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LAW REPORTS

Exchequer Court of Canada

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1934

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 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.

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

DEPUTY LOCAL JUDGE:

The Honourable 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.

CORRIGENDA

- Page 32—The name of Gerald F. Sullivan should appear with the names of W. L. Scott, K.C., and V. W. Price, as joint counsel for the defendant.
- Page 125—L. 1, headnote—word “by” should read “from.”
- Page 226—Margin should read “Maclean J.”
-

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2. *Reilly v. The King* (1932) Ex. C.R. 14. Appeal to the Supreme Court of Canada dismissed. Leave to appeal to the Privy Council granted. Appeal dismissed.
3. *Ross Engineering Corpn. et al, J. O. v. Canada Paper Co. et al* (1932) Ex. C.R. 141. Appeal to the Supreme Court of Canada dismissed. Leave to appeal to the Privy Council refused.
4. *Ross Engineering Corpn. et al, J. O. v. Paper Machinery Co.* (1932) Ex. C.R. 238. Appeal to the Supreme Court of Canada allowed and new trial ordered. Leave to appeal to the Privy Council refused.

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CASES
DETERMINED BY THE
EXCHEQUER COURT OF CANADA
AT FIRST INSTANCE

AND
IN THE EXERCISE OF ITS APPELLATE
JURISDICTION

BETWEEN:

THE SHEARWATER COMPANY, LIM- } CLAIMANT;
ITED }

1933
Apr. 28,
May 9,
July 20.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Seizure—Customs enactments—Coasting regulations—The Merchant
Shipping (Colonial) Act 1869*

Claimant's ship was seized in August, 1930, by an officer of the Customs Excise Preventive Service of Canada for alleged violations of the Customs Act and coasting regulations. To maintain the seizure the Crown relied upon certain sections of the Customs Act, R.S.C., 1927, c. 42, and certain coasting regulations made thereunder, or under corresponding sections of earlier Customs Acts. In 1883 certain regulations were enacted by Order in Council, pursuant to the provisions of the Customs Act, 1877, and they became effective upon publication in the *Canada Gazette*. In May, 1901, no. 12 of such regulations was rescinded by Order in Council, and the following substituted therefor: "No goods shall be taken into or put out of any coasting vessel or boat, while on her voyage by river, lake or sea, without permit of the Collector or proper officer of Customs," and it was for an alleged infraction of this regulation that claimant's ship was seized. The regulation never became effective, because of failure to publish it in the *Canada Gazette*.

The Crown contends that regulation no. 12 as originally enacted continued in force and effect, because the repeal of the same intended by the later regulation no. 12 never became effective, and that the seizure should be maintained under it, and also under regulation no. 4, which provides *inter alia* that if any officer finds that "any goods" had been unladen from a vessel before the master had reported to a customs officer, the goods and vessel shall be forfeited.

Held, that the coasting regulations and the statutory provisions under which they were made, never became effective since they were not enacted in the form required by *The Merchant Shipping (Colonial) Act 1869*.

2. That enactments in regulation of the coasting trade of Canada involve more than a mere determination of the nationality of ships which may engage in that trade.

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REFERENCE by the Minister of National Revenue. The reference came before the Court upon an agreed statement of facts and upon the papers and documents referred by the Minister.

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

Ainslee Greene, K.C., and *L. A. Ryan* for Claimant.

C. P. Smith, K.C., and *F. P. Varcoe, K.C.*, for Respondent.

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

THE PRESIDENT, now (July 20, 1933), delivered the following judgment:

This is a reference made by the Minister of National Revenue, pursuant to the power vested in him under section 174 of the Customs Act, and was heard upon the papers and documents referred, and upon an agreed statement of facts.

The facts of the case may be briefly stated. On or about August 16, 1930, the British steamship *Vedas*, registered at the Port of Halifax, N.S., in the name of the Shearwater Company Ltd., the claimant herein, and licenced under certain regulations to engage in the coasting trade of Canada, reported outwards coastwise from Windsor, Ont., for Montreal, P.Q., with a cargo of approximately 12,900 cases of beer. At the material time, the *Vedas*, it is agreed, was under verbal charter to one Harry Low, but that is not, I think, of importance. The *Vedas* apparently did not proceed diligently on her voyage to Montreal, but it is charged, loitered in Lake Erie and there transhipped a portion of her cargo, approximately 9,000 cases of beer without permit of any proper officer of Canadian Customs, and contrary to the requirements of the Customs Act and the coasting regulations. The beer comprising the whole of the original cargo was manufactured in the City of London, Ontario, by Carling Breweries Limited. It is conceded that any excise or customs duties or other revenue imposts, exigible upon the cargo, were paid before the same was laden aboard the *Vedas* at Windsor. It is not suggested that the beer discharged from the *Vedas* was relanded in

Canada, and it was not shown whether the transshipment took place in Canadian or in American waters. The *Vedas*, together with the balance of her cargo, was on August 30, 1930, seized by an officer of the Customs-Excise Preventive Service of Canada, and is still under detention. The reference concerns only the *Vedas*, which was valued at the time of her detention, by Customs Officers, at \$50,000. The notice of seizure served upon the master of the *Vedas*, by the Commissioner of Customs, as required by the Customs Act, was in accordance with Departmental Form K. 30, and is in part as follows:—

That contrary to the requirements of the Customs Act and Coasting regulations, the said vessel after report outward coastwise from the port of Windsor, Ont., bound for Montreal, Que., on or about the 16th day of August, 1930, did not proceed directly to the port whither bound as declared; that goods were put out of the said vessel and unladen therefrom while on her voyage without permit of the Collector or proper officer of Customs and before report by the Master to a Customs officer; and that goods were carried contrary to the Customs Act and Regulations made by the Governor in Council.

To maintain the seizure, the respondent, at the hearing, relied upon section 298 of the Customs Act, Chap. 42, R.S.C., 1927, which purports to empower the Governor in Council to make regulations in respect of the coasting trade of Canada, certain coasting regulations made thereunder or under corresponding sections of earlier Customs Acts, and section 245 (2) of the Customs Act (1927) which provides a penalty of \$400 against the master of any vessel for non-compliance with any regulations made by the Governor in Council, and in default of the payment of such penalty it is provided that the vessel may be detained, and if the default continues for a certain period the vessel may be sold to pay such penalty and the expenses of keeping her while under detention. The case was put to me on that footing only. No breach of any requirements of the Customs Act, other than section 245 (2), was suggested. It was not contended at the hearing that the goods "were carried contrary to the Customs Act and Regulations made by the Governor in Council," as is alleged in the notice of the seizure of the *Vedas* served upon her master. As the validity of the provisions of the Customs Act purporting to authorize the enactment of coasting regulations by the Governor in Council, are here challenged, and the coasting regulations made thereunder as well, upon grounds which

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I shall later mention, it would seem both desirable and convenient at this stage to refer to such provisions of the Customs Act, and the coasting regulations made thereunder.

Section 13 of Chap. 10 of the Statutes of Canada for 1877, entitled "An Act to amend and consolidate the Act respecting the Customs," provided as follows:—

The Governor in Council may, by regulation, declare any trade or voyage on the seas, rivers, lakes or waters, within or adjacent to Canada, whether to or from any place within or without Canada, to be a coasting trade or a coasting voyage within the meaning of this Act,—whether such seas, rivers, lakes or waters are or are not geographically or for the purposes of other Acts or laws, inland waters; and all carrying by water which is not a carrying by sea or coastwise, shall be deemed to be a carrying by inland navigation; and the Governor in Council may from time to time, with regard to any such coasting trade dispense with such of the requirements of the four next preceding sections as he deems it inexpedient to enforce in any case or class of cases, or make such further regulations as he may think expedient; and any goods carried coastwise, or laden, water borne or unladen, contrary to such regulations or to any provision of this Act not dispensed with by such regulations shall be forfeited.

In April, 1883, pursuant to this provision of that Act and section 124 (3) of the same Act which empowered the Governor in Council to make regulations respecting various matters including the coasting trade of Canada, certain coasting trade regulations were enacted by Order of the Governor in Council. The Order in Council recites that the

Board submit for the approval of the Honourable The Privy Council the following amended regulations governing the Coasting Trade of Canada submitted by the Honourable the Minister of Customs and concurred in by the Honourable the Minister of Justice, and it further recites that

His Excellency in Council has been pleased to order and it is hereby ordered, that the following regulations respecting the Coasting Trade of the Dominion be and the same are hereby adopted and established.

Then follow the regulations fourteen in number, under the caption, "Coasting Regulations in respect of British Registered Vessels."

The first regulation defines what is coasting trade, and enacts that vessels engaged in that trade "shall be subject to the regulations governing the same"; the second regulation is to the effect that only British registered vessels, and vessels owned by subjects of countries included in any treaty with Great Britain by which the coasting trade is mutually conceded, may engage in the coasting

trade of Canada; in substance this was merely declaratory of the law as it then stood. Regulation 3 provides that a coasting vessel may carry goods the produce of Canada, or goods duty free, or goods duty paid, from one Canadian port to another, provided always that the owner or master of such vessel shall take out a licence for the year or part of the year always terminable on the 30th day of June, for that purpose, and that the owner or master in taking out the said licence shall enter into a bond of \$500 conditioned that such vessel shall not be employed in the foreign trade, and provided also that the master of every such vessel shall report inwards and outwards on entering or leaving a port, on the form prescribed. Regulation 4 requires the master of any licensed coasting vessel to produce his licence to any officer of Customs upon demand, and to answer all questions put to him, and it provides that any such officer may board such vessel when he may deem proper, and if he should find any dutiable, or prohibited or smuggled goods, or if "any goods" had been unladen from the vessel before the master had reported to a Customs officer, the goods and vessel shall be forfeited. I think that "any goods" must relate to dutiable, or prohibited or smuggled goods. It is improbable that the penalty of forfeiture of both goods and vessel was intended to be imposed if "any goods" related to goods which were the produce of Canada and upon which all revenue imposts had been paid. Regulation 5 provides that before a coasting vessel shall depart from any port of lading, a report, in the form prescribed by that regulation, shall be delivered to the collector or some officer of Customs, and such report shall be the clearance of the vessel (in lieu of the requirements of the Customs Act), for the voyage, except for goods under bond, or goods liable to excise or internal revenue duty, and with this exception the report apparently does not require any information as to the contents of the cargo. The report requires, in the case of a report outwards, a declaration by the master in the following terms:

I, the undersigned, master of the above named vessel, do solemnly swear that I am bound for and will proceed directly to, the Port of , and that I will not, during said voyage, touch at any foreign port, nor take on board nor land, nor put off of said vessel any goods liable to Customs duty, or other revenue impost, before arriving at the above-named port of destination.

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This regulation was apparently designed to apply to a licensed coasting vessel only and it is suggested, with some force, I think, that a licensed coasting vessel might discharge or take on goods during her voyage providing they were not goods under bond or goods liable to excise or internal revenue duty. Regulation 6 requires that vessels employed in the coasting trade that have not taken out a coasting licence shall report inwards and outwards at their port of arrival or destination, and clearances are required of them whenever they depart from any port within the Dominion of Canada, and in default of their so reporting the vessel and cargo, a penalty is provided. Regulation 7 is to the effect that goods under a removal bond from one Canadian port to another may be carried in any licensed British vessel trading coastwise, but only upon such goods being entered in the report outwards and clearance. Regulation 8 provides that no coasting vessel shall touch at any foreign port unless forced to do so by unavoidable circumstances. Regulation 9 provides how and when goods carried or to be carried coastwise shall be shipped or unshipped, and regulation 10 states that officers of Customs may board and search any coasting vessel at any port or place. Regulation 11 is applicable to boats under fifteen tons and states that such boats, except by special licence, shall not carry any goods from a foreign country, which are liable to duty. Regulation 12 is as follows:—

No goods can be carried in any coasting vessel or boat, except such as are laden to be so carried at some port or place in Canada, and no goods shall be taken into or put out of any coasting vessel or boat while on her voyage by river, lake or sea.

Regulation 13 permits the reports inwards and outwards coastwise required by the regulations, in the case of any steam vessel, to be made by a purser if carrying one, and regulation 14 states that all these regulations shall apply to the coasting trade of British Columbia.

These regulations became effective by publication in the *Canada Gazette* shortly following their enactment. In May, 1901, regulation no. 12 was rescinded by an Order in Council which recites that

The Governor General in Council is pleased to order and it is hereby ordered that the Regulations made by Order in Council of 17th April, 1883, respecting the Coasting Trade of the Dominion of Canada shall be and the same are hereby amended by rescinding section 12 of the said Regulations and substituting the following in lieu thereof.

This I assume was done under the authority of section 245 (c) Chap. 32, R.S.C., 1886. The material part of the new regulation no. 12 runs thus:—

12. No goods shall be taken into or put out of any coasting vessel or boat, while on her voyage by river, lake or sea, without permit of the Collector or proper officer of Customs.

This regulation in fact never became effective, because of the failure to publish it in the *Canada Gazette*, yet, it is quite apparent, I think, whatever be its importance, that it was for the supposed infraction of this abortive regulation that the *Vedas* was seized. The notice of seizure served upon the master, I think, makes that quite clear. This is confirmed by the fact that the Department of Customs had apparently long acted under the belief that the new regulation no. 12 had become effective, because on August 1, 1901, a printed memorandum—which was put in evidence—was issued by the Commissioner of Customs addressed “To Collectors of Customs and others concerned” and under the caption of “Summary of Customs Manifesting and Coasting Regulations,” and the memorandum contained this new regulation no. 12. In this printed memorandum all the coasting regulations enacted in May, 1883, appear in full except regulation no. 12; the number remains followed by the words “Amended 31st May, 1901.” Further on in the memorandum the new regulation no. 12 is set forth in full under the head “Amendment of Section 12 Coasting Regulations.” Then there is the further fact that it was under this regulation that the respondent sought to maintain the seizure at the hearing of the reference.

Upon the hearing of the reference it was not shown whether or not the new regulation no. 12 had ever been published in the *Canada Gazette* as required by section 301 of the Customs Act, 1927, or the corresponding provision of the Customs Act in force in 1901, and at a subsequent date I heard counsel upon the point. It transpired, as I have already stated, that the new regulation no. 12 had never been published in the *Canada Gazette* and consequently had never become effective, but the coasting regulations of 1883 had been so published and I allowed counsel for the respondent to give evidence of that fact. I thereupon gave leave to counsel to submit written arguments applicable to the new state of facts that had de-

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veloped by reason of the irrelevancy of the new regulation no. 12 to the issue. Counsel for the respondent now contends that the seizure in question should be maintained under the old regulation no. 12, which continued in force and effect, it is claimed, because the repeal of the same intended by the later regulation no. 12 had never become effective; and also it is contended that the seizure should be maintained under coasting regulation no. 4.

I shall first consider the provisions of the Customs Act of 1877, pursuant to which the coasting regulations in question were made by the Governor in Council, and the coasting regulations themselves, the validity of which are wholly contested by counsel for the claimant, upon the ground that neither the statutory provisions nor the coasting regulations were enacted in conformity with the requirements of the Imperial Statute, "The Merchant Shipping (Colonial) Act of 1869." While this point is of importance in so far as the matter presently before me is concerned, it is likely hereafter to be of academic interest only because of the coming into force of the Statute of Westminster, 1931. The Statute of Westminster has not, in my opinion, a retroactive effect; the antecedent history of Imperial legislation in respect of shipping, and of the coasting trade, in British possessions, repels, I think, the suggestion of the Statute of Westminster being a declaratory enactment. And it was not contended by counsel for the respondent that the British North America Act conferred unlimited power upon the Parliament of Canada to legislate in respect of shipping or the coasting trade of Canada.

It is to be determined what meaning is to be given to "regulation" of the coasting trade of Canada. There is no difficulty as to what is meant by "coasting trade." On the one hand it is contended, as I understand it, that "regulation" of the coasting trade is limited to a determination of the nationality of ships that shall be permitted to engage in that particular trade; on the other hand it is contended that "regulation" of the coasting trade comprises all such and similar provisions as are to be found in the Canadian coasting trade regulations of 1883. The latter contention is that submitted by counsel on behalf of the claimant. As was suggested in Mr. Greene's argument, one method of ascertaining the meaning of what is a "regulation" of the

coasting trade of Canada, is to review the earlier Imperial legislation relative to the same subject matter, and if it is there found that the word "regulation," when employed with reference to the "coasting trade," had a definite meaning, then it is a fair deduction, it is claimed, that when the power to legislate in respect of the "regulation" of Canadian coasting trade was conferred upon the Parliament of Canada, "regulation" must be implied to mean and to include what it meant and included in the legislative practice of the Imperial Parliament which conferred upon Canada the power to legislate in regulation of its coasting trade. And Mr. Greene referred to the case of *Croft v. Dunphy* (1), in which Lord Macmillan propounded a rule for the interpretation of the statute that was there in question, and which it is urged is applicable here. He said:

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When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power. Thus in considering what might be appropriately and legitimately enacted by the Dominion Parliament under its power to legislate in relation to "bankruptcy and insolvency," it was considered relevant to discuss the usual contents of bankruptcy statutes.

Turning now to Imperial legislation extending in part to the British North American Provinces, and in force at the date of Confederation. It will be sufficient, I think, to refer to Chap. 107 of 16 & 17 Vict. (1853) "An Act to amend and consolidate the laws relating to the Customs of the United Kingdom . . . and certain laws relating to trade and navigation and the British possessions"; this Act was preceded by Chap. 93 of 8 & 9 Vict. (1843), and was entitled "An Act to regulate the Trade of British possessions abroad." In the Customs Consolidation Act, 1853, the short title, and under the head "As to the coasting trade of the United Kingdom,"—which appears within the text of the Act and not as a marginal reference—and commencing with section 151, we find a definition of what constitutes coasting trade in the United Kingdom, and that is followed by provisions which state that the coasting trade of the United Kingdom shall be carried on only in British ships, that coasting ships are confined to coasting voyages, that vessels engaged in the coasting trade must report at

(1) (1933) A.C. 156.

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Customs within twenty-four hours after arrival and before goods are unloaded, that the landing or shipping of goods shall be at the times and places fixed by officers of Customs, that the master of a coasting vessel must keep a cargo book, and other provisions of the same general character. It is argued, as I have already stated, that if "regulation" of the coasting trade of the United Kingdom, at that time, included such provisions as I have mentioned, then the word "regulation" when used in Canadian statutes in respect of coasting trade, must be implied to include such or similar provisions as applied to the coasting trade of the United Kingdom, that is to say, the word "regulation" should be interpreted to mean and include what it did in Imperial legislative practice because the authority for the Parliament of Canada to legislate in respect of the coasting trade of Canada was conferred by an Imperial Act, which I shall at once mention. Passing then to the Imperial Act of 1869, enacted subsequent to the date of Confederation. This is the Act which I have already mentioned as conferring upon the legislatures of British possessions, the power to legislate in respect of their coasting trade, and "legislature," according to the interpretation clause of that Act, included the Parliament of Canada. This Act, being Chap. 11 of 32 Vict. and entitled "An Act for amending the Law relating to the Coasting Trade and Merchant Shipping in British possessions," its short title being "The Merchant Shipping (Colonial Act) 1869," for the first time conferred upon Canada the power, subject to certain conditions, to regulate by legislation the coasting trade of Canada. Sections 4 and 5 of that Act are as follows:

4. After the commencement of this Act the legislature of a British possession, by any Act or Ordinance, from time to time, may regulate the coasting trade of that British possession, subject in every case to the following conditions:

- (1) The Act or Ordinance shall contain a suspending clause, providing that such Act or Ordinance shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.
- (2) The Act or Ordinance shall treat all British ships (including the ships of any British possession) in exactly the same manner as ships of the British possession in which it is made.
- (3) Where by treaty made before the passing of this Act Her Majesty has agreed to grant to any ships of any foreign state any rights or privileges in respect of the coasting trade of any British possession, such rights and privileges shall be enjoyed by such ships for so long as Her Majesty has already agreed or may hereafter

agree to grant the same, anything in the Act or Ordinance to the contrary notwithstanding.

- (5) The following sections of The Customs Consolidation Act, 1853, are hereby repealed; namely,

Section three hundred and twenty-eight as from the commencement of this Act:

Section one hundred and sixty-three as from the date in the case of each British possession at which either an Act or Ordinance with respect to the coasting trade made within two years after the commencement of this Act in such British possession comes into operation, or if there is no such Act or Ordinance, at which the said two years expire.

These provisions were re-enacted in the identical language in the Merchant Shipping Act, 1894, sec. 736. It was under the provisions of the Imperial Statute of 1869 that Chap. 14 of the Statutes of Canada, 1870, "An Act respecting the Coasting Trade of Canada," was enacted. That Act provided that no goods or passengers might be carried coastwise in Canada except in British ships; it contained a suspending clause as required by the Imperial Statute of 1869, and it only came into operation in Canada after Her Majesty's pleasure had been publicly signified by proclamation in Canada.

It is my opinion that enactments in regulation of the coasting trade of Canada involve more than a mere determination of the nationality of ships which may engage in that trade. Sec. 5 of the Imperial Act of 1869 repealed sec. 163 of The Customs Consolidation Act, 1853, which provided that goods and passengers could only be carried between any two ports in a British possession, in British ships, and the repeal of this section left the Parliament of Canada free to determine thereafter what ships might engage in Canadian coasting trade. The Act of 1869, however, does more than repeal sec. 163 of the Act of 1853; it conferred upon the Parliament of Canada the power "to regulate the coasting trade" of Canada from "time to time," subject to the conditions therein mentioned. The repeal of sec. 163 of the Act of 1853 was an incident of the policy expressed in the Act of 1869, namely, that British possessions might thereafter regulate their own coasting trade. If it was intended merely to permit the legislatures of British possessions to determine the nationality of ships which might engage in their coasting trade, then, as was suggested by claimant's counsel, a simple repeal of sec. 163 of the Act of 1853 would have sufficed. Furthermore, the

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Parliament of Canada could not have been of the opinion that "coasting regulations" was limited to a regulation of the nationality of ships that might engage in the coasting trade of Canada, otherwise it would not have continued to enact in the Customs Act of 1877, and later Customs Acts, the provision that the Governor in Council might make regulations respecting the coasting trade of Canada, because by its own Act of 1870 it had already determined what ships might engage in that coasting trade, and that Act was enacted and proclaimed in accordance with the conditions of the Imperial Act of 1869. I think "regulation" of the coasting trade includes, for example, the provisions contained in the Canadian coasting regulations of 1883, and the provisions of the Imperial Act of 1853 relating to the coasting trade of the United Kingdom, some of which I have mentioned. It is impossible to say that the regulations in question here are not in regulation of the coasting trade of Canada. That is just what they purport to do. They were designated by their makers as "coasting regulations" as will appear from the Orders in Council which I have mentioned, they were proclaimed as such in the *Canada Gazette*, the Department of Customs published the same as such in the printed memorandum I referred to, the charge preferred against the *Vedas* and the reason for her detention is that her master violated one or more of these "coasting regulations," and they were enacted avowedly pursuant to the terms of a statute which purported to authorize their enactment as "coasting regulations" by the Governor in Council. The regulations in question are therefore in my opinion "regulations" of the coasting trade of Canada within the meaning and intendment of The Merchant Shipping (Colonial) Act, 1869.

The next point for decision is whether the coasting regulations ever became effective. The regulations were not enacted in the form required by the Imperial Act of 1869, and neither were sections 13 and 125 of the Canadian Customs Act of 1877 under which the regulations were made. Neither the regulations nor the statutory provisions under which they were made contained the suspending clause required by sec. 4 (1) of the Imperial Act of 1869, and they were never approved of and proclaimed as required by that Act, which omissions are, I think, fatal. For these reasons

I am of the opinion that the coasting regulations in question, and the statutory provisions authorizing the same, never became effective.

In the result, it is my opinion, that the seizure of the *Vedas* cannot be maintained and that she should be released to her owners. It is not therefore necessary that I should pronounce upon any other aspect of the case. I referred to the coasting regulations at some length in order to show their character and purpose, and also because I thought the same would be convenient if this judgment came to be reviewed by another court. I know of no reason why I should refuse the claimant its costs of the reference and I therefore allow the same.

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Judgment accordingly.

BETWEEN:

EMMA MACLAREN APPELLANT;

AND

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Revenue—Company in liquidation—Shareholder—Interest on deferred payments—Income—Liquidator—Winding-Up Act—Income War Tax Act, s. 19—“On”—“That the company has on hand”—Interpretation—Constitutional law.

The appellant owned shares in the North Pacific Lumber Company Limited, which company in 1926 was ordered wound up under the provisions of the Winding-Up Act. The appellant, in 1929, received the sum of \$5,439.91 from the liquidator of the company, this amount being paid out of the undistributed income of the company during the process of winding it up. This sum represented appellant's share of interest on the balance of deferred purchase prices of properties of the company. The Commissioner of Income Tax included this sum in the assessment notice sent to appellant. The assessment was confirmed by respondent, and, appellant being dissatisfied, the matter was referred to this Court.

Held: That interest on deferred payments of capital is income subject to taxation; and the distribution of assets of a company by a liquidator does not change the nature of such assets in such a way as to convert interest or earnings into capital. *The North Pacific Lumber Company Limited v. The Minister of National Revenue* (1928) Ex. C.R. 68, followed.

2. That the word *on* in s. 19 of c. 97, R.S.C., 1927, is equivalent to *from the date of* or *after* and implies a notion of continuity.
3. That the words *that the company has on hand* in said s. 19 do not mean *that the company has on hand at the time of the winding-up order.*

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4. That taxing acts are not to be construed differently from any other act, when the language is clear and unambiguous.
5. That s. 19 is *intra vires* of the Parliament of Canada.
6. That there is no conflict between ss. 19 and 13 of c. 97, R.S.C., 1927.

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

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

J. R. Maclaren and *G. F. Maclaren* for appellant.
C. F. Elliott, K.C., and *W. S. Fisher* for respondent.

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

ANGERS J., now (April 22, 1933) delivered the following judgment:

[The learned Judge stated the nature of the appeal and then continued.]

It being admitted or established by the evidence that the appellant was a shareholder of the company, that she received in 1929 the sum of \$5,439.91 forming the subject of the present appeal and that this sum represented her share of interest on the balance of deferred purchase prices of properties of the Company, the whole case narrows down to a question of determining whether this interest constitutes an income and as such is taxable under the provisions of the Income War Tax Act, and, if so, whether its distribution by a liquidator under the Winding-up Act has had the effect of changing its nature from income to capital, as claimed by the appellant.

Section 3 of the Income War Tax Act defines taxable income; it contains, among others, the following stipulation:

3. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, . . . ; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not. . . .

The balance of a purchase price, whether payable in a lump sum on a fixed date or whether payable by instalments, which bears interest, is money invested at interest just as much as the amount of a loan carrying interest. If

the purchase price of the several properties sold by the Company had been paid in cash and the appellant had received her share and invested it, the interest or dividends derived therefrom would unquestionably have been income subject to taxation under the statute. In virtue of the deferred payment agreements the residue of the purchase price remained invested in the hands of the purchaser and the interest yielded by such residue was an income of the Company, of which the appellant received her proportion when it was distributed by the liquidator.

In the case of *The North Pacific Lumber Company Limited, appellant*, and *The Minister of National Revenue, respondent* (1), the Honourable Mr. Justice Audette held, and held rightly in my opinion, that interest on deferred payments of capital is income subject to taxation. At page 72 of the report, the learned judge says:

The interest due on the deferred purchase price and *earned by that capital* is a revenue of the company subject to the income tax, and which becomes a debt due to the Crown, for which the company is liable.

It goes without saying that the judgment in the above cited case does not constitute *res judicata* as regards the appellant herein, who was not a party thereto, but the reasons given in support of the judgment appear to me well founded and I unhesitatingly concur with the view adopted by the learned judge therein.

The next question raised by counsel for appellant, as I have already said, is whether the distribution of the assets of the Company by a liquidator changes the nature of such assets in such a way as to convert interest or earnings into capital.

The question having been brought up in the same case of *The North Pacific Lumber Company Limited* and *The Minister of National Revenue (ubi supra)* was decided in the negative by the Honourable Mr. Justice Audette.

The learned judge held in the first place that the Crown is not bound by the Winding-up Act, not being specially mentioned therein, and relied on the decision of the Supreme Court of Canada in the case of *The Queen v. The Bank of Nova Scotia* (2) and on Section 16 of the Interpretation Act (R.S.C., 1906, chap. 1, now R.S.C., 1927, chap. 1).

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(1) (1928) Ex. C.R., 68.

(2) (1885) 11 S.C.R., 1.

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Section 16 reads as follows:

No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby.

The text of this section is perfectly clear and comments are needless.

In the case of *The Queen v. The Bank of Nova Scotia*, Ritchie, C.J., referred to the following cases: *In re Henley & Co.* (1) and *In re Oriental Bank Corporation, ex parte The Crown* (2), in which the above doctrine was fully considered and adopted.

See also on this point: Bacon's Abridgement of Law, vol. 8, Prerogative, p. 92; Maxwell on the Interpretation of Statutes, 7th Ed., pp. 117 et seq.; *Giles v. Grover* (3); *Cushing v. Dupuy* (4); *Théberge v. Landry* (5); *The Liquidators of the Maritime Bank and The Queen* (6); *The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick* (7).

The Crown is not mentioned in the Winding-up Act and it is accordingly not bound thereby. I see no need of insisting further on this point.

It was argued on behalf of appellant that the payments made by the several purchasers of the Company's properties, consisting partly of principal and partly of interest, became one common fund of assets as soon as they were received by the liquidator and that the distribution by the latter of the amounts so received must be considered as a distribution of capital, irrespective of the fact that a portion of such amounts was interest when they came into the hands of the liquidator.

The Honourable Mr. Justice Audette has held in the *North Pacific Lumber Co. Ltd. v. The Minister of National Revenue (ubi supra)* that the fact that the affairs of a Company pass into the custody and under the control of a liquidator does not change the nature of a debt owing to the Company. In other words what is paid by a debtor to the liquidator as interest remains interest and what is paid as capital remains capital, for the purpose of taxation, just as if there had been no liquidation and the money had been

(1) (1878) 9 Ch. D., 469.

(4) (1879-80) 5 A.C., 409, at 419.

(2) (1885) 28 Ch. D., 643.

(5) (1876) 2 A.C. 102, at 106.

(3) (1832) 9 Bing., 128, at 156.

(6) (1888) 17 S.C.R., 657.

(7) (1892) A.C., 437, at 441.

paid to the Company itself. In fact the moneys due to the Company are received by the liquidator for the Company. Under Section 19 of the Winding-up Act (R.S.C., 1927, chap. 213) the Company from the time of the making of the winding-up order ceases to carry on business, but its corporate state and its corporate powers continue to exist until the affairs of the Company are entirely wound up: see *Kent et al v. La Communauté des Soeurs de Charité de la Providence* (1).

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The learned judge in the case of *The North Pacific Lumber Co. Ltd.* and *The Minister of National Revenue*, having arrived at the conclusion that the nature and character of the debts had not been changed by the liquidation, held that the interest on deferred payments of capital received by the liquidator was income and as such was taxable under the Income War Tax Act. I share this opinion without the least hesitation and I do not see that I could add anything useful to the learned judge's remarks which I adopt unreservedly.

Has this interest become capital as a result of its distribution by the liquidator to the shareholders? I do not think that it has; more than that I cannot conceive how it could be considered capital under the law in force in 1929.

In support of his contention counsel for appellant has cited the decision in the case of *Inland Revenue Commissioners v. Burrell* (2), in which it was held "that super tax was not payable on the undivided profits as income, because in the winding up they had ceased to be profits and were assets only."

In this case the Court of Appeal (Pollock, M.R., Atkin, L.J. and Sargant, L.J.) affirmed the decision of Rowlatt, J., who had upheld the decision of the Commissioners of Income Tax.

The grounds on which the decision of the Court of Appeal is based are clearly summed up in the following remarks of the Master of the Rolls (pp. 63 and 64):

Upon the grounds, and in accordance with the authorities, which I have up to this point stated and referred to, the Crown are not, in my judgment, entitled to charge super tax in accordance with the assessments made. It is not right to split up the sums received by the shareholders into capital and income, by examining the accounts of the company when

(1) (1903) A.C., 220, at 225.

(2) (1924) 2 K.B., 52.

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it carried on business, and disintegrating the sum received by the shareholders subsequently into component parts, based on an estimate of what might possibly have been done, but was not done.

There is in addition a dictum of Scrutton L.J. directly in point: see *Inland Revenue Commissioners v. Blott* (1920, 2 K.B. 657). In that case the question was whether certain bonus shares allotted to a shareholder could be treated for purposes of super tax as part of his total income from all sources for the previous years within s. 66 above quoted. Rowlatt J. (1920, 1 K.B. 114), the Court of Appeal (1920, 2 K.B. 657) and the House of Lords (1921, 2 A.C. 171) all decided in the negative. Scrutton L.J. in the course of his judgment dealt with the very point to be decided here. He said (1920, 2 K.B. at 675): "A company is liquidated during the year of assessment, and the liquidator returns to the shareholders, (1) their original capital, (2) accretions to capital due to increase in the value of the assets of the company, (3) the reserve fund of undivided profits in the company, (4) the undivided profits of the last year of assessment. Heads (3) and (4) will have paid income tax through the assessment of the company; but it appears to me that none of the heads will be returnable to super tax as assessment; they are not income from property, but the property itself in course of division."

No doubt this opinion was expressed obiter in the course of the judgment, but I agree with it. The quota returned to the shareholder is returned to him as that part of the property of the company to which he is entitled, by the officer whose duty it is to distribute the "property of the company" in accordance with s. 186 of the Companies (Consolidation) Act, 1908. That officer does not carry on the company as the directors did; and he has no longer the powers that they had, to divide the profits as dividend upon the shares—profits, to which, in that character, the shareholder had no right to lay a demand.

The decision of the Court of Appeal follows the dictum of Scrutton L.J. in re *Inland Revenue Commissioners v. Blott* (1) quoted by Pollock M.R. in his notes in the case of *Inland Revenue Commissioners v. Burrell* hereinabove cited.

In the *Blott* case an assessment to super tax had been made upon Blott for a certain year in respect of an allotment to him of bonus shares in a limited Company; in the previous year the Company had decided that out of its undivided profits a bonus should be paid to its shareholders by means of a distribution among them of unissued shares credited as fully paid up. The Court of Appeal found that these shares were not part of Blott's income but were an addition to his capital.

The facts in the *Blott* case differ materially from those in the present case, where no allotment of shares was made in payment of accumulated profits. It was apparently to meet such a contingency that Section 2 of the (Canadian)

(1) (1920) 2 K.B., 657, at 675.

Income War Tax Act, 1917, was amended in 1920 by 10-11 Geo. V, chap. 49, by adding thereto Subsection (1): "Dividends shall include stock dividends." Subsection (1) has become Subsection (b) in chapter 97, R.S.C., 1927.

The case of *Crichton's Oil Company* (1), to which Pollock, M.R., also refers, although perhaps more in point than *Inland Revenue Commissioners v. Blott*, differs nevertheless quite substantially from the present one. The facts in the *Crichton* case were these: the capital of the Company was divided in preferred and ordinary shares, the former being entitled to a cumulative preferential dividend; the articles of association empowered the directors to set aside, out of the profits, the sums they thought proper as a reserve fund; for some years the preferential dividend was paid, but for three years the expenditure exceeded the income, the result being a loss of capital amounting to £4,346; in the following year there was a profit of £1,675 on the year's business, but the directors declared no dividend; the Company went into voluntary liquidation—which is what happened in the present case; the debts were paid and the capital to the extent of £7 per share (the par value being £10) was returned to the shareholders; the sum of £1,675 remained in the hands of the liquidator. The question was whether this sum of £1,675 ought to be paid to the preference shareholders or whether it ought to be distributed as surplus assets among all the shareholders rateably. It was held by the Court of Appeal, affirming the decision of Wright, J., as follows:—

Upon the construction of the articles (of association), that the preference shareholders were not entitled to have this sum applied in paying them dividends for the four years in which they had received none, but that it must be divided as capital rateably among all the shareholders.

The decision in the *Crichton* case rested to a great extent on the interpretation of clause 6 of the articles of association of the Company which provided that the owners of the preference shares should "be entitled to a cumulative preferential dividend at the rate of £5 per cent per annum, payable half-yearly . . ." (b) "Provided always that, in the event of the winding up of the company, the surplus assets . . . shall be distributed between the holders of preference shares and ordinary shares, according to the amount paid thereon . . ."

(1) (1902) 2 Ch., 86.

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Dealing with this clause 6, Stirling, L.J., says (p. 96):

Clause 6 of the articles provides (b) what is to happen in the event of the winding-up of the company, namely, that the "surplus assets" are to be distributed between the holders of preference shares and ordinary shares according to the amount paid up thereon. *Primâ facie* I think "surplus assets" means that which remains after all claims of the creditors of the company and the costs of the winding-up have been paid. In the present case there has been a loss of capital, and this sum of £1,675, the excess of the income over expenditure in the last year of the company's trading, is, I think, "surplus assets," and ought to be dealt with as provided by clause 6.

Clause 139 of the articles was also considered.

This case, decided mostly on the interpretation of the memorandum of agreement and articles of association of the Company and on questions of fact is, it seems to me, of very little assistance, if any, in deciding the issues herein. The case of *Bishop v. Smyrna and Cassaba Ry. Co.* (1) was also cited.

The case of *Inland Revenue Commissioners v. Burrell*, I must admit, offers more analogy with the present one than any of the others hereinabove alluded to. This decision however was based on the Finance (1909-10) Act, 10 Ed. VII, chap. 8, which contains no provision similar to Section 19 of the (Canadian) Income War Tax Act.

The provision contained in Section 19 was introduced into the Income War Tax Act, 1917, in 1924, by 14-15 Geo. V, chap. 46, s. 5 as subsection (9) of Section 3; it later became Section 19 of chapter 97 of the Revised Statutes of Canada, 1927.

Section 19 reads as follows:

On the winding-up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

It appears to me evident that this section was enacted to meet circumstances similar to those which arose in the *Burrell* case; if it was not, I must say that, in my opinion, it does meet them.

It has been urged on behalf of appellant that Section 19 is not sufficiently broad and clear to change the law as expressed in the *Burrell* case and the decisions therein referred to. Counsel for appellant particularly submitted that the word "on" in Section 19 is not broad enough to cover the whole period of liquidation but that it refers to

(1) (1895) 2 Ch. D., 596.

a definite particular time, viz., the commencement of the liquidation, and that it cannot be extended to mean "during." I cannot agree with this proposition. In my opinion, the word "on" in Section 19 is equivalent to "from the date of" or "after" and it implies a notion of continuity. The word "on" undoubtedly has other meanings, varying according to the sentence in which it is used; it cannot be construed separately. In the case of *Robertson v. Robertson* (1), an application by a wife, against whom a decree nisi for dissolution of marriage had been made, for an order for permanent maintenance, Jessel, M.R., interpreting the word "on" in Section 32 of the Divorce Act, 1857, empowering the Court to make the order "on" the decree, stated:

Whatever meaning may be given to the word "on" in the Act of Parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word "on." "On," if not confined to the time of making the decree, must mean shortly after.

In a case of a similar nature, i.e., *Bradley v. Bradley* (2), the President of the Probate, Divorce and Admiralty Division of the High Court of Justice, discussing the meaning of the word "on" in the same Section 32 of the Divorce Act, said:

The word "on" is an elastic expression, which, so far from excluding the idea of its meaning after, is more consistent with that signification than any other. In some cases the expression "on" may undoubtedly mean contemporaneously or immediately after, and the question now before the Court is, whether there is anything from which it can be seen that the legislature used the word in the 32nd section in this restricted sense?

It seems obvious to me that the word "on" has a much more restricted meaning in Section 32 of the Divorce Act than it has in Section 19 of the Income War Tax Act; the decree under the Divorce Act is final and the word "on" in that case implies no idea of continuity.

The appellant further contended that the words "to the extent that the company has on hand undistributed income" refer exclusively to such funds on hand at the commencement of the winding-up proceedings. Again I fail to agree with the appellant's contention; I do not think that the legislators in using the words "that the company has on hand" in Section 19 meant or intended to mean "that the

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(1) (1883) P.D. 94, at 96.

(2) (1877) P.D., 47, at 50.

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company has on hand at the time of the winding-up order.” There is nothing in the statute to indicate such an intention on the part of the legislators and it cannot be assumed.

See *Hope v. The Minister of National Revenue* (1), in which the purview of Section 19 was carefully analysed by the Honourable Mr. Justice Audette. At page 161 of the report the learned judge says:

It is true that sec. 5, subsec. 9 (14-15 Geo. V, ch. 46) reads as follows:—

5. *On the winding up, discontinuance or reorganization of the business of any incorporated company the distribution in any form of the property of the company shall be deemed to be a payment of a dividend to the extent that the company has on hand undistributed income* and that this section came into force for the taxing period of 1921; but it is found that it is the time of payment of such dividend that must govern. That is to say, without any further qualification any such dividend paid in the ordinary course after that date will fall within the ambit of the section. It is a dividend paid in 1926 and which must be paid according to the law in force at that date, which does not require an investigation as to how the company came to pay the dividend.

And at page 162, he adds:

The plain intention of this section 5, subsec. 9 (14-15 Geo. V, ch. 46) is that dividends made up of undistributed profits and paid or payable after 1921 as under the circumstances of the case, are liable to tax. The Act primarily imposes a tax upon all incomes made up of profits and gain and that is intended to be taxed in this case. And failing to come within any of the statutory exemptions, the appellant must pay. The wording of subsec. 9 of sec. 5 is clear and unambiguous in its grammatical meaning and that should be adhered to.

I may perhaps quote from page 163 the following extract:

Moreover, I must find that this amendment of the Act in 1924 (sec. 5, subsec. 9) was enacted for the purpose of removing any possible doubt or contention—*ex majore cautela*—because the reserve fund in question in this case, made up of gain and profits, would, prior to such amendment, under secs. 3 and 4 of the Act, be treated as a dividend made up of profits and gains and thereby become liable. The amendment is of the same nature as the one made with respect to the Judges' salaries. See *In re Judges' Salaries* (1924, Ex. C.R. 157), confirmed on appeal to the Supreme Court of Canada.

Any doubt which may have existed regarding the Crown's right to tax as income, interest or earnings received by the liquidator of a limited company during the winding up of the company, has been removed by the enactment of subsection 9 of section 5, of chapter 46 of 14-15 Geo. V, now section 19 of the Income War Tax Act.

Some stress was laid by counsel for appellant on the doctrine that taxing statutes must be interpreted strictly. A few short remarks on the question may be apposite in the

circumstances. Taxing acts are not to be construed differently from any other act.

Lord Russell, in the case of *Attorney-General v. Carlton Bank* (1) said:

I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardships or of business convenience or the like. Courts have to give effect to what the Legislature has said.

There is, of course, the well established principle that in a taxing act the tax must be expressed in unambiguous terms and that, in case of reasonable doubt, the act must be interpreted in favour of the tax payer: *Partington v. Attorney-General* (2) *Cox v. Rabbits* (3); *Versailles Sweets Ltd. v. Attorney-General of Canada* (4); Maxwell on the Interpretation of Statutes, 7th Ed., p. 246.

Section 19 of the Income War Tax Act, however, is clear and unambiguous: it shows clearly the intention of the legislators to impose upon the appellant the tax which has been assessed against her.

Counsel for appellant further argued that Section 19 of the Income War Tax Act is *ultra vires* of the Parliament of Canada inasmuch as it purports to change into income what, at common law, is capital and purports to effect a change in the nature of the property itself and is, consequently, an infringement upon the exclusive powers of the provincial legislatures to legislate with regard to property and civil rights, contrary to subsection 13 of section 92 of the British North America Act; counsel for appellant moreover urged that section 19 is *ultra vires* of and beyond the scope of the Act, in that it is an attempt to tax capital.

I must say that the argument on this particular aspect of the case has not impressed me very much. I do not think that the Parliament is endeavouring, under Section

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(1) (1899) 2 Q.B., 158 at 164.

(2) (1869) L.R., 4 E. & I. App.
 100, at 122.

(3) (1877-78) L.R. 3 A.C. 473, at
 478.

(4) (1924) 3 D.L.R., 884, at 885.

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19, to tax capital. It has the power of taxing capital; this cannot be seriously contested. In fact counsel for appellant does not question the power of the Parliament of Canada to do so. He merely says that it cannot tax capital by means of an "Act to authorize a levy and war tax upon certain incomes." In my opinion, the tax is not imposed on capital, but exclusively on income. The import of Section 19 is that earnings, by way of interest or otherwise, which undoubtedly constituted taxable income when the Company was in operation still continue to be taxable income after a winding up order is made. The nature of the property remains the same. If a change in the nature of the property is effected, it is so effected by the decisions which declare that what was income before the winding up order is capital after it. Under this system a Company could liquidate its business, voluntarily, with the assistance of a liquidator, sell all its assets under long deferred payment agreements and make the liquidation last for years in such a way that its shareholders would withdraw, in dividends, an income derived from the interest paid by the purchasers of the assets and avoid payment of income tax on the same.

However there is, as far as I can see, no interference of any kind on the part of the Parliament of Canada with property and civil rights. Section 19 does not change property from one description to another; it merely carries out the intention of taxing income as it comes to the Company and later goes to the shareholder.

See: *Joshua Brothers Proprietary Ltd. v. The Federal Commissioner of Taxation* (1); *Caron v. The King* (2); *Veilleux v. Atlantic & Lake Superior Railway Co.* (3); *Cushing v. Dupuy* (4).

Contrary to appellant's solicitor's contention, I do not see any conflict between Section 19 and Section 13 of the Income War Tax Act. Section 13 deals with accumulated gains and profits and leaves to the discretion of the Minister to decide in each case whether they should be taxed as income or not; the section obviously does not apply to the present case.

- (1) (1922-3) 31 Commonwealth
 L.R., 490.
 (2) (1924) A.C. 999.

- (3) (1911) R.J.Q., 39 S.C., 127.
 (4) (1879-80) 5 A.C. 409.

There will be judgment dismissing the appeal and confirming the assessment, with costs against appellant.

In his statement of defence the respondent claims payment of the balance of the tax outstanding, to wit of the sum of \$471.36 and interest. No proof was made in this respect and there is nothing in the record to indicate the date from which the interest should be calculated. The parties will determine between themselves the amount owing by appellant, tax and interest included, and if they cannot agree, they may refer the matter to me in chambers for a decision.

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Judgment accordingly.

BETWEEN:

HIS MAJESTY THE KING, in the right of the Dominion of Canada on the Information of the Attorney-General for Canada,

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 Dec. 1.
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PLAINTIFF;

AND

THE ATTORNEY-GENERAL FOR ONTARIO,
 DEFENDANT.

Excise Act—Whether Province or Dominion entitled to fine imposed thereunder—Criminal Code—Prisons and Reformatories Act

D. was convicted by an Ontario Magistrate under s. 176 of the Excise Act, R.S.C., 1927, c. 60, and sentenced to imprisonment for one month and a fine of \$200, and in default of payment, to a further term of imprisonment for six months. He served the definite term of one month's imprisonment in the common gaol at North Bay and was then transferred to Burwash Industrial Farm, an institution maintained and administered by the Government of the Province of Ontario. While there, the fine of \$200 was paid to that institution and the money was transmitted to the Treasurer of the Province of Ontario from whom it was demanded by the Commissioner of Excise on behalf of the Receiver General of Canada. This action was brought to determine the ownership of the money.

Held, upon a consideration of s. 1036 of the Criminal Code, s. 133 of the Excise Act, R.S.C., c. 60 and s. 40 of the Prisons and Reformatories Act, R.S.C., 1927, c. 163, the money in question is the property of His Majesty in the right of the Dominion.

INFORMATION exhibited by the Attorney-General of Canada, to recover from the Defendant a certain sum of money paid to Defendant by way of fine imposed upon a person convicted under The Excise Act, R.S.C., 1927, c. 60.

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

No oral evidence was adduced, the facts material and relevant to the issues being admitted. Those particularly applicable are cited in the reasons for judgment.

F. P. Varcoe, K.C., for plaintiff.

E. Bayly, K.C., for defendant.

THE PRESIDENT, now (December 1, 1933) delivered the following judgment:

This is in the nature of a test case to determine the construction of certain statutory provisions to which I shall refer presently.

In June, 1932, one Denomme was convicted by the Police Magistrate of North Bay, Ont., under sec. 176 of the Excise Act, and was fined \$200 and costs and sentenced to imprisonment for one month, and in default of payment of the fine to a further term of imprisonment for six months.

