiff's Patent 246,547 was invalid by reason of anticipation.—3. That although evidence of a general commercial adoption of a certain device may assist in the determination of the question as to whether or not there is invention, invention cannot be presumed from such a fact. Such evidence is of little assistance to the Court in determining whether or not there is invention, and evidence of that nature must be considered with caution.—4. The Court also held that defendant's machine did not infringe plaintiff's patent, No. 237,913. **BURT BUSINESS FORMS v. AUTOGRAPHIC REGISTER SYSTEMS, LIMITED** . . . . . 39

2 — *Validity — Subject-matter — Infringement—Sale of one element of combination — Anticipation — Publication.*] The plaintiff is the owner of a patent relating to improvements in blade holders, and means for retaining blades in the holder, in safety razors. The article made up of the blade-holder and blade, and the associated integers, is what is protected by the patent. The blade and holder in combination is described and claimed, as also the blade and holder separately. The defence is that the patent is null for want of subject-matter and anticipation and that the defendant does not infringe.—*Held*, that the idea of employing a blade-holder of the type described, with projections in the upper

## PATENTS FOR INVENTION

—Continued

plate of the holder to co-operate with apertures in the blade, for holding it in the required position, had not been previously suggested by anyone, and required some amount of ingenuity. That it was not a common idea, or a natural development of an old idea or one which would readily occur to workers in that art, and was not anticipated.—2. That, as the invention produces no new result, it is protected only in respect of the particular means set forth in the Specification.—3. That the sale of the blade alone, in all respects the same as plaintiff's, without the holder, but manufactured for use in plaintiff's holder constitutes an infringement of plaintiff's patent.—[*Townsend v. Haworth* (1879) 48 L.J. Eq. 769, and *Dunlop Pneumatic Tyre Co. v. Moseley & Sons et al* (1904) 21 R.P.C. 274, discussed and distinguished.] **GILLETTE SAFETY RAZOR COMPANY OF CANADA, LIMITED v. MAILMAN ET AL** 54

3—*Conflict action—Rule 32 of Practice—Statement of date of invention—Motion for Chambers Order to amend statement after disclosure made.*] As required by Rule 32, the parties after issues joined filed a sealed statement in writing of the respective dates on which the inventors claim to have made the invention mentioned in their applications. The sealed envelopes were opened on the 4th of January, 1932, by consent and in presence of solicitors of both parties. More than a month afterwards a motion in chambers was made by the plaintiff corporation for leave to amend the written statement of the date of the invention relied on by it, by substituting January 15, 1925, for July 25, 1927.—*Held*, that after disclosure made between the parties in conformity with Rule 32, an order in chambers should not be made allowing one of the parties to amend its statement of the date of the invention relied on in the action. **LARKIN WARREN REFRIGERATING CORPORATION v. FRIGIDAIRE CORPORATION** . . . . . 67

4 — *Infringement — Anticipation — Subject matter.*]—*Held* that the proper principle to be applied in testing anticipation is that the specification which is relied upon as an anticipation must give the same knowledge as the specification of the invention itself.—*Pope Appliance Corporation v. Spanish River Pulp and Paper Co.* (1929) A.C. 275 referred to.—2. That much of the merit of a new combination depends on the result produced. If a slight alteration turns that which was practically useless into what is useful and important, though the invention may be small yet the result being the difference between success and failure, there is proper subject matter for invention. The art of combining two or more

## PATENTS FOR INVENTION

—Continued

parts, whether they be new or old, or partly new or partly old, so as to obtain a new result in a better, cheaper or more expeditious manner, is valid subject matter, if it is presumable that invention in the sense of thought, design or skilful ingenuity was necessary to make the combination.—3. In determining the question of infringement it is necessary to distinguish between the case where an invention is for a mere improvement of an old machine which has been in use for producing a certain result and where the only novelty which could be claimed in the improvement was in the use of certain mechanical means in order to produce in a known machine the same result which had been produced by other mechanical means, and the case where there is novelty in the machine and novelty in the effect and result to be produced thereby. In the latter case the doctrine of infringement by substitution of equivalents applies, and one must look very narrowly upon any other machines for effecting the same object to see whether or not they are merely colourably different contrivances for evading that which has been done before.—4. That the question is not whether the substantial part of a machine or method has been taken from the specification, but whether what has been done by the alleged infringer takes from the patentee the substance of his invention.—The Court found the patent in suit was not anticipated, had subject matter and was valid and infringed. LIGHTNING FASTENER COMPANY, LIMITED v. COLONIAL FASTENER COMPANY LTD. ET AL (No. 13145)..... 89