After Denomme had served the definite term of imprisonment of one month in the common gaol at North Bay, he was transferred to the Burwash Industrial Farm, a prison or reformatory institution maintained and administered by the Government of the Province of Ontario, and while there serving the alternative term he paid the fine of \$200 to the Ontario institution mentioned, which sum was duly transmitted to the Provincial Treasurer of Ontario by whom it has since been retained though payment over of the same was demanded by the Commissioner of Excise, to the Receiver General of Canada. The question for decision is, who is entitled to the said sum of \$200, His Majesty in the right of the Dominion of Canada, or the Treasurer of the Province of Ontario. The plaintiff claims the moneys referred to by virtue of sec. 133 of the Excise Act, and sec. 1036 of the Criminal Code, while the defendant asserts claim thereto by virtue of sec. 40 of the Prisons and Reformatories Act, Chap. 163, R.S.C., 1927.

It will be convenient to refer at once to the statutory provisions which relate to the issue falling for determination. Sec. 1036 of the Criminal Code provides as follows: Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation

of any law . . . , the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the province in which the same is imposed or recovered, except, that, (a) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada. . . . , and (b) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of Canada or of any department thereof in which that Government bears the cost of prosecution . . . , shall belong to His Majesty for the public uses of Canada, and shall be paid by the magistrate or officer receiving the same to the Minister of Finance and form part of the Consolidated Revenue Fund in Canada: Provided however, that with respect to the province of Ontario the fines, penalties and forfeitures . . . first mentioned in this section shall be paid over to the municipal or local authority where the municipal or local authority wholly or in part bears the expense of administering the law under which the same was imposed or recovered.

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Then ss. (3) of the same section provides:

The Lieutenant-Governor in Council may from time to time direct that any fine, penalty or forfeiture, or any portion thereof paid over to the treasurer of the province under this section be paid to the municipal or local authority if any, which wholly or in part bears the expenses of administering the law under which the same was imposed or recovered

The next statutory provision to be mentioned is sec. 40 of the Prisons and Reformatories Act, Chap. 163 R.S.C., 1927, which in part reads as follows:

Any person who, under the provisions of this Act, is liable to be removed from any prison or refuge, may be so removed notwithstanding that such imprisonment, or any part thereof, is imposed in default of the payment of a fine or penalty in money, and that such person is entitled to be discharged upon payment of such fine or penalty. (2) If the fine or penalty is paid after the removal of the offender, the same shall be paid to the proper officer of such prison or refuge, to defray the expenses of the removal of the said offender, and otherwise for the uses of such prison. This section also provides that nothing therein contained shall affect the right of any private person to such fine or penalty, or any part thereof. The Prisons and Reformatories Act authorized the transfer of prisoners from the common gaols of the province of Ontario to an industrial farm; it is not contended that the prisoner Denomme was unlawfully removed from the gaol at North Bay to Burwash Industrial Farm.

The remaining statutory provision to be mentioned is sec. 133 of the Excise Act, as enacted by sec. 6 of Chap. 30 of the Statutes of Canada for 1932, entitled an Act to amend the Excise Act, the first clause of which reads as follows:

All forfeitures and penalties under this Act, after deducting the expenses in connection therewith, shall belong to His Majesty for the public uses of Canada;

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it is provided however by subsections (a) and (b) that the net proceeds of any penalty or forfeiture may be divided among certain persons who gave information or otherwise aided in the recovery of the penalty or forfeiture. Sec. 133 of the Excise Act as enacted in 1932 differs slightly from the repealed section as found in Chap. 60 of the Revised Statutes of Canada 1927; the only difference between the repealed sec. 133 of the Excise Act, Chap. 60, R.S.C., 1927, and the substituted sec. 133 enacted in 1932, is that in the latter section the words "unless it is otherwise expressly provided" are omitted from the first clause of the section as quoted above, and it is suggested that the draftsman, in eliminating those words, had in mind sec. 40 of the Prisons and Reformatories Act and intended thereby to remove any doubt that all forfeitures and penalties imposed under the Excise Act should belong to His Majesty for the public uses of Canada.

Examining now with some care the statutory provisions which I have mentioned. Section 1036 of the Criminal Code may be reconstructed to read thus: "Whenever no other provision is made by any law of Canada, all fines or penalties imposed for the violation of any law, shall, in the province of Ontario, be paid over to the municipal or local authority bearing in whole or in part the expense of administering the law under which the same was imposed or recovered, except, that, all fines or penalties imposed in respect of the breach of any of the revenue laws of Canada, and all fines or penalties imposed for whatever cause in any proceedings instituted at the instance of the Government of Canada or any department thereof shall belong to His Majesty for the public use of Canada." That expresses, accurately and fully I think, the meaning of that section, in so far as this case is concerned. The scheme of the section was clearly to divide all fines and penalties recovered into two heads or groups with a different destination for each. The fines, penalties and forfeitures referred to in the first clause of the section, and designated in the last clause of ss. 1 of section 1036 as the fines, penalties, etc., "first mentioned in this section" relate generally to any fines or penalties imposed for the violation of any law and are to be paid over, in the province of Ontario, to certain municipal or local authorities, but "any law," by subsec-

tions (a) and (b) of sec. 1, does not include "revenue laws" for which another destination is prescribed for any fines or penalties paid thereunder, the latter group being expressly excepted from inclusion in the former group. So far, I think, that there is no difficulty whatever in ascertaining the purpose and meaning of this section of the Code. Standing by itself, it means that generally fines or penalties imposed for violation of any law shall, in the province of Ontario be paid over, by the magistrate or officer receiving the same, to a particular municipality or local authority, but there is an exception to this, namely, that if the fine is imposed for breach of the revenue laws of Canada, such as the Excise Act, or for whatever cause in any proceeding instituted at the instance of the Government or of any department thereof, the same belongs to His Majesty for the public uses of Canada. That would seem to be a natural and logical disposition of such matters. Then sec. 133 of the Excise Act, enacted as late as 1932, states that all penalties imposed under that Act shall belong to His Majesty for the public uses of Canada, provided however, that the net proceeds may be divided among certain persons who aided in the recovery of the penalties. This provision affirms the principle found in sec. 1036 of the Criminal Code in so far as concerns the destination of fines or penalties imposed and recovered for violation of the revenue laws of Canada. The provisions of the Criminal Code and the Excise Act therefore make it clear that it was the intention of parliament that the fine or penalty in question here, one recovered for the violation of the revenue laws of Canada, was intended to belong to His Majesty for the public uses of Canada.

But it was contended by Mr. Bayly that sec. 40 of the Prisons and Reformatories Act provides an exception to the provisions of the Criminal Code and the Excise Act mentioned, in respect of the distribution of certain fines or penalties. Sec. 40 of the former Act provides that where a term of imprisonment is imposed in default of the payment of a fine or penalty in money, and default occurs prior to the prisoner's removal from one prison to another under the provisions of that Act, but is paid after the removal of the offender, the same shall be paid over, not to the municipal or local authority in the Province of

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Ontario bearing the expense of administering the law under which the same was imposed or recovered as provided by the Criminal Code, but to the proper officer of either the prison from which the prisoner was removed or the one to which he was removed, "to defray the expenses of the removal of the said offender, and otherwise for the uses of such prison". It is difficult to say just what "prison" is to have the use of such fine or penalty, the prison from which the prisoner was removed,—ordinarily the common gaol as it was in this case—or the prison to which he was removed. It does look as if the statute directs the money penalty to go to the prison from which the prisoner was removed. But whatever the section in this respect means or was intended to mean, it states that the money penalty to which it refers is to be paid to some officer to defray the expenses of the removal of the offender, and otherwise "for the uses of such prison," and not as formerly, in the Province of Ontario, to the municipal or local authority mentioned in the last clause of sec. 1 of sec. 1036 of the Criminal Code. That would seem to be the only reason requiring the enactment of sec. 40 of the Prison and Reformatories Act, so far as I can see; it purports to alter the previously prescribed destination of the fines or penalties referred to therein, as I have just explained. The section, and its purpose, is perhaps difficult to understand, but after all that, I think, matters little. It is clear, I think, that whatever was the real intention and purpose of sec. 40 referred to, it was not intended to disturb the division or grouping of fines and penalties mentioned in the Criminal Code provision, still less that fines or penalties imposed for violation of the revenue laws of Canada should not be paid over by the magistrate or officer receiving the same to the proper Dominion authority but to be applied to the uses of some prison, which, if intended, one would expect to find expressed in the most explicit language. Sec. 40 merely purports to alter the destination of a fine falling within the first group of fines, and does not expressly or by implication suggest that the fines mentioned in ss. (a) and (b) of sec. 1036 of the Criminal Code and sec. 133 of the Excise Act, should be paid over to any authority except that there mentioned. The words "whenever no other provision is made by any law of Canada for the application of any fine," at the beginning of the Criminal Code pro-

vision, was stressed by Mr. Bayly, but I doubt if such words were intended to apply to the Province of Ontario, because the last clause of sec. 1 of sec. 1036 of the Criminal Code fixes another destintaion altogether in that Province for the fines mentioned in the first part of that section, and which fall within the first group of fines, and does not, I think, relate to that group of fines distinctly earmarked by that statute, and the Excise Act, as belonging to the Dominion authorities. There is nothing in sec. 40 of the Prisons and Reformatories Act which suggests that any of the fines falling within the second group are not to be paid over to the Dominion authorities as prescribed by the provisions of the Criminal Code and the Excise Act.

Upon a careful consideration of the statutes here relevant, I have no difficulty in reaching the conclusion that the moneys in question belong to His Majesty in the right of the Dominion by virtue of ss. (a) and (b) of sec. 1 of sec. 1036 of the Criminal Code, and sec. 133 of the Excise Act, although I must confess that during the hearing it did appear to me that neither the affirmative nor the negative of the contrary propositions advanced by counsel were obvious. I think there is no conflict between the provisions of the Criminal Code and the Excise Act, and sec. 40 of the Prisons and Reformatories Act. In the result the plaintiff's contention must prevail but there will be no order as to costs.

Judgment accordingly.

BETWEEN:

SCHWEYER ELECTRIC AND MANU- FACTURING COMPANY	}	PLAINTIFF;
AND		
NEW YORK CENTRAL RAILROAD COMPANY	}	DEFENDANT.

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 25, 26, 27, 30,
 & 31.
 Feb. 1 & 2.
 Nov. 8.

Patent—Infringement—Abandonment of invention—Non-user of patented invention—Filing date—Patent Acts 1906 and 1923

The patent in suit is for new and useful improvements in Automatic Train Control Apparatus. The Court found there was no infringement and further held:

1. That the abandonment of his invention by an inventor can only be inferred from such conduct as clearly denotes the voluntary surrender to the public of his rights in some form or other.

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2. That non-user of a patented invention is not fatal to a patent.
3. That the Commissioner of Patents in the exercise of his discretion, having granted a patent under the Patent Act of 1923, the Court will not now hold that the filing date given to the applicant should be changed to another date and thus render the application subject to certain provisions of the Patent Act of 1906.
4. That the Patent Act of 1923 does not affect the operation of the Act of 1906 in respect of applications for patents made under that Act or to affect any right or privilege acquired by an applicant for a patent under that Act.
5. That s. 50 of the Patent Act means, that if a person has acquired in some way or other, something which was the subject of an application for a patent by another who is presumably the first inventor, but for which a patent had not yet issued, he, the former, should have a continuing right to use and vend the same notwithstanding the issue of the patent to the other person.

ACTION by plaintiff to have it ordered and adjudged that defendant is infringing its patent No. 316,852.

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

R. S. Smart, K.C., O. M. Biggar, K.C., and M. B. Gordon for the plaintiff.

W. L. Scott, K.C., and V. W. Price for the defendant.

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

THE PRESIDENT, now (November 8, 1933) delivered the following judgment:

In this action, the plaintiff alleges that the defendant is infringing a patent of invention, no. 316,852, granted to D. H. Schweyer on November 3, 1931, which was a reissue of patent no. 290,748 granted to the same patentee on June 25, 1929, upon an application made on August 31, 1923; the plaintiff by assignment became the owner of the patent. The alleged invention is said to relate to "new and useful improvements in Automatic Train Control Apparatus". The offending apparatus is a system of automatic train control, in use in Canada, on the line of the Michigan Central Railroad Company, which is owned or controlled by the New York Central Railroad Company, the defendant, and was installed by the General Railway Signal Company of Rochester, N.Y., which company I assume is the real defendant in the action. The trial of the action occupied thirteen days and a very considerable

amount of technical evidence was tendered by both sides; and very intricate issues of fact and law developed during the trial and altogether the case presents many points of complexity and difficulty.

The history of Schweyer's alleged invention was calculated to beget confusion and difficulties. Schweyer claims to have made his invention in 1916, and in that year he filed an application for a patent therefor in the United States, but that application was, on direction of the Patent office, divided, and in September, 1921, a patent issued to Schweyer in respect of one division of his application, that relating to brake appliances. Schweyer, for some reason or other, did not at once proceed to prosecute his application for a patent in the United States for the invention described in the other division of his application, that relating to his automatic train control apparatus, the subject-matter of the patent here in suit, and it was not till August 10, 1922, that he filed an application in the United States in respect of that portion of his invention. That application was there treated as a fresh one, upon the ground that his application of 1916 had been abandoned, at least that is the way I understand it. A corresponding application was filed in Canada by Schweyer on August 31, 1923,—seven years after the date of his alleged invention—and as already stated a patent issued thereon on June 25, 1929; in the interval many amendments were made to the specification and its claims. The specification of the patent issued to Schweyer in 1929 contained some thirty-four claims; the reissue patent of course embraces a description of the invention, which, I think, is substantially if not precisely the same as in the surrendered patent, but the claims of the specification were extended almost four-fold and now number one hundred and twenty-one. Prior to the date of Schweyer's application in Canada, one Howe applied for a patent in this country for what is described as an "automatic train control system," which is substantially the same as the defendant's automatic train control system, the alleged infringing device; and the General Railway Signal Company, as assignee of Howe, applied for Letters Patent in Australia, France, and England, for Howe's alleged invention, and the invention appears to have been there published or advertised prior to the date of Schweyer's application in Canada. The General Railway Signal Company also pub-

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lily demonstrated and tested Howe's train control system, or something substantially the same, on a United States railway; and this system was described in a technical journal published there, all of which was prior to the date of Schweyer's application for a patent in Canada. To further complicate the situation, there came into force in Canada, the day following the filing of Schweyer's petition for Letters Patent, the Patent Act of 1923, which repealed the Act of 1906, and from this fact arises several controversial points. In the circumstances it would be strange if there did not emerge from this unusual history many debatable points of which the defendant avails itself.

I cannot forbear saying that it does appear to me to be a most undesirable state of affairs which makes it possible for a period of many years to intervene between an application for Letters Patent and the granting of the same. The patent rule relating to patent applications apparently requires that the applicant proceed with his application with due diligence, and it is the spirit of the rule that the application be proceeded with within a period of one year from the date of the acknowledgment of the filing of the application, and for failure to do so, the rule states, the application shall be held to be abandoned unless the Commissioner is satisfied the delay was not the fault of the applicant. A practice has apparently grown up which does not discourage dilatoriness in the prosecution of a patent application, and it appears that the Patent Office generously treats almost any sort of a communication as a step in the application, which apparently suffices for another year's inaction by the applicant if he is so inclined; this practice affords an applicant the opportunity for pursuing dilatory tactics and for observing any developments in the particular art concerned, with the inevitable temptation to seek doubtful amendments to the specification and its claims, which may prove unjust to other workers in the same field of invention, and possibly to the public as well. I have no doubt there are many cases where considerable delay is unavoidable, both on the part of the applicant and the Patent Office, but such are not the cases I have in mind. Probably one method of minimizing this abuse would be to provide that the patent shall bear the date of the application, which I understand is the law in many countries.

I can hardly refrain also from commenting upon the practice which has unfortunately grown up in Canada of inserting in the patent specification an unnecessary number of claims, and this is exemplified in the fact that the claims in the patent in suit number one hundred and twenty-one, which I am quite satisfied was altogether unnecessary in order to state what it was Schweyer claimed to have invented, and to state the claims in such numbers was not, in my opinion, to state them *distinctly* as required by the Patent Act. But I have not Schweyer particularly in mind. The practice of multiplying claims unnecessarily is becoming too common in this jurisdiction and some way should be found of preventing this. If one has really invented something, he should know what it is, and it should not take many words to state in clear language what it is he claims to have invented. Terrell in his excellent work on Patents, discussing this very matter, remarks:

It must be remembered that the object of the claim is to give a perfectly clear statement of the invention claimed. Of late years a superstition has arisen that a patent is more valid and has a greater hold over infringement if every possible permutation and combination of the elements entering into the invention is separately claimed, and it has become a practice to file claims which are copies of those used in American specifications. American claims may be very useful in dealing with American law, but in English law such prolixity does not help a Court which, whether in considering subject-matter, novelty or infringement, invariably seeks to obtain an answer to the broad question, "What has this man invented?"

That, I think, would be a perfectly fair and just comment to make in respect of the claims in many patents issued in Canada, and it is quite correct to say that it is a pure superstition to think that a patent is more valid because every possible permutation and combination of the elements entering into the invention is separately claimed. In England, this point came before both law officers of the Crown on the interpretation of rule 4 of the English Patent Rules, 1905 (rule 14, 1920), in the case of *J. S. Bancroft's Application* (1). The English Patent Rule requires that the claims be stated in *clear and distinct terms*. The Attorney General pointed out that certain kinds of inventions might be such as to justify a large number of claims. He stated:

So long as the statement of each claim is in itself clear and succinct, and so long as there is an absence of repetition in the separate claims, we do

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(1) (1905) 23 R.P.C., p. 89.

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not think that there is necessarily any infringement of this rule. . . . But in the present case we think that the decision of the Chief Examiner was right . . . An attempt is made to deal with every possible contingency. . . . I must say that I deprecate very much the multiplication of claims by the system, which seems to have prevailed in America, of attempting to deal with every possible contingency. I do not think it results in clearness. I think that the system of claims with which we are more familiar in this country is really clearer in the result, and that those who have American patents and who desire protection in this country, in bringing forward their claims, must endeavour to conform to the practice which has prevailed in this country.

I quite concur in the remarks of the Attorney General, who was then Sir Robert Finlay, and they are equally applicable to Canada. Prolivity and repetition in patent claims have also been frequently condemned in the Courts of the United States. If the provisions of the Patent Act are not in terms sufficiently clear to enable the Patent Office to prevent a useless and confusing multiplicity of claims, and repetition in the separate claims, I would very respectfully suggest to the Commissioner of Patents that he urge that the Patent Act be so amended as to bestow ample power upon the Patent Office to curtail the abuse to which I refer, and which is calculated to bring the whole law of patents into disrepute. I need hardly observe that my remarks are not applicable to all applications for patents filed in Canada, perhaps only to a relatively small number, but in my own experience I have frequently noticed that claims are allowed which appear to me to be objectionable because of repetition in the separate claims, and the practice, in my opinion, should not be permitted to gather weight. A good illustration of the distinction between the British practice—the preferable practice I think—and that which frequently obtains in Canada, is afforded by the British patent granted to the General Railway Signal Company, the inventor being Howe and whom I have already mentioned, wherein the claims of the specification are stated in nine paragraphs, whereas the corresponding Canadian patent granted to Howe contains ninety claims. The question always is: What has the patentee invented? After the patentee has described his invention, and its operation or use as contemplated by him, it should not be difficult to state in comparatively brief terms what it is he claims as his invention and for which he seeks a monopoly. If the specifications are framed clearly, and in language which is unmistakable, part of the difficulty of patent cases would disappear.

Turning now to the patent in suit. The specification at the very beginning describes the invention in general terms thus:

It is an object of the invention to provide novel inductive devices between the vehicle and track for obtaining clear, caution and danger or other signals or conditions in an efficacious manner when passing the controlling points or stations of the track.

Another object is the provision of such inductive devices so arranged and means controlled thereby whereby a predetermined condition is obtained whenever the vehicle or train passes a controlling station or point of the track, with other conditions possible under selective control from the track. Thus, a danger condition will be established whenever the vehicle passes a controlling station, for stopping or retarding the vehicle, unless clear or caution conditions are brought about at the same time.

A further object is to provide such apparatus in which the source of electrical energy is carried by the vehicle, and in which batteries or other sources of current for the track devices are not required, to the end of obtaining a saving in the cost of maintenance.

A still further object is the provision in such an apparatus of a novel differential induction responsive device for controlling the vehicle equipment or translating means and controlled by suitable inductive devices on the track or adjacent to the path of movement of the responsive device.

The invention has for another object the provision of novel means controlled by the responsive inductive devices for the control of the vehicle equipment from the controlling devices on the track.

With the foregoing and other objects in view, which will be apparent as the description proceeds, the invention resides in the construction and arrangement of parts, as hereinafter described and claimed, it being understood that changes can be made within the scope of what is claimed, without departing from the spirit of the invention.

The invention is illustrated in the accompanying drawing, wherein the Figure is a diagrammatical view of the apparatus, showing the vehicle equipment passing a controlling station or point of the track under clear conditions.

Briefly outlined, the present apparatus comprises in its main and more important essentials, armatures 16 or magnetic devices on the track or roadway at the control stations or locations, a primary inductor 19 on the vehicle responsively affected whenever passing an armature, control relays or devices on the vehicle for obtaining clear, caution and danger conditions, a controller or switch device 45 on the vehicle controlled by the primary inductor 19 for changing the circuit connections of said control relays or devices whenever passing a control station and initiating a danger condition of said control relays or devices, secondary inductors 68 and 69 and relays 78 and 80 controlled thereby on the vehicle controlling said control relays or devices during such change in circuit connections, controlled inductors 2 and 3 on the track or roadway associated with said armatures for influencing said secondary inductors during such change in circuit connections to avoid the danger conditions and either maintain the existing running condition of the vehicle equipment or changing from a clear to a caution condition, and manually controlled means for restoring clear conditions of the vehicle equipment. The essential apparatus

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as outlined, with the necessary electrical circuits, is more simple than the complete apparatus as illustrated, such complete apparatus also including several features of safety which are not compulsory.

Then follows a description of the track equipment, the vehicle equipment, the intermediate responsive devices, the selective responsive devices and the electrical circuits; and following that there is described the method of operating the apparatus under *clear*, *caution*, and *danger* conditions. The claims relied upon are sixty-three in number, but they are represented, it was said, by the following five claims:—

12. An apparatus of the character described including a movably mounted differential inductive device including a core and inductively related coils thereon, an armature adjacent to the path of movement of said device with which said core is inductively co-operable for obtaining magnetic disturbance in said core when passing said armature, said coils being in direct current energized electrical circuits and creating opposing magnetic flux in said core so that the current in one coil is affected when passing the armature, and translating means controlled by the circuit of said coil.

37. An apparatus of the character described including a movably mounted differential inductive device energized by different direct current circuits, a relay in each of said circuits, and the relay in one circuit controlling the current in the other circuit, translating means controlled by said relays and means adjacent to the path of movement of said device and with which said device is inductively cooperable to affect the currents in said circuits for deenergizing one of said relays.

43. An apparatus of the character described including a movably mounted differential inductive device having direct current energized inductively related coils, one of which produces a magnetic flux weaker than and in opposition to the magnetic flux created by the other coil, a stick relay in series circuit with the coil producing the weaker magnetic flux, inductive means adjacent to the path of movement of said device with which said device is cooperable for reducing the current flowing in the first-named coil to deenergize said stick relay and translating means controlled by said stick relay.

66. In a railway traffic controlling system, the combination, a railway track, magnetic devices on the trackway at intervals, a vehicle on the track, an inductor on the vehicle aligning with said magnetic devices and passing in inductive relation thereover by the movement of the vehicle along the track, a primary circuit including a protection relay connected with said inductor and energized by direct current, a secondary circuit energized by direct current, and including a detector relay controlling its own circuit and inductively coupled through said inductor with said primary circuit, said primary circuit being connected to said inductor so as to deenergize said detector relay when said inductor is in inductive relation with said magnetic device, said secondary circuit controlled by said protection relay and a translating device controlled by said detector relay.

91. In a railway traffic controlling system, in combination, a railway track, an armature on said track, a vehicle on said track, an inductor on said vehicle moved by the movement of said vehicle into inductive relation with said armature, a primary coil on said inductor energized by direct current, a secondary coil in a secondary circuit including a relay

controlling its own circuit energized by direct current and inductively coupled by said inductor so that said primary coil effectively deenergizes said relay when said inductor is influenced by said armature, an electrically operated braking mechanism on said vehicle, a second relay controlling its own circuit, controlling said braking mechanism and controlled by the relay in said secondary circuit and a manually operated switch for establishing an energizing circuit for said second relay.

It will be convenient at this stage to describe with some detail, and as best I can, Schweyer's alleged invention, the defendant's train control system which is said to infringe Schweyer, and to point out in what respects they are similar, and in what respects they differ. Automatic train control as known to-day is the culmination of a prolonged development having for its object the control of trains, whereby they might be operated with increased despatch, and, at the same time, with increased safety. The first form of control developed was the *block system*, in which the railway track was divided into sections. A manually operated semaphore was located at each block, and the locomotive engineer operated his train in accordance with those signals, which were, and, in fact, still are, usually arranged to indicate three conditions: Clear—no train for two blocks ahead; Caution—a train on the second block ahead; and Danger—a train on the next block ahead. The next forward step was the substitution of automatic operation for manual operation of the semaphores, this being done electrically by means of what are called *track circuits*. The semaphore is automatically set to show either clear, caution, or danger conditions, according to the position of the preceding train. The latest development, and that to which this case has reference, was the provision of means whereby the electrical currents in the track circuit which automatically sets the semaphore at its different positions, will at the same time, automatically cause a registration of the same signals in an apparatus or device mounted on the locomotive, this apparatus being associated with the braking mechanism of the locomotive in such a way as to cause the brakes to apply, and the train to be automatically stopped when the track circuits have set the semaphore at *danger*.

The plaintiff's patentee, Schweyer, contemplates what is called a *three position* system, involving the transfer of the three indicated semaphore conditions, clear, caution, and danger, to the locomotive. On receipt of a caution signal,

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it is expected that the train will automatically reduce its speed to some predetermined number of miles per hour, while on receipt of a danger signal it will automatically come to a full stop. The defendant's arrangement is, what is described as a *two position* system, and contemplates the transfer of only two semaphore conditions, clear, and danger, to the locomotive, *caution* being combined with *danger* to show as *danger*. The registration of the danger signal in the locomotive acts in the same way as in the three position system, and results in the automatic stopping of the train unless the engineer takes steps to cancel the same.

Both systems employ the same general principle of magnetic induction, which was old, to communicate the signal from the trackway to the apparatus on the locomotive. For this purpose a U-shaped electromagnet, referred to as a *receiver*, is attached to the locomotive, and on the trackway at each semaphore or signal position are located armatures of iron, so positioned relative to the track that the receiver or receivers on the locomotive will pass directly over them with a clearance of about $1\frac{1}{2}$ inches. These armatures are also referred to as transmitters or inductors. The U-shaped electromagnet of the receiver has wound on it two or more coils, one set being called the *primary*, which strongly magnetizes the yoke of the receiver, and the other called the *secondary*, which is to be influenced by the track signal. In operation, whenever a receiver passes over an armature, a momentary cycle of electric current is generated in the secondary coil, which, under caution, or danger conditions, operates an electric device on the locomotive, called the *detector relay*, and which, in turn, brings into play succeeding electrical circuits and apparatus whereby the brake mechanism of the train is intended to be controlled. The strength of the pulse or cycle of current generated in the secondary coil depends both on the speed of the train and on the clearance between the armature and the receiver. The faster the train is moving, or the closer the receiver is to the armature when it passes over it, the stronger is the current. The effect produced by the passing of the U-shaped magnet over an armature is to increase momentarily the strength of the magnetism in the yoke of the receiver, or, as frequently expressed, to increase the *flux* in the yoke of the magnet during the instant the

passage is taking place, and as a result, and in accordance with the laws of electricity, if a coil of wire, called the secondary, is wound on the magnet, the magnetism, while it is in course of change, will cause a cycle of current to be generated in this secondary coil.

We again come to another principle of electricity common to both systems. If the trackway armature itself has a coil of wire wound around it, and the ends of this coil are connected together, there is then produced in the armature a choking effect, with the result that if the receiver passes over such an armature with its coil closed or short circuited, the increase in the strength of the magnetism in the receiver will be materially less than when it passed over with the choke coil open, and as a result, if the secondary coil on the receiver is connected with a relay, this provides an arrangement whereby a signal may be communicated from an armature on the trackway to a moving locomotive; when a clear condition prevails, the armature choke coil is short circuited, and due to the comparatively small change in the magnetism of the receiver, when it passes over the armature, the current generated in the secondary coil is not sufficiently strong to operate the relay mechanism, whereas in the danger position when the inductor coil is interrupted or open the change in the magnetism is sufficient to create a current sufficiently strong to operate the detector relay and bring its associated devices, and finally the brake mechanism, into action.

Numbers of relays are used in Schweyer, and in the defendant's train control system, and it might be desirable to describe this device. A relay consists of a coil of wire wound around a magnetic yoke, below which is an iron armature so arranged on a hinge that when an electric current of sufficient strength is passed through the yoke, the yoke becomes magnetized, and the hinged armature is drawn up. Associated with this armature are contacts, and the energization of the relay causes these contacts to close and thus provide means of controlling other electrical circuits. A *stick relay* is one which controls its own circuit through a contact operated by its own armature, that is to say, if the energizing current which magnetizes the relay is interrupted, the falling of the armature introduces a second interruption in the energizing circuit and that circuit cannot again become operative to work the relay until

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the armature is re-set by some other means. I was informed that I might visualize a *stick relay* as something in the nature of the indicator or annunciator associated with the ordinary door-bell; when the button is pressed, the annunciator falls, but once down, it is for the time being beyond the control of the button, and will not again function until re-set by some other means.

The Schweyer train control system as described in the patent, contemplates, as already mentioned, a three position system, using three receivers on the locomotive and three associated armatures at each trackway signal or semaphore position; one of the armatures, which Schweyer calls the centre armature, is uncontrollable, whilst the other two, which may be called the side armatures, are controlled by virtue of the choke coils with which they are equipped. The locomotive first passes over the centre armature which is shown located in the middle of the trackway, and then over the side armatures which are located one near either rail and which, it was suggested in evidence, might be located 160 feet further along the trackway from the centre one. For the first or centre receiver which passes over the centre armature, Schweyer's system employs an electromagnet with two primary coils energized from a direct current generator. On the intermediate part of the core of the magnet is wound a secondary coil which forms part of a circuit comprising a stick relay, called the detector relay, and a battery. The secondary coil is so connected, that the magnetic flux generated in the core of the receiver by the current from the battery, through the secondary coil, opposes the stronger flux generated in the same yoke by the current in the two primary coils.

The detector relay is normally energized by a battery, and its contacts, when the relay is energized, complete another circuit which controls a plunger switch arrangement, 45, referred to as a *translating switch*, which in turn controls the connections of further relays and circuits, and which eventually operate the mechanism which applies the brakes of the train. The function of the translating switch, would appear to be intended to complete circuits whereby the control of the air-brake operating mechanism is placed under two relays, 78 and 80, and which I shall refer to as the side relays, which are energized by alternating currents supplied by a special alternating current generator (as dis-

tinct from the direct current generator or the battery) and are controlled by the two side receivers mounted on either side of the locomotive, and are, I presume, generally similar to the receiver which is associated with the centre armature except that they are not provided with a secondary coil. On the trackway at each signalling position are established the two side armatures, 2 and 3, so arranged as to register with the two side receivers which I have just mentioned. These armatures are equipped with choke coils which may be opened or short circuited in sympathy with their associated semaphore, and the signals are thereby transmitted to the locomotive, and, the translating switch having performed its function, the air-brake mechanism is operated, (1) in a caution position, to reduce the speed of the train; and (2) in a danger position, to stop the train. On the other hand, if the semaphore shows a clear condition then the armatures will likewise show a clear condition (choke coils short circuited) and the side relays remain closed and no brake application will occur.

Since the centre armature has no choke coil to control it, the detector relay must function each time the centre receiver passes over a centre armature and it accordingly has to be re-set before the next centre armature is reached. To secure this end, a time element is introduced in the translating switch whereby the latter is made to take approximately 20 seconds to pass from its upper to its lower position. At the end of that time, another set of contacts comes into play completing further circuits whereby the detector relay is re-energized. This in turn re-energizes the translating switch, which returns to its original upper position, and the whole system is once more set ready to receive a signal.

It is to be noted that for the system of Schweyer to be practically operative the train must pass over the two side armatures within twenty seconds of the time it passes over the associated centre armature of the group. The function of the centre armature would appear to be to set a mechanism ready to respond to either a caution or a danger signal, which in turn is to be received by the two side receivers. The apparatus and its circuits as shown in the patent are very complicated, but its general object would appear to be the provision of an automatic master control of the train whereby its speed is reduced, or the

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train is completely stopped by the mechanism, irrespective of any action on the part of the engineer.

Referring now to the defendant's system of train control. As already explained, the defendant's system is a two position system, clear, and danger, there being no provision for a caution position. One armature only is used at each signal point. This armature is controllable, that is to say, it is provided with a choke coil whereby its effect on the locomotive receiver may be nullified when the coil is short circuited, which automatically occurs when the associated semaphore shows clear. The receiver on the locomotive consists of a U-shaped electromagnet on which are wound two coils, the first, the primary, is connected with a direct current generator which serves to magnetize the yoke, and the second, the secondary coil, is connected in circuit with the same generator, and a detector relay. The secondary coil is so connected that the current passing through it from the generator assists or intensifies the magnetic flux created by the primary coil. The detector relay controls other relays, which, in turn, operate the air-brake valve mechanism, and a whistle valve. The system being a two position system, provides only for clear and danger conditions, but means are provided whereby the engineer may, in certain circumstances, anticipate the operation of the automatic system and retain full control of the locomotive. This means is called the *acknowledging* contactor, or *forestalling switch*.

The functioning of the defendant's system in practice is as follows: When the receiver on the locomotive passes over a trackway armature set at clear (that is with the choke coil on the armature short circuited) the momentary current generated in the secondary coil of the receiver is not sufficiently strong to cause the detector relay to open and there is accordingly no operation of the automatic mechanism. On the other hand, if the signal on the trackway is at either caution or danger the choke coil circuit on the armature is automatically opened by the trackway relay, and the passing of the receiver across the armature creates a momentary current in the secondary coil of sufficient magnetism to de-energize the detector relay, which, in turn, brings into action the succeeding relays and eventually the brake mechanism which stops the train. Now it would not be practicable to have the train come to a full

stop at every caution signal, so, in practice, the defendant's system provides means whereby the automatic effect may be nullified by the engineer, if he is alert. This is done by means of the forestalling switch, whereby the engineer of a train approaching a semaphore set at caution, or danger, can, provided he closes this particular switch within fifteen seconds of reaching the associated track armature, and provided he releases it before the fifteen seconds have expired, remain in control of the train. However, should he fail to re-open the switch before the fifteen seconds have expired, then the automatic apparatus functions irrespective of anything he may do, the brakes automatically apply, and the train comes to a stop. The defendant's system may be described as one in which the engineer is intended to be in full control of the train at all times, but if for any reason he should fail to keep sufficiently alert, or should some emergency arise whereby he becomes incapable of performing his duties, then the system will, when either caution or danger conditions are present on that section of the trackway, automatically bring the train to a stop.

Comparing then the two systems we thus far find that Schweyer, as is set out in the patent, is a three position system, calling for three transmitters or armatures on the trackway at each semaphore position, two of which are controllable. The defendant's system is a two position system, calling for only one controllable transmitter at each semaphore position. Both systems employ the same general induction principle for the transference of the signal from the trackway to the locomotive, namely, a U-shaped electromagnet on which is wound a secondary coil, and this secondary coil in both cases controls a detector stick relay, but, in the case of Schweyer there are employed three receivers, the second and third being equipped with a primary coil only, and an alternating current not direct current is used to energize them and the relays immediately associated therewith.

From this point on the mechanism of the two systems would appear to differ very materially. In the defendant's system the detector relay controls circuits which include the manually operated forestalling switch and which finally operate the electric pneumatic valve which controls the air-brakes, three relays being used in all. In Schweyer, the detector relay controls the translating switch, which, in

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turn, completes the connection of the circuits controlled by the two side receivers, which through relays energized by alternating current, and a number of other relays, finally operates the air-brake valve to slow down the train under a caution condition, or to stop it under a danger condition. In all Schweyer shows thirteen relays in his device, as compared with three in the defendant's. The Schweyer system is provided with a switch, whereby, it was stated, the mechanism of the system can be reset once the brakes have been applied, but the patent shows no device which corresponds to the manually operated forestalling switch of the defendant, and in the defendant's system there is not, I think, any apparatus which corresponds to the translating switch of Schweyer, nor does the defendant use alternating current to operate any of the relays or other apparatus. In Schweyer, as stated in the patent, the relays which take the caution and danger signals from the armature on the track are energized by alternating current. In the defendant's device this is done by direct current operated relays and there is here a fundamental difference between the two systems. I do not think it is fair to assume that Schweyer contemplated a device which did not demand alternating current for its successful operation.

To recapitulate, the difference, between the arrangement disclosed in Schweyer's patent and that used by the defendant are as follows: In Schweyer there is a combination of three armatures, one uncontrollable, and two controllable by the trackway circuits; in the defendant's system there is but one armature at each semaphore position controllable by the trackway circuits. In Schweyer there are three receivers on the locomotive, one energized by direct current, the other two by alternating current; in the defendant's system there is but one receiver on the locomotive and which is energized by direct current. Schweyer has a translating switch to transfer circuits so that the two side receivers may control the brake mechanism; the defendant's arrangement has no translating switch. Schweyer has an alternating current generator while no alternating current is used in the defendant's arrangement, both however have a direct current generator. Schweyer has no forestalling switch, while in the defendant's arrangement there is a manually operated forestalling switch. Schweyer employs thirteen relays while the defendant's arrangement has

but three, and finally Schweyer has a governor speed control switch while the defendant has no such part in its arrangement.

Plaintiff's counsel contended that Schweyer contemplating a three position system, naturally required much more apparatus than the defendant, and a diagram was put in evidence which purported to show Schweyer simplified to a two position system, and, as a result, we find eliminated the two side armatures, the two side receivers, the alternating current generator and all alternating current circuits and relays, the translating switch, many of the other relays, and the governor speed control switch. This is a very material change in Schweyer's arrangement, eliminating as it does the alternating current feature on which the patent appears to rely in securing actual control. I am not satisfied that this can fairly be said to represent what Schweyer would have developed had he been confronted at the time with the problem of providing a two position instead of a three position system, and I think it might—as was suggested by counsel for the defendant—be equally reasonable to suppose that faced with that problem, he might just as readily have adopted the expedient of merely eliminating the particular side armature and receiver and its associated relays and apparatus, which, in his patent, are intended to give the *caution* control.

It will be convenient here to discuss another point of some importance. It was contended on behalf of the defendant, that if the secondary coil on the receiver was connected as described in Schweyer, it would not function to deenergize the relay associated therewith and that therefore Schweyer lacked utility. This is a very technical point and I have given it a most anxious consideration. As I understand it, the effect of a direct current energized receiver, of the type under discussion, passing over an armature is to create a cycle or wave current in the secondary coil of the receiver, and if this coil already has a direct current passing through it from a battery, it will depend entirely upon how the coil is connected, as to whether the magnetism created by the battery current assists or opposes the stronger magnetism of the primary coils, and consequently whether the battery current in the secondary and detector relay circuits is first implemented and then reduced or vice versa. In the arrangement described by Schweyer,

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and in that used by the defendant, an increase in the current is of no value, as such an increase merely results in the associated relay being more strongly magnetized and holding its armature up more tightly. A decrease in the current, however, if sufficiently great, results in the relay losing its magnetism. Its armature then drops the contacts open, and the control system, as a whole, functions. The defendant contends that Schweyer describes in his specification exactly how the primary and secondary coils are to be connected. The specification states:—

The coils 20 (primary coils) provide a strong magnetic flux in the core 21 in one direction, opposing the magnetic flux of less strength established in the immediate (or intermediate) portion of the core 21 in the opposite direction by coil 22 (the secondary).

And again,

The magnet 33 and the coil 22 are thus energized in series by the battery 40, and the feeble magnetic flux created by the energization of the coil 22 opposes but does not balance the stronger magnetic flux created in the core 21 by the coils 20. . . .

Counsel for the defendant contended that as a result of this method of connection, the current produced in the secondary causes first a rise in the detector relay energizing current followed by a fall or drop and that it does not function to produce the result described in the patent and which reads as follows:—

The effect of the change in the number of lines of force is the induction, into the circuit including the battery 40, coil 22 and magnet 33, of a single cycle of alternating current, of which the first half opposes the battery 40, causing the magnet 33 to become deenergized.

In the defendant's system, the method of connection is reversed, that is to say, the magnetism created by the energizing current in the secondary coil supplements the stronger magnetism created by the primary coils, with the result that in this case the cycle of current is the reverse of that which would be obtained if connected as described in Schweyer, and it causes first a fall or drop in the detector energizing relay current followed by an increase or a rise. One of the plaintiff's witnesses, in discussing this point, testified that even if this difference did exist Schweyer would still get the desired dip in the second half of the cycle, and that if the detector relay did not open on the first half, it would do so on the second. The defendant produced technical evidence to show that owing to the electrical characteristics of the circuits involved, the second half of the cycle is as a matter of fact largely non-existent,

and would not cause sufficient change in the steady current in the relay to operate such relay. This is an important point, in that if Schweyer, connected as described in the patent, does result in an increase followed by a decrease in current,—and I am satisfied from the evidence that that result is produced by this connection—and if the defendant's further contention that there is no appreciable second half cycle is true, then Schweyer is inoperative and will not function successfully, but I do not propose to express any definite opinion upon this point. The defendant put in evidence what are called oscillograph curves, the result of a test made at the plant of the General Railway Signal Company, by persons in its service, to verify this contention. These curves bear out this contention and no conclusive evidence was given to show that they did not reasonably represent the variations of the current in the defendant's system when connected, first as in actual use, and again as recommended and described in the Schweyer patent, that is to say, in the first case the dip occurs in the first half of the cycle and there is a small rise in the second half, while in the second case with the magnetism opposing one another, the rise occurs first, followed by a negligible dip in the second half.

In a hand book published by the General Railway Signal Company, and which is in evidence, the curve is shown with a symmetrical rise and fall, and on being asked to explain this, one of the defendant's witnesses, in the employ of the General Railway Signal Company, stated that this curve as there shown was intended to be purely theoretical, because at the time it appeared no oscillograph was available to tell exactly what was happening in the circuit, and that since its system (the defendant's system) depended on securing the fall in current first, they were not interested in the second half, as by the time that occurred, the relay had opened, and the current was interrupted. The plaintiff, in reply, attempted to develop the fact that while the defendant's arrangements of yoke and coils and the casing of defendant's receiver might give a curve like the oscillograph curve, a different arrangement of these elements might be designed so as to produce a dip of adequate value in the last half of the current cycle to operate the detector relay.

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The plaintiff objected to the reception of the oscillograph curves in evidence, on the ground that in so technical and complicated a point as this, the test should have been made only after an invitation had been extended to the plaintiff or its counsel to be present on the occasion of the proposed test. It would of course have been much more satisfactory if such test had been made in the presence of both parties, or in the presence of persons not associated in interest with either party, and on whom the Court could confidently rely for an impartial statement. I do not, however, suggest that those who made the test, the technical engineers of the General Railway Signal Company, and who gave evidence of the test, did in any way misrepresent the manner of making the test or in describing the actual results, in fact they impressed me as being very frank indeed and I have no reason whatever to doubt their evidence. However, I am satisfied that if the defendant's train control system was connected as described in the Schweyer patent, it would be inoperative, and would not give the desired or practical results. And I am also satisfied that the defendant's device, without the forestalling switch, or some corresponding similar arrangement, would not be an acceptable system in practice, and that its utility, from the standpoint of safety would be seriously impaired if this particular piece of apparatus were omitted.

Turning now to another aspect of the case: What is the invention described by Schweyer and what construction is to be placed upon the specification of his patent? If there be invention in Schweyer, it seems to me it is to be found in the whole combination, that is, in the particular arrangement of parts described in the specification and not in any subordinate integer or combination. The specification states that

the invention resides in the construction and arrangement of parts as hereinafter described and claimed,

and I cannot but think that this statement of the invention when first made was intended to relate to the whole apparatus.

Mr. Biggar, in his submission, stated that the system of train control disclosed in Schweyer was a complete system and that it comprised a number of things: (1) a track armature, (2) a tripping arrangement operated through a receiver which co-operates with the armature on the track,

(3) an apparatus for cancelling the effect of the tripping action brought about by the armature, and (4) a translating device; and he stated that of these parts really one only was defined in the claims sued upon, and that of the 63 claims in suit and represented by the five claims already mentioned, all were directed to what he called the *tripping mechanism*, because, he stated, the armature on the track was not new, the cancelling features of the arrangement as a whole were not new, but the tripping mechanism was new and it was the tripping mechanism as it occurred in a complete system together with the other features just mentioned, that the claims relied upon were alone directed; and it was those parts he contended that the defendant had taken, and that the action did not relate to other parts comprised in the whole system, and which were not here claimed. Therefore, he argued, we were not to compare the systems as a whole and that the invention infringed was the combination of the tripping mechanism with certain other parts but not the whole of the system. I hope I have not misunderstood the substance of Mr. Biggar's contention.

I visualize the complete system as a train of mechanism all set up and ready to function so as to apply the brakes of the locomotive immediately some lever or trigger in the locomotive is tripped, and as the first mechanical part to function to this end, in both Schweyer's system and that of the defendant's, is the armature of the detector relay, which is associated with the receiver, I think we may assume that this is the part, which when tripped, causes the complete mechanism to function; and that which causes it to trip is the pulse of current which is generated in the secondary coil of the receiver when the receiver passes over the trackway armature in a danger condition on the trackway.

In seeking the true construction of the specification, and in a consideration of the submission of Mr. Biggar which I have just stated, it is of course necessary to refer to the prior art. We find that early inventors sought to develop a mechanical trip, that is to say, some kind of a trigger—to employ the term used by one patentee—attached underneath the locomotive in such a position that when it passed over what I might call a tripping lever located on the trackway, it would be tripped and the brake mechanism

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would function. This line of development was not considered satisfactory and workers in the art accordingly sought more satisfactory means, and soon the principle of magnetic induction was suggested and disclosed and that is the basic idea employed in the systems of both Schweyer and the defendant. Induction is one of the fundamental principles of electricity and it simply means that if the strength of the magnetism or flux in any magnetic yoke be in any way suddenly increased or decreased a pulse or cycle of electric current is induced or created in a coil of wire wound around the yoke. Applied to train control, an electromagnet on the locomotive runs over an iron armature on the trackway and at the moment the passage is actually taking place there is a change in the strength of the magnetism, a pulse or current is induced in the coil, which is intended to operate the detector relay. It is immaterial in so far as the general principle of magnetic induction is concerned whether the magnet is carried on the train or installed on the trackway.

The earliest prior art cited appears to be Wiley (U.S.A.) no. 526,598, filed January 31, 1894, and which shows a magnetic induction system. In this patent the trackway armature is a controllable electromagnet and the train carried receiver is a plain iron yoke equipped with a coil of wire connected to a detector relay, the tripping relay. In danger conditions trackway circuits are closed which cause the armature to become magnetized by a battery on the track, and when the locomotive receiver passes over the armature in this condition, there is produced the desired sudden change in the magnetism and the resulting pulse of current in the coil on the receiver which serves to operate the detector relay. On the other hand, if track conditions are clear, the trackway circuits are interrupted, the armature has no magnetism, and when the locomotive passes over it, there are no changes in the magnetism in the receiver and the detector relay is not affected. The next patent to be mentioned is that of du Chambon (French), applied for on December 3, 1913. The same induction principle is here again described. Du Chambon shows a trackway armature which can similarly be magnetized, and on the locomotive he shows a receiver which consists of an electromagnet energized from a direct current source (a battery) and on

the yoke of this is wound a secondary coil, which, in turn, is connected to the detector relay. The resulting action is similar to Wiley, namely, that when the trackway armature is magnetized under *danger* conditions, a pulse of current is generated in the secondary coil when the locomotive passes over the armature, and causes the relay to function. In Dodgson and Howe (U.S.A.), a patent applied for November 27, 1905, and issued in 1909, the patentees arrive at the same end in a slightly different way. The armature on the track is so mechanically arranged that it is elevated when *danger* conditions exist and it makes use of the principle that the amount of change in the strength of the magnetism in a yoke depends, as I think I have earlier stated, not only on the speed with which the receiver passes the armature, but also on the distance between them when they are in opposition one to another; if this separation is large, the pulse of current induced in a secondary coil would be very weak, whereas if it is only a matter of an inch or so, the pulse would be very much stronger. Under *danger* conditions Dodgson and Howe arrange to elevate mechanically the trackway armature, materially reducing the separation, thereby producing under these conditions a pulse of current strong enough to operate the detector relay as the receiver passes over it. Oler (U.S.A.) no. 1,116,320, applied for on March 1, 1913, shows another variation of the same principle. Having considered the principle of magnetic induction we will now consider other pertinent factors.