5 — *Infringement — Subject-matter.*] The invention here relates to separable fasteners of a type disclosed in a former Canadian Patent granted to Sundback. It is claimed that the plaintiff was entitled to a patent because of his discovery that if the projection in the unit was made smaller than the recess in the other unit which co-operates with it, it would give increased flexibility.—*Held*, that inasmuch as the general form of interlocking members and of the recesses and projections thereon, as described in the patent in suit, had long been anticipated and used, the mere fact of making the projection smaller than the recess, thereby giving increased flexibility and allowing for shrinkage of the tape to which it was attached, did not constitute invention.—2. Every trifling improvement is not invention, and the industrial public should not be embarrassed by patents for every small improvement. A slightly more efficient way of doing a thing, small changes in size, shape, degree, or quality in a manufacture or machine, even

## PATENTS FOR INVENTION

—Continue d

assuming novelty, is not invention. More is necessary to justify a monopoly. LIGHTNING FASTENER COMPANY, LIMITED v. COLONIAL FASTENER COY. LTD. ET AL (No. 13633)..... 101

6 — *Infringement — Chemical patents — Equivalency — Discovery — Invention.*] The patents in suit relate to improvements in Weed Killers and Methods of Killing Weeds, which are fully described in the reasons for judgment. There was no suggestion that the defendant by experimental work had produced a new herbicidal preparation or that by the addition of a small amount of magnesium chloride it had produced a new result or compound or increased its utility or herbicidal effect. The Court held that the patents were valid and that the defendant's herbicidal mixture was substantially the same as the plaintiff's, and that by the mere addition of a small amount of magnesium chloride, which gave much the same results as calcium chloride, used by the plaintiff, the defendant could not escape infringement.—*Held* further, that though the action and properties of each constituent of a chemical composition or mixture was known, where a new formula has been made known and the constituents have been so combined as to overcome difficulties or disadvantages in known herbicides, such combination is patentable.—2. That a chemical compound intended for the accomplishment of a specific purpose, which has never before been known, used or published within the meaning of the Patent law, may be patented, provided one may assume some degree of skill and ingenuity, or the exercise of intelligent research and experiment successfully directed to a particular purpose or end.—3. That prior published documents cited as anticipating the patent in suit must be read without the knowledge of subsequent researches, especially those of the patentee, and the prior patents relied upon to establish anticipation must disclose as much as the subsequent patent. CHIPMAN CHEMICALS LIMITED v. FAIRVIEW CHEMICAL COY. LTD..... 107

7 — *Infringement — Invention — Improvement on means known.*] *Held*: 1. The invention in question is for an improvement in locking devices, for use on separable slider fasteners. 2. That, as the essence of the invention was the production of an old result, even though there is invention, the patentee is only protected in respect of the particular means he sets forth in his specification, and in such circumstances it may not be infringement to achieve the same result by using other means, by a different device.

## PATENTS FOR INVENTION

—Continued

LIGHTNING FASTENER COMPANY, LTD. *v.* COLONIAL FASTENER COMPANY, LTD. ET AL..... 127

8 — *Infringement — Anticipation — Factory Improvements.*] The invention claimed is for a blade to be used in safety razors, and it is claimed it is so perforated as to co-operate with the guard member of a handle to retain it in shaving relation thereto and that it also co-operates with the backing member so as to retain the latter in proper relation to the blade for shaving. It was held that the alleged invention was not new and did not denote invention.—2. It was held further that factory improvements, the little improvements and betterments in technique that skilled workmen devise, because they are skilled, should not be the subject of monopoly and do not constitute subject matter for a patent. GILLETTE SAFETY RAZOR CO. OF CANADA, LTD. *v.* PAL BLADE CORPORATION, LIMITED, ET AL 132