It is to be kept in mind that the pulse of current generated in a secondary coil is only momentary, and while it is sufficient to trip the armature of the relay, arrangements must be provided whereby this armature remains tripped, otherwise the brakes would only apply for an instant. Wiley, Oler, and du Chambon, show connections which meet this end, but this in turn demands some reset means to restore the original arrangement of the mechanism, otherwise it would not be ready to take another signal at the next semaphore position. This requirement in the three instances of the prior art just mentioned, was met by means of a push button arrangement or switch. A simple switch, however, had not proven acceptable in practice, since an engineer could render the whole safety system use-

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less merely by keeping his switch closed. Another important factor was that of reliability. In Wiley and du Chambon, for example, the entire mechanism on the locomotive is dead until the pulse of current from the receiver operates the detector relay, and accordingly should any defect develop in this system whereby it would not function when the pulse of current became present, the engineer would receive no signal, the brakes would not apply, and an accident might readily occur. To overcome this, there was developed what is known as the *closed circuit* principle, in which the whole system is normally energized, and is de-energized to apply the brakes, that is to say, if a defect occurred in the wiring or mechanism, the system would become de-energized and the brakes would apply; in this way the possibility of receiving a false *clear* signal would be largely minimized. The closed circuit principle is disclosed in Dodgson and Howe, and in Oler. In the former, the electromagnet which controls the train brakes is normally energized and applies the brakes when it is de-energized through the opening of its electrical circuit by the armature of the detector relay, while in Oler, both the detector relay and the brake actuated mechanism are normally energized, and the effect of the pulse of current from the receiver is to de-energize the detector relay, thereby causing its armature to drop and open the controlling contact of the electromagnet controlling the braking mechanism. Incidentally, a second contact opens the detector relay's own circuit; this type of relay is referred to as a stick relay, that is one which controls its own circuit. Therefore, it seems to me, the idea or principle of a closed circuit tripping arrangement had been anticipated. I do not think there could ordinarily be invention in doing this in any particular way.

In the light of this discussion we will again examine Schweyer. The trackway armature arrangements are not in question and we will therefore confine our attention to the arrangements on the locomotive. In Schweyer the receiver on the locomotive is an electromagnet energized from a direct current source carried on the locomotive. On the yoke of this electromagnet is wound a secondary coil which is connected through a battery to the windings of a detector stick relay. The detector relay in turn controls a

translating switch, which in turn functions to complete the circuits of two side receivers energized by an alternating current, and these in turn function to operate the brakes when they pass over their associated side armatures on the trackway. The connections are made to give a closed circuit arrangement, that is to say, the complete system is normally energized. It would therefore appear that Schweyer uses the general principle of magnetic induction to transfer the signal from the trackway to the locomotive, a principle admittedly old in the art. His receiver consists of a locomotive carried electromagnet energized from a direct current source which is disclosed in Dodgson and Howe, and a secondary coil which is disclosed in du Chambon, and he uses a closed circuit arrangement of connections, including a stick relay which was disclosed in Oler.

The automatic communication of signals from a semaphore to a locomotive by the principle of magnetic induction was not a new idea or principle in 1916, and there was no novelty in the parts to be employed such as inductive devices, relays, electrical circuits, etc.; all this was known and had been broadly described in the prior art, and I should say was well known to workers in the particular art in question. It was unlikely that devices of this general nature would, when in principle known, come at once into actual use because it is probable that until comparatively recent years railways were not receptive, on many grounds, to the idea of installing such devices, and therefore it is difficult to say how practical they were, or how much or how little was necessary in the way of detail improvement to produce a perfectly satisfactory train control system; probably these improvements would readily be made by any one working in the art and possessing a knowledge of the underlying principles, and with the opportunity of carrying out actual tests on a railway. What I have in mind particularly to say is, that the failure of adoption by railways of train control systems in the early stages of the art is not of importance in a consideration of the prior art. I think it is correct to say that prior to 1916 the idea or principle of communicating signals from track to locomotive by magnetic induction and the use of electromagnets with primary and secondary windings and through that the operation of relays which would influence contacts, was well known. The particular tripping arrangements of Schweyer,

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employing a closed circuit, was not new, because Oler had described the same arrangement. In 1916—and I am assuming that to be the date of Schweyer's alleged invention—the field was not open, in my opinion, to any great invention or discovery in the matter of automatic train control systems. Therefore whatever degree of invention is to be accorded to Schweyer, it cannot be said that he unfolded any new principle in connection with automatic train control systems, nor can I see invention in any of the elements or integers or subordinate combinations, which go to make up his whole system. Both Schweyer and the defendant's train control systems start with the well known principle of magnetic induction, and then each employs virtually the same mechanism—disregarding for the moment Schweyer's differential connection—to de-energize the detector relay which was known prior to 1916, and from that on they seem to substantially diverge as I have already pointed out in the means and their arrangement, before they arrive at the electromagnet which controls the brakes. The most, I think, that can be attributed to Schweyer in the way of invention is that he disclosed a particular arrangement of known co-operating parts, to achieve certain ends in a certain way, and probably that was all that was open to any worker in the art to do.

Therefore, I think, that all that can be claimed by Schweyer is the precise train control mechanism or combination described in his specification and that, I think, is the true construction of the specification. The next question then to determine is whether the defendant's system infringes Schweyer. I have described the arrangement or construction of each, and I have pointed out wherein they differ in construction, arrangement, and operating results, and it appears to me that the two systems of train control, considering each as a whole, represent different conceptions in the arrangement of means and in the precise ends to be obtained, and they are, I think, in this respect quite substantially distinguishable. They are, I think, both based upon principles and means that were known to the prior art, and if that be correct, no one should be precluded from attaining a known object, in a particular way, provided it was not, in patent law, the equivalent of another known way. There is one fundamental difference in the defendant's train control system and that of Schweyer,

which, I think, I have already suggested. The defendant has developed a system of train control whereby the locomotive engineer will always be in control of his train, but should he become negligent and fail to properly operate the forestalling switch when his train passes a signal set at either caution or danger, or should he be unable from some untoward cause to perform his duties, then the train would automatically be brought to a stop, and it could not be re-started until the re-set switch, which can only be worked from the ground with the train at rest, was operated. Schweyer contemplates a system of train control which, irrespective of what the engineer may do, will under caution conditions reduce the speed of the train to some predetermined number of miles per hour, and in a danger condition bring the train to a stop. Schweyer contemplates, I might further add, the use of opposing polarities in the receiver, and this is set out in the patent thus:

A still further object is the provision in such an apparatus of a novel differential induction responsive device for controlling the vehicle equipment or translating means and controlled by suitable inductive devices on the track or adjacent to the path of movement of the responsive device.

A difference of opinion prevailed between counsel throughout the trial, in regard to the meaning of the word *differential*. So far as I have been able to ascertain it is a term occasionally used in electrical practice, for example, a *differential* winding in an electric generator is described as a method of connecting the field coils of the generator so that these magnetic fields oppose one another, and I think that Schweyer's system must be limited to a receiver connected in this manner. The defendant on the other hand uses a winding that is the reverse of Schweyer, a cumulative one. In the one case the magnetisms are in opposition to one another, in the other the magnetisms are cumulative. Therefore if the defendant's receiver was connected in the manner described in Schweyer, which point I have already discussed, and would not function—and I have expressed the opinion that it would not—that, if I am correct, conclusively corroborates the view that the two systems or arrangements are substantially and vitally different, and that one is not the mechanical equivalent of the other, and that there is no infringement. On the issue of the infringement it is therefore my opinion, for the foregoing reasons, that the plaintiff must fail.

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Now here, in the circumstances, I might stop, but I have had very elaborate arguments from counsel on both sides on other points chiefly involving the interpretation of certain provisions of the Patent Act,—and most of these points are quite difficult—and I think in fairness to counsel, and by way of precaution in case I am wrong in the conclusion I have reached and expressed upon the main issue, and as an appeal from this judgment is more than probable, I ought to discuss these several points and express my views concerning them.

One point raised by the defence was this: It was urged that Schwyer had abandoned his invention, at least I so understood it, by reason of the fact that he delayed six years in proceeding in the United States Patent Office with that portion of his divided application of 1916 which related to his automatic train control system, and that his Canadian application was not made until seven years after the date of his alleged invention; it will be remembered that Schwyer's United States application of 1922 was not treated as a divisional application by the Patent Office there, but rather as a fresh application. This contention does not appear to be founded on any provision of our Patent Act. Subject to possible exceptions, I know of no penalty against mere dilatoriness on the part of a first inventor in applying for a patent in this country. There is apparently warrant for the doctrine of abandonment in the United States, because there the Patent Act provides that a patent for invention may be refused if abandonment is proven. There is not, in our statute, any authority for such a doctrine, although some similar doctrine may be found within the common law. It is conceivable that in a state of facts pointing to unexplained delays by an alleged inventor in applying for a patent, associated with other facts, certain inferences might be drawn, for example, that the alleged inventor had not consummated his alleged invention at the alleged date, but I hesitate to so hold upon the facts here before me, although there may be some grounds for such an inference. Whether or not there has been abandonment by an inventor could only be inferred from such conduct as clearly denotes the voluntary surrender to the public of his rights in some form or other. The facts revealed here would not indicate an intention on the part of Schwyer to dedicate his alleged invention

to the public, nor is there any indication of abandonment by publication, public use, or sale. In Canada, the first inventor could, at the time material here at least, successfully apply for a patent many years after his invention if he establishes priority of invention, regardless of the fact that independent inventors had earlier applied for a patent of the same invention, if in the intervening period he had not in some way given it to the public. Patent Rule no. 10 provides that an applicant shall proceed with his application with due diligence and upon his failure to proceed with the same within one year after the date of the acknowledgment of the filing of his application the same shall be held to be abandoned unless the Commissioner is satisfied that the cause of the delay was not the fault of the applicant. If that rule is a valid one, its only effect in Canada would be that the inventor could not obtain letters patent for his alleged invention and consequently could not commence infringement proceedings, but if he was the first inventor he could successfully resist infringement proceedings brought against him by another patentee of the same invention. The question of the abandonment of an application for patent does not arise here. In fact Schweyer did not abandon his Canadian application for a patent, and we are not concerned with what occurred elsewhere. An abandonment of an application is one thing and an abandonment of an invention is another thing. The rule does not prescribe that an inventor must file his application promptly upon making his invention, nor does the Patent Act require this. In the circumstances therefore I am of the opinion that whatever it was that Schweyer invented in 1916, if anything, he had not abandoned it in so far as Canada was concerned.

Then, I understood Mr. Scott to contend that because Schweyer's described train control system had not so far gone into use upon any line of railway, that this afforded evidence adverse as to its utility. In my opinion such a contention, standing by itself, is without substance and is fundamentally unsound. We might assume that Schweyer had a very satisfactory train control system, but it would require a demand from some railway company before it could be put into actual use, and as Mr. Biggar suggested, it would be absurd to expect that Schweyer, or the plaintiff, should build a railway, in order that he or it might install

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the automatic train control device described by Schweyer in his patent to demonstrate its utility. Inventions of the character here involved, as I have already suggested, are not easily marketed with railway companies until public opinion or some public authority compel their adoption. In any event non-user of a patented invention is not fatal to a patent. It would appear contrary to principle and common sense if such should be the case. Non-user by the public of a patented article, might be corroborative of other evidence pointing strongly to lack of utility, but that is not, I think, quite this case. The Patent Act makes provision for the compulsory licensing of a patented invention if the patentee does not meet the public demands for the thing patented, but it does not require that potential users must use the invention.

Another ground of attack against Schweyer is that it was invalid because it was described in certain printed publications more than two years prior to the date of the filing of Schweyer's application for a patent in Canada, and this involves the rather novel question as to what was the true filing date of Schweyer's application in Canada. Both Mr. Scott and Mr. Biggar were in agreement that this point was only of force if it was the Patent Act of 1923, which came into force on the 1st day of September of that year, that was applicable to Schweyer's application, and not the Patent Act of 1906, which expired on the previous day, August 31, 1923, which happened to be the day on which Schweyer filed his petition for the patent in question. Schweyer's petition as already stated was accompanied by a specification describing the invention, the oath and the prescribed fee but no drawings accompanied the application; a letter accompanying the application stated that the drawings would follow, and in fact they did in the course of a week or so. In the state of facts obtaining, the oath was not quite in the prescribed form but it is hardly necessary to state just in what respect it was defective.

Sec. 7 (1) of the Patent Act of 1923 provides that
 any person who has invented any new and useful art, process, machine manufacture . . . not known or used by others before his invention thereof and not patented or described in any printed publication in this or any foreign country more than two years prior to his application . . . may, on petition to that effect . . . obtain a patent granting to such person an exclusive property in such invention.

The corresponding provision of the Patent Act of 1906 makes no mention of the description of an invention being published in this or any other country, or for any period, prior to the application. It therefore will be seen that sec. 7 of the Act of 1923 provides that if an invention is patented, or described in any printed publication in any country, more than two years prior to an application for patent therefor, that constitutes a bar to the granting of a patent, while sec. 7 of the Act of 1906 is silent upon the matter of the publication of a description of an alleged invention prior to an application for patent therefor. I perhaps should state that sec. 17 of the Act of 1906 provided that the Commissioner might object to grant a patent in any one of six enumerated cases, one of which reads thus:

When it appears to him that the invention has been described in a book or other printed publication before the date of the application, or is otherwise in the possession of the public.

Mr. Scott and Mr. Biggar were in agreement that if the Commissioner did not exercise his discretion to refuse a patent under this provision of the Act of 1906, from which there was an appeal to this Court had he refused, that this provision could not be invoked in an infringement action later brought under the patent when issued, and that this provision was not to be read as qualifying sec. 7 of the Act; if sec. 17 (*d*) of the Act of 1906 were to be otherwise construed, I must say, it would appear to qualify seriously the effect of sec. 7 of that Act as construed by the Courts; it would mean that the first inventor would lose his right to a patent if a subsequent and independent inventor described the same invention in a printed publication at any time prior to the application of the first inventor for a patent, which is the rule in England and I think in most other countries. Sec. 17 of the Act of 1906 does not appear in the Act of 1923; however in view of the agreement of counsel as to the effect of sec. 17 (*d*) of the Act of 1906 I do not intend to express any definite opinion as to its interpretation or effect. It affords at least some room for argument.

It would probably be a serious matter for Schweyer if it is the Patent Act of 1923, and not that of 1906, that governs his application, and that depends upon what was the true filing date of his application. The question then falls for decision as to what filing date is to be given to the application of Schweyer. The Patent Act of 1906 required that

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before a patent could be obtained the inventor must make an oath to the effect that he believed himself to be the inventor of the invention for which a patent was asked, and the specification must correctly and fully describe the invention. In the case of a machine, or in any other case in which the invention admitted of illustration by means of drawings, the Act required that the applicant *shall also with his application*, send in drawings in duplicate, showing clearly all parts of the invention, but the Commissioner might dispense with any drawings if he saw fit to do so. Schweyer's application was undoubtedly prepared with reference to a definite drawing and it contains scores of numeral references to that drawing, and obviously that drawing was intended to form a part of the descriptive portion of the specification. It is arguable that the invention described in the specification, without the drawings, would not be intelligible even to those skilled in the art, and it is also arguable that a patent granted on that specification unaccompanied by the drawings would be void for insufficiency of description. It may appear rather strange that the Patent Office should have given to the application the filing date of August 31. The natural course to follow, one would think, would be to inform the applicant or his agent that no further action would be taken in respect of the application until the drawings were received. Patent Office Rule no. 25, in force on September 11, 1923, states that applications for patents unaccompanied by the fee, petition, oath and specification provided by law will receive no recognition and shall not be filed or numbered and shall be "pigeon holed," but prior to that date the corresponding rule merely stated that applications unaccompanied by the fee would not receive recognition. In the work of Fisher and Smart on Patent Law, there appears as an appendix bearing the date of 1913, a publication concerning Canadian Patent Office Practice, and it contains what is said to be definitions for guidance in preparing and presenting applications relating to patents, and this publication was no doubt circulated in its time; it purports to have been published by a senior officer then in the Patent Office, and in fact his name appears in the record concerning the patent in suit. One paragraph of this publication relates to the date to be given to applications for patent and it reads thus:

Under the present practice of the Patent Office, the filing of the Petition, Oath and Power of Attorney (if an attorney is employed) together with the statutory fee, payable at par, at Ottawa, will ensure for the applicant a filing date as of the day they are received at the Patent Office. The specification and drawings to follow with as little delay as possible; but no reference to the Examiner will be made until the application is complete in every particular.

That means that a filing date would be given applications merely upon receipt of the petition accompanied by the oath, a power of attorney and the statutory fee. Such a practice, if it prevailed at the material time here, would be without authority and contrary to the statute; however this case is somewhat different because the application was complete with the possible exception of the drawings. While it seems to me that the practice of giving a filing date to an obviously incomplete application is inherently an objectionable one, yet there may be reasons to the contrary which do not at the moment come to me. However, in this case, the Patent Office did give the filing date mentioned to the application in question, and in due course a patent issued, as many others may have done in similar circumstances. I do not think I can now go back and alter the record and hold that the true filing date was a week later, when the drawings were supplied. I am not prepared to hold that the specification was so incomplete that it was no specification at all, and that Schweyer should not have been given the filing date of August 31. There was filed a specification which may have amply described and disclosed the alleged invention to those skilled in that art, and it may well be that the delayed drawings, which would soon follow, would merely clarify and elaborate the specification. The Commissioner having exercised a discretion, and having granted a patent for the statutory period, and apparently under the Patent Act of 1906, I am not convinced that I should now hold that the filing date given to Schweyer should now be changed to another date and thus render the application subject to certain provisions of the Patent Act of 1906. In respect of the inaccuracy in the affidavit accompanying the petition, I am not disposed to attach much importance to that. The affidavit was amended, because it was defective, and I think that was permissible. The statute is also open to the interpretation that the oath may be filed at any time prior to the granting of the patent.

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It was contended also on behalf of the defendant that even if Schweyer was properly entitled to the filing date of August 31, 1923, yet his application had to be dealt with under the provisions of the Patent Act of 1923 which came into effect on the day following. Sec. 66 of the Act of 1923 repealed the Act of 1906, and certain amending statutes, but it provided,

that any patent issued prior to the passing of this Act which could successfully have been impeached for violation or non-compliance with any provision of the Acts heretofore in force may with like effect be so impeached after the passing of this Act, and in any action for the infringement of any such patent any such violation or non-compliance which could have been set up as a defence may with like effect be so set up after the passing of this Act.

Then sec. 67 provides that

no relief, right or privilege granted to or acquired by any patentee or other person in respect of any patent or application for the same under chapter forty-four of the statutes of 1921 shall be affected by the repeal of said Act but such relief, right or privilege shall continue as if said Act had remained in force.

The importance of these two sections is that they reveal an intention to preserve certain rights and remedies in respect of certain issued patents, and applications for patents, notwithstanding the repeal of the Act of 1906. Then sec. 68 (1) provides that on the coming into force of the Act of 1923, patents issued prior thereto under the Act of 1906 should become subject to the provisions of the Act of 1923, but nothing in that Act was to be construed as reviving or restoring any patent that was void when that Act came into force nor to avoid any patent that was valid at such time. It appears to me that the making of patents issued under the Act of 1906 subject to the provisions of the Act of 1923 is hardly relevant to the point under discussion because here the question is what was the true date of the application, and what Act is applicable to the application, and this is distinguishable from the question as to what Patent Act shall apply to the patent itself when issued and not before. Mr. Biggar argued that the repeal of the Act of 1906 did not affect any right or privilege which that statute gave Schweyer on the date of his application for a patent; he argued that the receipt of an application one day before the repeal of the Act would be in no different position from one that had been in the Patent Office years before the repeal of the Act of 1906, and he relies on sec. 19 of the Interpreta-

tion Act to sustain that contention. That section in part provides that

where any Act or enactment is repealed or where any regulation is revoked, then, unless the contrary intention appears, such repeal or revocation shall not, save as in this section otherwise provided, (b) affect the previous operation of any Act, enactment or regulation so repealed or revoked, or anything duly done or suffered thereunder, or (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment or regulation so repealed or revoked.

If the application of Schweyer was properly given the filing date of August 31st, then he had acquired a right or privilege equally as secure as if it had been received one year prior to the repeal, and, I think, it could hardly be said that in such circumstances the application would not be governed by the Act of 1906. I do not think that it appears from the Act of 1923 that there was an intention to affect the operation of the Act of 1906 in respect of applications for patent made under that Act or to affect any right or privilege acquired by an applicant for a patent under that Act.

Another point raised on behalf of the defendant is that in any event its use of its train control system is protected by sec. 50 of the Patent Act. That section is as follows:

Every person who, before the issuing of a patent has purchased, constructed or acquired any invention for which a patent is afterwards obtained under this Act, shall have the right of using and vending to others the specific article, machine, manufacture or composition of matter patented and so purchased, constructed or acquired before the issue of the patent therefor, without being liable to the patentee or his legal representatives for so doing; but the patent shall not, as regards other persons, be held invalid by reason of such purchase, construction or acquisition or use of the invention, by the person first aforesaid or by those to whom he has sold the same, unless the same was purchased, constructed, acquired or used for a longer period than two years before the application for a patent therefor, thereby making the invention one which has become public and in public use.

I think the evidence shows that the defendant's train control system was installed in the latter part of 1930, or early in 1931, on the Michigan Central Railroad, in Canada. That, I think, has been satisfactorily established. I cannot construe sec. 50 of the Patent Act to mean what Mr. Scott contended it does mean. The section is confusing and its meaning should be clarified. This statutory provision appeared in Chap. 34 of the Statutes of Canada for 1859, and also in Chap. 24 of the Statutes of Canada for 1848-9; which statutes related to patents, and the meaning and purpose of the provision was, I think, more clearly expressed

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in those statutes than in sec. 50 of the Patent Act. It seems to me that section means and was intended to mean, that if a person has acquired in some way or other, something which was the subject of an application for a patent by another who is presumably the first inventor, but for which a patent had not yet issued, he, the former, shall have a continuing right to use and vend the same notwithstanding the issue of the patent to the other person. That is the only interpretation I can put upon the section. Now the patent to Schweyer issued in 1929, which was prior to the date of the installation of the defendant's train control system in Canada, and that is the date, I think, that must be looked to and not the date of the reissue patent, in a consideration of sec. 50. Sec. 50 of the Patent Act is not therefore, in my opinion, applicable to this case, and does not constitute a ground of defence available to the defendant.

Finally, the defendant contends that the reissue patent here in suit is void chiefly because of the addition of new claims which were not mentioned in the surrendered patent, the omission of which in the surrendered patent could not be attributable to inadvertence, accident or mistake; the grounds of attack on this point are those usually mentioned whenever the validity of a reissue patent is put in issue. The statute states that whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more or less than he had a right to claim as new, and it appears that the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, the Commissioner may, upon surrender of the old patent cause a new patent to issue in accordance with an amended description and specification. The description of the invention in the surrendered patent, and in the reissued patent, so far as I can see, are the same. If the Patent Office grants a reissue patent, after its examiners have passed upon the application, it becomes extremely difficult for a Court,—without the assistance of evidence—except in the most brazen infractions of this particular provision of the Patent Act, to say that the reissue patent is void upon the grounds alleged here. It would, I think, be possible to devise some more satisfactory way of amending patents than that now prescribed by the Patent Act. That there

should be an opportunity for a patentee to amend his patent goes without saying, but, I think, it should be upon an application duly advertised, so that others interested might have an opportunity of contesting the application if thought necessary, or some similar procedure, so that the step of amending a published patent should be regarded as something serious and not a mere routine affair. My view in this particular case is that the reissue patent cannot be disturbed. I cannot say upon the evidence that there was not inadvertence, accident, or mistake, in the preparation of the original specification, or that there was any fraudulent or deceptive intention on the part of Schweyer in applying for a reissue of his patent, particularly upon the ground of his not having claimed all that he thought he had a right to claim; the only departure in the reissue patent from the surrendered patent entirely relates to the claims. The claims in the reissue patent have been greatly extended in numbers, but the additional claims are substantially, in my opinion, in the surrendered patent; they have been merely repeated in other forms, and I should doubt if the new claims have upon any true construction of the specification gone further than the old claims. Even though some of the claims were bad on the ground of envisaging something that was old, or something that was not within the ambit of the described invention, I should doubt if that would invalidate the reissue patent, and it is the patent itself, and not any of its claims, that is said to be void.

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In the result therefore it is my opinion that the plaintiff must fail with the usual consequence as to costs.

Judgment accordingly.

BETWEEN:

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

1933
 * Jun. 9, 10,
 12.

PLAINTIFF;

AND

CORNELIUS HAWKINS O'HALLORAN (In Trust),
 DEFENDANT.

1934
 * Jan. 18.

Crown — Expropriation — Compensation — Injurious Affection — "Public Work" — Expropriation Act.

The defendant owns two islands named Piers and Knapp, separated from each other a distance of 1,250 feet, in the Gulf of Georgia. The Crown expropriated Piers Island for a term of five years for use as a peniten-

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tiary. The defendant, in addition to rental, claimed compensation for injurious affection to Knapp Island.

- Held:* That in determining the compensation under the circumstances here existing, the value of the freehold must be considered in order to reach a fair and just conclusion as to the amount of compensation.
2. That there is no unity of property in the two islands, they being separate holdings or estates; it is not a case of the severance of a single holding or estate.
 3. That the fact of common ownership does not constitute the two islands one estate.
 4. That to entitle a person to recover compensation for injurious affection, the damage must arise from something which would, if done without statutory authority, have given rise to a cause of action.
 5. That the penitentiary on Piers Island is a public work within the meaning of s. 2 (g) of the Expropriation Act, R.S.C., 1927, c. 64, the construction of which is that "public work" includes all public undertakings, public buildings, or properties which the Government of Canada is authorized to construct, acquire, extend or maintain for any authorized public purpose.

INFORMATION by the Crown to have the compensation for the leasehold of the defendant herein fixed by the Court.

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

Lindley Crease, K.C., and *G. A. Cameron* for plaintiff.

C. H. O'Halloran and *R. D. Harvey* for defendant.

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

THE PRESIDENT, now (January 18, 1934) delivered the following judgment:

This case raises some rather unusual and troublesome questions. On June 16, 1932, the plaintiff for the purposes of a public work of Canada, expropriated, for the limited period of five years, under the authority and provisions of the Expropriation Act, Chap. 64, R.S.C., 1927, a certain island in the Gulf of Georgia, in the vicinity of Saanich Peninsula, British Columbia, known as Piers Island, hereinafter to be referred to as Piers, and which property was registered in the name of the defendant as a trustee. Other small islands closely adjacent to Piers were at the same time taken, but with that we are not here seriously concerned. The information refers to the estate or interest taken as a "leasehold interest," and

whether that term be strictly accurate or not, it will be convenient to continue its use. The leasehold interest expropriated included also

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the right on the part of His Majesty the King, His officers, agents and employees during the said term to cut and remove timber and upon the expiration of the said term to remove buildings, erections and fixtures from the said lands.

The sum of \$420, payable in each and every year during the term, is pleaded by the plaintiff as sufficient compensation for and in respect of all claims of the defendant for "rental, damages and loss" occasioned by reason of the leasehold interest expropriated, and the location, erection, use and maintenance of a penitentiary thereon, or by reason of other lands of the defendant being injuriously affected by the said expropriation. Piers was taken by the plaintiff for the purpose of constructing and maintaining thereon a penitentiary for the detention of certain Doukhobors resident in Canada, who, I understand, were minded to roam the countryside in congregated numbers, in a nude state. The several buildings since erected on Piers for penitentiary purposes are not of a permanent character, although the facilities installed for water supply and fire protection services may be regarded as of a more permanent nature. The male and female prisoners, in almost equal numbers each and altogether numbering about 560 at the time of trial, are detained in separate compounds located in one corner of the island, and each compound is surrounded by wire fencing, and the whole penitentiary facilities are constantly under guard. Some of the prisoners are in rotation engaged in certain work outside the compounds but then under guard.

The defendant is the trustee of two trusts constituting what is called the James Swan Harvey Family Trust, and as such is the registered owner of Piers, and also an adjacent island called Knapp Island, hereinafter to be referred to as Knapp. The defendant, *inter alia*, alleges, that Piers and Knapp are two valuable residential island properties, the value of which lies not in their actual land value, but as pleaded in the statement of defence, in their natural beauty, topography, sheltered location, sand beaches, proximity and accessibility to Vancouver Island and the City of Victoria, variety of flora and silva, equable climate, and ample water supply, and that these particular advan-

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tages give these two islands a peculiar and special value; that Piers and Knapp are so near to each other and so situated, as to constitute one estate and that the possession and control of each imparts an enhanced value to both of them; that there is standing timber on Piers to the value of \$5,000, but if the timber were cut and removed the damage and depreciation caused thereby to that island would amount to \$37,500, an amount much in excess of the commercial value of the timber, and would destroy the value of the island for residential purposes,—the most valuable use to which it might be put—and render it suitable for farming only; that the construction and maintenance of a penitentiary on Piers deprives that island and Knapp of the benefits of the natural advantages mentioned, and of their selling or leasing value, by reason of the stigma cast upon the same in putting Piers to use as a penitentiary, and which stigma, it is said, will survive the expiration of the expropriated leasehold; that Piers has a fair value of \$50,000, and that in any event the depreciation resulting from its use as a penitentiary will amount to \$25,000, but, pleads the defendant, if the plaintiff will abandon his right to cut and remove the timber the defendant will abandon his claim of \$37,500, as compensation for the right to cut and remove the timber; that Knapp, the fair value of which is \$35,000, has been injuriously affected by reason of the penitentiary on Piers and that its immediate depreciation in value therefrom is \$25,000. The defendant pleads that the sum of \$420 per annum tendered by the plaintiff is not a just compensation, and the particulars of the compensation claimed are set forth in his statement of defence precisely as follows:

(a) For rental of Piers Island \$4,000 per annum, being 8% upon the valuation of \$50,000; (b) For depreciation of Piers Island for the cutting and removal of timber therefrom \$37,500; (c) For the permanent depreciation of Piers Island (if the timber is not removed therefrom) \$25,000; (d) Ten per cent of the amount awarded for the entry and taking; (e) Depreciation to Knapp Island for loss, damage and depreciation, resulting from a penitentiary on Piers Island, and including the depreciation and devaluation of the mortgagee's security \$25,000; (f) such amount of compensation for the removal of buildings, erections and fixtures from the said lands, being Piers Island, as to this Honourable Court may seem just.

The defendant, I might say, challenges the power or authority of the plaintiff to expropriate the leasehold interest in question.

Piers is located about 2,600 feet from the mainland, and about twenty miles from the City of Victoria, and comprises about 241 acres of which somewhere in the vicinity of thirty-five acres was cleared land at the time of expropriation; the balance is wooded and with the exception of very small and scattered areas is, I think, unsuitable for cultivation; the cost of clearing wooded land on Piers ranges, it is said, from \$100 to \$300 per acre. The cleared land, consisting practically of two parcels, had not been cultivated for many years and must have been rapidly reverting to wild land; the penitentiary compounds and buildings are located on the larger parcel of the cleared land, containing about thirty acres, and one small portion of the same is presently being cultivated by the penitentiary authorities. Piers was purchased for residential purposes, in 1909 by Col. James Swan Harvey, through whom it may be said the defendant derived title, the consideration price being about \$18,900, payable in instalments over a period of six years; at the date of such purchase by Col. Harvey there was a dwelling house and other buildings on the island, which were insured at \$4,200, besides other improvements. The dwelling house was destroyed by fire in 1913 while it was being altered and enlarged into hotel premises by its then proprietor; the hotel project was not again revived and the dwelling house was never restored. At the date of expropriation there was on the property a barn sixty feet long and twenty feet wide, on blocks, and in fair condition, and during the construction of the penitentiary establishment it was used as a stable; there were also two small and dilapidated buildings on the property, but their value would be negligible. One of the defendant's witnesses stated that there were about three million feet of fir and cedar timber standing on Piers, chiefly the former, of old and young growth, but not of a first class grade. There is quite a growth of other trees and shrubs on the island such as oak, yew, arbutus, etc. It was agreed by all the witnesses, I think, that the chief value of the timber, trees and shrubs, on the island, would be in their enhancement of the value of the land itself for residential purposes, and it was generally agreed by all the witnesses that the value of the island would be greatly reduced if the timber were cut and removed and that no prudent

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person owning the island would do so. And with all this I agree. After the acquisition of Piers by Col. Harvey there soon followed a series of transactions in connection with this property which are somewhat difficult to follow and which were not very lucidly explained. It would appear that Piers was sold, in 1910 by Col. Harvey (or by the Harvey Family Trust) for \$60,000, and apparently \$20,000 was paid in cash on account of the purchase price, the balance, \$40,000, being secured by a first mortgage on the property itself. The purchaser then, on terms, sold or agreed to sell the island after a few weeks to a company for \$75,000, which company in turn, and in the same year, sold it to Piers Island Syndicate Ltd. for \$85,000, the consideration being satisfied by the assumption of the mortgage of \$40,000 just mentioned, and the balance in the fully paid shares of the purchasing corporation; this corporation made a paper sub-division of Piers into 41 lots, but it remained a paper sub-division having never been filed or recorded at the Land Registry Office, and no sales of lots were ever made. Whether I have stated the facts in connection with these transactions with strict accuracy matters little because in the end, and after protracted litigation, Piers reverted to the Harvey Family Trust in 1918. This series of transactions is not, I might at once say, of the character which affords any dependable assistance in determining the present freehold or leasehold value of Piers. Since 1918 no transactions have taken place in connection with Piers except, I think, that in 1928 or 1929 an option of purchase was given by the owners for a period of fifteen days, but this option was not exercised. From 1913 down to the date of expropriation Piers was unoccupied—with an exception hardly worth mentioning—and no revenue has since been derived therefrom by its owner.

It is perhaps desirable to review briefly certain of the evidence tendered by the defendant in support of the several grounds upon which he claims compensation. Mr. Macpherson, an experienced real estate broker, doing business at Victoria, valued Piers at \$50,000, if sold en bloc, and at \$75,000, if sub-divided and sold in lots. This witness based his valuation of Piers on its special adaptability for exclusive and high class residences. He mentioned as attractive features possessed by the island, its sand beaches,

its trees, its extensive shore line, its accessibility from the mainland, and the condition of the motor highway from Victoria to a point opposite the island. He referred to previous sales of island property in the vicinity, and stated that James Island comprising 736 acres, was sold in 1931 for \$200,000, as a site for the manufacture of explosives; he mentioned also the sale of Portland Island, in 1927, for the sum of \$40,000, the purchaser acquiring the same for the purpose of raising horses, and he thought this island suitable only for farming or stock raising purposes, and much inferior to Piers in respect of shelter, approaches, landing facilities, etc., and not so adaptable for sub-division purposes as Piers. He referred to the value of certain sub-division lots on the mainland which in some instances sold for \$200 and \$250 per acre. Other facts stated by this witness might be mentioned: Piers was assessed at \$20,000 but this did not represent its true value; the rental value of Piers should be calculated on the basis of eight per cent of its valuation; there was no demand for real property in this region at the date of expropriation and any offers presently made for Piers would not be a true reflection of its real value; and that though a considerable portion of Piers was rocky, that did not diminish its value or its attractiveness as a location for a single residence, or several residences. Mr. Kalvog, of Seattle, U.S.A., a real estate broker, placed a valuation of \$50,000 on Piers, in 1930, for the purpose of an individual estate, or as a group of small estates, and he then had in mind the idea of marketing the same himself with persons resident on the Pacific coast of the United States, but nothing seems to have come of it. He stated that islands on the British Columbia side of the Gulf of Georgia were much enquired after by certain classes of citizens of the United States, and that the prohibition laws of the United States had developed an interest in residential property in British Columbia, particularly in island properties. Another witness, Greubb, placed a value of \$50,000 on Piers not only at the date of taking but for the previous twenty years; he stated that Piers in point of contour, water frontage, beaches, foliage, etc., possessed advantages over other islands in the gulf. A stigma, he said, would long remain upon Piers after the termination of the leasehold, by reason

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of its use as a penitentiary. The witness Punnett, a real estate agent, placed the value of the island at \$200 per acre, or altogether at \$48,000, and anywhere from \$50,000 to \$60,000 for sub-division purposes, providing certain improvements were first made; the normal value of Knapp he placed at \$35,000, and he stated that this value had been already depreciated by fifty per cent by reason of the penitentiary placed on Piers. The witness Coton, a real estate broker, stated it would be difficult to sell Piers at the present time, but in time it might be sold for \$50,000; that it would not be so readily marketed in the form of sub-division lots as would lots on the mainland because island property appealed only to a restricted class. The witness Ryan stated that, in 1931, he offered to pay \$25,000 for Knapp, for his own use, but with a penitentiary on Piers he would not repeat the offer nor would he wish to purchase it even when the penitentiary was removed. The witness Brett, employed by Mrs. Harvey on Knapp, testified that at times one could hear the chopping of trees and the chanting of the prisoners on Piers. Col. Cooper, Warden of the British Columbia Penitentiary, stated that the wood required as fuel for the heating of the penitentiary buildings was obtained so far mainly from the beaches and fallen trees; but he was unable as yet to state what quantity of wood would be required for this purpose for a whole season, but he thought from five to six hundred cords per year. This witness also stated that the possibility of prisoners escaping from Piers was very remote, but if any did, it was unlikely that they would resort to a landing on Knapp in their efforts to escape confinement.

Reviewing now certain of the evidence submitted on behalf of the plaintiff. Mr. Pemberton, land surveyor, landowner, and for many years doing business as a real estate agent in rather a big way over the whole of Vancouver Island, and also with a considerable experience in land subdivisions, land valuations, and in real estate loans, testified first on behalf of the plaintiff. He stated that since 1929 the market demand for real estate had dropped and almost disappeared, few sales being made, and in very many instances sales merely represented an exchange of properties. He stated that of the 30 odd acres on Piers which might be cultivated, 15 or 20 acres were good land and worth

about \$100 per acre, and that the whole island as a farm would not be worth more than \$6,000; for residential purposes he thought it was worth \$12,500 at the most, and if \$15,000 was asked it could not be obtained. He thought Piers particularly desirable as a single residential property, or two such properties, and as such would realize its highest selling price; to cut the standing timber would, he thought, rob the property of its greatest attraction or beauty. This witness had a good deal to do with the sale of islands in the Gulf of Georgia and it would appear from his evidence that island properties possessed no peculiar or particular demand. Piers, for sub-division purposes, was not so valuable he stated as sub-division property on the mainland, because of its comparative inaccessibility at all seasons and the lack of conveniences and improvements, and he was of the opinion that a sub-division of Piers would not meet a favourable reception from the buying public at any time; he stated that many sub-divisions on the mainland, more accessible and more favourably located generally than Piers, had failed to sell. He stated that the opportunity of selling a group of two or more islands held by one owner would not be greater than in the case of a single island, and that the sale of one island would not influence the sale of another nearby island, unless they were connected together at low tide or in some other way. As to rental values this witness stated that country properties rented on the basis of from 1½ to 5 per cent of the going value of the property, and Piers would have to be regarded as farm land for rental purposes as it was without any residence; if there were a moderately priced and modern residence on Piers, say worth about \$3,000, it would rent, he stated, for probably \$20 or \$25 per month, but without a residence it could not be rented, except possibly for farming purposes. He was of the opinion that after Piers was vacated as a penitentiary its marketability would not be adversely affected on account of the use to which it is now put, and that the market value of Knapp was not injuriously affected by the occupation of Piers as a penitentiary. Mr. Wolfenden and Mr. Foreman, real estate agents, who more than a month before the trial had examined Piers and Knapp at the request of the defendant, were called as witnesses by the plaintiff after it was learned that the defend-

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ant had no intention of calling them; some protest was made on behalf of the defendant to the reception of the evidence of these two witnesses but I fail to see any sound objection to their being called to testify on behalf of the plaintiff. Mr. Wolfenden valued Piers at \$15,000, without including anything that might be allowed for forcible taking, or any damages for depriving the defendant of the possession of the island during the period of the leasehold interest. The rental value of the island he put at \$100 per month, or \$1,200 per year. He stated that no injury was being done Knapp by reason of the penitentiary on Piers; that if the growing trees on Piers were cut and removed the island would lose its real value; that the property was one that should not be sub-divided; and that if business conditions improved the value of Piers would rise. Mr. Foreman confirmed generally the evidence of Mr. Wolfenden, but he placed the rental value of Piers at \$75 or \$80 per month; he was of the opinion that water front lots on the mainland were more valuable and more marketable than water lots on islands in the gulf. The witness Hall valued Piers at about \$14,000 and a good rental return, he stated, would be 5 per cent on that value; he stated that the James Seed Company had leased a large farm on Salt Springs Island, 300 acres, at a rental of \$600 per year, there being about 200 acres under cultivation, and two good houses were upon the property; he also referred to the Patterson farm which, he stated, was an excellent farm, about 65 acres being under cultivation, with a good house and out buildings thereon, and it was presently rented at \$25 per month, or \$300 per annum. He thought that if the penitentiary was removed from Piers at the expiration of the leasehold its value would not be adversely affected by reason of its past use as a penitentiary, and he distinguished this penitentiary from the ordinary penitentiary; the former he thought more like a camp where a peculiar but harmless lot of people were detained, fed and clothed. The witness Foreman, I should also say, expressed much the same view.

I have thought it only fair to counsel, after their elaborate array of evidence touching the many points put in issue, and considering the possibility of an appeal from this judgment, to review the same at this length. The first point for decision is the amount of compensation that should be

allowed the defendant for the expropriated leasehold, that is, for the use and occupation of the island and regardless of any other claims for compensation arising incidentally from the expropriation itself. The case was put to me on the footing, by both sides, that the amount of compensation under this head should be calculated upon the basis of an annual rental, and this may be the proper method for doing so, but when the compensation so calculated becomes payable, may be another question. In order to determine the amount of compensation calculable on an annual rental basis, one must consider either the probable rate of annual rental which Piers would actually command in the market at the date of expropriation, or, what would be a fair return or compensation to the owner upon the ascertained market value of the freehold. Ordinarily, the annual rental of any property reflects a certain return upon the value of the property, or the amount of the investment therein, calculated usually at a certain rate of interest. It is difficult to say what annual rental Piers would bring if put on the market at the date of the expropriation: in the state in which it then was, any rental which might be secured would be small indeed, in my opinion. In the situation here I do not think that the compensation can be justly or adequately determined if based merely on the probable annual rental which the property would bring in the open market at the date of expropriation. The circumstances here are unusual, the whole of the island has been compulsorily taken for a limited time; it is devoted to an unusual purpose, one which the present owner, or Col. Harvey, never had in mind; the population of the island grows in a moment from nothing to probably near six hundred; several new wooden buildings have been erected on the property; there is the possibility of the occupation of the island as a penitentiary adversely affecting the value and marketability of the island after the termination of the leasehold; there is introduced a new fire risk by reason of the use to which the island is put which conceivably might turn out to be quite serious; there is the possibility of injury and deterioration to the real property particularly that portion occupied by the enclosed penitentiary compounds; and all these and other matters would be considered by a voluntary lessor. Now, it would hardly be

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just to say, that because the island could not be leased to a tenant farmer, or to a person desirous of residing on the island for a few months in the summer season and who was able and willing himself to erect thereon some sort of a dwelling, at any but a small rental, that the Crown should here pay as rental just what the ordinary tenant would likely pay for it, for some ordinary purpose. And yet the evidence shows that the freehold has presently a substantial value. Any owner of Piers approached for the purpose of leasing the island for the disclosed purpose of a penitentiary would undoubtedly take all the matters I have mentioned into consideration, because the whole situation would be an unusual one and hardly within the contemplation of the owner, and he would fairly demand a rental that he would not ordinarily expect others to pay. I think that is the position I should take if I owned the island. The full effect of the occupation of the island as a penitentiary is difficult to predicate, but it must not be considered lightly. Some might be inclined to look upon the island as being occupied by a reformatory rather than a penitentiary, and having visited the island myself in company with counsel I can quite understand that view, but the fact remains that it is known as a penitentiary to the general public. It seems to me therefore that in determining the compensation here something else besides the probable annual rental value of the island from tenants ordinarily available and in the market at the date of expropriation, must be considered. I think therefore that the value of the freehold must be considered in this case in order to reach a fair and just conclusion as to the amount of compensation. Before considering the value of the freehold, or the compensation for the leasehold interest, certain conclusions which I have reached might be stated briefly. The property in question is not to be valued on the basis of farm lands, that is, I think, generally agreed upon. The most advantageous use to which Piers could be put would, I think, be that of a limited number of select and high class residential properties; its sub-division into lots would not, I think, be practical or profitable, presently or in the near future. I think the commercial value of the standing timber should be disregarded entirely in a consideration of the freehold or rental value of the island;

Piers is not forest or timber lands and I doubt if it ever was regarded as such, and it is doubtful if the merchantable timber could be profitably cut and marketed. I agree with the witnesses who stated as their opinion that to cut and remove the standing timber would cause a serious injury to Piers and very materially reduce its selling value, as residential property. I do not mean to say that a prudent cutting of the trees would cause any damage to the property, it might rather improve it. Then, the value of the freehold, or the compensation for the leasehold interest, must be estimated as the property stood at the time of taking, with the standing timber, trees, buildings, improvements, and advantages of any kind which it then possessed.

Now, as to the value of the freehold, I agree generally with the valuation given to Piers by the witnesses Pemberton, Wolfenden, Foreman, and others, that is, anywhere from \$12,000 to \$15,000, and I am prepared to adopt the higher figure. That amount compares favourably with the price at which the island was purchased by Col. Harvey in 1909, because the island then possessed some improvements which have since vanished. It is true that the real estate market throughout Canada is now inactive, and one of the very great problems in fixing the compensation for lands taken by public authorities, to-day, is to determine just how far present depressed land values should weigh in fixing compensation. The owner here was not a willing lessor and ordinarily it would be his privilege to refrain from selling or leasing his property, until an active real property market, consonant with his own idea of values, arose. The selling or rental price of other islands in the Gulf of Georgia do not seem to render any reliable assistance in estimating the value of Piers. Nor do I think that the value of one island can be determined by comparison with the selling price of another; these islands differ in so many respects that it is impossible to say how far the price paid for one would influence a buyer seeking another. The values attached to Piers by the defendant's witness are, in my opinion, over-sanguine estimates of possibilities unlikely to be realized in the near future. I think that \$15,000 would be a very fair valuation of Piers at the time of the expropriation in question. Starting then with that fact what is a fair compensation to allow the defendant?

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Considering the estimated value of the freehold, the purpose for which it was acquired and held, the possible damage to the marketability of the island on the termination of the leasehold by reason of its use as a penitentiary, the deprivation of the right of the owner to dispose of the unencumbered freehold during the term, the possible deterioration of some portions of the property owing to its occupation as a penitentiary, and, considering on the other hand, the state of the property with its buildings and improvements at the date of expropriation, that it had long been unoccupied, that no recent offers had been made for the sale or rental of the property, and the limited market for island properties, I think, on the whole, I will have dealt generously with the defendant if I fix the compensation at the rate of \$1,400 per year, or \$7,000, for the full period of the leasehold expropriated for any damage, loss, expense or inconvenience which the defendant may suffer by reason of the expropriation of the leasehold interest. In fixing this amount of compensation I have not considered the claims made by the defendant in respect of the right to cut and remove timber, or the alleged injurious affection to Knapp, both of which I shall presently discuss. Whether the total amount of compensation just mentioned should be paid forthwith or annually or otherwise, whether the compensation if payable periodically throughout the term of the leasehold should now be resolved into a principal sum representing the present worth of such recurring payments, and any question of interest, are matters possibly requiring further consideration, and they are reserved until the settlement of the minutes when I shall be pleased to hear counsel upon these several points.