9 — *Infringement — Specification.*] The patent in suit granted to Wagner, and assigned to plaintiffs, is for a method and apparatus for the recovery of chemicals and of heat from the waste liquors used in the chemical pulp industry. The plaintiffs' apparatus is a self-sustaining process, a unitary structure capable of complete recovery of the active reagents from the waste liquors, stress being laid upon the fact that the upper chamber must be kept at a high temperature, and that the liquor must be sprayed in so that destructive distillation takes place in the upper zone. The defendants' alleged infringing apparatus is for the same purpose but in the defendants' case the liquor is projected into the furnace without atomizing and onto the walls of the furnace where it adheres and from which, after a certain quantity of the water has been removed, it drops to the hearth of the furnace, in lumps of varying sizes, where it burns by the action of the organic matter contents not consumed in the upper zone or intended to be so consumed. A boiler is placed at the top to prevent the upper zone becoming overheated and thus minimize the possibility of combustion of the materials in that zone.—*Held*, that the essence of the alleged invention rested on what the patentee describes as a process of destructive distillation of waste liquors, the evaporation of all water and combustion of nearly all the consumable products in the liquor, i.e., woody or ligneous matter, in its downward flight in the upper zone of the furnace, leaving nothing but a carbon residue and non-volatile salts reaching the floor of the furnace, and that the method employed by the defendants

## PATENTS FOR INVENTION

—Concluded

where recovery takes place on the hearth and not by distillation in the upper zone, was not Wagner and was not inferable from Wagner, but was radically different, was based on an altogether different idea and principle and could not be said to be an infringement of plaintiffs' patent. J. O. ROSS ENGINEERING CORPORATION, ET AL *v.* CANADA PAPER COMPANY, ET AL ..... 141

10 — *Combination — Aggregation — Patent Law — Infringement — Proof of Date of Invention.*] *Held* (following the decision of the Supreme Court of Canada *In re Christian and Neilson v. Rice* (1930), S.C.R. 443), that by the date of discovery of the invention is meant the date at which the inventor can prove he 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. That he who first communicates an invention to "others," would be the true and first inventor in the eyes of the patent law of Canada, as it stood previous to September, 1932.—2. That where each element in a combination functions with all the other elements for the purpose of attaining a result, and when one of the elements is removed from the combination the usefulness of all disappears, then such a combination is a true combination within the meaning of patent law, whereas in a mere aggregation, if any one element is removed the remaining elements would continue to function.—The Court found that the claims relied upon by the plaintiffs herein were not anticipated, were valid and were infringed by the defendants. J. O. ROSS ENGINEERING CORPORATION ET AL *v.* PAPER MACHINERY LTD. ET AL..... 238

See also JURISDICTION.

## PERILS OF NAVIGATION

See SHIPPING AND SEAMEN.

## PERSONAL CORPORATIONS

See REVENUE No. 2.

## PERSONS AGGRIEVED

See TRADE MARKS No. 1.

## PERSONAL PROPERTY

See SOLDIER'S SETTLEMENT ACT.

## PETITION OF RIGHT

See CROWN Nos. 1, 2 &amp; 4.

## PRACTICE

See PATENTS No. 3.

## PRIOR ADOPTION

See TRADE MARKS, No. 4.

## PROOF

of date of Invention.—See PATENTS FOR INVENTION No. 10.

**PROPERTY AND CIVIL RIGHTS***See JURISDICTION.***PROVINCIAL LAWS***See CROWN No. 2.***PUBLICATION***See PATENTS FOR INVENTION.***PUBLIC WORK***See CROWN NOS. 2 AND 4.***RESPONSIBILITY**of Crown for tort:—*See CROWN No. 2.**See also CROWN No. 4.**See also SHIPPING AND SEAMEN.***REVENUE**

1. *Customs Act. No. 4.*
2. *Customs Fisheries Protection Act. No. 4.*
3. *Deductions. No. 2.*
4. *Fisheries Treaty, 1818. No. 4.*
5. *Forfeiture. No. 4.*
6. *"Income Accumulating." No. 1.*
7. *Income War Tax Act. Nos. 1 & 2.*
8. *Interpretation. No. 1.*
9. *Market Price. No. 3.*
10. *Personal Corporations. No. 2.*
11. *Sales Tax. No. 3.*
12. *Seizure. No. 4.*
13. *Shareholder. No. 2.*
14. *Special War Revenue Act. No. 3.*

1 — *Income War Tax Act, Section 11, ss. 2—"Income accumulating"—Interpretation.*—*Held* that the word "accumulating" used with the word "income" in section 11, ss. 2 of the Income War Tax Act, 1917, and Amendments, is there used gerundially, that is as a verbal noun rather than as a verb; it is used just to earmark it as the fund for unascertained person or persons with contingent interest and which is taxable in the hands of the Trustee. *J. B. McLEOD v. MINISTER OF NATIONAL REVENUE*..... 1

2 — *Personal Corporations — Section 21, Income War Tax Act—Deductions—Shareholder.*—*Held* that section 21 of the Income War Tax Act, dealing with personal corporations, is to be construed as meaning that shareholders are to be assessed upon the company's income according to their several interests therein, and that shareholders of personal corporations thus assessed are entitled to any statutory exemptions or deductions to which ordinarily the corporation, or the shareholder, would be entitled. *BLACK, WILLIAM A. v. MINISTER OF NATIONAL REVENUE*..... 8

3 — *Sales Tax — Market Price — Special War Revenue Act.* The shares of both the defendant companies, outside of qualifying shares, were owned and held by Palmolive Company of Delaware, U.S.A. Previous to 1924, Colgate-Palmolive Peet Co., Ltd., manufactured and

**REVENUE—Concluded**

sold soap and toilet articles at Toronto and in that year Palmolive Manufacturing Co. (Ontario) Limited, was organized to take over the manufacturing end of the business. The business of both companies was carried on in the same premises and the officers of both were the same. The manufacturing company sells the major portion of its products to the selling company on the basis of costs plus 15 per cent profit. The Crown claims that the manufacturing, or alternatively both companies, are liable for the sales tax upon the basis of the sales price to the public by the selling company, namely, the market price.—*Held*, that the selling price arranged between the two defendant companies is not the sale price within the meaning of the statute.—2. That in taxing a statute where the tax is based on the selling price of goods, sale price can only mean the market price unless there are express words saying it is some other kind of price. *THE KING v. COLGATE-PALMOLIVE-PEET COMPANY, LTD. ET AL.*... 120

4 — *Customs Act — Seizures — Forfeiture—Fisheries Treaty 1818—Customs and Fisheries Protection Act.* The *Natalie S.* entered the port of North Sydney, from the fishing grounds off Ingonish, N.S., for the alleged purpose of effecting repairs to her engines. On the same day, after effecting certain repairs and after clearing outwards, her master purchased 5½ tons of ice from a local dealer, without licence or permit. The *Natalie S.* was shortly afterwards seized for an infraction of section 10 (c) of the Customs and Fisheries Protection Act. (R.S.C., 1927, c. 43.)—*Held*, that though an American vessel may, under the Fisheries Treaty, 1818, enter a Canadian port for the purpose of making repairs therein, this did not render lawful the act of her master in purchasing ice as aforesaid, contrary to the provision of the Customs and Fisheries Act, and that the vessel was lawfully seized and forfeited.—2. That section 10 (c) of the Customs and Fisheries Protection Act is *intra vires* of the Parliament of Canada, and is not a violation of the Fisheries Treaty of 1818. *THE KING v. SCHOONER Natalie S.*..... 155

**RIPARIAN PROPERTIES***See WATERS AND STREAMS.***SALES TAX***See REVENUE.***SEIZURE**of vessel:—*See REVENUE No. 4.***SHAREHOLDERS**of personal corporations:—*See REVENUE No. 2.*



## SHIPPING AND SEAMEN

1. *Accident*. No. 1.
2. *Boat at Anchor*. No. 1.
3. *Collision*. No. 1.
4. *Contract*:
  - (a) *Law Applicable to*. No. 2.
  - (b) *Intention of Parties*. No. 2.
5. *Contract of Carriage*. No. 2.
6. *Fog*. No. 1.
9. *General Average*. No. 2.
8. *Jurisdiction*. No. 2.
9. *Perils of Navigation*. No. 2.
10. *Responsibility*. No. 1.
11. *Tug and Tow*. No. 1.