Coming now to the claim that Knapp has been injuriously affected by reason of the occupation of Piers as a penitentiary. Knapp comprises 40 acres and contains a residence which cost about \$8,500, a water supply, a landing place, and a private electric lighting system. Mr. Macpherson placed the normal value of Knapp at \$30,000, but, he stated, the existence of a penitentiary on Piers would reduce the value of the former by fifty per cent and more, and for that reason, its present market value would be about \$10,000, and its marketability would for a time suffer on this account. I do not think any weight is to be

attached to the claim that an enhanced value is to be given to Piers or to Knapp, by reason of the fact of common ownership, nor do I think they constitute one estate; they are distinct and different properties, separated by a channel 1,250 feet wide—almost a quarter of a mile. The penitentiary compounds on Piers are not visible from Knapp, except from one position. The suggestion that prisoners, who might possibly escape from Piers would direct themselves to Knapp is highly improbable, as is also the suggestion that any noises originating from the penitentiary would be the cause of annoyance to residents of Knapp. It is laid down in Halsbury, Vol. 6, para. 51, that in order to entitle a person to recover compensation for injurious affection, the damage must arise from something which would, if done without statutory authority have given rise to a cause of action. That principle has been laid down time and again. Had the plaintiff purchased from the defendant the title to Piers and erected a penitentiary thereon, it could hardly be contended that the defendant, as owner of Knapp, would have a cause of action against the plaintiff for injurious affection. The defendant's case in this respect is no stronger than would be the similar claim if made by another person who happened, instead of the defendant, to be the owner of Knapp. In my opinion, such a claim is not well founded and the defendant is not entitled to any compensation for injurious affection to Knapp, caused by the use of Piers as a penitentiary. There is no unity of property in the two islands, they are separate holdings or estates, and this is not a case of the severance of a single holding or estate. It is not sufficient to say that before the taking of Piers there was common ownership of both islands. See the remarks of Lord Summer in *Holditch v. Canadian Northern Ontario Railway* (1), and the case of *Cowper Essex v. Acton Local Board* (2).

The right "to cut and remove timber" presents difficulties rarely encountered in expropriation cases. It is perhaps a little difficult to understand just what is meant by "timber"; I understand "timber" to mean standing trees which might be cut and devoted to some use, say in the construction or maintenance of a public work. The exercise of such a right is probably available to the Crown

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(1) (1916) 1 A.C. 536 at p. 542. (2) (1889) 14 A.C. 153.

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in respect of standing timber on lands expropriated for a limited time, for the purposes of a public work; that right at least is not challenged. The defendant contends that the compensation for the right to cut and remove timber should now be assessed, once and for all, and apparently upon the assumption that any timber required by the Crown during the term of the leasehold, in connection with the public work in question, would be cut and removed. Counsel for the plaintiff argued that by virtue of the expropriation the parties here stood in the relation of landlord and tenant, and that the law in such a case would be applicable here. That proposition is not, I think, wholly accurate at least, if at all, as the right of the Crown to cut and remove timber in a case of the kind presently under consideration, is probably more extensive than the corresponding right of a tenant under a lease. The ordinary relationship of landlord and tenant presupposes a voluntary agreement wherein certain terms or conditions are expressed, or implied by law. Here, the plaintiff did not lease Piers, he took it without the leave of the defendant, for a limited period of time. However, the plaintiff's counsel put this particular phase of the case before me on the footing that the Crown stood ready to compensate the defendant according to the quantity and value of the timber or trees actually cut and removed, which, in the circumstances appears to me to be the proper thing to do, and that, I think, was probably intended when the expropriation proceedings were started. At the trial, it was, I thought, agreed that there would be a reference annually, or, at the end of the term of the leasehold, to determine the compensation to be allowed under this head. I do not see how such damages or compensation can now be determined. There is no means of determining what timber may be cut for the purpose of the public work, or its effect upon the value of the freehold, and one cannot assume that the whole of the standing timber, or even a small portion of it, will be cut and removed; it is to be assumed that none shall be cut except to meet the actual necessities of the public work on the property, but it is not possible presently to say what that shall be. So far a negligible amount only has been cut. It seems to me that by the exercise of just an ordinary amount of common sense and

judgment the parties themselves should reach a definite agreement upon all aspects of this point of controversy. I have already stated that if the standing timber were extensively and indiscriminately cut and removed, a serious injury would be done the property; a limited and judicious cutting might improve the property. The matter should be settled amicably, or possibly upon consideration, the Crown might see fit to abandon the right altogether. However, the right taken to cut and remove timber, seems to me to be something apart from the use and occupation of the land and buildings taken, and was so intended; the compensation which I have fixed was reached upon the basis that the defendant would be compensated for any damage caused by the cutting and removal of timber, but I foresee difficulty in determining just what might constitute a cause of damage, and what are the precise "rights" of the plaintiff, under the expropriation, in this connection. For the time being I reserve the whole matter until the termination of the leasehold, with leave, however, to the defendant, if he is so advised, to move on the settlement of the minutes for a reference to assess the compensation under this head at fixed periods, instead of postponing the same to the end of the term. At the moment it strikes me that it would occasion a needless expense to attempt to assess the compensation annually; in the meanwhile I shall keep an open mind in the matter. The plaintiff at present is keeping an accurate record of all timber cut and removed. I hope however that the parties may themselves yet come to terms upon this point and thus avoid needless litigation and expense.

The defendant also urged that the Expropriation Act was *ultra vires*, but that proposition is not, I think, one of substance. It was also contended that lands could only be taken for a "public work," and that Piers was not taken for the purposes of a "public work," within the meaning of the Expropriation Act. First, I observe that this point was not raised in the pleadings, and I think it is now too late for the defendant to do so. In fact, the defendant in his statement of defence, pleaded admission of the allegation contained in the plaintiff's information that the lands taken were for the purpose of a "public work". Sec. 2 (g) of the Expropriation Act, defines a

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"public work," and it is said to mean and include certain enumerated public works, the public buildings, etc.; the true construction of the section is, I think, that "public work" includes all public undertakings, public buildings, or properties which the Government of Canada is authorized to construct, acquire, extend or maintain for any authorized public purpose. The penitentiary on Piers is, in my opinion, a public work within the meaning of the Act, and the expropriation is one authorized by sec. 3 and sec. 9 of the Act.

While it is true that the defendant's claims for compensation appear unduly extravagant and excessive, yet I think he is entitled to his costs of the trial. The costs of any reference that may ensue is reserved.

Judgment accordingly.

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IN THE MATTER OF The Foreign Insurance Companies Act, 1932,
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IN THE MATTER OF Appeal from the Ruling of the Superintendent of Insurance refusing Registry of The Continental Assurance Company according to the Provisions of the said Act.

Foreign Insurance Company—Registration—Confusion due to similarity of names—"or otherwise on public grounds objectionable".

The Continental Assurance Company, a United States corporation, was refused registration in Canada under the Foreign Insurance Companies Act, 22-23 Geo. V, c. 47, on the ground that its name was liable to be confounded with that of the Continental Life Insurance Company, a Canadian corporation licensed under the Canadian and British Insurance Companies Act, 22-23 Geo. V, c. 46. On appeal from the ruling of the Minister of Finance, it was held:

1. That under s. 9 of the Foreign Insurance Companies Act registration may be refused if the name of the applicant company is so similar to the name of a company already registered under the same Act, as to cause confusion.
2. That the words "or otherwise on public grounds objectionable" in ss. 1 of s. 9, of the Foreign Insurance Companies Act mean something other than the question of confusion arising out of a similarity of names.

APPEAL from the decision of the Minister of Finance refusing registration to the Continental Assurance Company under the Foreign Insurance Companies Act, 22-23 Geo. V, c. 47.

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

G. F. Henderson, K.C., and *E. G. Gowling* for Continental Life Insurance Co.

W. Evan Gray, K.C., for Continental Assurance Co.

C. P. Plaxton, K.C., for the Attorney-General

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

THE PRESIDENT, now (February 22, 1934) delivered the following judgment:

The Continental Assurance Company, which for the sake of brevity and clarity will hereafter be referred to as the applicant, made application in October, 1932, to the Superintendent of Insurance, for its registration under the Foreign Insurance Companies Act, 1932. The applicant is a United States corporation, incorporated under the laws of the State of Illinois, and has carried on a life insurance business in a substantial way in that country since 1911, and presently is licensed to carry on such business in thirty-five different states. The applicant, it is said, is associated, through share ownership, with the Continental Casualty Company which is licensed to carry on business in Canada, and in fact does so, but that does not appear to have any relevancy to the issue to be determined here.

The applicant complied with all the requirements of the statute, and of the Department of Insurance, in its application for registration. After a hearing by the Superintendent of Insurance at which the applicant, and the Continental Life Insurance Company as an objecting party, appeared, the Superintendent made a report to the Minister of Finance recommending that the registration of the applicant be refused on the ground that its name was liable to be confounded with the name of the Continental Life Insurance Company, a Canadian corporation licensed to carry on the business of life insurance in Canada under the Canadian and British Insurance Companies Act, 1932, and thus "on public grounds objectionable"; thereupon the Minister accordingly refused to register the applicant.

From the report of the Superintendent of Insurance and the refusal of the Minister, the applicant appealed, and the

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right of appeal being questioned by the Superintendent of Insurance, the applicant applied to Angers, J. for an order requiring the Superintendent of Insurance to deliver to the applicant a certificate in writing setting forth his ruling in the matter of the applicant's application for registration and the reasons therefor, with which order the Superintendent of Insurance in due course complied. In the facts of this case, I think, there was the right of appeal under the statute.

Coming now to the real question for decision in this matter. The issue seems to me to be one of the interpretation of a statutory provision, and that is sec. 9 of the Foreign Insurance Companies Act, 1932, and it reads thus:—

If the name of any company applying to be registered is that of any company registered, under this Act, or, in the opinion of the Superintendent, any name liable to be confounded therewith, or otherwise on public grounds objectionable, the Superintendent shall so report to the Minister, and the Minister may refuse to register the company.

(2) Such report, if based upon the objection that the name of the company applying to be registered is that of any company registered under this Act or any name liable to be confounded therewith, shall be deemed to be a ruling of the Superintendent from which an appeal shall lie under and subject to the provisions of section thirty-four of this Act.

The Superintendent of Insurance, and the applicant, agree that the language of sec. 9 (1) is defective and through inadvertence does not express fully what was intended, that is to say, it was never intended by the legislature to limit the application of this statutory provision to companies registered under the Foreign Insurance Companies Act but should have included companies registered under the Canadian and British Insurance Companies Act. The applicant, it is said, through the appropriate avenue, requested that this defect be cured by amending legislation. All parties to the controversy therefore agree that something important was omitted from this section of the Act. Mr. Gray, for the applicant, agreed that I might construe this section of the Act as if the omission had been supplied, and that I might deal with the appeal upon the merits if I felt inclined to do so. He, however, urged that upon a fair construction of the section as it stands the ruling of the Superintendent of Insurance was in error.

There can be no doubt, I think, as to the construction to be put on sec. 9. It means that a registration may be

refused if the name of the applicant company is so similar to the name of a company already registered under the same Act, as to cause confusion. The first clause of the section enables the Superintendent to report adversely to an application of a foreign company for registration under the Foreign Insurance Companies Act on account of the similarity of its name to another foreign company already registered under the same Act.

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To attempt to sustain the refusal to register the applicant under the words "or otherwise on public grounds objectionable" is untenable, in my opinion. These words have no reference to the situation produced by an applicant company seeking registration under a name so similar to a name already registered as to be calculated to cause confusion. The words "or otherwise on public grounds objectionable," as here used, mean something other than the question of confusion arising out of a similarity of names and in such a case there is no appeal from the report or decision of the Superintendent of Insurance, while in the other case there is an appeal and an applicant is entitled to a judicial decision as to whether its name is liable to be confounded with another name. The words "or otherwise on public grounds objectionable" exclude an objection grounded on a possible confusion of names.

Mr. Gray for the applicant, as I have already stated expressed his willingness that I dispose of the appeal upon the merits if I so cared to do, and that I might assume that the alleged missing words were supplied in sec. 9 of the Act in question. I do not think this is a case where the Court would be justified in reading into the section the words said to have been inadvertently omitted. I think I am bound to assume that the legislature meant precisely what it said notwithstanding counsel for the applicant, and the Superintendent of Insurance, believe it to be a *casus omissus*. This is not a case where the imperfect wording of a section of a statute creates some doubt as to its meaning but where the intent of the legislature may be resolved with confidence from other provisions found in the same statute.

It seems to me that the appeal should be allowed and it should be declared that the applicant is entitled to registration. The statute, as it stands, authorizes a refusal of

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registration of a foreign insurance company under the Act in question here when its name is liable to be confounded with the name of another foreign company already on the registry, and any attempt to base the refusal upon the words "otherwise on public grounds objectionable," does not appear tenable to me. I cannot see any useful purpose now to be served in a discussion of the appeal upon the merits of the case.

Judgment accordingly.

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BETWEEN:

J. V. BOUDRIAS FILS LIMITEE

PLAINTIFF;

AND

BOUDRIAS FRERES LIMITEE

DEFENDANT.

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Unfair Competition Act—Use of name or surname in connection with partnership or incorporated company—Conditions relating to use of name or surname.

Held: That s. 9 of the Unfair Competition Act, 22-23 Geo. V, c. 38, does not restrict an individual or a group of individuals to the use, as a trade name, of his or their personal names or surnames alone, thereby debaring him or them from adding any word or words thereto indicating a body corporate or a partnership.

2. That no man can be deprived of the right of using his name honestly in connection with his business.
3. That under s. 9, 22-23 Geo. V, c. 38, any individual or group of individuals may use his or their names or surnames in connection with his or their business, provided such business be commenced and carried on for his or their own direct benefit, in good faith and without any intention to deceive. Given these three conditions, confusion is immaterial.

ACTION by the plaintiff company under The Unfair Competition Act, 22-23 Geo. V, c. 38, asking for an injunction restraining the defendant company from using the name "Boudrias" as part of its corporate name and from selling any of its wares having the name "Boudrias" prominently exhibited thereon.

In 1896 one J. V. Boudrias started in business in the city of Montreal as a manufacturer of, and dealer in tea, coffee, extracts and spices, under his own name. In 1912 he organized a company called J. V. Boudrias Limitée, which took over the business and carried it on until 1920

when that company sold its assets to the plaintiff company, in which J. V. Boudrias held the controlling interest. In 1928 he sold this interest to one J. L. Freeman covenanting with him not to carry on, directly or indirectly, for a period of five years, any business similar to that of the plaintiff company. J. V. Boudrias also assigned to plaintiff company his right, title and interest in all formulas, recipes and processes, controlled or used by him, relating to any products then or formerly manufactured by him or by the company, as well as his right, title and interest in any trade names, trade-marks or patents relating to any products being then manufactured by the company or formerly owned, controlled or manufactured by the assignor.

The five years having elapsed, J. V. Boudrias and his sons, in 1933, caused the defendant company to be incorporated and began to manufacture and sell tea, coffee, spices and extracts, distributing the same as "products of Boudrias Frères Limitée". The defendant company from the commencement of its operations carried on business in the premises formerly occupied by the plaintiff company. These premises were the property of J. V. Boudrias who had leased them to plaintiff company in 1928 for a term of five years, the lessee having the option of renewal for a further five-year term. J. V. Boudrias offered to renew the lease to plaintiff company at a rental fifty per cent lower than the one stipulated in the lease for its renewal, but plaintiff company vacated the premises.

The Court found that the defendant company had, since it started its operations, carried on business in good faith and without any intention to deceive; that as far as the plaintiff company is concerned, the name "Boudrias" had not acquired a secondary meaning and had not become identified with its goods.

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

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

H. Gerin-Lajoie, K.C., and *C. H. Macnaughten* for defendant.

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ANGERS J., now (March 15, 1934) delivered the following judgment:

[The learned Judge, stated the nature of the action and then continued.]

Before discussing the proof in relation to the facts posterior to the commencement by the defendant company of its operations, I believe it expedient to examine the law bearing upon the question at issue, viz., the right of J. V. Boudrias and his sons to use the surname "Boudrias" as part of a corporate name.

Counsel for plaintiff submitted that a cause of action in a case of this nature is established when it appears that the names of the two companies are sufficiently similar as to create a danger of confusion, even though the defendant had acted in good faith and without any intention of creating confusion. Counsel, in support of his contention, relies on section 7 and subsection (b) of section 11 of The Unfair Competition Act. Section 7 is in these terms:

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

Section 11 reads thus:

11. No person shall, in the course of his business,
- (a) make any false statement tending to discredit the wares of a competitor;
 - (b) direct public attention to his wares in such a way that, at the time he commenced so to direct attention to them, it might be reasonably apprehended that his course of conduct was likely to create confusion in Canada between his wares and those of a competitor;
 - (c) adopt any other business practice contrary to honest industrial and commercial usage.

Section 11 lays down the general rule forbidding acts of unfair competition in the course of business. I do not think it applies to the present case: the plaintiff in fact is merely seeking to restrain the defendant from using the word "Boudrias" as part of its corporate name and from selling its wares with the word "Boudrias" thereon.

The sections in the Act concerning trade names are sections 7, 8, 9 and 10.

Section 7 sets forth the principle that no one is entitled to knowingly adopt in connection with his business a trade name which, at the time of its adoption, is the name, or is similar to the name, in use by another person as the trade name of a business of the same character carried on in Canada, or elsewhere if such name is known in Canada.

Section 8 has no application herein: it stipulates that no person shall have the right to continue using in Canada a trade name which, when he adopted it, he knew was, or was similar to, the trade name of a business of the same character then being carried on in Canada, or elsewhere if its name was then known in Canada. This section deals with trade names adopted before the coming into force of the Unfair Competition Act.

Section 10 deals with the burden of proof and states that it is incumbent upon a person, who adopts a trade name similar to one already in use, to show that, at the time of his adoption thereof, he was in ignorance of the use of a similar trade name and that in adopting it he did so in good faith.

As already stated, section 7 states the general principle concerning the adoption and use of trade names; section 9 lays down an exception:

9. Nothing in the last two preceding sections shall affect the right of any individual or group of individuals to adopt for use and use his or their own personal names or surnames as a trade name for a business commenced and carried on for his or their own direct benefit in good faith and without any intention to deceive.

Counsel for plaintiff submitted that section 9 has no application in the present case, because the defendant's business is not carried on under a personal name or surname, or personal names or surnames, but under a corporate name including the words "Frères" and "Limitée"; now, as counsel says, nobody has a personal name of which the word "Frères" or the word "Limitée" forms part. If the second proposition does not admit of controversy, I must say that I do not agree with the first one. I do not think that section 9 must be so narrowly interpreted as to have it mean that an individual or a group of individuals are only entitled to the use, as a trade name, of his or their personal names or surnames alone and that he or they are

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debarred from adding any word or words thereto indicating a body corporate or a partnership, as, for instance, the words "Limitée", "et Compagnie", "et Frères" or "et Fils".

Assuming for a moment with counsel for plaintiff that the meaning of section 9 is that a group of individuals have the right to use their personal names or surnames, as a trade name, without any addition thereto, the result, in the present instance, would be that the Boudrias family could either use, for the purposes of their business, the surname "Boudrias" alone or a firm name composed of the names of all the partners, such as, for instance, "J. Victor Boudrias, Paul Boudrias, Adrien Boudrias, Girard Boudrias and—I suppose counsel for plaintiff would not want to ostracize this harmless conjunction—René Boudrias". Needless to say, the order of the names could be interverted. Firm names as "Boudrias père et fils", "Paul Boudrias et Frères", "Boudrias et Compagnie", to mention only a few examples, would not be permitted and these trade names would still be more objectionable if followed by the word "limitée", thereby indicating a corporation instead of a mere partnership. Why that should be is beyond my comprehension. It is indeed hard to conceive that the legislators ever intended to deprive a person from using his surname as part of a firm name or a corporate name, for the sole reason that another person, bearing the same surname or having acquired, as in the present case, a corporate name of which this surname forms part, is already using it in connection with his business. If section 9 is so rigidly drafted as to mean that an individual is deprived of the right of using his patronymic name in a firm name or corporate name simply because another individual or group of individuals has or have previously included the same patronymic name in a firm name or corporate name, assuming naturally that the only resemblance between the two trade names consists in the patronymic names and the words "Limited" or "Company", I think that the section ought to be amended. What I believe however the legislators' intention was, as I have already said, in adopting section 9, even though they did not say it very plainly, is that no one is to be deprived of using his personal name or surname as a trade name,

be this trade name a firm name or a corporate name, provided it be done for his own direct benefit in good faith and without intention to deceive; and the same remarks apply *mutatis mutandis*, to a group of individuals.

If the case does not come within the purview of section 9, for the reason that this section only applies to the use, as a trade name, of the name and surname of an individual or the names and surnames of a group of individuals, it must be governed by section 7. This section, as we have seen, prohibits the adoption of a trade name which is the name, or is similar to the name, in use by another person.

Subsection (k) of section 2 defines the word "Similar", as applying to trade names, as follows:

"Similar", in relation to . . . trade names describes . . . names . . . so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin.

I do not think that the name "Boudrias Frères Limitée" so closely resembles the name "J. V. Boudrias et Fils Limitée" as to come within the definition of said subsection (k); its adoption therefore would not be prohibited by section 7.

At all events I may repeat that I am of opinion that the adoption of the name "Boudrias Frères Limitée" by J. V. Boudrias and his sons was permissible under the provisions of section 9 and that the defendant company is entitled to use it, provided of course its business was commenced and is carried on in good faith, without intention to deceive and for the direct benefit of the Boudrias family.

Before dealing with the question of fact raised by this proviso, I deem it appropriate to examine as briefly as possible the authorities cited by counsel, bearing in mind that they are all decisions rendered under the common law and, with respect to the decisions of our own tribunals, anterior to the enactment of the Unfair Competition Act.

The first case upon which counsel for plaintiff relied is that of *F. W. Woolworth & Co. Ltd. v. Woolworths (Australia) Limited* (1). The facts were these. The plaintiff

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company was incorporated in Great Britain in 1909 with the object of carrying on a business for the sale of a large variety of inexpensive articles. It was promoted by an American company of the same name, which had had prior to 1909 a successful career. The defendant company, incorporated in 1929, was the buying agency of a company incorporated in Australia in 1924, under the name of Woolworths Limited, for the sale of articles of a similar class to the plaintiff company's goods and also of a certain quantity of articles at a higher price. There was no one bearing the name Woolworth connected with the defendant company or its parent company in Australia.

It was held

that the evidence had not shown that there had been up to the time of the action any real confusion; but that by the name "Woolworths" the Plaintiff Company was understood to be meant, not only among the general public, but also among traders and manufacturers; that the name Woolworths (Australasia) Ld. must suggest some connection with the Plaintiff Company; that the Defendant Company's name so nearly resembled the name of the Plaintiff Company as to be calculated to deceive.

Judgment was given for the plaintiff and an injunction granted.

The Woolworth case differs from the present one, in that there was no one with the name Woolworth connected with the defendant company and that the latter had accordingly no particular reason to adopt this name.

The next case to which my attention was drawn on behalf of plaintiff is the case of *J. H. Coles Proprietary Ltd. (in liquidation) v. Need* (1).

Lord Wright (at page 386) says:

It may be noted that both the Chief Justice and the Full Court of Victoria proceeded on the basis that the Appellant's trade names had not lost their distinctive character and this also was the conclusion of the dissentient Judges of the High Court. Their Lordships, after considering the evidence, agree with that opinion, and also with the further opinion of all these judges that all the right that the Respondent ever had in regard to the user of the Appellant's trade names was a revocable licence to use these names so long as the business arrangement continued between the Appellant and the Respondent.

This case is of no assistance; the principle involved is not the same as the one with which we are concerned in the present suit.

A third case cited by counsel for plaintiff is that of *Heppells Limited v. Eppels Limited & Isaac Jacob Eppel* (1).

Heppells Limited was incorporated in 1924 for the purpose of carrying on the business of wholesale and retail chemists and druggists. It had a number of retail shops in the West End of London. Eppels Limited was incorporated in 1928 for the purpose of carrying on the business of dispensing chemist in the neighbourhood of Barons Court, in London, and had one store in that district. The defendant, Isaac Jacob Eppel, a qualified chemist, carried on in Dublin the business of a chemist's shop for several years and later organized the defendant company. Before the latter had opened its shop the plaintiff sought an injunction to restrain the defendant company from trading under the name of Eppels Limited.

It would appear from the report that Mr. Justice Clauson, before whom the motion was made, arrived at the conclusion that the defendant company's name so closely resembled the plaintiff's name as to be calculated to deceive, although he does not say so explicitly. After citing the facts and noting the difference between the names "Heppells" and "Eppel", the learned judge adds:

It is suggested on his behalf that the name Eppels Limited does not so closely represent the Plaintiffs' name as to be calculated to deceive, it being admitted that the business which is going to be carried on, in so far as it is a chemist's business, has at least some features in common with the chemist's business carried on in various parts of London by Heppells Limited, the Plaintiffs. This is an application for an injunction, and I desire to say nothing further than that having perused the evidence I can see no ground disclosed by it on which the Defendants can effectively resist this injunction, and I propose to grant an injunction as asked.

Of the three cases referred to the last one is surely the most in point. The two names, although spelled differently, do not differ greatly in their pronunciation; as Mr. Justice Clauson put it: "Can I not take judicial notice of the fact that some people don't sound their aitches (h's)?" To the ear both names were alike and one might easily have been mistaken for the other; this is seemingly the reason which led Mr. Justice Clauson to grant an injunction. The judgment does not in the least intimate that Eppel was not entitled to use his surname as part of

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a corporate name; it merely says that he could not use it in such a way that his trade name would so closely resemble that of plaintiff as to be calculated to deceive.

The next cases brought to my attention by counsel for plaintiff are those of *The Hurlbut Company v. The Hurlbut Shoe Company* (1) and *Brewster Transport Co. Limited v. Rocky Mountain Tours and Transport Co. Limited et al* (2).

The first of these two cases deals with trade-marks. The Hurlbut Company had registered a trade-mark consisting of the name "Hurlbut" and the family crest and another one consisting of the name alone, for use on shoes. The Hurlbut Shoe Company, a partnership composed of Frank H. Hurlburt and his wife, later registered a trade-mark consisting of the name "Hurlburt" with a device of a bow and arrow and sold a special kind of shoe with the mark on it. The Hurlbut Company took an action for the expunging the the trade-mark and for an injunction. The Exchequer Court dismissed the action (3) and, on the offer made by the defendant company before the institution of the action and repeated in its defence, to vary its trade-mark by substituting for the word "Hurlburt's" the name of the company, ordered the trade-mark to be so varied. The plaintiff appealed. Upon the respondent, the Hurlburt Shoe Company, undertaking to state in its advertisements that it had no connection with The Hurlbut Company and to amend its trade-mark by adding thereto the name of the respondent Frank Hurlburt, the Supreme Court dismissed the appeal. The judgment of the majority of the Court (Anglin C.J. and Duff, Mignault, Newcombe and Rinfret JJ.; Idington J. dissenting) was delivered by Mr. Justice Duff. The learned judge, in a brief and clear statement, sets forth what he considers to be the law concerning the right of an individual to use his surname in connection with his goods or business (p. 142):

The law is quite clear that no man can acquire a monopoly of his own surname in such a way as to prevent another person of the same name honestly using that name in connection with his goods or his business, but that is subject to the important qualification that no man is entitled by the use of his own name or in any other way to pass off his goods as the goods of another, and if he is using his own name with that purpose, or

(1) (1925) S.C.R., 141.

(2) (1931) S.C.R., 336.

(3) (1923) Ex.C.R. 136.

even, without the conscious intention of doing so, with the effect of doing so, and if, when he becomes aware of the fact that such is the effect of his conduct, he persists in that conduct without taking reasonable care to qualify the representation implied in his conduct in such a way as to avoid deceiving persons who otherwise would be deceived by it, he cannot be said to be using his own name in good faith for his own legitimate business purposes.

Mr. Justice Duff referred to certain cases upon which counsel for the defendant particularly relied; I shall deal with them later.

The action brought by Brewster Transport Co. Limited against Rocky Mountain Tours and Transport Co. Limited, Rocky Mountain Royal Blue Line Motor Tours Limited and others was to restrain the defendants from using a trade name, containing the words "Royal Blue Line", in connection with motor passenger transportation in Alberta, the plaintiff claiming, as first user in that territory, an exclusive right to the name; the question of the use of a surname as a trade name did not arise. The Supreme Court (Anglin C.J., Newcombe, Rinfret and Lamont JJ., and Cannon J. dissenting) affirming the judgment of the Appellate Division of the Supreme Court of Alberta, which by a majority had reversed the decision of Ives J. and dismissed the action, held that:

In view of the existing prior extensive use of the name by a certain company and its affiliated corporations in the tourist transportation business in other territories, the use by plaintiff of that name in a like business was not proper, being a use that would mislead the tourist public, and therefore plaintiff had not shown a right to the use entitling it to claim the protection of a court of equity (*McAndrew v. Bassett*, 4 De G. J. & S. 380, at 384; *In re Heaton's Trade-Mark*, 27 Ch. D. 570).

The case was decided mainly on facts; besides it is not in point. Counsel for plaintiff admitted that the case turned on a question of territoriality, but contended that it served to introduce a word or two on the subject of the statute which is now in force. I must say that I fail to see how this decision can be of any help in interpreting the statutory provisions with which we are concerned.

Counsel for plaintiff also cited the following cases: *Prof. Dr. G. Jaeger v. Jaeger Company Limited* (1); *Heels v. Stafford Heels Limited et al* (2); *Edison Accumulators Limited v. Edison Storage Batteries Limited* (3); *C. & A. Modes v. Central Purchasing Association Limited et al* (4);

(1) (1927) 44 R.P.C., 83 and 437.

(2) (1927) 44 R.P.C., 299.

(3) (1929) 46 R.P.C. 432.

(4) (1931) 43 R.P.C. 163.

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British Legion v. British Legion Club (Street) Limited (1); *J. Lyons & Company Limited v. J. Lyons* (2).

Of these six cases, only three relate to trade names, including patronymic names; the Jaeger case, the Edison case and the Lyons case. The other three deal with anonymous trade names; they have little, if any, application to the point in question, except in so far as they uphold the principle that no one can adopt a trade name so similar to that of another as to be a source of confusion; it is unnecessary to comment upon the decisions in these three cases; a few remarks regarding the others may however be apposite.

I shall first take the Jaeger case. The plaintiffs brought action seeking: (a) a declaration that they were entitled to use the word "Jaeger" in connection with articles of clothing and to carry on business under the style of "Prof. Dr. G. Jaeger", provided they took precautions to distinguish their goods and business from those of the defendant; (b) an injunction to restrain the defendant from stating that the use by plaintiffs of the word "Jaeger" was calculated to deceive or that plaintiffs were not entitled to use the said name; (c) an injunction to restrain the defendant from continuing to prosecute its application for the registration of the trade-mark "Jaeger". The defendant counterclaimed for an injunction restraining the plaintiffs from passing off their goods as those of the defendant by the use of the name "Jaeger". At the trial the plaintiffs asked for the declaration aforesaid qualified by the addition of the words "as part of their business name" after the word "Jaeger".

Mr. Justice Romer refused the injunctions claimed by the plaintiffs and held that the only relief that could be granted was the qualified declaration asked for at the trial; that the name "Jaeger" had come to be distinctive and to indicate the defendant's goods; that the precautions taken by the plaintiffs had not been sufficient to avoid confusion and that the injunction claimed by the defendant ought to be granted.

The defendant appealed and the plaintiffs gave notice of cross-appeal. The Court of Appeal held that the defendant's appeal ought to be allowed and the order for a

(1) (1931) 48 R.P.C. 555.

(2) (1931) 49 R.P.C. 188.

declaration discharged and that the injunction granted against plaintiffs ought to be modified so as to safeguard the right of the latter to trade in their firm name.

This case, decided exclusively on facts, offers no interest, save that it acknowledges the right of a person to the use of his name in connection with his business, under certain conditions.

The Edison case also turned on a question of fact. On motion by plaintiff an interlocutory injunction was granted restraining the defendant from using its name on the ground that the words "Accumulators" and "Storage Batteries" were synonymous and that confusion was likely to arise. The defendant appealed; the appeal was dismissed. At page 438 of the report (*ubi supra*) the Master of the Rolls (Lord Hanworth) says:

What is plain is that these two companies are carrying on a business, the integral part of their names being in fact synonymous the one with the other. It is found by the evidence, and it is clear, that accumulators are in this country sometimes called storage batteries, and storage batteries may be called accumulators.

I think it can be gathered from the report, although it is not so stated expressly, that the name "Edison" was not the surname of any one interested either in the plaintiff or the defendant company.

The last case cited by plaintiff, to wit *J. Lyons & Co. Limited v. J. Lyons*, is a clear case of deliberate passing off. The defendant was not prohibited from using his name, but was restrained from using it in such a way as to deceive. The plaintiff company, established for some time, carried on business as restaurateurs and purveyors on a large scale. It had numerous shops in Great Britain, four of which in the neighbourhood of Brighton. It also sold its goods through retailers. For many years the plaintiff had packed and blended, and widely advertised and sold, tea and cocoa as "Lyons Tea" and "Lyons Cocoa". The defendant was originally registered as Sidney Lyons but, at an early age, his name was changed to Joseph; he was a nephew of Sir Joseph Lyons who had been connected with the plaintiff company. The defendant, who was the keeper of a boarding house at Brighton, in December, 1930, commenced to advertise and offer for sale in Brighton and the vicinity packets of tea and cocoa labelled "J. Lyons Superior Tea, Depot Brighton" and "J. Lyons Pure Digestive Cocoa".

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The plaintiff company took action to restrain the defendant from selling goods and passing them off as being the plaintiff company's goods.

It was held that the phrase "Lyons Tea" and "Lyons Cocoa" had come to mean the goods of the plaintiffs, that the packets of tea sold by the plaintiffs and the defendant respectively were alike, that the phrase "Brighton dépôt" was misleading, that the defendant had intended to deceive and had deceived the public into buying his goods as and for the plaintiffs' goods and an injunction was granted.

Dealing with the question of law, Mr. Justice MacKinnon says (p. 191):

There has been cited one of the best known passages about such a case, the quite short Judgment of Lord Justice Turner in the case of *Burgess v. Burgess* (1853, 3 De G. M. & G. 896) where he said: "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not."

That I believe to be a perfectly sound statement of the law. *Prima facie* any man has a right to use his own name in carrying on trade and selling goods. If it happens that somebody else of the same name is also engaged in the same trade, certainly this proposition is true in every case: that the man who is trading in his own name must not do that in such a way, *otherwise than by using his own name*, as to pass off his goods as being those of the other trader bearing the same name. That would be true in every case. But there may also be cases in which it is also true "that a man may so use even his own name in connection with the sale of goods as to make a false representation." I quote there a sentence from the opinion of Lord Herschell in *Reddaway v. Banham* (L.R., 1896, App. Cas. 199, at page 211; 13 R.P.C. 218 at p. 229). Such a case arises where the name common to himself and the other trader has become so closely associated with the goods sold by the other trader as to become part of the well-known description of the goods. The more closely a particular surname is associated with a particular class of goods, the more difficult must it become for another trader happening to own that same name so to use his own name with sufficient distinction as to make it clear to the purchasing public that the goods he is selling are not the goods of the earlier and better known trader.

This was a case in which a deliberate attempt had been made by the defendant to pass off his goods as those of the plaintiff. Yet the defendant's right to use his surname was

not denied; the defendant was merely prohibited from using it in such a way as to cause deceit.

Counsel for defendant relied on the following decisions: *Burgess v. Burgess* (1); *John Brinsmead & Sons Ltd. v. Edward George Stanley Brinsmead* (2); *Actiengesellschaft Hommel's Maematogen v. Hommel* (3); *Dunlop Pneumatic Tire Co. Ltd. v. Dunlop Motor Co. Ltd.* (4); *John Dewar & Sons Limited v. James Haggart Dewar* (5); *S. Chivers & Sons v. S. Chivers & Company Limited* (6); *Jamieson & Company v. Jamieson* (7).

The principle that a man is entitled to use his name in connection with his business, even though the similarity of his name to that of another trader, previously established in the same class of business, may occasionally lead to confusion, provided there be no fraud, was laid down in the case of *Burgess v. Burgess (ubi supra)*. It is useless to repeat here the remarks of Lord Justice Turner cited by MacKinnon J. in his judgment in the Lyons case, an extract whereof containing the said quotation is hereinabove reproduced; but I think it is proper to quote the judgment of Lord Justice Knight Bruce, which, although worded differently, and, as has been said, in a more epigrammatic form, does not, in my opinion, differ substantially from that of Lord Justice Turner; it reads as follows (p. 903, in fine):

All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers; nor is there anything else that this defendant has done in question before us. He follows the same trade as that his father follows and has long followed, namely, that of a manufacturer and seller of pickles, preserves, and sauces; among them one called "essence of anchovies". He carried on business under his own name, and sells his essences of anchovies as "*Burgess's Essence of Anchovies*", which in truth it is. If any circumstance of fraud, now material, had accompanied, and were continuing to accompany, the case, it would stand very differently; but the whole case lies in what I have stated. The whole ground of complaint is the great celebrity which, during many years, has been possessed by the elder Mr. Burgess's essence of anchovies. That does not give him

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| (1) (1853) 3 de G. M. & G., 896. | (4) (1907) 24 R.P.C., 572. |
| (2) (1913) 30 R.P.C., 137 and
493. | (1906) 23 R.P.C., 761. |
| (3) (1912) 29 R.P.C., 378. | (5) (1900) 17 R.P.C., 341. |
| | (6) (1900) 17 R.P.C., 420. |
| | (7) (1898) 15 R.P.C., 169. |

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such exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovies, and selling it under his own name.

Notwithstanding the fact that the plaintiff, the elder Burgess, had sold his essence of anchovies as Burgess's Essence of Anchovies, the injunction by which he sought to restrain his son from selling the same product under the same name was refused.

The case of *Dunlop Pneumatic Tyre Co. Limited v. Dunlop Motor Co. Limited (ubi supra)* was decided on the facts; it was held by the Second Division of the Inner House, in the Court of Session in Scotland, that there was no proof of probable deception of persons acting with reasonable care, the business of the two companies being mostly in different goods; that the term "Dunlop tyres" was the proper and usual name of certain (formerly patented) articles which might be sold by all under that name; that, as regards articles other than tyres, the complainants had acquired no exclusive right to the name Dunlop; also that there was no proof of *mala fides*. An appeal was taken to the House of Lords and dismissed: see 24 R.P.C., 572.

Lord Kyllachy, who was one of the judges sitting in the Second Division of the Inner House, made the following observation (23 R.P.C., p. 770):

The one (observation) is that, far as the law may have gone in its justifiable anxiety to prevent imposition upon the unwary purchaser, and content as it has sometimes been to pursue that object at the expense of encouraging the acquisition of virtual monopolies by traders and companies prepared to spend largely in systematic advertising and litigation, it has never as yet, at least so far as I know, gone the length of debarring any merchant or manufacturer from selling his own goods under his own name, unless there has been, in addition to the use of that name, some overt act or course of conduct plainly indicative of fraud—that is to say, of dishonest effort to pass off his own goods as the goods of another. The authorities—beginning with the case of Burgess and other cases not yet overruled—appear to me to make that proposition fairly clear. I myself so held, after full consideration, in the case of *Dewar* (7 S.L.T. 462), a case which was not carried further; and if the case of *Valentine* (17 R.P.C. 673), or the opinions there expressed, should be held—which I greatly doubt—to affirm or imply any broader proposition, all I can say is that, with the greatest respect, I am unable to agree with that judgment.

Commenting upon these two decisions (*Burgess v. Burgess* and *Dunlop Pneumatic Tyre Co. Ltd. v. Dunlop Motor Co. Ltd.*) Kerly (The Law of Trade-Marks, 6th edition, p. 617) says:

In the present state of the authorities, however, no such general rule can now be laid down as an absolute rule of law. The inclination of the courts is to treat the question whether the use of the name in question by a defendant is calculated to pass off his business or goods as that or those of the plaintiffs as one of fact in each particular case, *as though there were no difference in principle between a man's own name and any other apparently descriptive word.*

The last proposition is, in my opinion, too broad. The inclination of the Courts may have been to treat the question whether the use by a defendant of his own name is calculated to deceive as one of fact in each case, but I do not think that they have gone as far as holding that there is no difference in principle between a man's own name and *any other apparently descriptive word*; at least I am unable to interpret the decisions, brought to my attention, in that sense. If such is the trend of the jurisprudence, I must say, with all due respect, that I cannot agree with it; I believe that there is a difference between a man's surname and another apparently descriptive word. Every man has the undeniable right to the use of his patronymic name in his business and he cannot be absolutely restrained from using it, even though another person bearing the same name, previously established in a business of the same character, has adopted it; he can only be prevented from making use of it in such a way as to cause confusion. With regard to a common descriptive word it is obviously different; no one has a particular title thereto and a trader can be restrained from using it, if someone else has previously adopted it and if its use by the newcomer is calculated to deceive. The restriction is and should naturally be stricter in the case of a descriptive word than in that of a patronymic name.

More in point are the remarks contained in the following paragraph of Kerly's work (p. 617):

There is, as already stated, no reported instance, where, apart from fraud, a defendant has been absolutely restrained from using his own name, but in one case (*J. & J. Cash, Ltd. v. Cash*, 18 R.P.C. 213; 19 R.P.C. 181) an order was made restraining him from using it without taking reasonable precautions to distinguish his business and goods from those of the plaintiff, and orders have occasionally been made restraining the use of the name descriptively, e.g., as *Cash's Frillings (J. & J. Cash, Ltd. v. Cash, ubi supra)* or *Fownes' Gloves (Rigden v. Jones*, 22 R.P.C. 417). But such orders will only be made in the rare and highly exceptional cases where it can be proved that a personal name has become so identified by use in a widespread and well-known business with a particular trader as to be necessarily deceptive when used without qualification by anyone else in the same trade (*Joseph Rodgers & Sons, Ltd. v. W. N. Rodgers & Co.*, 41 R.P.C. 277).

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In the Brinsmead case, cited by counsel for defendant and to which Kerly refers in support of his statement that there is no difference in principle between a man's own name and any other descriptive word, the facts were briefly these. John Brinsmead & Sons Limited, pianoforte makers, brought an action against Edward George Stanley Brinsmead, pianoforte manufacturer, and Waddington & Sons Limited, pianoforte dealers, to restrain them from passing off pianos made by the said Edward George Stanley Brinsmead as pianos of the plaintiff; the plaintiff also charged the defendants with conspiring together to pass off the pianos. The plaintiff put on the fall of its pianos the words "John Brinsmead & Sons, London" in capital Roman letters surrounded by lines. On the fall of the defendant's pianos there appeared, in a running hand, the name "Stanley Brinsmead" with a dash at the foot of the "d" coming back under the name and the word "London" in printed Roman characters underneath. In the curls of the initial "S" in small type were the names "Edward" and "George". The evidence showed that a "Brinsmead piano", to the trade and public, meant a piano made by the plaintiff and that the Christian names of the plaintiff and the defendant were not generally known. The evidence further showed that the defendant's pianos were cheap pianos and had a sale among a different class of people from that to which the plaintiff's pianos were sold. Waddington & Sons Limited offered to submit to an injunction restraining it from passing off, if the charge of conspiracy were withdrawn; the offer was rejected. The evidence showed that Waddington & Sons Limited had advertised pianos of the defendant Brinsmead as "Brinsmead" and represented to customers that one of such pianos was a "Brinsmead" piano. The Chancery Division of the High Court of Justice (Warrington J.) refused the injunction (30 R.P.C. 137).

Held—(1) that the defendant Brinsmead had put his name Stanley on his pianos as prominently as the word "Brinsmead" and had not attempted to imitate the mode in which the plaintiff company's name was used, and that he had not acted dishonestly, notwithstanding that he knew that he was deriving some advantage from the fact that his name was the same as that of well-known manufacturers; (2) that the charge of conspiracy failed. The action as against him was dismissed with costs.

The plaintiff appealed from the order dismissing the action as against the defendant Brinsmead; the Court of

Appeal upheld the decision of Warrington J. (30 R.P.C. 493).

Held that the use by the defendant of his name alone did not deceive, and that the appellants had failed to prove any intention on his part to enable or induce dealers to pass off his pianos for those of the appellants.

Lord Justice Buckley says (p. 506) that

if a man makes a statement which is true, but which carries with it a false representation and induces the belief that his goods are the plaintiffs' goods, he will be restrained by injunction

and he cites cases in which that proposition is found.

Coming to the deception arising from the use of one's own name, Lord Justice Buckley adds (p. 507):

Thirdly, in the application of the principles which I have stated there is, in my opinion, no difference whatever where the true statement consists in an accurate statement of the defendant's name as distinguished from any other true statement of fact, if of course you have evidence that from the use of his own name deception results. If a trader takes a name which is not his own name, but is that of a rival trader, and uses it in his trade, no doubt that is very strong evidence that he intends to deceive, and the Court will fasten upon that in any case in which it occurs; but if that is not so, if he is simply using his own name and it is proved that its use results in deception, he will be restrained even from using his own name, without taking such steps as will preclude the deception which, by hypothesis, is engendered by his using his own name. There are many authorities for this proposition. I am only going to refer to two or three of them. In the first place, *Burgess v. Burgess* of course is a case so familiar to us all that I need not stop to refer to it, but I will read a passage presently from which it will be shown that, if you are going to seek to apply *Burgess v. Burgess* rightly, you may say that it is the judgment of Lord Justice Turner which more accurately states the exact effect of the law than the dramatic and brilliant sentences of Lord Justice Knight Bruce. The sentence in Lord Justice Turner's judgment which involves—it does not state, but it involves—the whole proposition which I am stating, is this: "Where the defendant sells goods under his own name and it happens that the plaintiff has the same name it does not follow that the defendant is selling his goods as the goods of the plaintiff." Of course, that sentence involves this as an idea which is communicated by the same words; it does not follow, but it may be that it is the fact, and if you prove it is the fact that the defendant is selling his goods as the goods of the plaintiff, then even that he is using his own name is no defence.

Lord Justice Buckley then refers to the case of *Massam v. Thorley's Cattle Food Company* (1). This case turned mainly on facts; the defendant company was not prohibited from using the name "Thorley" in connection with its cattle food but it was declared not to be at liberty to use the name "Thorley's Food for Cattle" unless it took such precautions as would prevent purchasers from assuming

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that the food it sold was manufactured at the original establishment of Joseph Thorley.

At page 752 Lord Justice James, referring to the case of *Burgess v. Burgess*, cites Lord Justice Turner's judgment and says that he takes it to be an accurate statement of the law.

In the Hommel case it was held by Mr. Justice Eve (p. 385)

That this Court will not intervene to prevent a man using his own name unless he is so using it as to lead the Court to the conclusion that he is so doing for the fraudulent and dishonest purpose of filching improperly the trade of the plaintiff.

Then we come to the Dewar case. It deals particularly with the trade mark "Dewar's Whisky" registered by John Dewar & Sons Limited. The mark was ordered expunged. The case was decided mainly on facts, but the following remarks from Lord Kyllachy's judgment are interesting (p. 358):

In particular I might, I think, hazard the observation that, although it may be possible to establish as against a person using his own name to describe his own goods, that his name is already so appropriated as to make such description unlawful, I do not myself know of any case in which the use by a man of his own name has been successfully challenged—except in circumstances which plainly involve fraud on the part of the user.

The proposition that no one is entitled to claim a monopoly of his surname was very explicitly expounded in the case of *Jamieson & Co. v. Jamieson (ubi supra)*, in which the plaintiff carrying on business as Jamieson & Co. at Aberdeen, as manufacturer of harness composition, was seeking to restrain one George Jamieson, also a manufacturer of harness composition in the same locality, from passing off his goods as those of the plaintiff; the Court of Appeal, reversing the decision of Byrne J. held

That the distinctive features of the plaintiff's tins were the signature, "Jamieson & Co.", and the trade-mark, and that the defendant's goods had no similarity to the plaintiff's goods, except in features that were common to the trade, and that he had not passed off his goods as the goods of the plaintiff.

The Master of the Rolls (Lord Lindley) expressed himself in a very clear and concise manner on the question of the right of every man to use his own name in connection with his business (p. 181):

Now, when we are asked to restrain a man who is carrying on business in his own name, we must take very great care what we are about. The principle applicable to the case, I take it, is this: The Court ought not to restrain a man from carrying on business in his own name simply because

there are people who are doing the same and who will be injured by what he is doing. It would be intolerable if the Court were to interfere, and to prevent people from carrying on business in their own names in rivalry to others of the same name. There must be something far more than that, viz., that the person who is carrying on business in his own name is doing it in such a way as to pass off his goods as the goods of somebody else.

Lord Justice Vaughan Williams was of the same opinion as Lord Justice Lindley on this subject; at page 192 he says:

Now, I want to say, first, that I do not understand that there is any case, or ever has been any case, in which it has been laid down that a man, who happens to bear a particular name, is debarred from entering into any trade which he chooses to enter into merely because there is somebody else of the same name who has acquired a great reputation in the manufacture of the particular goods dealt with in this trade. The truth of the matter is that, inasmuch as the trader who has established a good business acquires, as I have said, no right of property in either his own personal name or in the name by which he chooses to denote his goods, it follows that the cause of action which the plaintiff has must always be this action for deceit by the defendant in attempting to pass off his goods as being the goods of the plaintiff; and the personal name of the plaintiff only comes into the matter, because the plaintiff, by the reputation that he has acquired in the business, has really come to denote his goods by his own personal name, just as he might denote them by some fancy name that he chose to use.