1 ——— *Collision—Fog—Boat at anchor—Tug and tow—Responsibility—Improper lights on tow—Cause of accident.* Plaintiff's barge, the *R.* with her tug attached was on September 1, 1931, forced to anchor about 1,400 feet below Glengarry Point on the St. Lawrence, on account of heavy fog. Another ship the *S.M.* was also anchored near her. The *P.* knew these vessels were ahead but notwithstanding the fog came on without slowing, until her captain came on the bridge at Glengarry Point when he decided to anchor his vessel, and in manoeuvring to do so the collision in question occurred. The *S.M.* and the tug regularly sounded their bells, and the *R.* also carried her two mooring lights, but not quite disposed according to the rules, being on the same level. The *R.* did not sound her bell.—*Held*, that in the circumstances, and in view of the heavy fog, the *P.* should have stopped sooner, and that the collision was solely the result of her negligence.—2. That the *R.* being attached to her tug, which was her servant, was not required by the rules of the road to ring her bell; and that the ringing of the bell by the tug was sufficient compliance with the rules; and moreover, the fact that the lights on the *R.* were not placed in accordance with the rules, having had no bearing on the accident; the *R.* in no way contributed to the collision. *RED BARGE LINE LIMITED v. STR. Poplar Bay & POPLAR BAY STEAMSHIP Co.*..... 209

2—*Contract of Carriage—Law applicable—Intention of the parties—Perils of Navigation—Jurisdiction—General Average.* The *S.*, a Norwegian vessel, entered into a contract of carriage with the B.N.A.G. Co., an American company, for the transport of a cargo of grain from Buffalo to Montreal. The contract was made at Buffalo and was evidenced by a bill of lading issued at Buffalo which contained a clause (the Jason Clause relating to General Average) which was necessary only under United States law. During the voyage the ship stranded twice, and the cargo was damaged and salvage expenses were incurred. The strand-

SHIPPING AND SEAMEN—*Concluded*

ings occurred at places which were well known by mariners to be dangerous. The plaintiffs claimed that the contract of carriage was not subject to the Harter Act (the law of the United States) and that the Law of the Flag (Norway) governed.—*Held*: 1. That perils of navigation are something fortuitous or unexpected and that damages which flow from the ordinary expected incidents of the voyage are not covered by the exception "perils of navigation."—2. That the law applicable to a contract depends upon the intention of the parties, and where, as in this case, a contract was made in the United States in the form there used and which had become necessary by the jurisprudence of that country, the parties will be assumed to have submitted themselves to the law of the United States regarding the responsibilities of the parties under the contract.—3. That the shipowner had exercised due diligence to make the ship seaworthy, and that the damage resulted from faults or errors in navigation, and that under the Harter Act of the United States the defendants were exempt from liability.—4. That the Exchequer Court has no jurisdiction over claims for General Average contribution, and that the defendants' counter-claim should be dismissed. *BUNGE NORTH AMERICAN GRAIN CORPORATION ET AL v. STR. Skarp*... 212

**SOLDIER'S SETTLEMENT ACT—**  
*Agreement to purchase—Tenancy at will—*  
*Sec. 22, ss. 6 and Sec. 31—Sec. 59, ss. (c)—*  
*"Orchard or fruit land"—Personal property.*

1. The Soldier's Settlement Board entered into an agreement with McC. for the sale of land to him as authorized by the Act. This Agreement, and the Act itself, provided that such agreement could only be cancelled for default by the settler to comply with the terms thereof, and in the case of land the same could only be re-possessed upon and after the Board giving to the settler thirty days notice of its intention to rescind said agreement.—*Held*, that the tenancy at will, mentioned in section 22 (6) and section 31 of the Soldier's Settlement Act, is a special statutory tenancy at will, and is not the tenancy at will known to the common law; it is a modified or conditional tenancy at will. After the notice has been given, the settler, if he remains on the land, becomes merely a tenant at will. Section 31, by itself, is merely declaratory of the common law rule.—2. That the sale of "orchard or fruit lands," mentioned in section 59 (c) of the Act, though providing for a valuation of the trees apart from the land, is nevertheless a sale of "orchard or fruit lands," which is not personal property.—That an intention in a statute to depart from a common law rule would need to be

**SOLDIER'S SETTLEMENT ACT***—Concluded*

expressed with the utmost clarity, and that section 59 (c) does not pretend to enact that planted and growing fruit trees are to be treated as chattels or personal property. *McCLELLAN v. THE KING*. . . . 18

**SPECIFICATION**

See PATENTS FOR INVENTION No. 9.