The next and last reference is to *S. Chivers & Sons v. S. Chivers & Co. Limited*. In this case Farwell J. says (at p. 426):

The principles on which the Courts proceed are not really in dispute, and, to my mind, the question is one purely of fact. I think it is well established that no man is justified in attempting to pass off his goods as the goods of another, whatever may be the means he uses for the purpose. I have heard an ingenious argument from Mr. Kerly this morning as to fraud being necessary. I will say a word or two about it presently; but speaking generally and apart from what I have to say presently, to my mind fraudulent intention is not material, partly because a man is presumed to intend the natural consequence of his own act, and partly because, although he may have acted in ignorance in the first instance, yet if he continues that course of conduct after he has got knowledge of the facts he then becomes guilty of the fraud, because he knows then in what the fraud consists. The other proposition which seems to me to be also undisputed is this: that no man is entitled to a monopoly of his own surname.

Mr. Justice Farwell then refers to the case of *Jamieson & Co. v. Jamieson* and quotes passages from the judgments of the Master of the Rolls and of Lord Justice Vaughan Williams, which I have heretofore cited in dealing with the Jamieson case. Reference is also made to the case of

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Powell v. Birmingham Vinegar Brewery Company (1), where (at p. 69) Lindley L.J. said:

A person who designs or adopts a mark to denote his goods imposes no unreasonable burden on rivals in trade by forbidding them from using the same mark to denote similar goods if the public are thereby misled. But to monopolize the use of words imposes a much more serious burden. Consequently, limits have been put to the right to complain of the use of words which have not been put to the right to complain of the use of marks. For example, if a man uses his own name to denote his own goods, it would be intolerable to confer upon him the right to prevent other people of the same name from honestly using their own name to denote their own goods, even although they might be of the same kind as his, and be undistinguishable from them: *Burgess v. Burgess*; *Turton v. Turton* (42 Ch. D. 128).

The case was taken to the House of Lords and the decision of the Court of Appeal affirmed (2). At page 711, the Lord Chancellor (Lord Halsbury) says:

The proposition of law is one which has been accepted by the highest judicial authority and acted upon for a great number of years. It is that of Turner L.J. who says in *Burgess v. Burgess*: "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another." That is the only question of law which, as it appears to me, can arise in these cases. All the rest are questions of fact. The most obvious way in which a man would be infringing the rule laid down by Turner L.J. is if he were to say in terms, "These are the goods manufactured by" a rival tradesman; and it seems to be assumed that unless he says something equivalent to that no action will lie. It appears to me that that is an entire delusion. By the course of trade, by the existence and technology of trade, and by the mode in which things are sold, a man may utter that same proposition, but in different words and without using the name of the rival tradesman at all.

I may perhaps add to this already long list of authorities two decisions to which no reference was made by counsel, namely, those of *Teofani & Co. Ltd. v. A. Teofani* (3) and *Turton v. Turton* (4).

In the *Teofani* case the Master of the Rolls (Lord Justice Cozens-Hardy) refers to the *Burgess* case and after quoting Lord Justice Turner's remarks (herein previously cited), he adds (p. 456):

I do not think that there is any case in which any doubt is expressed that that is the true principle of law.

In the same case Kennedy L.J. says (p. 458):

As I understand the law there is nothing to prevent a person who is setting up in a trade in which there are already others of the same name from using his own name, but alike from the legal and from the moral point of view a person is forbidden to use his own name in connection

(1) (1896) L.R. 2 Ch. 54.

(3) (1913) 30 R.P.C. 446.

(2) (1897) L.R., App. Cas. p. 710.

(4) (1889) L.R., 42 Ch. Div. 128.

with the goods in that business in such a way as to represent that the goods are the goods of somebody else of that same name. If he does that he is doing that which is wrong and which the Court, as it seems to me, has consistently through a long list of cases refused to allow him to do. He must carry on the business under his own name honestly, and he does not carry on the business in his own name honestly if he so uses his name in connection with the business or goods—in this case it is the goods—as to lead those who deal with him in that business as purchasers to believe that they are goods which are the goods of another trader of the same name.

It was held in this case (*inter alia*) that the use by the defendant of his name on his goods was not only calculated but intended to deceive.

In *Turton and Turton* the facts and judgment are briefly and, I think, accurately summed up in the head note:

The plaintiffs had for many years carried on the business of steel manufacturers under the name of Thomas Turton & Sons. The defendant John Turton had for many years carried on a similar business in the same town, at first as John Turton, then as John Turton & Co. In 1888 he took his two sons into partnership and carried on the same business as John Turton & Sons. There was no evidence that the defendants imitated the trade-marks or labels of the plaintiffs or otherwise attempted to deceive the public:—

Held (reversing the decision of North, J.), that although there was a probability that the public would be occasionally misled by the similarity of the names the plaintiffs were not entitled to an injunction restraining the defendants from the use of the name John Turton & Sons.

After having stated that the defendants, in doing business under the name of John Turton & Sons, merely represented that the business was being carried on by the father, John Turton, and his sons, which was the truth, Lord Esher said (p. 134, in fine):

Therefore the first question of law in the case is this: Supposing that, and that only, is done by the defendants, but, nevertheless, some people, or, if you please, many people, in the market, do from time to time give orders intending them for the plaintiffs' firm which on account of the similarity of name go to the defendants' firm, are the plaintiffs entitled to an injunction? If there had been anything more than the mere use of the name by the defendants in the way I have stated, that there might have been a necessity for an injunction, I think, cannot be denied. Here are two firms, Thomas Turton & Sons and John Turton & Sons: well, careless people may not notice the difference of Christian name, and may look more to the words "Turton & Sons" which are the same in both. That might be so. Therefore, for this purpose, I assume that the names are sufficiently alike to cause those blunders in trade; but they are blunders of the people who make the blunders. Has the defendant done anything to so far cause those blunders even though he did not intend it, which entitles the Court to stop him from doing what he is doing? He is simply stating that he is carrying on business with his two sons as partners. I say that is the accurate and exact truth of what he is doing. I will assume for the moment that it is pointed out to him that, he doing that, blunders will

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occur in the business and that the results which are complained of will happen. Is there anything dishonest—is there anything wrong morally, in any, even in the strictest sense, in a man using his own name, or stating that he is carrying on business exactly as he is carrying it on? Is there anything wrong in his continuing to do so, because people make blunders, and even, if you please, because they make probable blunders? What is there wrong in what he is doing?

Further on Lord Esher refers to the Burgess case and after quoting therefrom the proposition that “Where a person is selling goods under a particular name, and another person, not having that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses”, he goes on to say (p. 137):

It looks to me rather as if that would be a prima facie case. One name is stamped with peculiar value which is given to it; another man who has not that name comes and takes that name. I think prima facie that would look as if he were doing it for the purpose of interfering, and for the purpose of representing his goods to be the goods of the other. “But where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff.” That is to say, if only those two facts are established, that does not make a prima facie case. The first does make a prima facie case, but the second does not. Then Lord Justice Turner goes into the second case. He does not say so, but the next sentence is: “It is a question of evidence in each case.” The first is a prima facie case, but it may be answered by evidence. In the second case, although that is not a prima facie case there may be other circumstances. “It is a question of evidence in each case whether there is false representation or not.” He does not say whether there is “representation” or not, but “false representation.” That is he goes back to his fundamental proposition: No man can have the right to represent his goods as the goods of another person. Therefore if a man uses his own name, that is no prima facie case, but if besides using his own name he does other things which shew that he is intending to represent, and is in point of fact making his goods represent, the goods of another person, then he is to be prohibited, but not otherwise.

I take that to be a perfectly correct representation of what I think the law is, and I think that when you look at the judgment of Lord Blackburn in the case of *Singer Machine Manufacturers v. Wilson* (3 App. Cas. 376), you will see that he really comes to the same conclusion.

Lord Justice Cotton adopted the same view (pp. 141, 142 and 143).

In the case of *Reddaway v. Banham* (1) in which the plaintiffs had brought an action to restrain the defendants from selling belting as “Camel-hair Belting”, under which name the plaintiffs had sold belting for a number of years, Lord Macnaghten, referring to the Burgess and Turton cases, said (p. 233):

(1) (1896) 13 R.P.C., 218.

The judgment of Lord Justice Turner in *Burgess v. Burgess*, 3 De G. M. & G. 896, though eclipsed, as it has been said, in public favour by the brilliancy and point of his colleague's language, is an accurate and masterly summary of the law. But it seems to me to be an authority in favour of Reddaway, and not in favour of Banham. I am quite at a loss to know why *Turton v. Turton*, 42 Ch. D. 128, was ever reported. The plaintiffs' case there was extravagant and absurd.

Extravagant and absurd for Thomas Turton & Sons Limited to endeavour to restrain John Turton and his sons from carrying on a business of a similar description under the name of John Turton & Sons. Yet the names Thomas Turton & Sons Limited and John Turton & Sons offer as much similarity, if not more, as the plaintiff's and the defendant's names in the present case.

In a comparatively recent case, not alluded to in the argument, namely, that of *Joseph Rodgers & Sons Limited v. W. N. Rodgers & Company* (1), in which the defendant Wilfred Newbound Rodgers was prohibited from doing business under the name of W. N. Rodgers & Co., but allowed to do it under his own name, Mr. Justice Romer, after dealing with the facts, stated what he considered to be the law and made a brief reference to the Turton case; I think I had better quote his remarks (p. 291):

It is the law of this land that no man is entitled to carry on his business in such a way as to represent that it is the business of another, or is in any way connected with the business of another; that is the first proposition. The second proposition is, that no man is entitled so to describe or mark his goods as to represent that the goods are the goods of another. To the first proposition there is, I myself think, an exception: a man, in my opinion, is entitled to carry on his business in his own name so long as he does not do anything more than that to cause confusion with the business of another, and so long as he does it honestly. It is an exception to the rule which has of necessity been established. It is impossible to say, because Mr. Joseph Rodgers (for example) in the past established a business in cutlery, which has now become so successful that his goods are known as "Rodgers' Cutlery," that no one whose name is Rodgers may embark upon a cutlery business if, as I say, he does it honestly, and if he does not do anything more to cause confusion than merely carry on business in his own name. That is what I think was meant by Lord Justice Cotton in the well-known case of *Turton v. Turton*, where, at page 143, he says: "In my opinion, the Court cannot stop a man from carrying on his business in his own name, although it may be the name of a better-known manufacturer, when he does nothing at all in any way to try and represent that he is that better-known and successful manufacturer." The exception to the first rule is, however, an exception made in the interests of honest trading; again, it is an exception which only authorizes the use by a man of his own name; it is not an exception which, even in an honest case, entitles a man to use

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(1) (1924) 41 R.P.C., 277.

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something that is not his own name; that is to say, it does not entitle him to use his name in combination with something else, such as the words "& Company." I do not pause to consider the question which, I think, was dealt with by Lord Justice Stirling (then Mr. Justice Stirling) in another case, as to how far the exception enables a business to be carried on under a man's name with the addition of the word "Limited"; that is, perhaps, a more difficult question.

If the exception to the first rule set forth by Mr. Justice Romer is to be applied rigidly, perhaps it is right to say that a man who carries on business alone is not entitled, even in an honest way, to use his name in combination with the words "and Company", on the ground that such use would constitute a false representation, assuming, of course, that there is already another firm established in the same class of business under a similar name and that the addition of the words "and Company" is apt to render confusion more likely. But I must say that I am not inclined to carry this doctrine too far and I would feel loath indeed to prevent a trader, who becomes associated with a *bona fide* partner, from doing business under his name and adding thereto the words "and Company", provided this was done honestly and the firm name adopted was not the same as the one of another concern or so similar thereto as to be inevitably calculated to deceive.

Of the several cases *relied upon by counsel*, not one deals explicitly with the right to use, in conjunction with one's name, words such as "and Company", "Limited" or others of a like nature. The point was touched upon during the argument but no authorities were cited. Yet it is the crucial and practically the only question in dispute. The matter was considered and discussed in a few cases other than the Rodgers case and I think I ought to refer briefly to the decisions rendered therein.

In the case of *Turton v. Turton (ubi supra)* Lord Esher (at p. 139) says:

John Turton has done nothing more than that he has carried on business under this statement, "I carry on my business as the father, John Turton, with my two sons as partners." That is strictly accurate, and he has done nothing more. And I desire to say, that if the name of the plaintiffs' business which they had carried on had been Thomas Turton & Co., and that name had become valuable, and if the defendant had *bona fide* and honestly formed a company himself and had carried on business merely stating that his business was carried on by John Turton & Co., if that were an accurate description of a *bona fide* company constituted by himself, the same result would have followed if he had done nothing more than that because that statement also would be only simply and perfectly accurate.

In the case of *J. and J. Cash Limited v. Cash* (1) the Court of Appeal modifying the injunction granted by Keke-wich J. (2), ordered *inter alia* that the defendant Joseph Cash be restrained from carrying on business under the name of "Joseph Cash & Co." *while not in partnership with any other person*. The order will be found at the bottom of page 186 of the report (19 R.P.C.).

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Mr. Justice Romer in the Rodgers case refers to a judgment of Lord Justice Stirling (then Mr. Justice Stirling) in a case in which the question arose "as to how far the exception enables a business to be carried on under a man's name with the addition of the word 'Limited,'" without pausing to consider it. I assume that the case alluded to is that of *Tussaud v. Tussaud* (3).

The action was brought by "Madame Tussaud & Sons Limited" against "Louis J. Tussaud", claiming an injunction to restrain the defendant from applying to the Registrar of Joint Stock Companies for registration under the Companies Act of any company to be incorporated under the name of "Louis Tussaud, Limited".

At page 687, Stirling J. says:

It follows from the decisions in those two cases that the defendant is at perfect liberty to open on his own account and to carry on in his own name an exhibition of waxworks. Further, he might take partners into his business and carry it on under the name of "Louis Tussaud & Co." That seems to me to have been expressly decided in *Turton v. Turton* (42 Ch. D. 128). Having commenced business on his own account, I apprehend that he might sell it with the benefit of the goodwill to third parties, and that the third parties might, if they thought fit, continue to carry on the business under the same name—that of the defendant: that is to say, they would be entitled to the full benefit of the goodwill which they had honestly and legitimately purchased from the defendant. Again, the third parties might transfer the business and the goodwill to a joint stock company, and without expressing a final opinion on the point I am not prepared at the present moment to say that that company might not be registered under the same name as had previously been used in connection with the business.

On the other hand, I conceive it to be clear that the defendant could not, either for valuable consideration or otherwise, confer on another person the right to use the name of "Tussaud" in connection with a business which the defendant had never carried on, and in which the defendant had no interest whatever.

(1) (1902) 19 R.P.C. 181.

(2) (1901) 18 R.P.C. 213.

(3) (1890) 44 Ch. Div. 678.

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The same doctrine was laid down by Mr. Justice Farwell in the Chivers case (*ubi supra*), where at page 426 he says:

In my judgement also if a man, as here, has an old-established business which he has been carrying on for fifteen years or so under his own name he does not, within the meaning of the exception to which I have just referred, and which would in itself be probably evidence of a fraudulent intent, adopt a name which does not belong to him if he simply continues to use his own name, but attaches that name of his own to a company which he formed to carry on the business which he has himself carried on. To my mind, no element of suspicion of fraud attaches to the man who has established a business under his own name if he turns that business into a limited company and applies to that limited company his own name with the word "limited", because the reason for doing so is obvious, that he desires to retain the goodwill which he has gained for that name, and the Court is not driven to infer a fraudulent intention which would otherwise probably be inferred if he had, as I have already said, assumed a name to which he was not born, and to which there was attached some goodwill in the shape of another man's trade.

In the case of *Pine Cotton Spinners and Doublers' Association Limited and John Cash & Sons Limited v. Harwood Cash & Co. Limited* (1), it was held *inter alia* that:

A new company with a title of which the name "A" forms part has none of the natural rights that an individual born with the name "A" would have.

An individual named "A", not transferring to a company a business and goodwill, cannot confer upon the company a title to use his name as against persons who would be damaged thereby.

See also *Kingston, Miller & Co. Limited v. Thomas Kingston & Co. Limited* (2) in the same sense.

The last case to which I will refer is that of *Baird & Tatlock (London) Limited v. Baird & Tatlock Limited* (3); it is, I think, more in point than the two preceding cases. Lord Cullen (at page 93) says:

But the complainers say that the state of matters was materially altered to their prejudice when, in 1915, the Glasgow business became converted into that of a joint stock company designated Baird & Tatlock, Limited. The addition of the word "Limited" to the previous bare "Baird & Tatlock" was, they say, a step of piratical tendency—although not intentionally so, as now conceded—inasmuch as both businesses thereafter were businesses of companies both designated as "Limited" whereby, say the complainers, there was originated the cause of such confusion between the businesses as figures in the evidence, which the complainers affect to trace to the fact of each business being carried on under the name of a "Limited" company. In this connection the complainers contend that the respondents' company, Baird & Tatlock Limited, was a new legal entity, entirely dissociated from the pre-existing firm of Baird & Tatlock, whose business and goodwill it acquired; that it can borrow nothing from the pre-existing use of the name of Baird & Tatlock by that

(1) (1907) 24 R.P.C., 533, at 538. (2) (1912) 29 R.P.C., 289.

(3) (1917) 34 R.P.C., 85.

firm, and so falls to be regarded as presumably piratical, in effect, although not in intention. This contention appears to me to be equally without foundation in fact and in law. In the first place, there is no ground whatever in the evidence for saying that the addition of the word "Limited" to the previous name of Baird & Tatlock in the case of the Glasgow business was in any way responsible for the instances of confusion which occurred; and, in the absence of any such evidence, it is, I think, clear enough that what led to the confusion was the use in the designation of both businesses of the distinctive names Baird and Tatlock in combination.

Knowing the circumstances which surrounded the organization of the defendant company and the conditions which obtained since its inception, I am satisfied that the members of the Boudrias family were entitled to form a joint stock company, as they did, and to embody in its corporate name their patronymic.

There is one point on which all the decisions cited are in accord, viz., that no man can be deprived of the right of using his name honestly in connection with his business. Beyond that opinions are divided. A first doctrine maintains that the principle that a man is entitled to the use of his name as a trade name is subject to the restriction that no one has the right to pass off his goods as those of another and that, if the use of one's name has that effect, he may be restrained from using it without taking the necessary precautions to distinguish his goods from those of the earlier trader. The other doctrine is that a man may, so long as he acts honestly and without intent to deceive, use his name in connection with his trade, even though the similarity of the names may occasionally lead to confusion; in other words, no one can be prohibited from using his name in his business, unless the use he makes of it is fraudulent and intended to deceive.

The first doctrine was upheld in, among others, the cases of *Brinsmead v. Brinsmead*, *Chivers v. Chivers*, *Reddaway v. Banham*, and *Rodgers v. Rodgers*, above referred to.

The second doctrine, on the other hand, was adopted in *Burgess v. Burgess*, *Dunlop Pneumatic Tyre Co. v. Dunlop Motor Co.*, *Actiengesellschaft Hommel's Haematogen v. Hommel*, *Dewar v. Dewar*, *Jamieson & Co. v. Jamieson*, *Powell v. Birmingham Vinegar Brewery Company*, and *Turton v. Turton*.

I must say that I would have felt inclined to follow the second doctrine but for the judgment of the Supreme Court

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in the case of *Hurlbut Company v. Hurlburt Shoe Company* (*ubi supra*), by which I consider myself bound.

The situation would have been different had the plaintiff company established that the name "Boudrias" had acquired a secondary meaning and become identified with its wares; but this the plaintiff has not done. On the contrary, the evidence discloses that it advertised and sold its goods under various names, but particularly and to a very large extent under the name "Condor". When Freeman acquired from J. V. Boudrias his controlling interest in J. V. Boudrias & Fils Limitée, the company already owned two trade-marks of which the Condor formed a prominent part. On May 2, 1930, after Freeman had taken over the plaintiff company, the latter registered a trade-mark consisting of the words "Condor Coffee", a cup and saucer with vapour and the words "just real good coffee" under No. 49286: see exhibit J. Of its several trade-marks (see list exhibit 6) the most commonly used were the divers "Condor" trade-marks. In fact, the use of the "Condor" marks greatly exceeded that of all the others combined. I do not propose to dwell on this subject at length; reference may be had to the depositions of Freeman, Paul Boudrias, Mathieu, Carrier, Pérusse, Larue and Couvrette and to exhibits B, F, P, Z<sup>2</sup>, Z<sup>11</sup>, Z<sup>17</sup> and Z<sup>18</sup>.

In the telephone directory the name "Condor Food Products" appeared as well as "J. V. Boudrias & Fils Limitée": see exhibit E.

When Freeman took control of the plaintiff company, the latter owned an "International" truck; two or three months later the company replaced it by a "Reo" truck. This truck for some time had no inscription of any kind on it, but after a few months two plates with the word "Condor" were put on it; the name of the company did not appear; a photo of the Reo truck was filed as exhibit 29. The plaintiff company shortly after acquired four small trucks on which appeared the words "Moutarde Condor" or "Condor Mustard", with underneath, in smaller type, the name of the company; see exhibit Z<sup>2</sup>. Sometime later the four small trucks were repainted and the name of the company was left off. See depositions Mathieu and Carrier.

In the application the plaintiff company filed with the Commissioner of Patents in Ottawa for the registration of



the word mark "Boudrias" it mentioned the 10th of February, 1933, as the date on which it had first used the said word mark: see exhibit C.

It seems obvious to me that the plaintiff company, from the time Freeman acquired a controlling interest directed its efforts to make itself and its wares known under the name "Condor". The name "Boudrias", if not totally discarded, was never put forward. It is only when the Boudrias started to organize their new company that the plaintiff company thought of using the word Boudrias as a word mark.

In the face of the evidence I have no hesitation in saying that, as far as the plaintiff company is concerned, the name Boudrias has not acquired a secondary meaning and it has not become identified with its goods. In this respect the following cases may be consulted profitably: *S. Chivers & Sons v. S. Chivers & Co.* (*ubi supra*, at p. 429), *J. Lyons & Company Limited v. J. Lyons* (*ubi supra*, at p. 191), *Cellular Clothing Co. v. Maxton & Murray* (1).

The plaintiff company has, in my judgment, failed to establish such a usage of the name "Boudrias" in connection with its wares as would confer upon it a monopoly therein.

Assuming that under the common law a man is not entitled to use his name in connection with his business, if such use, although made in good faith and without any intent to deceive, may occasionally lead to confusion, without taking additional precautions to distinguish his wares from those of the other trader, has the law been changed by the enactment of the Unfair Competition Act? I think it has, by the insertion of the words "without any intention to deceive" in section 9.

Under this section any individual or group of individuals may use his or their names or surnames in connection with his or their business provided such business be commenced and carried on for his or their own direct benefit, in good faith and without any intention to deceive. If these three conditions are fulfilled, confusion is, to my mind, immaterial.

(1) (1899) L.R. App. Cas., 326, at 336.

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Are these three conditions realized in the present case? Question of fact with which I shall deal as briefly as possible.

There can be no doubt that the defendant's business was commenced and that it has been carried on since its inception for the direct benefit of J. Victor Boudrias and his four sons. It is admitted that from the date of the incorporation of the defendant company to the date of the institution of the action they have been the only shareholders and officers thereof; see paragraph 10 of the statement in defence and paragraph 1 of the reply.

The other two conditions, namely, the good faith and the lack of intention to deceive are correlative and may conveniently be treated together.

[The learned Judge here considered the evidence adduced at trial touching these matters and then continued.]

After weighing carefully the evidence I have no hesitation in saying that the defendant company has, since it started its operations, carried on business in good faith and without any intention to deceive. Referring in particular to J. V. Boudrias and his son Paul, I may say that both impressed me favourably and that both gave their evidence in an open and straightforward manner.

The action accordingly fails and there will be judgment dismissing it with costs. The defendant should remove the sign on which appears the name J. V. Boudrias, a photograph whereof was filed as exhibit 30, or the name J. V. Boudrias should be obliterated therefrom and an order will be made in the judgment accordingly.

*Judgment accordingly.*

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 May 3.

BETWEEN:

CONTINENTAL OIL COMPANY.... APPLICANT;

AND

COMMISSIONER OF PATENTS.... RESPONDENT.

*Unfair Competition Act—Conflicting applications to register trade-mark—“Motorine”—“Motorene”—Mandamus—Exchequer Court Act—Jurisdiction—Exchequer Court Rules—Procedure.*

*Held:* That an application for a mandamus requiring the Commissioner of Patents, as Registrar under the Unfair Competition Act, 22-23 Geo. V, c. 38, to determine whether an application to register a trade-mark

- should be allowed, is a substantive proceeding, and not an interlocutory matter.
2. That such a proceeding should be instituted by statement of claim and not by an originating notice of motion.
  3. That a mandamus will not be granted where a specific remedy is provided as by s 30 (c) of the Exchequer Court Act, R.S.C. 1927, c. 34, and the rules made thereunder.

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APPLICATION by the Continental Oil Company for the registration of the trade-mark "Motorine" for use in association with oils and greases.

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

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

*E. G. Gowling* for the respondent.

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

THE PRESIDENT, now (May 3, 1934) delivered the following judgment:

This is a motion made on behalf of the Continental Oil Company for an order requiring the Commissioner of Patents, as Registrar under The Unfair Competition Act, 1932, to determine whether an application of this company to register as a trade-mark the word "Motorine", for use in association with oils and greases, should be allowed having regard only to the state of the register at the date of such application, and the motion seeks direction from the Court that the Registrar dispose of the application on the basis only of the state of the register on the date of such application. I would point out that the motion, in effect one for a mandamus, not only seeks an order compelling the Registrar to determine whether the application of the Continental Oil Company should be allowed, but that that determination be reached in a particular way, that is to say, the Registrar must look only at the register as of the date of the application of the Continental Oil Company, and that he must disregard any conflicting applications received after the date of such application and before the same has been disposed of. The matter involved in this motion, for several reasons, is of considerable importance and by no means free from difficulties.

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Before I proceed further I had better state the important facts disclosed upon the motion. They are as follows: The Continental Oil Company, a United States corporation, applied on the 11th day of January, 1933, for registration of the word mark "Motorine" under the Unfair Competition Act, 1932, for use in association with the sale generally of oils and greases. The applicant had used the said mark in Canada only since the 17th day of December, 1932. On February 28th, 1933, The British American Oil Company Ltd., a Canadian corporation, applied for registration of the word mark "Motorene" in association with what the applicant describes as lubricating oils, and in this connection the applicant had used this word mark in Canada since the 1st of February, 1911.

The application of the Continental Oil Company was not disposed of before the application of The British American Oil Company was received, and accordingly on the 28th day of February, 1933, the Registrar had before him two applications for registration of practically the same word mark. The only distinction between the two words, it will be seen, is the use of the letter *i* in the one case, and the letter *e* in the other case. It would appear therefore that if either word mark is registerable only one of them should be allowed eventually. The Registrar has so far declined to make a decision in respect of The Continental Oil Company's application and on February 28, 1933, he addressed a communication to this applicant in the following terms:

A conflicting application consisting of the word "Motorine" as applied to the sale of lubricating oils, was filed in this office on February 28, 1933, by The British American Oil Co. Ltd., Toronto, Ont. No further action can be taken on either of these conflicting applications until the rights of the different applicants have been determined either by mutual agreement or a court of competent jurisdiction.

A similar communication was addressed, on the same date, to The British American Oil Company. I do not think these communications can be treated as a refusal of either application within the meaning of sec. 51 of the Unfair Competition Act, and I do not think they were intended as such.

I do not think this is a proceeding to be initiated by a notice of motion. The jurisdiction to entertain the subject matter is sec. 30 (c) of the Exchequer Court Act which reads this: "The Exchequer Court shall have and possess

concurrent original jurisdiction (c) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer". Rule 6 (3) of the Exchequer Court Rules is, I think, applicable here and it requires that the proceeding should be instituted by filing a statement of claim. While this point was not raised by Mr. Gowling, counsel for the Registrar, yet, in the facts developed here, it seems to me that this is a proceeding which should be launched by a statement of claim as prescribed by the Rules; it is essentially a substantive proceeding, and not an interlocutory matter. The Unfair Competition Act authorizes a proceeding by an originating notice of motion, but only in the case where it is sought to amend the register. Further, I am doubtful if a sufficient foundation has been laid for the remedy sought to be enforced by this motion. There should be shown by evidence a distinct demand of that which the party seeking a mandamus desires to enforce, and that such a demand was met by a refusal. See 7 C.E.D. at page 119. Any proceeding of this nature should, I think, be preceded by a notice demanding that the Registrar do the thing which the motion seeks to make him do, and I am not satisfied this has been done. It appears plain that the motion seeks to have determined that the Registrar cannot look at the second application, that of the British American Oil Company, and that at once involves the true construction of several of the provisions of the Act relevant here. The Registrar has evidently looked at and considered the second application and because of that he has decided to do nothing; and having looked at and considered the second application I can quite understand his embarrassment in attempting to construe the provisions of the Act which apparently bear upon the controversy. Then, it is not the general practice for the courts to grant a mandamus where a specific remedy is provided to enable justice to be done, such as provided by sec. 30 (c) of the Exchequer Court Act and the rules made thereunder, which I have already mentioned. In any event, I do not quite see how the court could well compel by mandamus the performance of a specific duty by a public officer unless it was perfectly clear what that duty was. And that is not clear in this case.

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The whole point involved in this motion is whether under the Act, the Registrar may or may not take cognizance of the application of the British American Oil Company, or whether he should consider only the first application, and that, only upon the state of the register on the date of that application. That is a question of the construction of the statute which is by no means easy or free from very substantial difficulties, and therefore I think that the rule which I have already mentioned should be strictly followed. The matter is too important to be disposed upon motion, and I should hope that there was some way by which the respective claims of both applicants to registration might be heard in the same proceeding. I think the point really at issue is important and offers fair ground for divergent views and should not be disposed upon motion.

However, I think I might with propriety express my opinion regarding the action taken by the Registrar in respect of the application of the Continental Oil Company, but without expressing any opinion upon the statutory grounds advanced in support of the motion by Mr. Biggar, or those advanced against it by Mr. Gowling. It would seem desirable, I think, that the construction placed upon certain provisions of the Act by Mr. Biggar, and the construction urged by Mr. Gowling on the same and other provisions of the Act, should come before the court in some form or other, and, I think, this might more satisfactorily be done by way of an appeal under the Act if the Registrar would make that possible. This probably would avoid the necessity of Mr. Biggar proceeding by statement of claim. I can see that there is room for placing different interpretations upon very important provisions of the Unfair Competition Act, which, in the public interests and that of practitioners, should be pronounced upon by the courts. The Act is a comparatively new one, and as might be expected, difficulties in its interpretation and administration naturally arise.

It is not only the long delay in dealing with the application of his client which Mr. Biggar complains of,—and which he thinks should be favourably disposed of—but that no decision has been given at all. I think in all fairness there is a great deal of justification for the complaint, because a year's delay, or even, ordinarily, a delay of three

months, in disposing of a trade-mark application, might prove a serious matter for an applicant and for his business. Trade-mark applications should be dealt with promptly and the Patent Office organization and staff should be such as to permit of this. Now, whatever may have been the difficulties in the way of the Registrar in reaching a decision in the case of one or the other application here, there is no authority whatever for holding that no action could be taken until the respective applicants had removed the difficulties by mutual agreement, or their respective rights had been determined by the court. I agree the Registrar should make a decision; he should refuse one or the other, or both; this would permit either of the applicants, or both of them, to assert an appeal. While the second applicant was not before me on the motion, I have no doubt it complains also of the failure to render a decision upon one or both applications. Until this is done, there cannot, I think, be any appeal, the interested parties meanwhile are helpless, and the only remedy open to them is to seek an order of the court to compel the Registrar to act upon their applications; but that is not a satisfactory way of dealing with a case of this kind particularly where there are two applicants for the same mark. There is no provision in the Act for referring applications which are in conflict to the court when the Registrar does not, for some reason or other, see fit to make a decision himself. Mr. Biggar contended that under sec. 39 of the Act a decision should be rendered practically forthwith upon receipt of an application for registration of a trade-mark and that had this been done in the case of the application of the Continental Oil Company, upon the state of the record at the date of its application, the registration would have gone to his client. I pass no opinion upon that view of the statute at present. I am not in a position to say what time might fairly elapse, in the Patent Office, between the date of the receipt of an application and the date of the disposition of the same. In the situation developed here I quite understand why the Registrar feels that he cannot close his eyes to the facts disclosed in the second application. But the gravamen of the complaint here is that no decision at all has been made, and I have no hesitation in stating that had proceedings been begun in the form I

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have suggested, and upon the state of facts disclosed upon the motion, I should have felt bound, if it were at all possible, to grant an order requiring some action on the part of the Registrar, just what, I need not and cannot now say.

Being of the opinion that the motion must, for the reasons stated, be denied, I cannot make any direction to the Registrar as to what he should do. Nevertheless, I would respectfully suggest that he at once exercise his best judgment in the matter and make it possible for one or both of the interested parties to appeal. I have no doubt that both applicants feel confident of their respective positions and whatever he does there will be an appeal.

There will be no order as to costs.

*Judgment accordingly.*

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 Oct. 16.  
 1934  
 Mar. 20.

BETWEEN:

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

PLAINTIFF;

AND

WILLIAM NEILSON LIMITED,  
 DEFENDANT.

*Revenue—Sales tax—When exigible—Special War Revenue Act.*

The Special War Revenue Act, R.S.C. 1927, c. 179, as amended by 21-22 Geo. V, c. 54, provided that there should be levied a sales tax of four per cent on the sale price of all goods produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof. The amendment also provided that goods sold prior to March 2, 1931, for delivery after June 2, 1931, were liable to the tax of four per cent.

The defendant company, a manufacturer of chocolate products subject to the tax, sought to avoid payment of the increased tax by accepting orders for future delivery of goods which were set apart in its warehouse and marked "Reserved stock sold". There was no identification of the particular goods representing the order of any individual purchaser. When a customer wished delivery of a portion of the goods ordered they would be taken from the reserved stock and payment made when shipped. The defendant notified the Department of National Revenue each month of the quantity of goods thus sold and later remitted the tax thereon calculated at the rate of one per cent.

The action was brought to recover the amount of the tax calculated at the rate of four per cent upon the sale price of goods sold after March 2, 1931, and delivered after June 2, 1931.



*Held:* That the tax was exigible by the manufacturer when the transaction was finally consummated by delivery of the goods to the purchaser, regardless of the precise date of sale, or where or when the title to the goods passed to him.

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

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

*Glyn Osler, K.C.*, and *H. C. Walker* for the Crown.  
*C. F. H. Carson* for the defendant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (March 20, 1934) delivered the following judgment:

In this information the plaintiff seeks to recover from the defendant a certain sum of money alleged to be due and payable as sales tax, under sec. 86 of the *Special War Revenue Act*, as amended by chap. 54, s. 11, of the Statutes of Canada, 1931. By the amending statute just mentioned, sec. 86 (1) of the *Special War Revenue Act* was repealed, and a new section was substituted therefor, and the early portion of the new section reads as follows:

86. (1) In addition to any duty or tax that may be payable under this Act or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of four per cent on the sale price of all goods,—

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

Although the new section, no. 86 (1), was only assented to on August 3, 1931, yet it became effective as of June 2, 1931. The corresponding portion of the repealed section provided that the sales tax should be one per cent of the sale price of all goods,

(a) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the sale thereof by him.

It will be observed that thus far the distinction between the new section, and the repealed section, is that by the former provision the rate of taxation was to be four per cent instead of one per cent, and the tax became payable at the time of the delivery of the goods to the purchaser, instead of at the time of the sale of the goods by the manufacturer.

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The defendant was at the material time a manufacturer of chocolate products which were subject to the sales tax. Early in April, 1931, the defendant, and others, were led to believe that an increase in the rate of the sales tax was imminent. In anticipation of such an increase the defendant conceived the idea of promoting the sale of its products to certain, not all, of its customers, in advance of their immediate requirements, with the expectation that these sales would be treated by the taxing authorities as having been made prior to the date when the anticipated increased rate of taxation would come into effect, and that such sales would be taxable at the rate of one per cent only, and not at the anticipated increased rate which turned out to be four per cent.

It is desirable, particularly in the event of an appeal, that I should explain the nature of the transactions in question, although in my view of the case such facts are really not of importance. I shall first quote from a circular letter addressed by the defendant to its salesmen and this will generally outline the plan of procedure adopted by the defendant in reference to these transactions. It is in part as follows:

With reference to the coming increase in Sales Tax.

In many instances we find that the lack of proper warehousing facilities is preventing the Jobbers from buying the supplies they desire. Therefore we are ready to assist them in making it possible for them to take full advantage of the coming increase in Tax. We will warehouse the goods they specifically order and they may be taken out by the jobber as required within a reasonable time, and whether the orders are stored in Calgary, Edmonton or Toronto, the Jobbers must be invoiced at once for the goods. We want you to cover your strategic Jobbers immediately, taking only *bona fide* orders. As we are assisting the jobber to take advantage of the Sales Tax increase by warehousing this goods, the jobber should co-operate with us by releasing his order in large shipments as soon as possible; you will appreciate we are doing the jobber a real service in protecting him. Remember, these orders must be *bona fide*.

Read carefully the attached circular prepared by the Canadian Manufacturers' Association. Digest also the attached sample order and invoice. Have the jobber sign the order and you write across the face of the order "Accepted by William Neilson Limited, per E. V. Johnson", thus signifying that the order has been placed and accepted. Also, under the heading "When shipped", write the word "Advise". If you make out the invoice, you must follow the enclosed copy and the notation on our invoice must appear on your invoice, word for word.

Note the above word—"strategic" jobber. You no doubt realize that we could not make this offer to every one of your Jobbers, but to such jobbers as (names omitted) and so forth, you have a wonderful opportunity.

We are quite prepared and want to sell every box of bars we have on hand in Toronto and in storage at outside points. Understand, the order must be *signed* by the dealer, accepted by you and *invoiced* by you if time is short, or by us, before the budget comes down, and the goods, if in your storage, must be set aside and specifically appropriated to him as the ownership is his.

\* \* \* \* \*

Should the government make it impossible for the order to go through as we have outlined, and insists upon collecting the new tax, the dealer in that event will have to assume same.

I should also in fairness refer to another letter of the defendant's, dated April 27, 1931, addressed to one Lison, who, I think, was a salesman of the defendant, and which Mr. Carson stressed as evidence of the *bona fides* of the defendant's scheme. It is as follows:

To-morrow we will mail you a list of Jobbers' names, if any that you should not sell on this scheme.

Understand, when we invoice the goods, the goods become the property of the dealer, therefore if he should fail or become a bankrupt, the goods carried in our warehouse would be considered part of his assets, which we would have no claim upon.

The practice suggested in the defendant's circular letter to its salesmen was carried out and these special sales were all made after April 1, 1931. The salesman would write across the face of the order an acceptance thereof on behalf of the defendant, and later an invoice would go forward to the customer. The customer's shipping directions were usually expressed upon the order, "future as required", or, "advise". The defendant, in practice, would then manufacture the goods mentioned in these orders, or take the same from manufactured stock already on hand, and assemble the same aside in one section of its warehouse and the bulk would represent the aggregate of such special orders or sales. The goods so set apart were designated or marked "Reserved Stock Sold". I should perhaps further state that upon receipt of an order the sales department of the defendant company would advise its production department of the receipt of such order or orders, and the production department would later inform the sales department that such and such goods were being held against such and such order or orders, stating the number or numbers thereof. When a customer requested delivery of a portion of the goods so ordered they would be taken from the reserved stock. The invoices forwarded the customers contained a notice that the goods were held in the defendant's warehouse at Toronto at the customers' risk and subject

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to their shipping instructions. The particular goods representing the order of any one customer were not earmarked and there was no way of identifying the same in the total quantity of reserved stock; they would be in the reserved stock representing the aggregate of goods so ordered but not delivered. There is no evidence as to the practice followed where the goods were to be supplied from any of the defendant's warehouses outside of the City of Toronto. The goods would not be paid for by the customer until shipment was made, when, a thirty day draft would be made upon the customer. In November, 1931, this practice was abandoned and the undelivered balance of the reserved stock turned back into ordinary warehouse stock, the unfulfilled orders cancelled, and these special transactions came to an end. Roughly, it was stated, about twenty-five per cent of the total quantity of goods thus ordered was turned back into ordinary warehouse stock. As I understand it, the defendant would monthly send a statement to the Department of National Revenue, advising them of the quantity of goods thus sold, and in the following month it would remit the tax thereon, calculated at the rate of one per cent upon the sale price. It seems that in all cases here the sales tax was not added to the price of the goods, but was absorbed by the defendant. Possibly it was reflected in the selling price, but that is not clear. I think this sufficiently explains the procedure followed in respect of the special orders or sales which give rise to the controversy here.

The question for decision is whether such of the goods here in question, as were delivered after June 2, 1931, were liable to the sales tax at the rate of four per cent, or, at the rate of one per cent, upon the sale price. Upon a careful consideration of the matter it is my opinion that sec. 86 (1) of the Act is conclusive of the issue, and that the sales of goods in question here, delivered after June 2, 1931, were liable to the sales tax at the rate of four per cent upon the sale price, at the time of delivery. The meaning of sec. 86 (1) (a) is, I think, quite plain, and it is to the effect that after June 2nd the sales tax was to be four per cent on the sale price of goods, payable at the time of delivery by the manufacturer, instead of at the time of the sale as hitherto; that is the main feature of the new section no. 86 (1) of the Act. It matters not, I think,

subject to what I shall immediately state, when the sales took place, or when in the strictly legal sense the goods passed to the purchaser; the tax was exigible by the manufacturer when the transaction was finally consummated by delivery of the goods to the purchaser. I have already pointed out that the new section 86 (1) of the Act, which was substituted for the same numbered section in the amended statute, was only assented to on August 3, 1931, but by sec. 25 of the amending Act, the substituted sec. 86 (1) was stated to be deemed to have come into force on the second day of June, some two months prior to the enactment of the amending statute. It was therefore a taxing provision intended to be retroactive for the period of two months in respect of the delivery of goods sold prior to June 2nd, but delivered after that date. It seems to me that some such provision was imperative.

There are two qualifying provisions in sec. 86 (1) (a) of the amending Act, which I should at once mention, and they are as follows:

Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof.

Provided further that if any manufacturer or producer has prior to the 2nd day of March, 1931, made a *bona fide* contract for the sale of goods to be delivered after this section comes into force, and if such contract does not permit the adding of the whole of the tax imposed by this section to the amount to be paid under such contract, then so much of the tax by this section imposed as may not under such contract be added to the contract price shall be payable by the purchaser to the vendor and by the vendor to His Majesty, but in case the vendor refuses or neglects to collect such tax from the purchaser the vendor shall be liable to His Majesty for the payment of such tax.

It is difficult to understand just why the first proviso was enacted, what was its intention, or what purpose it was intended to serve. The draftsman, out of an abundance of caution, probably hoped to capture the sales tax upon some sale or sales of goods, where, for some unusual or unexpected cause, there was not a physical delivery of the goods by the manufacturer to the purchaser. If such a case arose the legislature evidently intended that the tax would then be payable by the manufacturer at the time of sale. In any event, that proviso raises no difficulty here because in all cases with which we are here concerned, deliveries were made.

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Coming now to a consideration of the second proviso to sec. 86 (1) (a) and which I have just above quoted. Now this proviso, which was repealed the following year, relates to bona fide contracts for the sale of goods made prior to March 2, 1931, but which were to be delivered after the new sec. 86 (1) came into force, on June 2nd, and it states that when the full tax of four per cent on the sale price could not be added under the contract, then, so much of it as could not—that here would be three per cent—must be paid by the purchaser to the vendor, and by the vendor to His Majesty, and if the vendor neglected to collect the tax from the purchaser, then the vendor would be liable for the balance of the tax to His Majesty, the one per cent tax presumably having been paid by the manufacturer at the time of sale under the provisions of the repealed section no. 86 (1). No goods therefore, sold prior to March 2nd for delivery after June 2nd, were to escape the tax of four per cent upon the sale price. It was to be paid either by the manufacturer or the purchaser. The sales of goods with which we are here concerned took place after March 2nd, and the same were all delivered after June 2nd, under the terms of the contracts of sale; the date of delivery was to be determined by the customer. From this, I think, the intention of the legislature is fairly clear. Sales of goods made even prior to March 2nd, for future delivery, were not to escape the increased tax rate if they were to be delivered, or were delivered, after June 2nd, when either the purchaser or vendor was to pay the same. No exception is made in respect of goods sold after March 2nd, and it must have been intended to capture the tax upon sales of goods made subsequent to March 2nd, but which were delivered after June 2nd, and the tax in that event was in the first instance payable by the manufacturer, upon delivery of the goods, without recourse against the purchaser in the manner indicated in the preceding proviso. It is to be inferred from the second proviso which I have quoted, that the legislature intended that in the case of any contract for the sale of goods made after March 2nd, and prior to June 2nd, as here, and which goods were in fulfilment of the contract delivered after June 2nd, the sales tax was payable by the manufacturer at the rate of four per cent at the time of the

delivery of the goods, regardless of the precise date of sale, or where or when the title to the goods passed to the purchaser. The increased tax rate was retroactive for a definite period, and the Crown looked to the manufacturer to pay it, in the first instance, when the goods were delivered and not when sold, and the rate of taxation was to be four per cent upon the sale price. That was the scheme and purpose of the new section 86 (1) of the Act, and, I think, upon careful examination this will appear to be quite clear. If goods sold prior to March 2nd and delivered after June 2nd, were not permitted to escape the tax, which was to be paid by either the manufacturer or the purchaser, then it follows that in the case of goods sold after March 2nd but not delivered till after June 2nd, the tax was to be paid by the manufacturer upon delivery of the goods. In other words, goods sold subsequent to March 2nd, deliveries of which were postponed till after June 2nd, became liable to the sales tax prescribed by sec. 86 (1) (a).

Many other contentions were raised by Mr. Osler and Mr. Carson. It was urged, for example, by the former that whether the property in the goods in question passed to the customer was to be determined by the Sales of Goods Act of Ontario, and by the common law authorities. Mr. Carson argued that "sale," as used in the Special War Revenue Act, should be construed only in the sense contemplated by the Act, and was not affected by the common law, or the Sales of Goods Act of Ontario or any other province. In view of the conclusion I have expressed it would seem unnecessary to discuss these points which so frequently arise in cases involving the passing of goods from a vendor to a purchaser.

There will be judgment for the plaintiff. It was agreed by counsel that I need not determine the precise amount payable by the defendant, if I found for the plaintiff, but if in the end counsel are unable to agree upon the proper amount, I may be spoken to upon the point upon the settlement of the minutes. Costs will follow the event.

*Judgment accordingly.*

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 Jan. 30. INCORPORATED AND NORTHERN } PLAINTIFFS;  
 {  
 ELECTRIC COMPANY, LIMITED. }  
 AND  
 BALDWIN INTERNATIONAL RADIO }  
 OF CANADA, LIMITED..... } DEFENDANT.  
 (13632)

*Patents—Patentability—Infringement—Invention—Claims—Equivalency.*

The two patents in suit relate to electric signalling and particularly to signalling over ocean cables. The Court found that there was no infringement and

*Held:* That on a true construction of the patents, the monopoly claimed must be limited to the precise combination described, and if the claims purport to go beyond this, then such claims, if not the patents themselves, would be void.

2. These are not cases where the doctrine of equivalency applies.

ACTION by the plaintiffs to have it declared that their patents no. 169,472 and no. 213,999 for electric signalling over ocean cables are valid and were infringed by the defendant company.

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 the plaintiffs.

*E. G. Gowling and D. K. MacTavish* for the defendant.

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

THE PRESIDENT, now (January 30, 1933) delivered the following judgment:

This is an action for alleged infringement, by the defendant, of two patents owned by the plaintiffs. The first patent no. 169,472, was granted to E. H. Colpitts in May, 1916, on an application made in October, 1914. The specification states that the invention relates to electric signalling and particularly to signalling over ocean cables. One of its objects is to amplify efficiently very low frequency electric waves, and a special object is to provide an efficient amplifying system adapted without transformers for use at



the receiving end of a signalling circuit. The second patent, no. 213,999, issued in October, 1921, on an application made in January, 1921, by H. De F. Arnold, and is apparently a re-issue of a patent granted in January, 1915. This alleged invention relates to the use of repeaters generally and vacuum discharge repeaters more particularly, "as amplifiers without transformers", and still more particularly to thermionic repeaters for securing amplification of current in circuits of low impedance. Both patents deal with the amplification of feeble currents or signals, whereby weak signals fed into the terminals of a device are amplified or strengthened to the extent that they are enabled to operate a recording or sound reproducing device, or to repeat the strengthened signals into an outgoing line. In each case the devices are intended to repeat signals with a frequency as low as two periods per second from one low impedance line or circuit into another of like impedance, and the exclusion of transformers is particularly emphasized.