**SPECIAL WAR REVENUE ACT**

See REVENUE.

**STATEMENT OF DATE OF INVENTION**

See PATENTS FOR INVENTION No. 3.

**SUBJECT MATTER**

See PATENTS FOR INVENTION.

**TENANCY AT WILL**

See SOLDIER'S SETTLEMENT ACT.

**TORT**

Action for against the Crown:—See CROWN No. 2.

**TRADE MARKS — Infringement — Expunging — Calculated to deceive — Person aggrieved.**

The plaintiff is the owner of two trade-marks, one consisting of the word "Sunlight," to be applied to the sale of soaps and other laundry goods, and the other consisting of a rectangular box-lid label bearing the word "Sunlight," with scroll devices and other designs, to be used in the sale of candles, common soaps and other laundry and toilet preparations.—The defendant is the owner of the trade-mark consisting of the word "Sunbrite" used in the sale of Javel Water in bottles, the label thereon consisting of the word "Sunbrite" and the words "Javel Water" in certain colours and set in a certain design as described in the reasons below.—The plaintiff contends that the defendant's mark is calculated to deceive the public and should be expunged. The defendant denies this and by counter-claim asks that the trade-mark of plaintiff be expunged, except in so far as applied to cake soap.—*Held*, that the trade-mark of the defendant does not so resemble the plaintiff's trade-mark in appearance, sound, or otherwise, as to be calculated to deceive or mislead the public into purchasing the goods of the defendant believing them to be those of the plaintiff. That moreover, the plaintiff's product and that of the defendant are not of the same class, the one being a cake soap, and the other a liquid, and that the action of the plaintiff should be dismissed.—2. *Held* further that the grievance of the applicant to expunge must be substantial; a fanciful or sentimental grievance is not sufficient; that the defendant is not a person aggrieved within the meaning of the Trade Mark and Design Act, and that the counter-claim

**TRADE MARKS—Continued**

of the defendant to expunge the plaintiff's trade-mark cannot be maintained.—

3. That the plaintiff not having incurred any additional costs as a result of the defendant's counter-claim, which was brought up by plaintiff's unfounded action, the plaintiff should pay to the defendant the costs of the action, and there should be no costs against him upon the dismissal of his counter-claim. *Note*: The question as to the party on whom falls the burden of proving that a mark is calculated to deceive and the application of Rules 34 and 39 discussed. *LEVER BROTHERS v. B. L. WILSON*. . . . . 69

2 — *Infringement — Expunging — Calculated to deceive.*] Plaintiff's trade-marks in this suit are the same as those described in the case of *Lever Brothers v. Wilson* printed herein at page 69. The defendant's mark consists of the word "Sunrise" used in connection with the sale of washing fluid.—*Held*, that even if the defendant's product could be said to belong to the same class of goods as that of the plaintiff, defendant's label being so different in appearance, colour, lettering and subject matter from that of plaintiff's label, and bearing on its face, in large type, the words "Sunrise Company, 711 Langlois Ave., Windsor, Ont.," it cannot be said to be "calculated to deceive," within the meaning of the Trade Mark and Design Act. *LEVER BROTHERS, LTD. v. PIZZUTI*. . . . . 79

3 — *Expunging—Use by importer of exporter's mark—Knowledge of name of proprietor of mark not necessary.*—*Held*, that an importer of goods may have a mark of his own for use in the sale of such goods and disregard the exporter's mark, but he cannot register or appropriate to himself the exporter's mark, the mark of the producer of the goods which he imported, though he may use it in connection with such goods imported with such mark.—2. It is not necessary for the validity of a trade-mark that the public should know the name of the proprietor of a trade-mark, but that, in the public mind such mark meant a particular manufacture. *CONTINENTAL OIL COMPANY v. CONSUMERS OIL COMPANY LIMITED*. . . . . 136

4 — *Expunging — Calculated to deceive—Prior adoption—General similarity.*] The petitioner, long prior to the registration of respondents' mark, adopted for use a specific trade-mark consisting of the representation of a ram, across the centre of which appears the word "Ceetee," with under the word "Ceetee" the words "Pure Wool" and over the word "Ceetee" the words "Guaranteed Unshrinkable" and under the ram the phrase "Established 1859," as applied to woollen goods of all

**TRADE MARKS—Concluded**

kinds. The respondents had registered a specific trade-mark consisting of the representation of a sheep arranged in front of the representation of radiating ways of light arranged under a rectangular figure, together with the name Dominion cutting through the rectangular figure and the words Woollens & Worsteds Limited flanked on either side, as applied to woollens, worsteds, knitted goods and wearing apparel. The Court found that the petitioner adopted its trade-mark some time previous to the adoption by the respondents of their mark and the registration thereof, and held:—1. That inasmuch as the most conspicuous part of the two trade-marks and that which caught the eye, was the ram which was similar in general shape and appearance, the respondents' trade-mark was calculated to deceive and was registered without sufficient cause and should be expunged.—2. Where two persons apply for registration of their marks and such registration is refused by reason of other similar marks being on the register, and where subsequently, without notice to the other, one of said marks was registered, upon petition to the Court by the other person for the registration of its mark and for expunging the other marks cited against it, the Court is in the same position as the Commissioner of Patents and should deal with the same as if there were two co-pending applications for registration before it, and must decide whether both should be registered or, if only one, which one.—3. That there is nothing in the law prohibiting a party from adopting a particular representation of a sheep in connection with other designs for use as a trade-mark and that the same may be registered as such. *THE C. TURNBULL CO. LTD. v. DOMINION WOOLLENS & WORSTED LTD., ET AL.* . . . . . 218

*See also INDUSTRIAL DESIGNS.*

**TUG AND TOW**

*See SHIPPING AND SEAMEN.*

**VALIDITY**

*See PATENTS FOR INVENTION.*

**WATER ACT**

*See WATERS AND STREAMS.*

**WATERS AND STREAMS—Riparian properties—British Columbia law—non-navigable stream—Right of owner to bridge on same—Flotation of logs—Right to recovery for damage to bridge—"Obstruction"—Water Act B.C., sec. 84.—Held,** that where a person is the owner of land in the province of British Columbia through which a non-navigable stream flows, he may legally build a bridge across the stream from one part of his property to the other without the necessity of obtaining the permission or authority of the Provincial Government. That such a bridge, though built with a pier in the centre of the stream, leaving a passage of 50 feet and over on each side thereof, is not an "obstruction" within the meaning of the Water Act of British Columbia.—2. That anyone floating logs or poles down such a stream must take the necessary precautions to avoid causing damage to such a bridge by the flotation operations; and the Court in this case finding defendant negligent, condemned it to pay damages. *THE KING v. THE BELL LUMBER COMPANY.* . . . . . 31

**WORDS AND PHRASES**

*"Income Accumulating"*—*See McLEOD v. THE MINISTER OF NATIONAL REVENUE* . . . . . 1

*"Orchard or fruit land"*—*See McCLELLAN v. THE KING.* . . . . . 18

*"Calculated to deceive"*—*See LEVER BROS. v. WILSON.* . . . . . 69

*Also LEVER BROS. v. PIZZUTI.* . . . . . 79

*Also, THE C. TURNBULL CO. LTD. v. DOMINION WOOLLENS & WORSTEDS LTD.* . . . . . 218

*"Person Aggrieved"*—*See LEVER BROS. v. WILSON.* . . . . . 69

*"Head of an enterprise," "Owner of an industry."* *ROCHON v. THE KING.* . . . . . 161

**WORKMEN'S COMPENSATION ACT**

No application to Crown—*See CROWN* . . . . . No. 2.