Apparently the problem which concerned Colpitts was to devise an amplifier which would take a weak signal from a low impedance line, such as a submarine cable, telegraph or wireless circuit, and to amplify it to a sufficient strength to operate a siphon recorder, a device in common use at that time for the recording of telegraph signals. He explains that in order to secure a maximum use of the small energy available at the terminals of a submarine cable, it is necessary that the impedances should be equalized, or, to employ the term used by Waterman, a witness for the plaintiff, in his explanation of this law of electrical circuits, "matched". All electrical circuits and devices in a signalling system have impedance or resistance. The simplest way to match impedances is by means of transformers. A transformer consists of an iron core on which are wound two coils of wire; it has the property of transferring the effect of impedance from one side to the other, that is to say, if one coil is wound with an impedance of 100,000 ohms and the other coil with 1,000 ohms it would effect the transfer of a signal from a 100,000 ohms line or device to a 1,000 ohms line or device, with maximum efficiency, which would not obtain if two lines or devices of such dissimilar impedance were directly connected together. Transformers were well known means of matching im-

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pedances. Both Colpitts and Arnold, however, state the undesirability of transformers in the particular amplifications they had in mind and they each sought to provide effective amplifying devices from which transformers were to be excluded. Colpitts accordingly devises an amplifier, the impedance of the input of which is low, to approximate that of the incoming line, and the output impedance of which is arranged to match that of the recording apparatus. His amplifier, shown in fig. 1 of the patent, consists of what he describes as an "ionized gas repeater" directly connected to a plurality of audions operating in parallel. The ionized gas repeater used by Colpitts is a mercury ionized gas repeater device. The input circuit consists of two electro magnets, which being connected to the incoming line have their magnetism affected in sympathy with the signal currents and in turn create a corresponding varying deflection in the stream of gaseous ions created by the mercury arc, thereby enabling the signal currents to be repeated in the output terminals of the device.

The input impedance of Colpitts' device is dependent on the electro magnets; these can be wound to a suitable impedance to correspond with that of the incoming line; the output of the device is said to be of high impedance. The audion, the second element used in the device is now so well known as not to require any detailed description; briefly, it consists of three elements in an evacuated enclosure, one element being the heated cathode which emits electrons, the second the anode or plate, and the third the control grid. A voltage applied to the control grid controls the current flowing between the cathode and the plate and signals impressed on the grid are reproduced in amplified or strengthened form in the output of the plate-cathode circuit. The amplifying power of an audion is largely dependent on the mechanical arrangement, the size and spacing of the three electrodes, but in all cases, where an audion is used for amplifying purposes, there is an amplification of energy. The input impedance of all types of audion is of a high order, while the impedance of their output varies according to the construction of the tube. If the output circuits of a number of like audions are connected in parallel, then the output impedance will be proportionately reduced.

Colpitts' arrangement, in operation, accordingly contemplates: (1) a low impedance line connected to the electro magnet of the ionized gas device, the coil of the magnet being wound to have an impedance corresponding to that of the line; (2) a direct connection consisting of a wire and a battery between the high impedance output of the gas device to the grids or control members of several audions; (3) the plate circuits or outputs of these several audions being connected together, thus reducing the impedance of the output to correspond with that of the recording device or of the outgoing line. There does not appear, so far as I can see, to be any direct reference in Colpitts to the transmission of speech, or music, as such. He seems to have been chiefly concerned with the amplification of very low frequency signals such as telegraph or cable signals, as low as two vibrations per second. Colpitts does not appear to have been used to any great extent commercially. Waterman stated it was used in connection with transcontinental telegraphy for a while, but has been obsolete for the past ten years having been replaced by audions.

Coming now to Arnold's patent. Arnold is intended to be an improvement on Colpitts; in his device he retains an audion as the output element, but he abandons the ionized gas repeater as the first or input element, substituting therefor one of the audion type. He introduces a third audion between the input and output and the device accordingly comprises three audions in cascade. He, like Colpitts, does not use transformers in the different circuits, and, he states that "while heretofore it has been necessary to employ transformers in circuit with the audion in order to secure efficient amplification", by the audion, and that "it has been discovered that audions of the usual type may be so constructed that without the use of transformers they will step up the input voltage of either direct current or alternating current of any frequency in one step, as much as 30 times its original value". This type of audion he calls a "high-voltage output audion". He then goes on to state that "it has furthermore been discovered that audions may be constructed which will step down the input voltage, for example, to one-third of its original value. This last mentioned type of audion has a

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high current and a low voltage output, and because of its low output impedance such an audion can be worked efficiently into a line of like impedance". This new type of audions he calls a "high current output audion" and states that these special audions form the subject matter of another patent. He abandons the principle of matching impedances in the case of the connection between the incoming low impedance line and the input audion, but retains it in the connection between the output of the last audion or audions and the low impedance outgoing line. The undistorted amplification of speech and music, where there is a wide range of frequencies, is claimed to be one of the properties of the device by reason of the exclusion of transformers from the circuits. He states that his device "will operate, without transformers, from a line of low impedance, for example 250 ohms, into a like line with a resultant current much greater—fifty or more times greater, than would flow in the second circuit if it were directly connected to the first circuit."

Arnold, operatively, therefore contemplates: (1) a low impedance line directly connected to the high impedance input of a "high voltage audion"; (2) a direct connection consisting of a wire and a battery between the high impedance output of the "high voltage" audion and the high impedance input of the "high current" audion; and (3) direct connection between the output of the high current audion (output of the device) and the outgoing low impedance line, these impedances being approximately the same or matched.

Now, as to the alleged infringing circuit made by the defendant, which, I shall when convenient, designate as Baldwin. This is a device comprising three audions, the first called variously 224 or A; the second 250 or B; and the third 250 or C. The first two audions are in cascade, while C, the third, has a complicated connection with B, its input being connected to the output of B, as in cascade, but at the same time its output is connected with the output of B in a sort of series or parallel connection. It is stated that the input line to the device is of a high impedance. It is also said that the output of the device has an impedance of 8,000 ohms. In actual construction and operation Baldwin presents the following combination:

(1) a low impedance microphone working into a transformer; (2) the output of the transformer connected to the high impedance input of the device; (3) a direct connection consisting of a wire between the high impedance output of the first audion A to the high impedance input of audion B; (4) a complicated connection between audions B and C; (5) a combined output of audions B and C, with an output impedance of 8,000 ohms; (6) an outgoing line into a transformer of a low impedance sound reproducing device.

Now, to compare the devices of Colpitts and Baldwin. Colpitts, as his first element, uses an ionized gas discharge device, and as his second, a number of audions in parallel, while Baldwin uses an audion as his first element and as his second a combination of audions, but not Colpitts' combination. Audions in parallel were known to the art, and Colpitts deliberately abandons the audion as his first or input element for the reason that "a direct connection between the output terminals of the gaseous repeater and a siphon recorder, or one between the input terminals of an audion, or even a bank of audions in multiple, and a cable circuit, would result in inefficient operation." He further states "it is extremely desirable to avoid the use of a transformer", and "the necessity of using the undesirable transformer to balance impedance is at once avoided in accordance with this invention". Colpitts accordingly abandoned the audion because of its high input impedance and substituted therefor an ionized gas discharge device thereby securing a device capable of giving a low impedance to correspond with the low impedance of the incoming cable.

There is, it seems to me, a fundamental difference between the audion and an ionized gas repeater, in that the latter depends, as its name implies, on ionization for its successful operation. Baldwin does not use an ionized gas repeater, nor does he use audions in the true parallel connection of Colpitts in the output. There is therefore, in my opinion, a clear distinction between Colpitts and Baldwin, and I do not think that the latter can be said to infringe the former.

It now remains to be determined whether Arnold is infringed by Baldwin. Here we find considerable similar-

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ity in that the amplifying elements of both devices consist of audions only. The terms "high" and "low" in respect of impedance, voltage, and current, are constantly used in both the patents here in suit, and was used by counsel in argument, but except in the case of Baldwin where the different values are known, complete information as to the meaning to be ascribed to those terms is lacking. What then did Arnold regard as a high impedance or a low impedance, what at that time was a high voltage or a low voltage, and what at that time was a high current and what was a low current? Arnold has to do with the amplification of signals in circuits of low impedance, and in his specification he stresses the fact that his device "will operate without transformers, from a line of low impedance for example, 250 ohms, into a like line with a resultant current much greater, fifty or more times greater, than would flow in the second circuit if it were directly connected to the first circuit". We may therefore assume that to Arnold 250 ohms was low, and he refers to 100,000 ohms as being very high. High voltage, as used in the expression "high voltage output" of Arnold, can, I think, be interpreted by reference to the patent where it is stated that a "high voltage output audion" is one which amplifies or steps up the voltage to as much as thirty times its original value without the use of transformers. The audion in the Arnold circuit is not, however so far as I can see, described as a part of the circuit in the specification of the patent. It would appear that what Arnold had in mind was not that "high voltage" is 100, or 1,000 or more volts, but rather the amplifying capacity of the audion. We have no evidence as to the amplifying qualities of audions known at that time and we cannot say how they compared with the figures mentioned by Arnold. We can only assume that he regarded an amplifying ability of thirty times, as classifying the audion as "high voltage". His (Arnold) output audion he calls a "high current output" audion but again he fails to define what is a "high current". We may assume the current was higher than that in the high voltage audion, but how much higher than this, or how much higher than in known types of audion, we have

no information. He does, however, give some details of the audion used in describing his device. He states:

Audions may be constructed which will step down the input voltage, for example, to one-third of its original value. This last mentioned type of audion has a high current and a low voltage output. Because of its low impedance, i.e., the low impedance between its cathode and anode, such type of audion can be worked efficiently in a line of like impedance. This new type of audion will be referred to as the "high current output audion".

and

The audion 2 (that is the high current audion) acts as an amplifier in which the current is increased and the voltage lowered in its output circuit.

Because of the fact that the impedance between the cathode and anode 8 of the audion 2 is lowered, it can be worked efficiently into a line 16 of similarly low impedance.

and the device as a whole will, for example:

Work from an incoming line of 250 ohms impedance into an outgoing line of like impedance with a resultant current of more than fifty times that which would flow into the outgoing line if the latter were directly connected to the incoming line.

This is quite specific and irrespective of what the current may be, and however measured, the voltage of the output of this audion is lower than the voltage of the input and may be as low as one-third of the same, while at the same time the output impedance is low and it is presumed that it approximates 250 ohms since it was intended to connect with a line of that impedance.

Let us now examine Baldwin in the light of what I have just said concerning Arnold. Audion 224 of Baldwin has high amplifying capacity, it being admitted that three-tenths of 1 volt applied to the input gives a resulting voltage of 50 in the output, or an amplification of 168 as compared with Arnold's 30. The 224 audion contains one additional element to the audion shown in Arnold. Cornell called it a "screen grid tube" and stated that "it is a development of late years, wherein a high rate of amplification is realized over what was had in the days of Colpitts and Arnold; by virtue of the introduction of this screen grid this tube steps up the voltage that is applied to the grid and in addition increases the current at the same time; in other words, it is an energy amplifier, which is the standard and common action of all conventional tubes". Hence, under the Arnold classification it might be called a high voltage output audion, but it is an audion of a type unknown to Arnold at that time.

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We may now consider the 250 B and C audions of Baldwin. Audions of this type, according to Cornell, have an amplifying ability of 3 times, and the two combined as in Baldwin produce a voltage amplification of 6 times, that is to say, the 50 volt output of the 224 audion impressed on the grid of B, results in a voltage of 300 at the output terminals of the Baldwin device. As for the output current, this is stated to be 37/1000 ampere, but having no information in regard to Arnold, one cannot say whether it is higher or lower than Arnold. In so far as impedance is concerned, the impedance of the output of Baldwin is stated to be 8,000 ohms, though that of a single 250 audion is stated to be 1,800 to 2,000 ohms. In any case it is materially higher than the 250 ohms mentioned by Arnold.

Coming now to the matter of transformers. In exhibit 10, it is agreed in regard to Baldwin that, "in all cases a matching transformer would be used to couple the other circuits to the main amplifier", an exception however being that when a phonograph pick-up is used the latter is connected directly to the input of the amplifier without a matching transformer. In other words, notwithstanding the statement of the defendant's counsel, there appears to be a definite effort to at least approximately match the impedance of the different portions of the circuits and of the device. Are transformers necessary for the efficient and satisfactory working of Baldwin? Waterman says you can feed directly from a modern microphone into the input of Baldwin without a transformer coupling between the microphone and the amplifier with entire success "but you might or might not desire to do it". In respect of feeding the output into the low impedance loud speaking device Waterman says it can be done, "but if taken in series it is in the order of 3,500 ohms and with a loud speaker of 16 ohms you would not get an entirely efficient operation without the function of a transformer taking place again in tubes B and C". On the other hand, Cornell stated definitely that it is not practical to dispense with transformers in public address systems, and, I think that transformers are necessary for the satisfactory operation of Baldwin as used.

There remains to consider the connection between the A and B tubes in Baldwin, and the corresponding connec-



tion in Arnold. Prior to Arnold, the usual way of connecting audions in cascade was to use transformers between the output of one audion and the input of the next. Arnold simply eliminates the transformers and his system is a direct connection between two audions, consisting of a wire and a battery. In Baldwin we have the same direct connection between the two audions but he simplifies it by leaving out Arnold's battery. I do not find any claim to invention in regard to this direct connection, and Waterman stated that direct coupling between circuits is often used and has been a generally accepted practice for the past twenty-five or thirty years.

So far as the principle of the matching of impedances is concerned that was well known before Arnold, and therefore was not subject matter for a patent. Arnold claims a combination of a high voltage audion connected to a high current audion. Audion A of Baldwin might be called a high voltage audion, according to Arnold's definition, but Arnold does not claim the audion itself, he claims the combination of elements constituting the circuit arrangement or system; audions B and C of Baldwin are not high current audions within the definition of Arnold. Arnold calls for high current and low or reduced voltage in the output, whereas the B and C audions of Baldwin separately give a three-fold increase in voltage, and when combined a six-fold increase in voltage, as well as a high current. The Arnold device is limited to repeating and amplifying a signal from one low impedance line to another of like character without the use of transformers; Baldwin is never used without transformers and, upon the evidence, I do not think it could function successfully without transformers. Baldwin, I think, seeks the amplification of energy in progressive stages in which the voltage is progressively amplified and the circuits are matched where necessary, with transformers, in order to secure the maximum of efficiency, whereas Arnold contemplates an amplification of voltage in his first element and a lowering of voltage and a higher current in his output element. The combination of Arnold, and Baldwin not only represent different combinations and circuit arrangements, but they produce results which vary. Arnold claims a simple combination of two audions of different characteristics and he defines those characteristics.

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Baldwin also employs two audions of different characteristics but not the same combination as Arnold; while the first audion of Baldwin might possibly be classed as a high voltage audion under Arnold's classification, the second audion cannot be classified as a high current audion, and therefore Baldwin does not use a combination of a high voltage audion, and a high current audion, as defined by Arnold. Therefore, in my opinion, Baldwin does not infringe Arnold.

Macleod J.

A true construction of both patents in suit, in my opinion, limits the monopoly claimed to the precise combination described, and by that limitation Colpitts and Arnold are each bound. If the claims of these patents purport to go beyond this, then such claims, if not the patents themselves, would be void. These are not cases, I think, where the doctrine of equivalency applies.

Finding there is no infringement, it is not necessary to discuss any other phases of the case developed at the trial. The action is therefore dismissed and the defendant will have its costs.

*Judgment accordingly.*

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 Nov. 29, 30,  
 Dec. 1, 2, 5, 6,  
 7, 9, 12, 13,  
 14, 15.

BETWEEN:

HIS MAJESTY THE KING,

PLAINTIFF;

AND

1933  
 Jan. 26, 27  
 & 28.

SOUTHERN CANADA POWER CO. LTD.,

DEFENDANT.

1933  
 Dec. 29.

*Damages to Canadian National Railways—Canadian National Railways Act—Action instituted in the name of His Majesty the King—Jurisdiction—Exchequer Court Act.*

*Held:* That as the *Canadian National Railways Act*, R.S.C. 1927, c. 172, does not vest ownership of the government railways in the Canadian National Railway Company, it being entrusted only with the management and operation of the railways as an agent or mandatory for the government, they remaining the property of the Crown, an action for damages to the Canadian National Railways, brought in the name of His Majesty the King, is properly instituted.

This action was brought for the recovery of a sum of money for damages caused through the derailment of a train of the Canadian National Railways in consequence of a wash-out of the embankment between the viaduct over the highway and the bridge crossing the St. Francis River, near Drummondville, P.Q. The Court found that the dam of

the defendant company at Hemmings Falls was responsible for the wash-out of the railway embankment at Drummondville and the derailment of the train; that the accident was not the result of *vis major* nor was it caused by the fault or negligence of the Plaintiff; that consequently the defendant company is liable to the Plaintiff.

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ACTION by the Crown to recover a sum of money for damages allegedly suffered by it through the negligence of the defendant company.

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

*Hon. J. E. Perrault, K.C.; Napoleon Garceau, K.C., and J. P. Pratt, K.C.,* for the plaintiff.

*A. Decary, K.C., and J. Marier, K.C.,* for the defendant.

The facts are stated in the reasons for judgment.

ANGERS J., now (December 29, 1933) delivered the following judgment:

[The learned Judge stated the nature of the action and then continued.]

The first question I shall examine is whether the plaintiff was, at the time of the accident, the owner of the railway line and of the locomotive and cars which were damaged.

Up to 1899 the railway line running from Charny to Ste. Rosalie and passing at Drummondville was the property of the Drummond County Railway.

By the Statutes 62-63 Victoria, chap. 6, assented to on August 11, 1899, the Governor in Council was authorized to purchase from the Drummond County Railway Company and the latter was authorized to sell and convey to Her Majesty the whole of the railway and undertaking of the company, including its main and branch lines of railway and all buildings, fixtures and appurtenances appertaining thereto. Section 1 of the statute stipulates that upon such purchase being effected the said railway and its branch lines shall become and form part of the Intercolonial Railway and may be operated as such.

Before dealing further with this Act, I believe it expedient to mention that in virtue of section 145 of The British North America Act, 1867, it became the duty of the Government and Parliament of Canada to provide for

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the commencement within six months after the Union of a railway connecting the River St. Lawrence with the City of Halifax, in Nova Scotia (called the Intercolonial Railway in the preamble of said section) and for the construction thereof without intermission and its completion with all practicable speed.

In order to provide for the fulfilment of the duty imposed on the Government and Parliament of Canada as aforesaid, an act intituled "An Act respecting the construction of the Intercolonial Railway" was passed and assented to on December 21, 1867 (31 Vict. chap. 13).

Section 1 of this act stipulates that there shall be a railway constructed, connecting the Port of Rivière du Loup (in the Province of Quebec) with the line of railway leading from the City of Halifax (in the Province of Nova Scotia), at or near the Town of Truro, and that such railway shall be styled and known as "The Intercolonial Railway."

Section 2 of the said act says inter alia: "The said railway shall be a public work belonging to the Dominion of Canada."

Since its construction the Intercolonial Railway has always been the property of the Crown. We find it defined in the following statutes: 44 Vict. chap. 25, s. 122, An Act to amend and consolidate the Laws relating to Government Railways; R.S.C. 1886, chap. 38, s. 67, An Act respecting Government Railways; 54-55 Vict., chap. 50, An Act respecting the Intercolonial Railway; R.S.C., 1906, chap. 36, s. 80, An Act respecting Government Railways; R.S.C., 1927, chap. 173, s. 83, An Act respecting Government Railways. The several sections of the acts above referred to, which define the Intercolonial Railway, with the exception of section 122 of chapter 25 of 44 Victoria and section 67 of chapter 38 of the Revised Statutes of Canada of 1886, which are somewhat less explicit, stipulate that all railways, branches and extensions thereof, etc., *vested in Her or His Majesty*, as the case may be, *under the control and management of the Minister* (i.e. the Minister of Railways and Canals), and situated in the Provinces of Quebec, Nova Scotia and New Brunswick, are hereby declared to constitute and form the Intercolonial Railway.

It may perhaps be noted that the Intercolonial Railway which, according to the statute 31 Vict., chap. 13, was to connect the Port of Rivière du Loup, in the Province of Quebec, with the line of railway leading from the City of Halifax, in the Province of Nova Scotia, at or near the Town of Truro, was later extended, in the Province of Quebec, from Rivière du Loup to Hadlow, as appears from the definitions in sections 122 of 44 Vict., chap. 25, and 67 of chap. 38 of the Revised Statutes of Canada of 1886. Hadlow is situated between Lévis and Charny, a short distance east of the latter place, reference to which is made from time to time in the testimonies of some of the witnesses.

The statute 62-63 Victoria, chap. 6, previously referred to, which authorized the Governor in Council to purchase the Drummond County Railway was to come into force as soon as another act, namely an "Act to confirm an agreement entered into by Her Majesty with the Grand Trunk Railway Company of Canada, for the purpose of securing the extension of the Intercolonial Railway System to the City of Montreal," (62, 63 Vict. chap. 5) was brought into operation by the Governor General's proclamation. A proclamation was issued, dated the 21st of September, 1899, declaring that the said act (62-63 Vict. chap. 5) would come into force on the 26th of the same month; a copy of this proclamation was filed as exhibit 1.

Pursuant to the authorization conferred by the statute 62-63 Victoria, chap. 6, an Order in Council was passed on November 4th, 1899, recommending the purchase by the Governor General in Council from the Drummond County Railway Company of the whole of its railway and undertaking; a copy of this Order in Council was filed as exhibit 3.

By deed in private writing dated November 7, 1899, a duplicate whereof was produced as exhibit 2, the Drummond County Railway Company sold to Her Majesty the whole of its undertaking and railway, including its main line and branches and their connection, and namely "the line of railway extending from Ste. Rosalie, a point on the Grand Trunk Railway in the Province of Quebec, to a point on the western side of the Chaudière River where the said line of railway connects and joins with the Grand

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Trunk Railway." The point referred to is Chaudière.

The Drummond County Railway has since been the property of the Dominion of Canada and has formed part of the Intercolonial Railway.

By the statute 9-10 Geo. V, chap. 13, assented to on June 6, 1919, the Canadian National Railway Company came into existence. This statute is now chapter 172 of the Revised Statutes of Canada, 1927.

In virtue of section 3 of chapter 172 (section 1 of chap. 13 of 9-10 Geo. V), the Governor in Council may nominate such persons as may be deemed expedient, not less than five nor more than fifteen (increased to seventeen by 21-22 Geo. V, chap. 8, s. 1), to be directors of the company and, upon such nomination being made, the persons nominated and their successors, and such other persons as may from time to time be nominated by the Governor in Council are incorporated as a company under the name of Canadian National Railway Company. Then the directors appointed by the Governor in Council are, under the statute, deemed to be the company.

Section 19 of said chapter 172 contains the following provisions, reproduced literally from the statute 9-10 Geo. V. chap. 13, section 11:

19. The Governor in Council may from time to time by Order in Council entrust to the Company the management and operation of any lines of railway or parts thereof, and any property or works of whatsoever description, or interests therein, and any powers, rights or privileges over or with respect to any railways, properties or works, or interests therein, which may be from time to time vested in or owned, controlled or occupied by His Majesty, or such part or parts thereof, or rights or interests therein, as may be designated in any Order in Council, upon such terms and subject to such regulations and conditions as the Governor in Council may from time to time decide; such management and operation to continue during the pleasure of the Governor in Council and to be subject to the termination or variation from time to time in whole or in part by the Governor in Council.

Acting under the authority conferred upon him by section 11 of chapter 13 of 9-10 Geo. V, the Governor in Council on the 20th of January, 1923, entrusted to the Canadian National Railway Company the *management and operation* of, among other lines, the Intercolonial Railway, as appears from a duly certified copy of an Order in Council filed as exhibit 4.

It seems obvious to me that under the Statute incorporating the Canadian National Railway Company, the latter

is not vested with the ownership of the Government Railways, but that it is only entrusted with the management and operation of the railways, which remain the property of the Crown. See *Dominion Building Corporation v. The King* (1).

If we refer to the sections of the act relating to the "Powers of the Company" and to "Finance," we see, among other things, that the company cannot abandon any lines and cannot issue securities without the approval of the Governor in Council; this is surely not consistent with the right of ownership.

Now if we turn back to section 15 of the act (chap. 172), relating to the costs of administration and operation of the railways, we find the following stipulations:

15. Notwithstanding anything in the Government Railways Act or the Consolidated Revenue and Audit Act, all expenses incurred in connection with the operation or management of the Canadian Government Railways, under the provisions of this Act, shall be paid out of the receipts and revenues of the Canadian Government Railways.

2. In the event of a deficit occurring at any time during any fiscal year the amount of such deficit shall from time to time be payable by the Minister of Finance out of any unappropriated moneys in the Consolidated Revenue Fund of Canada, the amounts paid by the said Minister under this section to be included in the estimates submitted to Parliament at its first session following the close of such fiscal year; and in the event of a surplus existing at the close of any fiscal year such surplus shall be paid into the said fund.

The receipts and revenues of the Government railways are the property of the Government; the Canadian National Railway Company merely has the administration or management of these funds and out of them it pays the operating and administrative expenses; if there happens to be a deficit in any fiscal year, it is paid out of the unappropriated moneys in the Consolidated Revenue Fund of the Dominion; if, on the contrary, there is a surplus, it must be paid into the said fund.

The Canadian National Railway Company is in fact only an agent or mandatory for the Government.

It has been argued on behalf of the defendant that, under section 33 of the act, the action should have been brought in the name of the Canadian National Railway Company and that it should have been taken before the Superior Court of the Province of Quebec.

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(1) (1930) App. Cas. 90, at 96.

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The material provisions of section 33 read as follows:

33. Actions, suits or other proceedings by or against the Company in respect of its undertaking or in respect of the operation or management of the Canadian Government Railways, may, in the name of the Company, without a fiat, be brought in, and may be heard by any judge or judges of any court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in court under the rules of court applicable thereto.

2. \* \* \* \* \*

3. Any court having under the statutes or laws relating thereto jurisdiction to deal with any cause of action, suit or other proceeding, when arising between private parties shall, with respect to any similar cause of action, suit or other proceeding by or against the Company, be a court of competent jurisdiction under the provisions of this section.

The first paragraph of section 33 is not imperative, but merely permissive: it uses the word "may." It does not deprive His Majesty of the right to sue in his own name. It may be that the action could have been taken in the name of the Canadian National Railway Company, but I am not called upon to express any opinion on the subject and I shall refrain from doing it.

Having reached the conclusion that His Majesty had the right to institute the action in his name, the question of jurisdiction raised by the defence offers no difficulty: under section 30, subsection (d) of the Exchequer Court Act (R.S.C., 1927, chap. 34) the Court has concurrent original jurisdiction in Canada in all actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. Moreover it is well established law that His Majesty can choose his tribunal: See Chitty on Prerogatives, p. 244; *Cawthorne v. Campbell, Lowndes et al* (1); *Attorney-General and Humber Conservancy Commissioners v. Constable* (2); *Attorney-General v. Walker* (3); *Farwell v. The Queen* (4). I have no hesitation in saying that this Court has jurisdiction to take cognizance of the present case.

[The learned Judge here considered the evidence adduced at the trial of the action and found that the defendant company was liable to the Plaintiff in the sum of \$80,923.20 and costs.]

*Judgment accordingly.*

(1) (1790) 1 Anstr. pp. 205 and 208, in note.  
 (2) (1879) L.R., 4 Ex. Div., p. 172.

(3) (1877) 25 Grant, p. 233; (1878-1879) 3 O.A.R., 195.  
 (4) (1893) 22 S.C.R., 554.



BETWEEN:

B. HOUDE COMPANY LIMITED,

APPELLANT;

AND

COMMISSIONER OF PATENTS,

RESPONDENT.

1934  
 Jan. 15 & 22.  
 Apr. 11.

*Trade-Marks—Petition to register—Appeal from Registrar of Trade-Marks—“Royal Flush”—Unfair Competition Act.*

*Held:* That the Unfair Competition Act, 22-23 Geo. V, c. 38, does not prohibit the use of the word “Royal” in a trade-mark.

2. That the use of the word “Royal” in connection with tobacco, cigars, cigarettes and cigarette papers is not misdescriptive of the character or quality of the wares, or of the conditions of their production or place of origin.

APPEAL from the decision of the Registrar of Trade-Marks refusing to register the words “Royal Flush” as a trade-mark.

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

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

*E. G. Gowling* for respondent.

The facts are stated in the reasons for judgment.

ANGERS J., now (April 11, 1934) delivered the following judgment:

On September 14, 1933, the petitioner filed with the Commissioner of Patents an application for the registration of the words “Royal Flush” as a trade-mark for use in association with tobacco, cigars, cigarettes and cigarette papers.

On November 7, 1933, the Commissioner of Patents notified the petitioner that, as the trade-mark contained the word “Royal”, it could only be registered by express warrant of His Majesty.

On November 10, 1933, the petitioner’s solicitors directed an inquiry to the Commissioner of Patents as to the statutory ground upon which, in the exercise of his jurisdiction, he reached the conclusion set out in his notification; on January 5, 1934, the Commissioner advised that registration of no trade-mark containing the word “Royal” could be granted and that authority had been given by

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Order in Council (No. 205/2555) dated December 12, 1933, for the return of the fee paid on the application.

By its petition setting forth the above recited facts and alleging besides that the said fee had been returned to the Commissioner, The B. Houde Company Limited asks for the direction of the Court for the registration of the trade-mark in question. The petition is supported by the usual affidavit, to which are attached a copy of the application for the registration of the trade-mark "Royal Flush" dated the 13th of September, 1933, a copy of the Commissioner's notice of refusal dated the 7th of November, 1933, a copy of petitioner's solicitors' letter to the Commissioner dated the 10th of November, 1933, and a copy of the Commissioner's reply to said solicitors dated the 5th of January, 1934.

The facts are not disputed and the only question to decide is whether the law prohibits the use of the word "Royal" in a trade-mark. I have reached the conclusion that it does not for the following reasons.

Sections 13 and 14 of the *Unfair Competition Act*, 1932 (22-23 Geo. V, chap. 38) enumerates the emblems or symbols which may not be adopted as a trade-mark; neither forbid the use of the word "Royal".

Counsel for the Commissioner urged that the trade-mark "Royal Flush" is misdescriptive and as such objectionable under subsection (c) of section 26. I must say that I fail to see how the words "Royal Flush" used in connection with tobacco, cigars, cigarettes and cigarette papers may possibly be misdescriptive of the character or quality of the wares or of the conditions of their production or of their place of origin.

Counsel for the Commissioner, in support of his contention, cited the case of *Carron Co's Application* (1). The Carron Company, incorporated by Royal Charter, had registered in 1881 a trade-mark. In 1909 the company applied for leave to alter its trade-mark, one of the alterations being the addition thereon of the words "Carron Company, Incorporated by Royal Charter 1773". The registrar refused to allow the alteration because of the word "Royal", relying on Rule 12 of the Trade-Marks Rules of 1906. The company appealed and the Court (Swinfen Eady, J.) upheld the registrar's decision.

Rule 12 of the Trade-Marks Rules, 1906, which were in force when the judgment in the case of Carron Co's Application was rendered, read, in part, as follows:

12. Representations of the Royal Arms or Royal Crests, or arms or crests so nearly resembling them so as to lead to mistake, or of British Royal crowns, or of the British national flags, or the word Royal or any other words, letters, or devices calculated to lead persons to think that the applicant has Royal patronage or authorization, may not appear on trade-marks the registration of which is applied for.

Rule 12 prohibits expressly the use of the word "Royal". We have no similar provision in our law. The decision in the case of Carron Co's Application is, in the circumstances, of no assistance.

In the case of *The Royal Worcester Corset Co's Application* (1) it was held that the use of the word "Royal", without reference to the place of manufacture, would suggest royal patronage and would therefore be calculated to deceive within the meaning of section 11 of the Trade-Marks Act, 1905.

Clause 11 reads thus:

11. It shall not be lawful to register as a trade-mark or part of a trade-mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous designs.

There is no provision similar or equivalent to section 11 in the Unfair Competition Act.

I must assume that the legislators, who were undoubtedly aware of rule 12—section 14 of the Unfair Competition Act seems to have been derived therefrom—intentionally omitted the word "Royal" from the list of emblems or symbols, the use of which they intended to forbid.

I may add that I cannot see how the use of the mark "Royal Flush", the name of what is commonly known as a valuable hand in the game of cards called poker, in connection with tobacco, cigars, cigarettes, and cigarette papers, could suggest Royal patronage.

I think that the petitioner is entitled to the registration of the trade-mark "Royal Flush", in accordance with its application of the 13th of September, 1933, and the Commissioner of Patents is accordingly directed to register it.

There will be no costs on the petition.

*Judgment accordingly.*

1933

BETWEEN:

Jun. 27.

WILLIAM CHIPMAN..... SUPPLIANT;

1934

AND

Apr. 7.

HIS MAJESTY THE KING..... RESPONDENT.

*Crown—Jurisdiction—Exchequer Court Act—Rideau Canal Act—British North America Act—Crown as Trustee—Statute of Limitation—Non-Assignability of claim against the Crown.*

*Held:* That the Exchequer Court has jurisdiction to entertain an action arising out of the taking of lands under the Rideau Canal Act, 8 Geo. IV, c. 1.

2. That the Crown can only be constituted a trustee by express statutory provisions or a contract to which the Crown is a party.
3. That a claim against the Crown, in the absence of acquiescence, is not assignable.

PETITION OF RIGHT by the suppliant claiming compensation for lands taken by the Crown under the provisions of the Rideau Canal Act.

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

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

*F. P. Varcoe, K.C.*, for respondent.

The facts are stated in the reasons for judgment.

ANGERS J. now (April 7, 1934) delivered the following judgment:

This is a petition of right by which the suppliant seeks to recover from the Crown the sum of \$5,600 in the following circumstances.

The Canada Company, assignor to the suppliant, in virtue of an assignment filed as exhibit K, of the right, title, claim and demand it might have against the Crown for compensation under the Rideau Canal Act or otherwise, was incorporated by charter issued under the Great Seal of the United Kingdom of Great Britain and Ireland on the 19th day of August, 1826. A copy of the charter appears in the Appendix to the Journal of the House of Assembly of Upper Canada (1835), filed as exhibit E.

This charter was granted in pursuance and under the authority of an Act which came into force on the 27th day of June, 1825, entitled "An Act to enable His Majesty

to grant to a Company, to be incorporated by charter, to be called 'The Canada Company', certain lands in the Province of Upper Canada, and to invest the said Company with certain powers and privileges and for other purposes relating thereto" (6 Geo. IV (Imp.), ch. 75): *see* exhibit E.

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The Canada Company was thus incorporated for the purpose of acquiring from the Crown, in right of the Province of Upper Canada, the whole of the Crown reserves and one half of the Clergy reserves in those townships which, on or before the 1st of March, 1824, were actually laid out in the several districts of Upper Canada, except such portions of the Crown and Clergy reserves granted or demised on lease, or occupied on the licence or promise of the Government, or appropriated to public or clerical purposes, or occupied without disturbance for ten years, or which might be peculiarly convenient or necessary for the public service or for ecclesiastical objects such as the erection of churches, school houses or parsonage houses, with small pieces of land to be used as burying grounds, yards or gardens.

Previous to the issuing of the charter, namely, on the 26th of November, 1824, an agreement had been made between the Earl of Bathurst, His Majesty's Secretary of State for the department of the Colonies, and a Committee of subscribers to the company to be incorporated for the sale of the aforesaid lands to the company, providing *inter alia* for the appointment of Commissioners to ascertain the quantity of lands to be purchased by the company, the price to be paid therefor and the mode of payment: *see* exhibit E.

Another agreement was made between The Earl of Bathurst, on behalf of His Majesty's Government, and subscribers of the company to be incorporated, on the 23rd of May, 1826, by which a block of land in the territory purchased by the Crown from the Indians was substituted to and in lieu of the lands which, under the first agreement, were to be taken from the Clergy reserves and by which the terms of payment were modified and certain conditions, immaterial herein, were added; this new agreement is also to be found in exhibit E.

Among the lands alleged to have been purchased by The Canada Company from the Crown, pursuant to the afore-

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said agreements and for which it received a patent, was a lot described as lot number five (5) in the Sixth concession of the Township of South Crosby, in the County of Leeds, containing two hundred acres, as appears by a copy of the patent dated the 2nd of November, 1832, filed as exhibit D.

The grant and the description of the property in the patent read as follows:

We have given and granted and by these Presents do give and grant unto the said Canada Company and their Successors forever all those certain parcels or tracts of land situate in Our said Province and containing by admeasurement One Hundred and Ten Thousand six hundred and thirty-eight acres be the same more or less Being amongst other lands lot Number five in the Sixth concession of the Township of South Crosby in the County of Leeds containing Two hundred acres To Have and To Hold the said several parcels or tracts of land hereby given and granted to the said Canada Company and their assigns forever Saving reserving and excepting to Us Our Heirs and successors to and for the use as well of Us Our Heirs and successors as of All Our loving subjects all navigable streams waters and watercourses with the beds and banks thereof running flowing or passing in over upon by through or along any of the said parcels or tracts of land hereinbefore given and granted to the said Canada Company and their assigns and also saving and reserving to Us Our Heirs and Successors all mines of gold and silver that shall or may hereafter be found on any part of the said parcels or tracts of land hereby given and granted as aforesaid.

Then the patent contains a proviso regarding lots or parts of lots, among the lands granted, which may be required by the Crown for canals, roads, forts or other public purposes; this proviso is in the following terms:

Provided also if any of the said several lots or pieces of land hereby granted by Us to the said Canada Company their successors or assigns or any part thereof shall be required for canals roads the erection of forts hospitals arsenals or any other purpose connected with the defence or security of the said Province then all and every the said lands which may be so required for any or either of the purposes aforesaid shall revert to and become vested in Us Our Heirs and Successors upon a requisition for the same being made either by an act of the Legislature of Our said Province or by the Governor, Lieutenant Governor or person administering the Government of Our said Province or by his direction and this Our grant of such lands which shall be so required shall upon and after such requisition for the same being made be null and void and of non effect so far as respects such lands any thing herein contained to the contrary in anywise notwithstanding And We do hereby declare that in any such event We Our Heirs and Successors will name one arbitrator who shall in concurrence with an arbitrator to be appointed by Canada Company or their grantees or lessees and a third arbitrator to be chosen by such arbitrators determine what price it is reasonable should be paid by Us Our Heirs and Successors to the said Canada Company their grantees or lessees for any lands that may be so resumed by Us Our Heirs or Successors which determination shall be made by the voice of the majority of the said arbitrators.

An Act concerning the Rideau Canal was passed on the 17th of February, 1827 (8 Geo. IV, ch. 1), which provided, among other things, that the officer employed to superintend the construction of the canal should have full power and authority to enter into and upon the lands or grounds of or belonging to any person or persons, bodies politic or corporate, and to survey and take levels of the same or any part thereof and to set out and ascertain such parts thereof as he should think necessary for the proper making of the canal.

The said act also provided that the price or compensation to be paid for lands taken for the purposes of the canal should be determined by agreement with the owners or, if no agreement could be made, by arbitration.

[The learned Judge referred to the pleadings and then continued.]

At the trial admissions were filed by the parties reading as follows:

THE PARTIES HERETO, in addition to the admissions in the Pleadings herein, make the following admissions for the purposes of this suit, only:

(1)—The Officer employed by Her Majesty to superintend the construction of the Rideau Canal, entered upon Lot (5), in the 6th Concession of the Township of Crosby, in the County of Leeds, in the new Province of Ontario, and surveyed the lands comprising 60 acres, 1 rood and 33 perches, referred to in paragraph 7 of the petition of right, being the part thereof which he deemed necessary for the making of the said Canal, and the boundaries were marked first by pickets, as shown on Burroughs' plan dated 1839 (Exhibit A) and later by boundary stones in the same positions as the pickets, as shown on Snow's plan 1850 (Exhibit B). Chewett's plan 1829 (Extract therefrom Exhibit C) shows the lands coloured red but does not show any boundary pickets or stones, although in the cases of some other lots taken boundary stones are shown on this plan.

(2)—The Rideau Canal was finished and opened for navigation in May, 1832. The patent to the Canada Company (Exhibit D), being one of a number of patents granted by the Crown to the Canada Company, covering the lands in question, was dated November 2nd, 1832. This patent was issued pursuant to an arrangement which is disclosed by the following instruments contained in Exhibit E, being Appendix to Journal of the House of Assembly of Upper Canada, 1835, Vol. 2, No. 39: (a) the minutes of arrangement between Lord Bathurst, Colonial Secretary, and the promoters of the company, dated 26th November, 1824; (b) amending arrangement dated 23rd May, 1826; (c) charter of the Canada Company dated 19th August, 1826. In addition reference should be made to the statute authorizing the charter, being (1825) 6 Geo. IV, chap. 75 (Imp.) (Exhibit E).

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(3)—Pursuant to the arrangement, commissioners were appointed to value the lands. The commission and instructions are contained in Exhibit E. The valuation was duly made.

(4)—A certain book of the Canada Company called "Register of Lands" contains the following entry:

Concession	Lot	Number of Acres
6	5	Crown Reserve 200

This Register was dated 30th September, 1826. This admission however implies no admission by the Attorney-General as to the nature or purpose of such Register, or as to the effect of the entry therein.

(5)—Payments to the Government were made by the Canada Company as follows: 1827, £20,000; 1828, £15,000; 1829, £15,000; 1830, £15,000; 1831, £16,000; 1832, £17,000; 1833, £18,000; 1834, £19,000; 1835, £20,000; and in each of the seven succeeding years the sum of £20,000.

(6)—No voluntary agreement was ever made for the payment of compensation in respect of the 60 acres, 1 rood, 33 perches in question nor was any arbitration had to award compensation nor has any compensation been paid in respect of the said lands. But pursuant to a certain statute, 2 Vict., chap. 19, a proclamation was issued dated 7th September, 1839, requiring claims to be filed before 1st April, 1841 (Exhibit F). Following this proclamation and notice a claim for compensation was made by the company (Exhibit G). The company was notified that the claim did not comply with the requirements of the Public notice as appears by Exhibit H. Other correspondence relating to this claim is contained in Exhibit I.

(7)—The Canada Company never entered into possession of the said lands. The purchasers of the lots comprising the 27 acres, 3 roods and 24 perches referred to in paragraph 7 of the petition of right, and their heirs, successors and assigns have been in exclusive, adverse and open possession since the respective dates when the lots were sold.

(8)—The lands in question herein were not at any time resumed by the Crown under the proviso in that behalf contained in the patent issued in November of 1832.

(9)—The Canada Company executed the instruments in favour of the suppliant, William Chipman, mentioned in the petition of right, viz., a deed dated 31st January, 1910 (Exhibit J), and an assignment dated 29th December, 1922 (Exhibit K).

The first question to examine is whether this Court is competent to entertain an action arising out of the taking of lands under the Rideau Canal Act; the Crown denies the jurisdiction.

The Rideau Canal Act, passed as aforesaid on February 17, 1827, was, by section 27 thereof, declared to be a public act. When the British North America Act came into force on March 29, 1867, the Rideau Canal Act was still in force.

Section 3 of the Rideau Canal Act enacts that "such parts and portions of land or lands, covered with water, as may be so ascertained and set out by the officer employed by His Majesty as necessary to be occupied for the purposes of the said canal * * * shall be forever thereafter vested in His Majesty, His Heirs and Successors."

In virtue of the statute 7 Vict., ch. 11, intituled "An Act for vesting in the Principal Officers of Her Majesty's Ordnance the estates and property therein described, etc.", the Rideau Canal became vested in the Principal Officers of Her Majesty's Ordnance in Great Britain.

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By the statute 19-20 Vict., ch. 45, the Rideau Canal was revested in Her Majesty for the benefit, use and purposes of the Province of Canada: see section VI and the second schedule.

Under section 108 of the British North America Act and the third schedule thereto the Rideau Canal became the property of the Dominion of Canada.

In virtue of sections 129 and 91 of the British North America Act the Rideau Canal Act, not being repealed by the Parliament of Canada, became a law of Canada. It being so, I think that under section 19, subsection (d), of the Exchequer Court Act (R.S.C. 1927, ch. 34) this Court has jurisdiction to take cognizance of the present case: see *Henry et al v. The King* (1); *The Queen v. Yule* (2); see also *The Qu'Appelle Long Lake and Saskatchewan Railroad & Steamboat Co. et al v. The King* (3); *Consolidated Distilleries Ltd v. The King* (4).

The next question to determine is whether the south half of lot 5 taken for the canal, a part whereof was later laid out in town lots and sold by the Crown, ever became vested in the Canada Company.

To say the least the proof is most unsatisfactory; it could hardly be otherwise after a century and more.

[The learned Judge here considered the evidence on this point and continued.]

I think that so far as the portion of lot 5 which had been taken or reserved for the canal was concerned, the patent was ineffective and *pro tanto* null and void. This alone would suffice to dispose of the action as brought. If the Canada Company paid for land which it did not get, it may have had a recourse against the Crown for the recovery of the price it paid therefor; I would feel inclined however to believe that this recourse, if it existed, would now be prescribed. But, as I am not concerned with a claim of this nature, I do not think I should express an opinion on the question and will refrain from doing it.

(1) (1905) 9 Ex. C.R. 417.

(3) (1901) 7 Ex. C.R. 105.

(2) (1899) 30 S.C.R. 24 at p. 35.

(4) (1933) A.C. 508.

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But, if we assume that the grant was only null and void with respect to the portion of the lot which had actually been taken and used for the canal and that it was valid as regards the portion thereof which was later found to be unnecessary and was laid out into lots and as such sold by the Crown (with the exception of six lots) between the years 1873 and 1892, which is apparently the view taken by the suppliant (see para. 9 of the petition), has the suppliant got a claim against the respondent for the several purchase prices obtained by the Crown for the lots so sold? This is the question which I now propose to examine.

The question, in my opinion, must be answered in the negative. I do not think that the company ever had any right to claim and recover from the respondent the sums which the latter received in payment of the lots sold; needless to say, the respondent has no more right than the Canada Company, his assignor, had. If the Crown were not in a position to give to the purchasers of the lots a good and valid title thereto, the purchasers would, in my opinion, be the only ones entitled to recover from the Crown the sums disbursed for the purchase of these lots. If the company had a recourse against the Crown in consequence of the sale by the latter of lands belonging to the company, its recourse could only have been for the reimbursement of what it had paid to the Crown for the lands in question, with perhaps, in addition, interest and damages, or for compensation. But the suppliant, assignee of the company's rights, is suing for the prices received by the Crown and his claim is for the aforesaid reasons unfounded.

Even if I arrived at the conclusion that the company had in due time a claim against the Crown for the prices derived by the latter from the sale of the lots as equivalent to or in lieu of the consideration it had given to the Crown for the said lots or as equivalent to and in lieu of compensation for the taking of the lands, I think that the claim was at the time of the commencement of the proceedings herein and had been for a long time previous barred by the Statutes of Limitation: Imperial Statute 3-4 Wm. IV, chap. 42; 2 Vict., chap. 19, and R.S.O. 1927, chap. 106; R.S.C. 1927, chap. 34, s. 32; see *McQueen v. The Queen* (1).

It was argued on behalf of the suppliant that the Crown in collecting the purchase prices of lots which belonged to the Canada Company became trustee for the company. This contention, to my mind, is ill-founded. The Crown may perhaps have become a trustee of these moneys for the purchasers to whom no good and valid title in the lands passed; but there was no relation of trustee as between the Crown and the Canada Company. I see no privity between the Crown and the company or its assign, the suppliant herein, on the action as brought.

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I do not think that the Crown can be placed in the position of a trustee by implication; the Crown can only be constituted a trustee by the express provisions of an Act of Parliament or a contract to which the Crown is a party: *McQueen v. The Queen* (1); *The Hereford Railway Co. v. The Queen* (2); *Rustomjee v. The Queen* (3); see also *Henry et al v. The King* (4); *Kinloch v. Secretary of State for India* (5).

Reverting for a moment to the question of compensation, it is admitted that no agreement was ever made in this respect and that no arbitration was ever had to fix and award compensation for the taking of the lands in question: see paragraph 6 of the admissions. But the Canada Company apparently considered at one time that its recourse against the Crown was one for compensation in consequence of the expropriation of the south half of lot 5. Pursuant to an Act intituled "An Act to limit the period for owners of lands making claims for damages already occasioned by the construction of the Rideau Canal and for other purposes therein mentioned" (2 Viet., chap. 19) a proclamation dated the 7th of September, 1839, was issued enjoining all persons having claims for damages sustained in consequence of the canal, locks, etc., being constructed in or upon the lands of any of them to prefer and prosecute such claims in due course of law on or before the 1st of April, 1841, and notifying them that upon their failure so to do such claims would forever afterwards be barred and precluded; a copy of this proclamation was filed

(1) (1886) 16 S.C.R., 1.

(3) (1876) 1 Q.B.D., 487;

(1876) 2 Q.B.D., 69.

(2) (1894) 24 S.C.R., 1.

(4) (1905) 9 Ex. C.R., 417.

(5) (1882) L.R. 7 App. Cas. 619.

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as exhibit F. Annexed to the copy of the proclamation is a copy of a notice, containing information about the preparation of the claims, and a list of the newspapers in which it was published.

A claim, in the form of a letter, was addressed by the Canada Company to Major Bolton, superintendent of the Rideau Canal, in accordance with the directions contained in the notice aforesaid, bearing date the 9th of March, 1841: see exhibit G. Obviously the claim does not conform with the requirements of the notice.

On the 27th of March, 1841, the Government arbitrator wrote to the Commissioners of the Canada Company notifying them that the company's claim was unaccompanied by a diagram and a certificate of a surveyor as to the extent and nature of the damage, as required by the notice, and that it was doubtful if the claim could be entertained; a copy of the letter was produced as exhibit H. Two copies of letters, both dated April 3, 1841, from the Government arbitrator, to Major Bolton, were filed as exhibit I; to one of them is annexed an abstract of the claims received between March 1 and April 1, 1841, included in which is the claim of the Canada Company. The letters show that the Government arbitrator wanted advice concerning the company's claim. At the bottom of the first letter is a note stating that the matter was referred to the Commanding Royal Engineer, with a recommendation that it be submitted for legal opinion to the Attorney-General at Toronto. What happened, we do not know. Apparently the company did not press its claim. It is quite possible that it expected another letter from the Government arbitrator, seeing that his letter of March 27 (exhibit H) did not state positively that the claim could not be entertained, but merely said that it was doubtful if it could be. Be that as it may, I think it was up to the company to file a claim complying with the requirements of the notice published in pursuance of the proclamation aforesaid. By failing so to do, I am afraid that the company lost its recourse against the Crown for compensation, if ever it had one.

It was further urged on behalf of the respondent that the assignment by the Canada Company to the suppliant is not effective against the Crown and that the only person

who could sue on the present claim was the company itself; this contention appears to me well founded; on grounds of public policy a claim against the Crown, in the absence of acquiescence, is not assignable; the Crown cannot be expected to seek out the assignees of claims against it: see *Powell v. The King* (1); Audette, *Practice of the Exchequer Court*, 2nd Ed., 112, no. 27; *Arbuckle v. Cowtan* (2); see also *The Queen v. McCurdy* (3).

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Other questions have been raised which I do not deem expedient to discuss, seeing that the action, for the reasons above set forth, fails.

The suppliant is not entitled to the relief sought by his petition and the latter is accordingly dismissed with costs.

Judgment accordingly.

BETWEEN:

JEANNE TOMAN.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1933
 Dec. 18.
 1934
 May 14.

Crown—Responsibility—Negligence—Public Work—Chantier Public—Jurisdiction—Exchequer Court Act.

One G.C., a constable of the Royal Canadian Mounted Police, was driving an automobile belonging to the Force, in the City of Montreal. Whilst attempting to pass a street car, which had stopped to allow its passengers to alight, the automobile struck the Suppliant, causing considerable injury to her person.

Held: That the automobile in question was not a public work within the meaning of s. 19 of ss. (c) of the Exchequer Court Act, R.S.C. 1927 c. 34, nor was such automobile used in connection with a public work to bring it within the decision in the case of *Schrobounst v. The King* (1925) Ex. C.R. 167 and (1925) S.C.R. 458.

2. That the Court was without jurisdiction to entertain the action. The French version of a public work in said Act "chantier public" discussed.

PETITION OF RIGHT by the Suppliant claiming damages for personal injuries suffered by her through the negligence of a servant of the Crown.

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

(1) (1905) 9 Ex. C.R., 364 (2) (1803) 3 B. & P., 321, at 328.
 (3) (1891) 2 Ex. C.R., 311, at 319.

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A. Forest, K.C., for the Suppliant.

A. G. Fauteux, K.C., for the Respondent.

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

ANGERS J. now (May 14, 1934) delivered the following judgment:

[The learned Judge stated the nature of the action and after referring to the pleadings and evidence adduced at the trial continued.]

La responsabilité de l'intimé, si responsabilité il y a, ne peut, à mon avis, découler que du paragraphe (c) de l'article 19 de la Loi de la Cour de l'Echiquier (S.R.C., 1927, chap. 34) :

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

(a)

(b)

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

Avant la révision des Statuts de 1927 et depuis l'entrée en vigueur du Statut 7-8 Geo. V, chap. 23 (sanctionné le 29 août 1917), le paragraphe (c) de l'article 20 (devenu lors de la révision l'article 19) de la Loi de la Cour de l'Echiquier, était conçu dans les mêmes termes que le paragraphe (c) de l'article 19 actuel, à cette différence près que les deux derniers mots du paragraphe (c) de l'article 20, savoir "ouvrage public" ont été remplacés par les mots "chantier public". La version anglaise des deux lois emploie les mots "public work".

Le changement dans le texte français ne paraît guère heureux—en faisant cette affirmation, je ne me place pas à un point de vue purement linguistique—, lorsque l'on se réfère à l'opinion émise par quelques juges, comme nous le constaterons dans un instant, que les mots "public work" doivent s'entendre dans le sens qui leur est attribué dans d'autres statuts fédéraux, nommément dans la Loi des travaux publics et dans la Loi des expropriations. Dans l'une et l'autre loi les expressions "public work" et "public works" sont traduites respectivement par les mots "ouvrage public" et "travaux publics".

Avant l'amendement apporté au paragraphe (c) de l'article 20 de la loi de la Cour de l'Échiquier par 7-8 Geo. V, chap. 23, ledit paragraphe se lisait ainsi, tant dans le chapitre 16 du statut 50-51 Victoria, que dans le chapitre 140 des Statuts Révisés du Canada de 1906:

(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, sur un ouvrage public, résultant de la négligence de quelque employé ou serviteur de la Couronne, pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi.

Cette définition avait donné lieu à des décisions à l'effet qu'il ne pouvait y avoir réclamation que si l'accident s'était produit *sur* l'ouvrage public. Le fait est que, vu la façon dont les mots "sur un ouvrage public" se trouvaient placés, il était difficile d'arriver à une autre interprétation.

C'est à la suite du jugement dans la cause de *Piggott v. The King* (1) que le paragraphe (c) de l'article 20 de la Loi de la Cour de l'Échiquier a été amendé (7-8 Geo. V, ch. 23). Dans cette cause la Cour de l'Échiquier avait rejeté la pétition de droit par le motif que le dommage à la propriété du requérant n'avait pas été causé *sur* un ouvrage public, et la Cour Suprême avait, à l'unanimité, confirmé ce jugement. L'honorable juge Idington avait, en termes non équivoques, désapprouvé la rédaction de ce paragraphe (c), parce qu'elle donnait lieu à des dénis de justice. Il n'est peut-être pas hors de propos de citer le passage suivant des notes du juge Idington (p. 629):

It was intended by other parts of that Act (Petition of Right Act, 1875, 38 Vict., ch. 12) to execute its purposes by and through the ordinary courts of the province. In consequence of the establishment of this court immediately after such enactment, combined with a power of exercising the functions of an exchequer court, that Act was repealed by 39 Vict. ch. 27, sec. 1. And the jurisdiction to try such Petitions of Right was allotted to the Exchequer Court.

By section 19 of that statute, there was, amongst other things, enacted that it was not to give to the subject any remedy against the Crown save in such cases as embraced in above quoted proviso.

By the later development of the jurisdiction of the Exchequer Court, when separated from this court, it so turned out that the limits of relief under the "Petition of Right Act" were confined to the jurisdiction given that court.

Indeed, it has inadvertently, as I submit, been sometimes said that court had been given not only a jurisdiction, but that its provisions created a right to relief as well as supplied a remedy.

The measure of relief intended by the "Petition of Right Act" was, I think, wider than that jurisdiction, but, inasmuch as the jurisdiction

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(1) 53 R.C.S., 626.

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given in the Exchequer Court was the only jurisdiction to try any such claims, the only practical relief given was that assigned by the said "Exchequer Court Act."

The result has been to limit by the jurisdiction given the only relief, and that is less than, though probably intended to be coterminous with, the relief given in the Imperial Act above quoted.

It would be impossible properly to extend the express language of the jurisdiction given, by means of any section denying the right to be greater than something else.

The absurdity has continued for many years, and probably justice has often been thereby denied.

Le juge Idington cite alors le paragraphe (c) de l'article 20, tel qu'il se lisait avant l'amendement fait par 7-8 Geo. V, chap. 23, et continue ainsi:

This case illustrates what a stupid enactment this is.

The words therein, "on any public work," rendered it impossible, in the case of *Chamberlin v. The King* (42 Can. S.C.R. 350), for us to interfere, solely because the injury, if any, was done to property a long distance from the place where the public work existed from which it was said the cause of the destruction of suppliant's property originated.

Le juge Idington termine en disant (p. 632):

I respectfully submit that the sooner the probably misplaced words, "on any public work," are stricken out of sub-section (c) the better.

En transportant les mots "sur tout ouvrage public" à la fin du paragraphe, après les mots "pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi", si le législateur, ménageant ses efforts, n'a pas, il me semble, façonné un texte dénué de tout ambiguïté, il a tout de même manifesté son intention de ne pas restreindre le recours à l'unique cas de l'accident survenu sur le site même de l'ouvrage ou, si l'on veut, du chantier public, mais a permis à la Cour d'interpréter cette clause nouvelle et de déterminer en quels cas particuliers la négligence d'un employé ou serviteur de la Couronne s'est manifestée, pendant qu'il agissait dans l'exercice de ses fonctions *sur* un ouvrage public.

La première cause, à ma connaissance, à être jugée sous les dispositions du paragraphe (c) de l'article 20 tel qu'amendé—cet article 20 n'est devenu l'article 19, comme je l'ai déjà indiqué, que lors de la révision de 1927—a été celle de *The King v. Schrobounst* (1) dans laquelle la Cour Suprême, confirmant le jugement du Président de la Cour de l'Échiquier (2), a décidé que les mots "sur tout ouvrage public" qualifient l'emploi et non la présence de l'employé ou du serviteur de la Couronne sur tel ouvrage. L'hono-

(1) (1925) S.C.R., 458.

(2) (1925) Ex.C.R., 167.

rable juge Mignault, parlant au nom de la Cour, s'exprime ainsi (p. 459):

We are of the opinion that the words "upon any public work" in subsection (c) qualify not necessarily the presence but the employment, of the negligent servant or officer of the Crown. The driver of the motor truck was employed upon the public work in question; and this is sufficient to give the suppliants the right of action they assert.

If it had been intended to restrict the application of the subsection to the case in which the person causing the injury was at the time physically present "upon any public work" these latter words would more properly have been inserted immediately after the word "while," where their significance would have been unmistakable. The construction placed on the words "on any public work" in Piggott's Case and other cases decided on the subsection as it stood prior to 1917, proceeded upon and was necessitated by their collocation with the words "person or property."

La première question qui se présente est celle de savoir si, au moment de l'accident, le chauffeur de l'automobile de la Royale Gendarmerie à Cheval du Canada qui a frappé la pétitionnaire agissait dans l'exercice de ses fonctions ou de son emploi "dans un chantier public", ou, selon l'expression anglaise, "upon a public work".

La loi de la Cour de l'Echiquier ne définit point le "chantier public"; elle ne l'a jamais défini.

Dans une cause entendue et jugée en Cour de l'Echiquier avant l'amendement apporté au paragraphe (c) de l'article 20, savoir la cause de *La Compagnie Générale d'Entreprises publiques v. Le Roi* (1), la Cour Suprême, infirmant (Davies, J., dissident) le jugement de l'honorable juge Audette, a décidé (2) qu'un chaland (*scow*) amarré à un quai public et utilisé pour fins de réparations à cet "ouvrage public" devait être considéré comme étant employé sur un ouvrage public, aux termes du paragraphe (c) de l'article 20. A la page 531 du rapport, le juge Idington dit:

In this case it is hardly possible unless we give the meaning to the word "on" of "upon" and insist that the scow in question could not be said to be "on a public work" unless it was on the top of the very spot in the wharf under and with which the appellant's men were engaged.

Je n'insisterai pas davantage sur cet aspect de la cause, lequel n'offre plus d'intérêt depuis l'amendement et auquel j'ai fait allusion, en passant, principalement pour indiquer les circonstances dans lesquelles la réclamation, qui fait l'objet du litige, avait pris naissance. J'ai cité cette cause surtout pour ce qu'elle pouvait nous fournir d'éclaircissement sur ce qui constitue, au sens de la loi, un ouvrage ou,

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(1) 32 D.L.R., 506.

(2) 57 R.C.S. 527.

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selon l'expression nouvelle, un chantier public. Je trouve dans les notes de l'honorable juge Anglin une définition ainsi conçue (p. 532):

"Public work" may, and I think should, be read as meaning not merely some building or other erection or structure belonging to the public, but any operations undertaken by or on behalf of the Government in constructing, repairing or maintaining public property. In this sense the appellant's scow was "on public work" when it was injured.

Pour trouver une autre définition de l'expression "public work", il faut se référer à la cause de *Wolfe v. The King* (1).

Le résumé des faits et le "jugé" en tête du rapport, qui me paraissent au point, sont en ces termes:

Under a lease for an indefinite period and terminable on fourteen days' notice the Government of Canada occupied the basement and first floor of a building as a recruiting station in 1916-17. A fire originating on the premises while so occupied destroyed property belonging to the tenants of adjacent premises who claimed compensation by petition of right.

Held, affirming the judgment of the Exchequer Court (20 Ex. C.R. 306) Duff J. dissenting, that the portion of the building so occupied by the Government was not a "public work" within the meaning of that term as used in subsec. (c) of sec. 20 of the Exchequer Court Act.

Le juge en chef (Sir Louis Davies), interprétant l'expression "public work", s'exprime ainsi (p. 143):

It may be, I admit, somewhat difficult to decide in some cases what is or is not a public work within the meaning of the Act and I do not think it desirable to attempt any definite interpretation of the words "public work." Every case arising must be determined on its own special facts. But in the cases now before us it is sufficient to say, and I have no hesitation in holding, that the temporary occupation of the basement and ground floor of the Arcade Building subject to its being determined on a fourteen days notice could not constitute the whole building a public work or, apart from the whole building, make the basement which was occupied such a work. To my mind such a conclusion offends one's common sense and I agree with the finding of Audette J. when he says:

The words "public work" mentioned in section 20 of the Exchequer Court Act must be taken to be used as verily contemplating a public work in truth and reality, and not that which is mentioned in The Public Works Act or on The Expropriation Act for the purposes of each Act.

Le juge Mignault, de son côté, se basant sur la juxtaposition des paragraphes (b) et (c) de l'article 20, émet l'opinion que la définition de "public work", comprise dans la loi des expropriations, doit être adoptée aussi bien quand il s'agit de l'interprétation du paragraphe (c) que de celle du paragraphe (b) de l'article 20 de la Loi de la Cour de l'Échiquier. Afin de ne pas risquer de dénaturer sa pensée en ne citant que le passage où il arrive à la conclusion

d'adopter la définition de l'article 2 de la Loi des Expropriations, je crois opportun et juste de reproduire ici, même sous peine de prolonger quelque peu ces notes, non seulement sa conclusion mais aussi les raisons qui l'y amènent; à la page 154 du rapport il dit:

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In view of the collocation of the words "any public work" in subsection (c) with the same words in subsection (b), it follows that, according to the familiar rule of legal construction, these words should, if possible, receive the same construction in both subsections. Maxwell, *Interpretation of Statutes*, pp. 56, 57.

I think that subsections (a) and (b) deal with claims for compensation against the Crown in the exercise by the latter of statutory powers, and not with claims for damages against the Crown in respect of a tort, the latter being the subject of subsection (c) (see opinion of Fitzpatrick C.J. in *Piggott v. The King*, 53 Can. S.C.R. 626), but this does not present any obstacle to giving to the words "any public work" in subsections (b) and (c) the same construction which no doubt was in the mind of Parliament when it enacted section 20.

It appears obvious that the "public work" mentioned in subsection (b)—the construction of which might injuriously affect property and thereby cause damage—is a public work coming within the definition of "public work" and "public works" in section 2 of the Expropriation Act (R.S.C. ch. 143), to which Act subsections (a) and (b) of section 20 of the Exchequer Court Act are properly referable. It is noticeable that no definition of a public work is contained in the latter statute, and I cannot doubt that the public work referred to in subsection (b) is the public work contemplated in the Expropriation Act, for we find, in sections 22, 25, 26 and 30 of the Expropriation Act, the very words

property injuriously affected by the construction of any public work which are in subsection (b), which property, so affected, is a subject for compensation.

The definition of the words "public work" in section 2 of the Expropriation Act is very comprehensive, and I think, for the reason stated, that we can take it as indicating the meaning of the words "any public work" in subsection (b) and also, because of their collocation, in subsection (c) of section 20 of the Exchequer Court Act. It would at all events be impossible to give a wider meaning to these words in subsection (c) than in subsection (b).

The definition in question reads as follows:—

(d) "public work" or "public works" means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the light-houses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, dry-docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which money is appropriated as a subsidy only.

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Le juge Anglin, faisant allusion au jugement du juge Mignault, déclare ce qui suit (p. 149): "I concur in his conclusion and, speaking generally, with the reasons on which they are based"; puis il émet une opinion qui diffère assez radicalement de celle de son collègue (p. 149, *in fine*):

If s.s. (c) of s. 20 as enacted by 7 and 8 Geo. V. c. 23, stood alone I should be disposed to give to the words "upon any public work" a very wide meaning—to treat them as equivalent to "while engaged in any public undertaking." But in the construction of clause (c) we must not lose sight of the fact that Parliament has placed it in juxtaposition to clause (b) which confers jurisdiction on the Exchequer Court to entertain, every claim against the Crown for damage to property injuriously affected by the construction of any public work.

The words "any public work" in this subsection are undoubtedly limited to physical works which are the subject of "construction." I am, with respect however, not inclined to accept the view that the jurisdiction conferred by clause (b) is restricted to claims for compensation against the Crown for injurious affection of property occasioned by the exercise of powers to take land, etc., under the Expropriation Act. I would prefer to leave that question open. I am therefore not prepared, for the present at least, to accept the definition of "public work" in clause (d) of s. 2 of the Expropriation Act as applicable to s.s. (b) and (c) of s. 20 of the Exchequer Court Act. While, because the phrase "any public work" is found in s.s. (b) of the Exchequer Court Act as well as in s.s. (c) its construction in the latter phrase should be governed largely by that given to it in the former, *Blackwood v. The Queen* (8 App. Cas. 82) at page 94, I find nothing in either clause at all inconsistent with the construction which, in *Compagnie Générale d'Entreprises Publiques v. The King* (57 Can. S.C.R. 527) at page 532, I placed on the words "any public work" as used in s.s. (c) as it stood before the amendment of 1917, viz.,

not merely some building or other erection or structure belonging to the public, but any operation undertaken by or on behalf of the Government in constructing, repairing or maintaining public property.

L'honorable juge Duff, dissident, en est arrivé à la conclusion que l'édifice dont il s'agissait en l'espèce et qui est désigné dans le sommaire des faits précité, constituait un "public work", au sens du paragraphe (c) de l'article 20; à la page 146 du rapport il s'exprime ainsi:

I have little difficulty in reaching the conclusion that these premises were a "public work" within the meaning of the enactment under consideration. The term "public work" is defined in at least two statutes, the Public Works Act and the Expropriation Act. In the Public Works Act it includes "the public buildings," "property, * * * repaired and improved at the expense of Canada." And by definition in the Expropriation Act it also includes in the same terms "the public buildings" and "property repaired or improved at the expense of Canada." The definitions of the term "public work" to be found in these two statutes (they are substantially, if not quite, the same) have immediate statutory effect only in the interpretation of the enactments in which they are found; but they may very properly be resorted to for the purpose of throwing light upon the meaning of the same phrase found in another

enactment with no legislative interpretation expressly attached to it. Prima facie it appears to me that the meaning of the phrase in the Exchequer Court Act is no less comprehensive than that to be gathered from these two definitions. Prima facie therefore the premises in question were a "public work" within the meaning of the Exchequer Court Act.

Dans une cause de *Leprohon v. The Queen* (1) dans laquelle le pétitionnaire réclamait des dommages pour être tombé en sortant de l'hôtel des postes, aux Trois-Rivières, comme conséquence de l'état glissant des marches, et s'être blessé dans sa chute, le juge Burbidge a jugé qu'un hôtel des postes doit être considéré comme étant un "public work", mais il a rejeté la pétition par le motif que l'accident était attribuable à la négligence de la victime. Le juge Burbidge a décidé en outre que l'expression "public work" dans l'article 16 de la Loi de la Cour de l'Échiquier (50-51 Vict., chap. 16) comprenait non seulement les chemins de fer et canaux et autres entreprises généralement laissées à l'initiative privée, mais aussi tous les travaux publics (public works) mentionnés dans la Loi des travaux publics ou dans toute autre loi où se rencontre cette expression; à la page 106 du rapport, je trouve les remarques suivantes:

The first question in cases of this kind is whether the injury has happened on a public work. In *Brady v. The Queen* (2 Ex. C.R. 273) it was admitted by the demurrer that the Rocky Mountain Park of Canada is a public work; and in *The Corporation of the City of Quebec v. The Queen* (3 Ex. C.R. 176) I thought that the Citadel at Quebec was a public work within the definitions contained in the Acts therein referred to.

(La Cour Suprême (2) a., sur ce point, exprimé une opinion différente, bien qu'elle ait confirmé le jugement et rejeté la pétition, vu l'absence de preuve de négligence de la part d'un employé ou serviteur de la Couronne.)

So here there can, I think, be no doubt that a post office building owned and occupied by the Crown is a "public work" within the definition given in The Public Works Act (R.S.C. c. 36, ss. 2 (c) and 7). The liability of the Crown for the negligence of its officers and servants in the construction and management of its public works was first recognized by the Act 33 Vict. c. 23, intituled: An Act to extend the powers of the Official Arbitrators to certain cases therein mentioned, by which such Arbitrators were, among other things, authorized to hear and determine claims "arising out of any death or injury to the person or property on any railway, canal or public work under the control and management of the Government of Canada." And it is doubtful, looking at the provisions of this Act and of the Public Works Act then in force (31 Vict. c. 12), whether at the time Parliament had any intention to make the Crown liable in proceedings before the Official Arbitrators for the acts or negligence of its officers and servants in relation to public properties, other than railways and canals or works of a like character, which, as pointed out by the Judicial Committee of the Privy Council in cases that I shall refer to, are in other countries usually left to private enter-

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

(2) 24 R.C.S., 420.

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prise. The Act 33 Vict. c. 23 was however followed two years later by another amendment to The Public Works Act, 1867 (35 Vict. c. 24), by which, among other things, it was provided that every canal, lock, dam, hydraulic work, harbour, pier, public building, or other work or property of the nature of any of those mentioned in the 10th section of The Public Works Act, 1867 (31 Vict. c. 12) should be a public work under the control and management of the Minister of Public Works, and that all the enactments and provisions of the Act last mentioned, and of any Act amending it, did and should apply to every such work. The Act 33 Vict. c. 23 was such an Act, and after 1872 there was, I think, no chance for any such distinction as that suggested, arising out of the character of the public work. The liability of the Crown in a proper case and in a proceeding before the Official Arbitrators for damages arising out of any death or injury to person or property on any public work was, without any such distinction, clearly recognized; and I think that the expression "public work" occurring in the 16th section of The Exchequer Court Act must be taken to include not only railways and canals and other undertakings which in older countries are usually left to private enterprise, but also all other "public works" mentioned in The Public Works Act (R.S.C. c. 36) and other Acts in which that term is defined.

Il est question, pour la première fois, des arbitres officiels dans la Loi concernant les travaux publics du Canada sanctionnée le 21 décembre 1867 (31 Vict., chap. 12). L'article 31 de cette loi décrète que le Gouverneur pourra constituer un bureau d'arbitrage et nommer des personnes compétentes, n'excédant pas le nombre de quatre, comme arbitres ou évaluateurs pour le Canada. Il y est dit que "ces arbitres régleront, évalueront, estimeront et accorderont les sommes qui seront payées à toutes personnes pour les terres ou les propriétés prises pour les usages et fins de travaux publics, ou comme compensation pour toute perte ou dommages que cette prise de possession pourra leur causer, ou à l'égard de toute réclamation formulée à propos de quelque contrat..."

Comme on le constate, il n'y avait alors de réclamation contre la Couronne que dans les cas suivants: (a) pour compensation pour les terres ou propriétés prises pour fins de travaux publics; (b) pour compensation pour perte ou dommages résultant de la prise de possession de ces terres ou propriétés; (c) pour paiement dû en vertu d'un contrat. Il n'est aucunement question de réclamation résultant de délit ou quasi-délit. Une loi intitulée "Acte pour étendre les pouvoirs des arbitres officiels à certains cas y mentionnés", sanctionnée le 12 mai 1870, est venue remédier, sinon entièrement du moins partiellement, à cette lacune; c'est la chapitre 23 du statut 33 Victoria. L'article 1 se lit, en partie, comme suit:

Si quelque personne ou corps politique a, actuellement ou plus tard, quelque prétendue réclamation à exercer contre le gouvernement du

Canada, à l'égard de propriétés prises pour un usage, service ou objet public non prévu par l'acte passé en la trente et unième année du règne de Sa Majesté, chapitre douze, intitulé: "Acte concernant les travaux publics du Canada",—ou à l'égard de dommages à la propriété, prétendus, directs ou indirects, résultant de quelque acte ci-devant accompli, ou qui le sera à l'avenir par le gouvernement du Canada, et ne tombant pas sous l'empire de l'acte ci-dessus cité,—ou *quelque réclamation résultant de la mort d'un individu, ou de lésions corporelles ou de dommages à la propriété sur un chemin de fer, un canal ou des travaux publics sous le contrôle et la direction du Gouvernement du Canada*, ou résultant de l'exécution, ou de déductions faites en conséquence de la non-exécution de quelque contrat fait et passé avec le chef de quelque département du gouvernement du Canada, soit au nom de Sa Majesté ou en tout autre nom que ce soit,—telle personne ou tel corps politique pourra donner avis par écrit de sa réclamation au Secrétaire d'Etat du Canada, énonçant les particularités qui s'y rattachent et ce qui y a donné cause;...

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Puis l'article décrète que cet avis sera envoyé au chef du département que la réclamation pourra concerner et que celui-ci aura dès lors le pouvoir d'offrir compensation et, si celle-ci n'est pas acceptée, de référer la réclamation à un ou plusieurs des arbitres officiels, après quoi ceux-ci auront le pouvoir d'entendre et décider la réclamation.

Le juge Burbidge a raison de dire, *in re Leprohon v. The Queen (ubi supra)*: "It is doubtful, looking at the provisions of the Act (33 Vict., chap. 23) and of the Public Works Act then in force (31 Vict., chap. 12), whether at the time Parliament had any intention to make the Crown liable in proceedings before the Official Arbitrators for the acts or negligence of its officers and servants in relation to public properties, other than railways and canals or works of a like character."

Le statut 31 Victoria, chapitre 12, dans lequel se trouve l'article 31 précité, ayant trait à la nomination et aux pouvoirs des arbitres officiels, contient une énumération des travaux publics qui seront sous le contrôle du ministère des Travaux publics; c'est l'article 10. Etant donné la juridiction très restreinte des arbitres en vertu de l'article 31 cette énumération n'offrait au début aucun intérêt. Quand la loi 33 Victoria, chapitre 23, a été passée, étendant la juridiction des arbitres, entre autres choses, aux réclamations pour blessures à la personne ou pour dommages à la propriété, sur un chemin de fer, un canal ou un autre ouvrage public sous le contrôle du gouvernement, la définition contenue dans l'article 10 est devenue intéressante; cet article est ainsi conçu:

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10. Les canaux, écluses, barrages, pouvoirs d'eau, havres, jetées et autres travaux faits pour l'amélioration de la navigation de quelques eaux, les écluses, barrages, jetées, piliers, estacades et autres travaux faits pour faciliter le flottage du bois,—les chemins et ponts, les édifices publics, les chemins de fer et leur matériel roulant, les vaisseaux, dragues, chaland, outils, instruments et mécanisme pour l'amélioration de la navigation,—les vapeurs provinciaux et toute autre propriété ci-devant acquise, construite, réparée, maintenue ou améliorée aux frais de l'une ou l'autre des ci-devant provinces du Canada, du Nouveau-Brunswick ou de la Nouvelle-Ecosse, ainsi que les travaux et propriétés acquis ou à acquérir, construits ou à construire, réparés ou améliorés, aux frais du Canada,—et aussi toute cette partie de la propriété désignée sous le nom de "Terrains de l'Artillerie" transférée au ci-devant gouvernement provincial du Canada, par le gouvernement impérial et ensuite placée sous le contrôle du département des travaux publics,—seront et continueront d'être la propriété de Sa Majesté et placés sous le contrôle et l'administration du ministre des Travaux publics, à l'exception de ce qui suit, savoir: * * * (les exceptions n'offrent aucun intérêt dans le cas qui nous occupe).

Comme le mentionne le juge Burbidge, l'"Acte concernant les travaux publics du Canada" (31 Vict., chap. 12) a été amendé par 35 Vict., chap. 24; cette loi, qui a pour titre "Acte pour faire disparaître les doutes surgissant de l'Acte concernant les travaux publics du Canada", contient, entre autres, les dispositions suivantes:

1. Les canaux, écluses, barrages, pouvoirs d'eau, havres, jetées, édifices publics ou autres travaux ou propriétés de la nature de ceux énumérés dans la dixième section de l'Acte cité au préambule du présent (1), acquis ou devant être acquis, construits ou devant être construits, agrandis, élargis, réparés ou améliorés, au frais de la Puissance du Canada,—ou pour l'acquisition, la construction, la réparation, l'agrandissement, l'élargissement ou l'amélioration desquels des deniers publics ont été ou seront à l'avenir votés et affectés par le Parlement, et tous les travaux nécessaires à cet objet seront et sont des travaux publics sous le contrôle et l'administration du ministre des Travaux publics; * * *

Cette loi étendait de façon appréciable le champ des travaux placés sous le contrôle du ministre des Travaux publics et, par ricochet, la juridiction des arbitres officiels et la responsabilité de la Couronne pour dommages résultant des délits ou quasi-délits commis par ses employés ou serviteurs dans l'exercice de leurs fonctions ou de leur emploi sur un ouvrage public.

Depuis l'entrée en vigueur de la loi 35 Victoria, chapitre 24, jusqu'à la révision des statuts en 1886, la loi concernant la juridiction des arbitres officiels et la responsabilité de la Couronne pour dommages résultant de la négligence de ses employés ou serviteurs est restée la même. Quelques amendements ont été faits à l'"Acte concernant les travaux

(1) 31 Vict., chap. 12.

publics du Canada" (31 Vict., chap. 12), voir 37 Vict., chap. 13, 41 Vict., chap. 8 et 42 Vict., chap. 8: aucun ne modifie en quoi que ce soit l'aspect de la question. Peut-être n'est-il pas sans intérêt de noter que le statut 42 Vict., chap. 8, crée un appel à la Cour de l'Echiquier dans tous les cas d'arbitrage s'élevant sous l'empire de la loi 31 Vict., chap. 12 et ses amendements, lorsque les réclamations ont une valeur de plus de \$500, "suivant l'opinion *bona fide* de la partie ou des parties se plaignant de l'arbitrage, tel que démontré par affidavit." A cette époque la Cour de l'Echiquier n'avait point juridiction en première instance en pareilles matières; celles-ci ressortissaient aux arbitres officiels. La juridiction de la Cour de l'Echiquier était alors déterminée par la loi intitulée "Acte pour établir une Cour Suprême et une Cour d'Echiquier pour le Canada" (38 Vict., chap. 11), sanctionnée le 8 avril 1875, et ses amendements.

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Le chapitre 40 des Statuts Révisés du Canada, 1886, intitulé "Acte concernant les arbitres officiels", est une refonte des dispositions de l'"Acte concernant les travaux publics du Canada" (31 Vict., chap. 12) ayant trait aux arbitres officiels et des amendements y apportés.

L'article 6 du chapitre 40, qui remplace, entre autres, l'article 1 de 33 Vict., chap. 23, est ainsi conçu :

6. Si quelque personne a une réclamation à faire valoir pour des propriétés expropriées, ou pour de prétendus dommages, directs ou indirects, provenant de la construction, de la réparation, de l'entretien ou de l'exploitation de quelque ouvrage public, ou s'y rattachant,—ou provenant de quelque chose faite par le gouvernement du Canada,—ou provenant de quelque décès, ou de quelque blessure faite à la personne, ou de dommages causés à la propriété sur quelque ouvrage public,—ou a une réclamation résultant de l'exécution ou accomplissement de quelque contrat conclu au nom de Sa Majesté, ou s'y rattachant, ou motivée par des déductions faites à raison de la non-exécution ou du non-accomplissement d'un tel contrat,—cette personne pourra donner au Secrétaire d'Etat avis par écrit de sa réclamation, mentionnant les détails qui s'y rapportent et ce qui y a donné lieu,—et le Secrétaire d'Etat renverra cet avis au chef du département contre lequel la réclamation aura été faite; et sur ce, le ministre pourra, en tout temps dans les trente jours qui suivront l'avis, faire offre de ce qu'il considérera être une indemnité équitable, avec avis que la réclamation sera soumise à la décision des arbitres, à moins que la somme ainsi offerte ne soit acceptée dans les dix jours qui suivront cette offre. 31 V., c. 12, art. 34, partie;—33 V., c. 23, art. 1;—44 V., c. 25, art. 27, partie.

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Le paragraphe (c) de l'article 1 du chapitre 40 définit les mots "ouvrage public" ou "travaux publics":

(c) Les expressions "ouvrage public" ou "travaux publics" signifient et comprennent les barrages, travaux hydrauliques, privilèges hydrauliques, ports, quais, jetées et ouvrages ayant pour but d'améliorer la navigation de toutes eaux, les phares et balises, les glissoires, digues, piles, estacades flottantes et autres ouvrages ayant pour but de faciliter le flottage du bois, les ponts et chaussées, les édifices publics, les lignes de télégraphe, les chemins de fer de l'Etat, les canaux et écluses, les fortifications et autres travaux de défense, et toutes autres propriétés appartenant actuellement au Canada, et aussi les ouvrages et propriétés acquis, construits, prolongés, agrandis, réparés ou améliorés aux frais du Canada, ou pour l'acquisition, la construction, la réparation, le prolongement, l'agrandissement ou l'amélioration desquels des deniers publics sont votés et affectés par le parlement, ainsi que tout ouvrage nécessaire à aucune de ces fins,— mais non les travaux pour lesquels des crédits sont votés à titre de subvention seulement.

Moins d'un an plus tard, savoir le 23 juin 1887, était sanctionnée une loi, qui avait pour titre "Acte à l'effet de modifier l'Acte des Cours Suprême et de l'Echiquier, et d'établir de meilleures dispositions pour l'instruction des réclamations contre la Couronne"; c'est le chapitre 16 du Statut 50-51 Victoria. Cette loi, qui abrogeait le chapitre 40 des Statuts Révisés du Canada, 1886, savoir l'"Acte concernant les arbitres officiels", avait, entre autre, pour effet, de séparer la Cour de l'Echiquier de la Cour Suprême et d'en faire une cour distincte. Jusqu'à l'entrée en vigueur de cette loi la Cour de l'Echiquier avait été présidée par l'un des juges de la Cour Suprême. Par cette loi la Cour de l'Echiquier était substituée aux arbitres officiels et à l'avenir avait seule juridiction pour prendre connaissance des réclamations qui avaient été jusque-là de la compétence de ces derniers, en vertu d'abord du Statut 31 Victoria, chapitre 12, et ses amendements et ensuite du chapitre 40 des Statuts Révisés du Canada, 1886.

L'article 16 de cette nouvelle loi (50-51 Vict., chap. 16) contient, entre autres dispositions, les suivantes:

16. La Cour de l'Echiquier aura 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, sur un ouvrage public, résultant de la négligence de quelque employé ou serviteur de la Couronne, pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi;...

Comme nous l'avons vu, c'est cette rédaction qui a prévalu jusqu'au 29 août 1917, date de l'entrée en vigueur du

statut 7-8 Geo. V, chap. 23, lequel a renvoyé à la fin du paragraphe (c) les mots "sur tout ouvrage public", remplacés dans les Statuts Révisés du Canada, 1927 par "dans un chantier public".

Il est à noter que la nouvelle loi n'a pas reproduit la définition des expressions "ouvrage public" et "travaux publics" qui se trouvait dans le paragraphe (c) de l'article 1 du chapitre 40 des Statuts Refondus, 1886, et qui avait été incluse, avec quelques variantes et moins complète au début, dans les statuts antérieurs; de fait la nouvelle loi ne contient aucune définition quelconque de ces deux expressions. Lors des deux révisions subséquentes des statuts, en 1906 et en 1927, le législateur a également omis d'inclure dans la Loi de la Cour de l'Échiquier une définition des mots "ouvrage public" et "travaux publics" ou, selon la nouvelle phraséologie, "chantier public". Quel sens doit-on attribuer à cette omission? Quelle en est la portée? Doit-on y voir l'intention de laisser au juge la charge de déterminer, en chaque cas particulier, s'il y a ouvrage ou chantier public? Il est peut-être difficile de trouver cette intention dans les révisions de 1906 et 1927; l'on a tout simplement, en ces deux occasions, selon toute probabilité, accepté un texte existant; mais en 1887, quand a été passé cet "Acte à l'effet de modifier l'Acte des Cours Suprême et de l'Échiquier, etc.", qui est le chapitre 16 du statut 50-51 Victoria, quelques mois seulement après l'adoption de l'"Acte concernant les arbitres officiels" (S.R.C. 1886, chap. 40), il me paraît évident que le législateur a, sciemment et de propos délibéré, omis d'inclure dans la nouvelle pièce de législation qu'était ce chapitre 16 du statut 50-51 Victoria, la définition de l'ouvrage public qui se trouvait dans les statuts précédents ou toute autre définition quelconque. Il eût été facile et simple de reproduire dans la nouvelle loi la définition comprise dans le paragraphe (c) de l'article 1 du chapitre 40 des Statuts Révisés, 1886, ou encore celle contenue dans l'"Acte concernant les travaux publics du Canada", ou plus simplement même de dire que l'expression "ouvrage public" dans le paragraphe (c) de l'article 16 du chapitre 16 du statut 50-51 Victoria devait être interprétée selon la définition comprise dans telle ou telle loi. Encore une fois le législateur, en omettant du chapitre 16 du statut 50-51 Victoria la définition

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des expressions "ouvrage public" ou "travaux publics" qui se trouvait dans l'"Acte concernant les arbitres officiels" (S.R.C., 1886, chap. 40), a-t-il voulu laisser à la charge des juges de déterminer, dans chaque cas particulier, indépendamment de toute définition, ce qui constitue un "ouvrage public" ou des "travaux publics"? Cela me paraît plausible, voire même vraisemblable; je suis porté à croire que telle a été l'intention du législateur.

Comme nous l'avons vu, dans la cause de *Wolfe v. The King (ubi supra)*, le juge Mignault, s'est prononcé de façon catégorique et déclaré que la définition des mots "public work" dans l'article 2 de la Loi des expropriations peut servir à interpréter les mêmes mots tant dans le paragraphe (c) que dans le paragraphe (b) de l'article 20 (maintenant 19) de la Loi de la Cour de l'Échiquier.

Dans la même cause, l'honorable juge Duff, dissident, a, comme nous l'avons constaté, exprimé une opinion à peu près identique et déclaré qu'il y avait lieu de recourir aux définitions des mots "public work" contenus dans la Loi des expropriations et dans la Loi des travaux publics aux fins de jeter de la lumière sur le sens des mêmes mots dans un autre statut où il ne se trouve point de définition, même si ces mots, selon sa propre expression, "have immediate statutory effect only in the interpretation of the enactments in which they are found".

Tel que précédemment noté le juge Burbidge, *in re Leprohon v. The King (ubi supra)*, avait déjà opiné dans le même sens et jugé que les mots "public work" dans l'article 16 de la Loi de la Cour de l'Échiquier doivent être interprétés comme embrassant non seulement les chemins de fer et canaux et les autres entreprises généralement laissées à l'initiative privé, mais aussi tous les "travaux publics" énumérés dans l'"Acte concernant les travaux publics" ou toute autre loi dans laquelle cette expression est définie.

Revenant à la cause de *Wolfe v. The King (ubi supra)*, nous trouvons, en sens contraire, les opinions des juges Davies et Anglin: le premier, adoptant l'opinion du juge Audette, déclarait qu'il y avait lieu d'assumer que les mots "public work" dans l'article 20 de la Loi de la Cour de l'Échiquier étaient employés "as verily contemplating a public work in truth and reality", et non pas ce qui est énuméré dans la Loi des expropriations ou la Loi des tra-

vaux publics pour les fins de chacune de ces lois—“for the purposes of each act”; le second affirmait qu’il n’était pas disposé, pour le moment du moins, à appliquer aux paragraphes (b) et (c) de l’article 20 de la Loi de la Cour de l’Echiquier la définition des mots “public work” contenue dans le paragraphe (d) de l’article 2 de la Loi des expropriations.

Le juge Idington, qui siégeait aussi dans la cause de *Wolfe v. The King*, n’a pas exprimé d’opinion sur ce point.

La question de savoir si les définitions des mots “public work” dans la loi des expropriations ou celle des travaux publics ne me paraissant pas avoir été, dans la cause *Wolfe v. The King*, la *ratio decidendi*, je suis porté à croire que les opinions, d’ailleurs divergentes, sur le sujet ne constituent que des “obiter dicta”. Avec tout le respect dû à l’opinion contraire qui se peut soutenir et de fait a été soutenue avec d’excellentes raisons à l’appui, je ne peux me convaincre que, pour interpréter l’expression “public work” contenue dans la Loi de la Cour de l’Echiquier, l’on doive recourir aux définitions que l’on en trouve dans la Loi des expropriations ou dans la Loi des travaux publics. D’abord ces définitions sont expressément faites pour l’interprétation des expressions qu’elles définissent dans la loi où elles se rencontrent: en effet dans l’une et l’autre loi, l’article contenant les définitions (l’article 3 dans la Loi des travaux publics et l’article 2 dans la Loi des Expropriations) commence par ces mots: “En la présente loi, à moins que le contexte ne s’y oppose, l’expression... ‘ouvrage public’ ou ‘travaux publics’ signifie et comprend...” Il y a peut-être lieu d’y recourir à titre de guide, il peut même y avoir avantage à le faire, à la condition cependant que ce soit avec circonspection, parce qu’il se trouve dans ces définitions, étrangères à la juridiction de cette cour et à l’étendue du recours contre la Couronne pour dommages délictuels, des objets ou des biens qui manifestement ne peuvent être considérés comme “ouvrage public” ou “chantier public”, lorsqu’il s’agit de réclamation pour “blessures à la personne” ou “dommages à la propriété” résultant de la négligence d’un employé ou serviteur de la Couronne agissant dans l’exercice de ses fonctions ou de son emploi sur un “ouvrage public” ou “chantier public”, et parce que ces définitions, par contre, ne prévoient pas tous les cas où il peut y avoir

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responsabilité de la Couronne pour “blessures à la personne” ou “dommages à la propriété” dans les circonstances susrelatées. Ces définitions, à mon humble avis, peuvent guider le juge; je ne crois pas qu’elles le lient.

Nous avons déjà la version anglaise de la définition des mots “public work” et “public works”, telle qu’elle se trouvait dans le paragraphe (d) de l’article 2 de la Loi des Expropriations (S.R.C., 1906, chap. 143) et telle qu’elle se trouve encore aujourd’hui dans le paragraphe (f) de l’article 2 de la Loi des Expropriations (S.R.C., 1927, chap. 64), dans les notes de l’honorable juge Mignault dans la cause de *Wolfe v. The King* (*supra*); la version française se lit comme suit:

(f) “ouvrage public” ou “travaux publics” signifie et comprend les barrages, travaux hydrauliques, privilèges hydrauliques, ports, quais, jetées, docks ou bassins et ouvrages qui ont pour but d’améliorer la navigation de toutes eaux, les phares et les balises, les glissoires, digues, caissons, barrages flottants et autres ouvrages qui ont pour but de faciliter le flottage du bois, les ponts et chaussées, les édifices publics, les lignes de télégraphe, les chemins de fer de l’Etat, les canaux, les écluses, les cales sèches, les fortifications et autres travaux de défense, et tous les autres immeubles appartenant actuellement au Canada, et aussi les ouvrages et immeubles acquis, construits, prolongés, agrandis, réparés ou améliorés aux frais du Canada ou pour l’acquisition, la construction, la réparation, le prolongement, l’agrandissement ou l’amélioration desquels des deniers publics sont votés et affectés par le Parlement, et tout ouvrage nécessaire à quelqu’une de ces fins—mais non les travaux pour lesquels des deniers sont votés à titre de subvention seulement.

Voyons maintenant la définition des mots “public work” et “public works” contenue dans la Loi des Travaux publics.

Le paragraphe (c) de l’article 3 dit que l’expression “ouvrage public” (public work) ou “travaux publics” (public works) “signifie et comprend tout ouvrage ou propriété qui relève du ministre”; la version anglaise dit: “any work or property under the control of the Minister”.

Cette définition nous renvoie à l’article 9, qui se lit comme suit:

Le ministre a l’administration, la charge et la gestion des biens suivants appartenant à l’Etat et des services énumérés au présent article, savoir:

(a) Les barrages, les usines hydrauliques, la construction et la réparation des havres, jetées et ouvrages ayant pour objet d’améliorer la navigation sur certaines eaux, et les vaisseaux, dragues, chalands, outils, instruments et machines employés à l’amélioration de la navigation;

(b) Les glissoires, barrages, jetées, barrages flottants et autres ouvrages destinés à faciliter le flottage du bois; et la perception des droits de glissement, de séjour dans les barrages, et les affaires qui en dépendent, ainsi que les fonctionnaires et personnes employés à ce service;

(c) Les chemins et les ponts;

(d) Les édifices publics;

(e) Les lignes de télégraphe;

(f) Le chauffage, l'entretien et la réparation des édifices de l'Etat au siège du gouvernement, et tous les changements qui y sont parfois requis, et la fourniture du mobilier et des accessoires ou leur réparation;

(g) Toutes les parties des immeubles connus sous le nom de "terrains de l'Artillerie", transférées au gouvernement de la ci-devant province du Canada ou au gouvernement du Canada par le gouvernement du Royaume-Uni, et subséquemment placées sous le contrôle du ministère; et

(h) Tous les autres biens qui appartiennent actuellement au Canada, et les ouvrages et immeubles acquis, construits, prolongés, agrandis, réparés ou améliorés aux frais du Canada, ou pour l'acquisition, la construction, la réparation, le prolongement, l'agrandissement ou l'amélioration desquels le Parlement vote et affecte des deniers publics, sauf les ouvrages pour lesquels des deniers sont affectés à titre de subvention seulement, et tout ouvrage requis pour quelque-une de ces fins.

A l'exception de ce qui concerne la perception des droits de glissement et de séjour dans les barrages et les affaires en dépendant, les fonctionnaires et personnes employés à ce service, le chauffage, l'entretien et la réparation des édifices de l'Etat au siège du gouvernement, et les changements qui y sont requis et la fourniture du mobilier et des accessoires et leurs réparation ainsi que les parties des immeubles connus sous le nom de "terrains de l'Artillerie", la définition de l'article 9 de la Loi des Travaux publics est en substance la même que celle du paragraphe (f) dans l'article 2 de la Loi des Expropriations. Une autre différence est que la Loi des travaux publics ne fait pas mention des chemins de fer de l'Etat ni des canaux, qui sont du ressort du ministère des Chemins de fer et Canaux, non plus que des fortifications et autres travaux de défense, qui ressortissent au ministère de la Défense nationale.

A la lecture de ces définitions l'on se rend compte qu'il s'y trouve des objets qui ne peuvent entrer dans le cadre du paragraphe (c) de l'article 19 de la Loi de la Cour de l'Echiquier et que, par ailleurs, elles sont incomplètes. C'est souvent le cas des définitions que l'on veut trop détaillées.

Je crois que la définition qu'a donnée le juge Anglin des mots "public work" dans la cause de *La Compagnie Générale d'Entreprises Publiques v. The King (ubi supra)* et qu'il a répétée dans la cause de *Wolfe v. The King (ubi supra)*, laquelle est reproduite ci-dessus, est peut-être ce qu'il y a de plus complet en même temps que de plus concis sur le sujet.

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Que l'on adopte les définitions de l'article 2 de la Loi des expropriations ou des articles 3 et 9 de la Loi des travaux publics ou celle énoncée par le juge Anglin dans la cause *La Compagnie Générale d'Entreprises Publiques v. The King*, il me paraît impossible d'en arriver à la conclusion qu'il y avait, dans le cas qui nous occupe, un "chantier public", ou selon l'expression anglaise, plus large et plus compréhensive, un "public work". J'ai examiné avec soin la Loi de la Royale Gendarmerie à Cheval du Canada pour voir si je n'y trouverais pas quelque disposition qui pourrait m'induire à modifier mon opinion, mais je dois avouer que je n'ai rien trouvé.

Je puis aisément concevoir qu'une automobile fasse partie d'un "public work"—c'est le cas du camion dans la cause de *Schrobounst v. The King (ubi supra)*—, voire même en certains cas, plus rares, en constitue un en soi, à la condition qu'il s'y ajoute une machine, un appareil ou une invention quelconque susceptible d'exécuter un ouvrage pouvant être considéré comme "ouvrage public" ou "public work"; mais je ne crois pas que la voiture, qui a causé l'accident, était utilisée sur un "public work" ni, encore moins, qu'elle en était un par elle-même, indépendamment de toute autre circonstance.

Si j'avais pu conclure qu'il y avait, en l'espèce, un "public work", je dois dire que j'aurais hésité sérieusement à déclarer que le constable, qui était en charge de l'automobile, agissait, au moment de l'accident, dans l'exercice de ses fonctions ou de son emploi.

A ma connaissance, il ne se trouve pas, dans la jurisprudence, de définition à proprement parler de l'expression "public work", autre que celles ci-dessus mentionnées; il y a bien quantité d'arrêts à l'effet que tel ou tel ouvrage, tel ou tel chantier, telle ou telle propriété appartenant à la Couronne, constituent ou ne constituent pas, selon le cas, un "ouvrage" ou un "chantier" public; ces divers arrêts sont pour la plupart des cas d'espèce et, réunis, ils ne sauraient évidemment équivaloir, quelque nombreux qu'ils soient, à une définition complète, ou, en d'autres mots, à une proposition affirmative faisant connaître l'extension et la compréhension des termes "chantier public" ou "public work".

Je crois que le législateur devrait définir le "chantier public" ou "public work" dans la Loi de la Cour de l'Echiquier, laquelle non seulement établit la juridiction mais est aussi la seule qui détermine les recours du sujet contre la Couronne, en pareils cas.

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Je n'ai pas d'autre alternative que de déclarer que la pétitionnaire n'a pas droit au remède réclamé par sa pétition et que celle-ci doit en conséquence être rejetée. Je le regrette parce que la preuve démontre, à mon avis, que l'accident a été causé par la négligence, je dirais même la négligence grossière, du constable qui conduisait l'automobile au moment de l'accident.

La pétition est donc rejetée avec dépens. J'estime cependant que, dans les circonstances, l'intimé ne devrait pas insister pour recouvrer ses frais de la pétitionnaire.

Judgment accordingly.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT
 BETWEEN:

THE STEAMER "PHILIP T. }
 DODGE" (DEFENDANT) } APPELLANT;

AND

DOMINION BRIDGE COMPANY, }
 LIMITED, DUFRESNE CON- }
 STRUCTION COMPANY, LIM- }
 ITED, AND LA COMPAGNIE DU }
 PONT DE GASPE LIMITEE }
 (PLAINTIFFS) } RESPONDENTS.

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Shipping—Collision—Excessive speed—Improper navigation.

Action by plaintiffs (respondents) to recover damages suffered by them by reason of defendant ship (appellant) coming into collision with a bridge being erected by plaintiffs (respondents) over the York River at Gaspé, P.Q.

Held: (Affirming the judgment appealed from) that the speed of the *Dodge* in passing through the bridge opening was, in the circumstances, excessive.

2. That since the speed of the *Dodge* was excessive it cannot be maintained that the ship was navigated with reasonable care and that the accident was inevitable.

APPEAL from the decision of the Local Judge in Admiralty for the Quebec Admiralty District, allowing plaintiffs' action.

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

L. Beauregard, K.C. and *J. St. Germain* for appellant.
C. R. MacKenzie, K.C. and *L. Faribault, K.C.* for respondents.

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

THE PRESIDENT, now (June 20, 1934) delivered the following judgment:

This is an appeal from a judgment of Demers, L.J.A., for the Quebec Admiralty District, in which he held the plaintiffs severally entitled to the damages claimed. The cause was heard by the learned trial judge with an experienced assessor.

The important facts, and the chief contentions of the respective parties are to be found in the following excerpt from the reasons for judgment of the learned trial judge.

The Dominion Bridge Company Limited was erecting a bridge across the York River at Gaspé, P.Q., in virtue of a contract with the Dufresne Construction Company Limited, one of the plaintiffs.

On the 6th of July, 1932, when the said bridge was in course of construction and before delivery thereof, the defendant, steamer *Philip T. Dodge*, while proceeding for the first time through the opening or gap in the said bridge, came into collision therewith, causing the north bascule, attachments and gear of the said bridge to be wrenched from their foundations and damaged almost beyond repair.

The plaintiffs contend that these damages were caused by the fault and negligence of those on board the defendant steamer, and by their improper and negligent navigation, and they, in particular, allege:

That the defendant steamer was proceeding at an excessive rate of speed;

That no precautions were taken by those in charge of the said steamer to determine or ascertain local conditions as to proper navigation through the opening of said bridge;

That the said steamer did not take proper or effective engine or helm action to prevent the occurrence of the said collision.

The defendant pleads, in substance, that the said bridge is wrongfully constructed and designed; that it interferes with the navigation of the Harbour of Gaspé more than is necessary for the proper exercise of plaintiffs' statutory powers; that the said bridge was wrongfully and illegally erected and is a public nuisance; and by a second plea, alleges that no blame for the collision can be attributed to the defendant or to any of those on board of her.

The appellant steamship *Philip T. Dodge*, hereinafter to be referred to as the *Dodge*, is a steel ship of slightly over 5,000 gross tons, her length being 400 feet, her

breadth being 57 feet 7 inches, and her speed nine and a half knots. On the occasion in question she was bound for a wharf or pier belonging to the International Paper Company, situated at the head of Gaspé Harbour, and in order to reach this wharf she was obliged to pass through the draw of a bascule bridge being erected by the first named respondent (plaintiff). The bridge was, as I understand it, about completed, except, that the south leaf of the bascule span had not yet been put in place when the accident in question occurred; the north bascule however was then in place and in a fully elevated position. The distance between the two piers upon which the bascules rested was 90 feet, so that if the *Dodge* when passing through the draw was directly in the centre thereof, there would be a free space of 20 feet on each side of her. Directly in front of the draw or opening in the bridge, in proceeding up the Harbour of Gaspé, and at a distance of 800 feet in front of the draw, was a wharf known as Davies wharf, so that when the *Dodge* had fully passed through the draw she would be but 400 feet distant from the Davies wharf, and which of course she had to avoid; the wharf to which she was bound was on her port side after passing through the bridge. She had passed through the draw to the extent of two-thirds of her length, when the overhang of the poop on the starboard side came in contact with the north bascule, which was seven inches inside the face of the pier on which it rested, with serious damage to this leaf of the bascule.

On this aspect of the case the learned trial judge remarked:—

I come down to the second point—was there any negligence to be imputed to the defendant?

On this point, I agree entirely with the finding of the Assessor. As it was the first time that this ship had passed through this bridge, she should have taken great precaution. She had no experienced pilot. The fact is that the captain himself took care of the wheel.

The master, seeing these new works, should have stopped his ship and made himself acquainted with every condition before entering the gap. If he had ascertained these conditions beforehand, he would not have navigated with such speed.

I am of the opinion that he entered the gap in the middle, but for fear of striking Davies wharf, eight hundred feet ahead, he put his helm to starboard, and also to counteract the effect of the current to northward.

The current, striking the bow of a ship to the northward, could not push the stern to the northward, but to the southward.

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I summarize this to mean that the learned trial judge found, in which finding his assessor concurred, that the *Dodge* had not exercised sufficient caution in passing through the bridge; that the master of the *Dodge* should have stopped his ship and acquainted himself with the existing conditions before attempting to pass through the draw of the bridge; that he attempted to navigate the draw at an excessive speed and before fully passing through the draw he put his helm to starboard in order to escape contact with the Davies wharf and also to counteract a current to the northward, which would have the effect of putting his bow to port and his stern to starboard, the latter thus coming in contact with the north bascule; and that the *Dodge* had no experienced pilot. The learned trial judge seems to have been of the opinion that there was a current striking to the north and that the effect of this current on striking the port bow would be to move the stern of the *Dodge* to starboard, north, and not to the south, or port.

I do not agree to the proposition that the master of the *Dodge* should have stopped his ship and examined the situation before attempting to pass through the draw, even on his first trip through the bridge. Neither do I think any blame is to be attached to the *Dodge* for not having on board an experienced pilot. No pilot was there available to the *Dodge*, although, she did take on board an experienced local fisherman who was supposed to know these waters intimately. I am not disposed, upon the evidence, to attach importance to the question as to whether or not there was a current, or that it in any way contributed to the accident. There was a slight current passing directly through the draw, but, even if it struck somewhat to the north I do not think, upon the evidence, that it was itself of such consequence as to create any serious or added difficulty in navigating a ship through the bridge.

There is another point in the case which might conveniently be mentioned here. It was pleaded on behalf of the *Dodge*, and it was suggested on the appeal, that the bridge constituted a public nuisance. I must say it is difficult for me to comprehend why the owners of the bridge were permitted to locate the draw of the bridge precisely where it was located. It appears to be somewhat

out of the course or track theretofore followed by ships in reaching the upper waters of Gaspé Harbour, and to where the *Dodge* was on this occasion bound. In approaching the draw it was more or less necessary, except perhaps to those well acquainted with the locus, to make the approach on a somewhat curved course, and not on a straight course, and then, as I have already pointed out, the draw was located but 800 feet in front of a wharf which was in line with the course through the centre of the draw. The plan of the bridge was approved by the Department of Public Works, and the Department of Marine, at Ottawa, but the plans and drawings do not show the Davies wharf on the upper side of the bridge, or the existence of a shoal on the lower side of the bridge. In any event, the issue as to whether the bridge constitutes a public nuisance was not, I think, tried out, and, in my opinion, no ground work was laid for the determination of so important and serious an issue, and I therefore express no opinion upon it. I understood Mr. Beau regard so to agree, but he did contend, that the location of the draw was such as to render it difficult and sometimes impossible for shipping to avoid contact with the bridge in passing through the draw, and that on the occasion in question the master of the *Dodge* did everything reasonably to be expected of him, that he was not negligent, and that the accident was unavoidable; and all this constitutes, I think, the real substance of the appellant's case.

It is conceded by the appellant that in passing through the draw the *Dodge* was proceeding at the rate of four miles per hour. Witnesses called by the respondent (plaintiff), at the trial, placed this speed at as much as six miles per hour. I prefer to accept the evidence adduced by the appellant upon this point, although it is possible the speed of the *Dodge* did exceed four miles. The first question for determination therefore is whether a speed of four miles, in passing through the draw, was excessive. The learned trial judge seems to have thought the speed was excessive, without any specific finding as to what the speed was, and it is to be assumed that in this his assessor concurred. In view of the fact that the Davies wharf was directly in front of the *Dodge* when she passed through the

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draw, only 400 feet distant, the ship's length, it does seem to me that a speed of 4 miles per hour was excessive, because, once passing through the draw the *Dodge* was obliged to go to port not only in avoiding the Davies wharf, but also in reaching the wharf to which she was bound. In the same season, the *Dodge* made fifteen additional trips through the bridge without any mishap, and her master stated that in such trips he exercised greater caution, particularly with his "engines," and in this I think he must have had in mind the speed of his ship. I think the speed of the *Dodge* in passing through the bridge opening was, in the circumstances, excessive.

When the *Dodge* was two-thirds through the bridge opening, the master put his helm to starboard, which had the effect of putting the ship's stern to starboard, thus causing, I think, the collision and the damage complained of. This movement, I agree with the learned trial judge, was executed because of fear of coming into collision with the Davies wharf. One can quite understand such a movement, but it was an error, and was, I think, thought to be necessary because of fear, or the imminence, of colliding with the Davies wharf, but that fear or imminence arose, I think, because of the excessive speed of the ship in passing through the bridge draw. Had the speed been reasonably reduced I do not think the liability of contact with the Davies wharf would have been so apparent, and would not have occasioned the fatal order of "helm to starboard," and without this I think the *Dodge* would have passed through the draw without any mishap. And that conclusion as to the speed of the *Dodge* in passing through the bridge contains the answer to the contentions that the master of the *Dodge* navigated his ship with reasonable care, and that the accident was inevitable.

I am of the opinion therefore that the judgment appealed from must stand, and that the appeal should be dismissed with costs.

Judgment accordingly.

Reasons for judgment of Demers, J.:

The Dominion Bridge Company Limited was erecting a bridge across the York River at Gaspé, P.Q., in virtue of a contract with the Dufresne Construction Company Limited, one of the plaintiffs.

On the 6th of July, 1932, when the said bridge was in course of construction and before delivery thereof, the defendant, steamer *Philip T. Dodge*, while proceeding for the first time through the opening or gap in the said bridge, came into collision therewith, causing the north bascule, attachments and gear of the said bridge to be wrenched from their foundations and damaged almost beyond repair.

The plaintiffs contend that these damages were caused by the fault and negligence of those on board the defendant steamer, and by their improper and negligent navigation, and they, in particular, allege:

That the defendant steamer was proceeding at an excessive rate of speed;

That no precautions were taken by those in charge of said steamer to determine or ascertain local conditions as to proper navigation through the opening of said bridge;

That the said steamer did not take proper or effective engine or helm action to prevent the occurrence of the said collision.

The defendant pleads, in substance, that the said bridge is wrongfully constructed and designed; that it interferes with the navigation of the Harbour of Gaspé more than is necessary for the proper exercise of plaintiffs' statutory powers; that the said bridge was wrongfully and illegally erected and is a public nuisance; and by a second plea, alleges that no blame for the collision can be attributed to the defendant or to any of those on board of her.

On the first point, it appears that this bridge was erected by a company incorporated by the Provincial Statute of Quebec, 20 George V, Ch. 4, navigation being in the province of the Federal Government, it was properly stated in the Statute that the "construction

plans" of the said bridge and of its approaches, after their approval by the Federal Government, "shall be submitted to the Minister of Public Works and Labour and approved by him."

This construction could not be made without the approval of the Governor-in-Council of Canada.

The Federal Government having the control of navigation, I consider that its approbation of the plan of a bridge settles the point as to the proper construction of this bridge.

The defendant, in her contention to the contrary, relies on the case of the *SS. Urania* and on the decision of the Privy Council, reported in 1931, A.C., pages 300 and 308; but in that case, the charter authorizing the building of those works granted by the Federal Government, stated that the permission to build was granted, provided it would not obstruct navigation. The question decided by the Privy Council was that statute was governing the case, and the Privy Council, page 309 of the Reports, insisted that it was interference with navigation amounting to a public nuisance for which the defendant had no authority.

I am, therefore, of opinion that this case does not apply and that in the present case, the Federal authority was the proper authority to decide as to the form of construction of those works.

I come down to the second point—was there any negligence to be imputed to the defendant?

On this point, I agree entirely with the finding of the Assessor. As it was the first time that this ship had passed through this bridge, she should have taken great precaution. She had no experienced pilot. The fact is that the captain himself took care of the wheel.

The master, seeing these new works, should have stopped his ship and made himself acquainted with every condition before entering the gap. If he had ascertained these conditions beforehand, he would not have navigated with such speed.

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I am of the opinion that he entered the gap in the middle, but for fear of striking Davies wharf, eight hundred feet ahead, he put his helm to starboard, and also to counteract the effect of the current to northward.

The current, striking the bow of a ship to the northward, could not push the stern to the northward, but to the southward.

For these reasons, I arrive at the conclusion that plaintiffs are severally entitled to the damages prayed for; that the defendant steamer *Phalop T. Dodge* and her bail should be condemned to the damages claimed, with interest and costs, which damages should be assessed by the Deputy Registrar of this Court, with the assistance of merchants.

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BETWEEN:

ROSE MOSCOVITZ AND ANNA }
 MOSCOVITZ } SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Responsibility—Petition of Right—Public Work—Jurisdiction—Damages.

One K, an enlisted soldier in the Canadian Army Service Corps, engaged as a transport driver, stationed at Kingston, drove a motor truck, loaded with supplies, from Kingston and delivered the same to the Royal Air Force at Trenton. Whilst returning to Kingston, the motor truck driven by K., negligently collided with a motor truck in which M. was a passenger, causing his death. Suppliants are the widow and step-mother of M.

Held: That K. was engaged in a public work and was acting within the scope of his duties as a servant of the Crown, at the time of the accident. *Schrobounst v. The King* (1925) Ex. C.R. 167 and *Dubois v. The King* (1934) Ex. C.R. followed.

PETITION OF RIGHT by the suppliants claiming damages against the Crown for the death of Himan Moscovitz, caused through the negligent operation of a motor truck driven by a servant of the Crown while engaged on a public work.

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

B. C. Donnan, K.C., and *N. Borins* for the suppliants.

C. A. Payne, K.C., for the respondent.

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

THE PRESIDENT, now (June 8, 1934) delivered the following judgment:

This is a petition of right wherein damages are sought to be recovered against the Crown on account of the death of one Himan Moscovitz, whose death ensued from a collision between a motor truck in which he was a passenger, and a motor truck being driven by one Kelly, an enlisted soldier—a private in rank—in a detachment of the Canadian Army Service Corps, stationed just outside the City of Kingston, Ont.; it will be convenient to refer to this Military Station as of Kingston. The suppliant, Rose Moscovitz, of the age of forty-one years, is the widow of the deceased and executrix of his will, while the other suppliant, Anna Moscovitz, is the step-mother of the deceased, with whom she lived until his death. The deceased left no children.

Kelly's duties were described by one witness as that of a driver of a mechanical transport vehicle. On the occasion in question here Kelly was driving a motor truck, the property of the Crown, by which certain military stores were being forwarded from the Canadian Army Service at Kingston to a detachment of the Royal Air Force Airport at Trenton, Ont., some distance west; this motor truck was kept in a garage in Kingston, which, I assume, was either owned or rented by the Crown. After having delivered the truck load of stores at the Trenton Airport, and while returning to Kingston, the motor truck driven by Kelly collided with the other motor truck in question, which was proceeding in the opposite direction, resulting in the fatality mentioned. It is not necessary to say much regarding the issue of negligence, on the part of Kelly. The accident, I find, did occur owing to the negligence of Kelly, and nothing to the contrary was seriously put forward; in fact no evidence at all was produced by the Crown. I accept fully the evidence of Nathan Greenberg and Samuel Greenberg in describing the causes immediately leading to the collision of the two motor trucks, and which caused the fatal injury to the deceased. That the accident occurred owing to the negligent driving of Kelly, is not, I think, subject to serious doubt.

The chief defences raised are (1) That Private Kelly was not a servant of the Crown; (2) that he was not en-

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gaged on a public work; and (3) that the Trenton Airport, and the Barracks at Kingston occupied by the Canadian Army Service Corps, were not public works. Other defences raised were that the Fatal Accidents Act of Ontario did not here apply, and that the suppliant, Anna Moscovitz, the step-mother of the deceased, was not entitled to recover damages. I might at once state that the liability of the Crown in this case, if any, can only arise under the Exchequer Court Act, and not under any provincial statute. The question as to whom may properly bring a petition here, is, I think, to be determined by the relevant statutes of the Province of Ontario. It appears to me that both suppliants are properly before the court.

As to the contention that Kelly was not engaged upon a public work I propose to say but a few words. Just recently I rendered judgment in a somewhat similar case, *Dubois v. The King*, not yet reported, but to which I would refer, and there I discussed, at some length, what in my opinion constitutes a "public work" within the meaning of the Exchequer Court Act, and I cannot usefully add anything to what I there said. I am of the opinion that on the occasion in question Kelly was engaged upon a public work, the transporting of military stores belonging to the Crown, from one point to another, from one public service to another, by a motor truck belonging to the Crown. I am of the opinion also that Kelly was acting within the scope of his duties as a servant of the Crown at the time of the accident. This case, in my opinion, falls within the principle of the *Schrobounst* case (1).

It was argued on behalf of the Crown, that an enlisted soldier in the permanent military forces of Canada, regardless of his duties, was not a servant of the Crown. I was referred to the case of *Larose v. The King* (2). In that case the suppliant, working in a nearby field, was wounded by a stray bullet from a rifle range where members of the militia, or members of a rifle association, were engaged in target practice. It was there held that a rifle range was not a public work, and that the injury to the suppliant was not the result of the negligence of any

(1) (1925) Ex. C.R. p. 167.
 (1925) S.C.R. p. 58.

(2) (1900) 6 Ex. C.R. 425 and
 (1901) 31 S.C.R. 206.

officer or servant of the Crown, while acting within the scope of his employment. The facts of that case would seem to me to be inapplicable here. On appeal to the Supreme Court of Canada, Taschereau, J., who delivered the judgment of the court, said: "Then I do not see that the words that 'any officer or servant of the Crown' can be held to include the officers or men of the militia." I cannot feel confident just what was meant by this observation. By sec. 76 of the Militia Act, Chap. 41 R.S.C., 1886, Her Majesty was empowered to sanction the organization of rifle associations, and of associations for purposes of drill, to be composed of Militia officers, or men on the Militia Rolls, and of independent companies of infantry composed of professors, masters or pupils of universities, schools or other public institutions, or of persons engaged in or about the same, under such regulations as were from time to time approved by Her Majesty; but such associations or companies, it was provided, should not be provided with any clothing or allowance therefor. I think that Taschereau J. was of the opinion in that case, that the "officers or men of the militia" were not "officers or servants of the Crown," upon the ground that at the time material there, the "officers or men of the militia" were acting as members of a voluntary rifle association, and were not under any obligation as to service in such rifle associations, and were not under the pay of the Crown as such. Burbidge J., the trial Judge, was of the opinion that the rifle range was not a public work within the meaning of the term as used in the Exchequer Court Act, particularly when one had to consider a rifle range with reference to the special provisions of the Militia Act relating thereto. I do not therefore think that Taschereau, J. intended to say that "any officer or servant of the Crown," did not include one enlisted in one of the permanent military services of Canada maintained by the Crown, and whose assigned duties were comparable to those of Kelly in this case. Furthermore, the Militia Act provided that the owners of private property should be compensated for any damage that accrued to their respective properties from the use of any such rifle range and Burbidge J. held, by implication I assume, that this did not extend to personal injuries.

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Private Kelly was engaged in the Canadian Army Service Corps, as a transport driver, and such were his duties, and it was while acting within the scope of such duties the accident here occurred. On the occasion in question Kelly was, I think, a servant of the Crown, performing a public work. The fact that Kelly was an enlisted soldier, or in a soldier's uniform, would not seem to me to affect the question as to whether or not he was a servant of the Crown, on a public work, on the occasion in question. If Kelly were the driver, in uniform, of a locomotive hauling a car load of military stores, from Kingston to Trenton, on a Government owned line of railway devoted to military purposes entirely, it is improbable that if any person were negligently killed while Kelly was proceeding with his train along the rails, that a claim for damages could successfully be resisted. In point of fact there is no distinction between a locomotive and a freight car, and a motor truck, except that the former is propelled along a bed of steel, the other upon an ordinary highway, which after all is the same thing. I know of no principle or authority for the proposition that an enlisted member of the Permanent Military Forces of Canada is not a servant of the Crown, for some purposes at least. I think Kelly was a servant of the Crown in the sense intended by the Exchequer Court Act. I therefore think that the Crown is liable in damages to the suppliant.

As a result of the accident in question the deceased, Himan Moscovitz, suffered serious personal injuries, by reason whereof he was on the date of the accident, November 8, 1932, admitted as a patient in the Belleville General Hospital, at the City of Belleville, Ont., and was there confined as a patient until December 14, 1932, when he died as a result of such injuries. The suppliants claim damages on account of the death of Himan Moscovitz who was their sole means of support and maintenance, and in her capacity as executrix of the will of her deceased husband, the first named suppliant claims further damages. The particulars of the damages claimed by the first named suppliant in her capacity as executrix, relate to medical, hospital and nursing services, funeral expenses, and pecuniary loss incurred in connection with certain material on hand in the business of her deceased husband at the time

of his death, as will more clearly appear hereafter. The suppliants also claim certain damages on account of expenses incurred by them for transportation and maintenance in connection with their attendance upon the deceased while in the hospital at Belleville.

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The business of the deceased at the time of his death is described in the petition as that of a leather goods manufacturer. He purchased and tanned hides which he converted into laces, whips, belting laces, and things of that sort, which he marketed himself, as I understand it. At the time of his death there was on hand a certain quantity of hides, one-half of which had been tanned and finished, and the balance was in a raw state, and it was alleged that had these been finished and converted into manufactured articles, their value would have been in excess of \$6,000, but this was not clearly established. The cost of these hides in the raw state was said to be in excess of \$1,500. In consequence of the death of Moscovitz, it is claimed this stock of raw and finished hides had comparatively little value, and had to be sacrificed. A claim is made by the executrix for \$1,500, on account of pecuniary loss, in this connection. The deceased left also an unencumbered dwelling house worth \$1,500.

It appears from the evidence that the deceased paid weekly to his widow the sum of \$15, but according to her testimony this appears to have been largely on account of housekeeping expenses. I rather apprehend that the whole of what she thus received from her deceased husband was intended to be expended on this account, but probably that is not of importance. The other suppliant, Anna Moscovitz, the step-mother—whose age is sixty years—received from the deceased the sum of \$5 weekly, on account of her maintenance it was stated. The step-mother lived with the deceased ever since the death of her husband, and so far as I know he maintained her. I perhaps should state that the deceased Himan Moscovitz inherited from his father the business which he was carrying on prior to his death. The widow testified that her husband earned yearly from his business the net sum of about \$1,500 but there is no evidence from books of account, or bank accounts, in support of this; she also testified that her deceased husband confided to her in his lifetime all the

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details of his business, and I think there is no doubt but that she knew intimately the details of the business, and, in fact, in her husband's frequent absences from business, she carried on certain parts of the business, such as the buying of hides.

Now as to the quantum of damages to be allowed. Evidence was given by an actuary of a Canadian insurance company in which he stated, that according to the Canadian Actuarial Tables, the expectancy of life of the deceased,—who at the time of his death was forty-six years of age—was some twenty-five years. The deceased was in good health at the time of his injury. I do not think that up to this point evidence of this nature is objectionable. Based upon net earnings of \$1,500 per year and upon the assumption that the deceased was in good health at the time of his death, the actuary stated his earning power for the period would be roughly \$25,000. But this is not a reliable mode of ascertaining damages in actions for personal injury. See *Rowley v. London & N.W. Ry. Co.* (1) and *Jones v. Tersigni* (2). The rule seems to be that one must not attempt to give damages to the full amount of a perfect compensation for pecuniary injury, but a reasonable view of the case must be taken so that there may be given, what in all the circumstances, is a fair compensation. I have concluded to allow on account of pecuniary loss suffered by the suppliants the sum of \$6,000 to be apportioned as follows: To the first named suppliant the sum of \$4,000 and to the second named suppliant the sum of \$2,000. In respect of the suppliants' claim for expenses incurred in travelling to and from Belleville, and for their maintenance while there, I think the same must be disallowed. While it was a natural and consoling duty to perform, still no services were there rendered by them, that is to say, all the services rendered the injured man were by medical men, hospital attendants and nurses, for which a separate amount is being claimed by the executrix. I fear that claim is not well founded and must be disallowed. Then as to such expenses as were incurred in connection with medical, hospital and nursing services. This should be allowed, but not to include funeral expenses, and the amount under this head will be

(1) (1873) 8 L.R. Exch. 221.

(2) (1930) 38 O.W.N. p. 315.

fixed upon the settlement of the minutes of judgment. And lastly, as to the claim by the executrix for pecuniary loss in consequence of the inability of Himan Moscovitz to finish processing the stock of hides on hand, and to manufacture marketable goods from the same, as was his custom. I am in doubt as to the validity of such a claim, particularly for any possible claim arising after the death of Moscovitz. If any pecuniary loss could be established in the period between the occurrence of his injury and his death, that might constitute a fair claim by his estate. However, I am making no definite decision as to this particular claim for the moment, and I shall be prepared to hear any submission by counsel thereon, upon the settlement of the minutes of judgment.

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The suppliants will have their costs of the petition.

Judgment accordingly.

BETWEEN:

ALBERT DUBOIS AND ANTOINETTE DUBOIS } SUPPLIANTS;

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AND

HIS MAJESTY THE KING..... RESPONDENT.

Crown—Responsibility—Public Work—Jurisdiction—Exchequer Court Act—Petition of Right Act

Specially equipped motor cars, owned by the Government of Canada, are employed by the Radio Branch of the Department of Marine, in the detection and elimination of radio inductive interference. Two employees of the Radio Branch were returning to Ottawa in such a car, from a tour of inspection, when they stopped the car on one side of the travelled road to wipe the windshield which had become clouded due to weather conditions. An oncoming car, in which the son of the suppliants was a passenger, collided with the Government car, and he was killed.

Held: That the government owned motor car, in occupation and control of the government employees on the occasion in question, was a "public work" within the meaning of s. 19 (c) of the Exchequer Court Act, c. 34, R.S.C. 1927.

2. That the government employees in the said car were, at the time of the collision in question, officers or servants of the Crown acting within the scope of their duties or employment upon a public work, within the meaning of the said section of the Exchequer Court Act.
3. That the Court has jurisdiction to entertain the action.

The meaning of public work, within the Exchequer Court Act, and the liability of the Crown in tort, discussed.

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PETITION OF RIGHT by the suppliants claiming damages against the Crown for the death of their son caused by the alleged negligence of servants of the Crown while employed on a public work.

The case was heard on points of law only, before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

Charles Morse, K.C., and E. G. Gowling for the suppliants.

F. P. Varcoe, K.C., for the respondent.

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

THE PRESIDENT, now (June 1, 1934) delivered the following judgment:

This is in form a petition of right wherein the suppliants claim against the Crown the sum of \$5,000 on account of the death of one Albert Dubois Jr., due, it is alleged, to the negligence of certain servants of the Crown. The case is one of considerable importance.

There is in the Department of Marine at Ottawa, what is known as the Radio Branch, and one important work carried on by this Branch, from coast to coast in Canada, is the detection and elimination of radio inductive interference. The extent of this particular work may be gathered from the Introduction to a Bulletin issued by that Branch in 1932, entitled "Radio Inductive Interference," and from which it appears that over thirty thousand sources of radio interference have been investigated. The varied and important activities of the Radio Branch may be gathered from its Annual Reports, and the Radiotelegraph Act, Chap. 195 R.S.C. 1927.

In the investigation of radio inductive interference specially equipped motor cars owned by the Government of Canada are employed by the Radio Branch. In October, 1931, such a car, allocated for such work in the district surrounding Ottawa, was being used on a regular inspection tour for the detection of radio inductive interference, one Pollard being the radio electrician and investigator, and one Langlois the driver, both being regularly employed by the Radio Branch of the Department of Marine;

Pollard and Langlois were on this occasion returning to their headquarters at Ottawa, from Fitzroy Harbour, when, towards the close of the afternoon, darkness, rain and fog rendered driving conditions so bad, that they were obliged, while nearing the village of Britannia, to stop the car on one side of the travelled road in order to wipe the windshield. An oncoming car, in which Dubois the deceased was a passenger, collided with the Government car with fatal results to Dubois. The suppliants allege that the collision and fatality were due to the negligence of Pollard and Langlois.

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We are not presently concerned with the allegation of negligence against those in charge of the Government car. The immediate matters set down for decision are points of law, and they are, (1) whether the Government owned motor car in occupation and control of the persons mentioned on the occasion in question, was a "public work" within the meaning of sec. 19 (c) of the Exchequer Court Act, Chap. 34, R.S.C. 1927, and (2) whether Pollard and Langlois were, at the time of the collision in question, officers or servants of the Crown acting within the scope of their duties or employment upon a public work, within the meaning of the same section.

Prior to the year 1887, when the Act constituting the Exchequer Court as a tribunal apart from the Supreme Court of Canada was passed, there was no remedy against the Crown in tort, according to the decisions of the Supreme Court of Canada in the cases of *McFarlane v. The Queen* (1), and *McLeod v. The Queen* (2). The parentage of the present sec. 19 (c) of the Exchequer Court Act is to be found in sec. 16 (c) of the Act of 1887, and it in turn came over from the Official Arbitrators Act. In the case of the *City of Quebec v. The Queen* (3) Burbidge, J., went very fully into the origin of the jurisdiction of the Exchequer Court in respect of actions for injuries to persons or property arising from negligence of servants of the Crown, on a public work. It might be of interest to follow in brief outline the trend of decisions in cases of this kind since the establishment of the Exchequer Court. In the case just cited the City of Quebec claimed it had sustained

(1) (1882) 7 S.C.R. p. 216.

(2) (1882) 8 S.C.R. p. 1.

(3) (1891) 2 Ex. C.R. 252, p. 261.

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damages from rock falling from the Citadel on one of the streets below. While dismissing the petition Burbidge J., expressed the view that "the injury must happen on or in connection with a 'public work.'" That interpretation was regarded as too liberal by the Supreme Court of Canada. In second case launched by the City of Quebec (4) Burbidge J., though finding that the facts did not establish negligence, expressed the view that to refuse jurisdiction to entertain a claim for damages where the injury happened beyond the actual limit of the public work would be a narrow construction of the statute. But on appeal (5) the majority of the Supreme Court of Canada seem to have negatived that view. In *Letourneux v. The Queen* (6) Burbidge J., reaffirmed his view expressed in the second City of Quebec case, but he followed the ruling of the Supreme Court of Canada in that case, yet in the *Letourneux case*, the Supreme Court of Canada, on appeal, allowed damages for negligence, although the alleged injury to property did not occur on a public work; Burbidge J., I think, makes it abundantly clear in his judgment in the *Price case* (7), that the injury did not occur on a public work. Then later followed the case of *Paul v. The King* (8), in which it was held that a steam-tug owned by the Crown while engaged in towing an empty scow back from the dumping grounds, but still at a considerable distance from the place where the work of dredging was being carried on, collided with another vessel, and it was held that the collision and injury resulting had not occurred on a public work. These cases show that some judicial doubt existed as to the limits to which assertion of the prerogative might be made in a defeat of the claims of the subject.

Then, in 1917, the Canadian Parliament recognizing, I assume, that the construction placed by the courts upon sec. 16 (c) of the Exchequer Court Act would work an injustice in many cases, changed the wording of that section so as to include cases where the negligence and injury occurred off the public work, and the present sec. 19 (c)

(4) (1892) 3 Ex. 164.

(5) (1894) 24 S.C.R. 420.

(6) (1900) 7 Ex. C.R. 1, p. 7.

(7) (1906) 10 Ex. C.R. 105 at p. 137.

(8) (1904) 9 Ex. C.R. 245;

(1906) 38 S.C.R. 126.

was enacted. Then, some time subsequent to the enactment of the present ss. (c) of s. 19, there came the case of *Schrobounst v. The King* (1). In that case I held the Crown liable even though the negligence and injury complained of occurred off a public work; there the suppliants were in a vehicle standing at the curb of a public street when they were run into by a motor truck, the property of the Crown, employed in carrying workmen to a public work under construction, some distance from the scene of the injury. This judgment was affirmed on appeal, by the Supreme Court of Canada. In delivering the judgment of the court Mr. Justice Mignault interpreted the words "upon any public work" as referable to the "employment" and not the "presence" of the negligent servant of the Crown on a public work. The interpretation adopted by the courts in the *Schrobounst* case was followed in *Mason v. The King* (2), and that case practically overruled the *Paul* case. In the *Mason* case the injury was to property and was occasioned by a tug boat hired by the Crown and engaged in towing scows loaded with dredged material from the scene of the dredging operations which were being carried on by the Crown.

There is no definition of a "public work" in the Exchequer Court Act, and in interpreting that term resort is frequently had to other Acts of the Parliament of Canada in which the same expression is used. Sec. 3 (c) of the Public Works Act defines "public work" as "any work or property under the control of the Minister". Sec. 10 (c) provides for "public works" being placed under the control of some other Minister or Department. And the cases have consistently treated transferred control as not affecting the character of the "public work". Sec. 2 (d) of the Expropriation Act states that a "public work" means and includes an enumerated list of works or properties, and embraces all other property which now belongs to Canada, and also the works or properties acquired, constructed, extended, repaired or improved at the expense of Canada. In the case of *The Wolfe Company v. The King* (1), Mr. Justice Duff said in this connection

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(1) (1925) Ex. C.R. 167;
 (1925) S.C.R. 458.

(2) (1933) Ex. C.R. p. 1;
 (1933) S.C.R. 332.

(1) (1921) 63 S.C.R., 141.

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"The term 'public work' is defined in at least two statutes, the Public Works Act and the Expropriation Act. In the Public Works Act it includes the 'public buildings', 'property * * * * repaired and improved at the expense of Canada.' And by definition in the Expropriation Act it also includes in the same terms 'the public buildings' and 'property repaired or improved at the expense of Canada'. The definitions of the term 'public work' to be found in these two statutes (they are substantially, if not quite the same) have immediate statutory effect only in the interpretation of the enactments in which they are found; but they may very properly be resorted to for the purpose of throwing light upon the meaning of the same phrase found in another enactment with no legislative interpretation expressly attached to it. Prima facie it appears to me that the meaning of the phrase in the Exchequer Court Act is no less comprehensive than that to be gathered from these two definitions."

While I agree that the meaning of the term "public work" in the Exchequer Court Act should not be less comprehensive than that to be gathered from the definitions of the same term in the two Acts mentioned, yet, I am inclined to the view that the term "any public work" as used in the Exchequer Court Act was intended to be even more comprehensive than the same term as used in the Public Works Act, or in the Expropriation Act, though in the former Act the definition of "public work" is very broad indeed, because it includes not only "property" but "work". I doubt if the legislature intended that the term "any public work" in the Exchequer Court Act, no legislative interpretation being attached to it, was intended to be limited to what "public work" was intended to mean in the Public Works Act, and particularly in the Expropriation Act. I think the term "any public work" in the Exchequer Court Act, is to be interpreted in a common sense way, and, I think it means any work carried on by the Crown to serve the public with some necessity or convenience which is required by the public as such, and which requirement is made available by a parliamentary vote of public moneys. It was, I think, the deliberate intention of the legislature to create a liability against the Crown where injury or death occurred to any

person, owing to the negligence of any officer or servant of the Crown, acting within the scope of his duties upon any public work, of any kind. The mind of the legislature was, I think, primarily directed to the subject matter of the injury or death of a person, or injury to property, and not to the character of the "work," or the place where the alleged injury occurred, except that the injury must have occurred in connection with a public work. The intention was, I think, to place the Crown under the same liability as the subject in respect of claims arising from injury or death negligently caused by employees upon any public work; it is difficult to believe that the legislature intended to differentiate between an injury or death occurring in connection with one kind of public work and that on another class of public work. The legislation was in response, I assume, to a public demand to place the Crown in the same position as the subject in respect of what in the sense of the public would be regarded as a "work" carried on by the Dominion Government. I need hardly state that every employee of the Government of Canada is not engaged upon a "public work" in the sense intended by the Exchequer Court Act. The word "public" in association with the word "work" occasions no difficulty; the difficulty in cases of this kind is to determine what is a "work" and if the offending Crown servant was employed upon a "work". But I shall return to this point later.

In the *Wolfe* case, which I have already cited, it was suggested by some members of the court, that sec. 20 (c)—now sec. 19 (c)—should be interpreted in the light of the meaning to be attached to 20 (b), because of their juxtaposition. With the greatest respect I must say I am unable to appreciate the reasoning upon which that view is founded. Subsection 19 (c) refers to "any public work" while s.s. 19 (b) relates to a very limited number of "public works," namely, those which by reason of their construction or operation have injuriously affected other adjacent property. I do not think that sec. 19 (c), is to be interpreted by reference to sec. 19 (b), and I think it may be stated with confidence that such was never intended by the legislature.

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My attention was directed to several American cases as illustrative of the construction placed upon the words "public work," by the Supreme Court of the United States and other courts of that country, but I shall refer to one of them only. In the case of *Title Guaranty and Trust Company v. Crane Company* (1), the issues involved the right of parties who had delivered labour and materials to a company which was under contract to build a ship, to recover as materialmen under an Act of Congress which exacted from contractors for a public work a bond for the faithful performance by them of the contract, and the Act also empowered any person who furnished labour and material used in the construction and repair of any public work to intervene as claimants in a suit against the Guarantee Company on the bond supplied by the contractors. The work in question was the construction of a steamship for the United States Government. The ship was in course of construction only and had not been delivered over to the Government, but the Act provided that after the first payment to the contractors so much of the ship as was then built would belong to the Government. In the course of his judgment, which was the judgment of the Supreme Court of the United States, Mr. Justice Holmes said:—

Of course public works usually are of a permanent nature and that fact leads to a certain degree of association of the notion of permanence and the phrase. But the association is only empirical, not one of logic. Whether a work is public or not does not depend upon its being attached to the soil; if it belongs to the representative of the public it is public, and we do not think that the arbitrary association that we have mentioned amounts to a coalescence of the more limited idea with speech, so absolute that we are bound to read "any public work" as confined to work on land.

Undoubtedly Holmes J. used the phrase "representative of the public" as denoting the Government.

Mr. Morse argued that any public service was in itself a "public work," and with that I agree, that is, if the service is in reason and sense, a "work" within the intendment of the Exchequer Court Act. In the Public Works Act, "public work" means "any work" or "property" under the control of the Minister, that is, the work is "public" because it is under the control of the Crown. "Public work," "property" and "any work" in that

(1) (1910) 219 U.S. 24.

Act are synonymous. It will be observed that the courts have so far departed from the former notion of "public work" meaning only a physical thing being constructed, for a public purpose, by and at the instance of the Crown, as to recognize its incorporeal significance, for example, labour to maintain existing public property, or some public service such as the postal service. The practical question here arises whether the elimination or correction of radio inductive interference, a work carried on throughout the whole of Canada, is not a public service that constitutes a "public work." The Government of Canada licenses, as I understand it, all broadcasting stations, and all the numerous users of radio reception devices, and therefore the service rendered by the Radio Branch in attempting to correct radio inductive interference is a service rendered to a very large section of the public at the expense of the country. It is a work carried out by skilled persons with the aid of specially equipped motor cars. I cannot see why such a service should not properly be designated as "a public work," or even "property," just as would a telegraph line owned and operated by the Government, and telegraph lines are, I think, referred to in sec. 9 of the Public Works Act as "property" and as a "service." The motor car here was the "property" of the Crown, and was employed or in use at the time of the accident, by its servants, for the purpose of maintaining or improving a public service controlled and administered by the Crown, and the equipped motor car was one of the appurtenant means or instrumentalities for correcting radio inductive interference. Now, I think a public service of this nature is a "public work," and I think also that any physical instrumentality (such as the specially equipped motor car in this case) owned, equipped and used by the Crown, in carrying out a public service of such a character, is a "public work" within the meaning of the Exchequer Court Act.

Then I was referred to a line of decided cases where, for example, post office buildings owned by the Crown, and a Dominion Park, really public services, have been held to be public works within the meaning of the Exchequer

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Court Act. In *Brady v. The Queen* (1), it was held on demurrer, that the Rocky Mountain Park was a public work of Canada, and a person who was injured on one of the roads in the Park by reason of a wire negligently stretched across a road therein, was held to be entitled to recover damages against the Crown. In *Leprohon v. The Queen* (2), Burbidge J., expressed the opinion that a post office building owned and occupied as such by the Crown, was a public work, within the meaning of the Public Works Act. In *Keegan v. The King* (3) Audette, J. held that a post office building owned and occupied by the Crown was a public work. The case of *Johnson v. The King* (4) was one where horses, which were under hire to the Dominion Government, were lost owing to the negligence of the Crown's servants engaged in constructing for the Crown, the Atlin-Quesnelle telegraph line. There were two aspects of the case considered by the court, first the liability of the Crown under the contract of bailment, secondly the liability of the Crown for the loss of property by negligence of its servants on a public work. On the latter point Burbidge J., was of the opinion that the telegraph line in course of construction was a public work; I must say regarding that aspect of the case, it is difficult for me to conceive of any other conclusion being reached. In the case of *Brebner v. The King* (5) Audette, J. held that a barn, at Kingston, belonging to and under the control of the Department of Militia and Defence, not under the control of the Minister of Public Works, was a public work. These cases go to show that a "public work" includes public services, properties or buildings, wherein is administered one of the public services of Canada, at the expense of Canada, and excludes the popular idea or notion that a "work" is necessarily something constructive or permanent, in the material sense.

Mr. Morse advanced the proposition that the Government car in this case was a "building," apart from its being property owned by the Crown, and therefore a "public work" within the definition laid down by Anglin J., in the case of the *La Compagnie Generale d'Entreprises Publiques v. The King* (6), and later affirmed by him in

(1) (1891) 2 Ex. C.R. 273.

(2) (1894) 4 Ex. C.R. 100 at p. 106.

(3) (1915-17) 16 Ex. C.R. 412.

(4) (1903) 8 Ex. C.R. 360.

(5) (1913) 14 Ex. C.R. 242.

(6) (1917) 57 S.C.R. p. 527.

the *Wolfe* case. He referred to definitions of "building" supplied by Lexicographers. The Oxford English Dictionary defines a "building" as a "structure" and "structure" as a fabric or framework of material parts put together. In Widdifield's "Words and Terms Judicially Defined" the author defines a building as a "structure" or "edifice" erected by the hand of man composed of natural material as stone or wood, and intended for use or convenience. The author then quotes in support of his definition the case of *Carr v. Fire Insurance Association* (1), in which fixed and movable machinery, shafting, boilers, etc., were included in the word "building" as between mortgagor and mortgagee. I am rather disposed to agree with the author's definition of a "building" but not in the relevancy of the decided case cited by him to support his definition. In the American case of *Caddy v. The Interborough Rapid Transit Company* (2), a railroad car was held to be a structure or building, and an employer was held to be liable to the plaintiff for an accident occurring because the car was not properly provided with a scaffold on which the plaintiff could work. I was also referred to a series of English cases establishing the meaning of the word "building," as understood by the English Courts, though I must at once point out that a structure may be a "building" under one Act, and it may not be the same thing under another Act. In *Hanrahan v. Leigh-on-Sea* (3), an old railway car converted into a building was held to be a building as it originally stood. In *Long Eaton Recreation Grounds Company v. Midland Railway Co.* (4), it was said by Collins M.R. that a railway embankment could be covered by the word "building," and that a building was not necessarily limited to a structure of bricks and mortar. In *Brown v. Corporation of Leicester* (5), a wooden structure used as a show case was held to be a building within the meaning of the Public Health Act, 1888, which required the consent of the urban sanitary authority before erecting a house or building. These cases rather show that a "building" covers a wide field of "structures" great and small. If it be necessary to say

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(1) (1888) 14 O.R. 487.

(3) (1909) 2 K.B. 257.

(2) (1909) 195 N.Y. 415 at p. 420.

(4) (1902) 2 K.B. 574 at 587.

(5) (1893) 67 L.T. 686.

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that the motor car in question here is covered by the word "building," I see no reason for saying that it cannot, to use the language of Collins M.R. in *Long Eaton Recreation Grounds Company v. Midland Railway Co.*, just cited.

I cannot avoid the conviction that the work here rendered by the Crown for the public benefit, with property or means owned and controlled by the Crown, through servants employed by the Crown, a work or service made possible by moneys voted by parliament, constitutes a public work within the meaning of the Exchequer Court Act, and falls within the principle laid down in the *Schrobonst* case. The car here was not merely a means of transportation for the radio electrician and investigator engaged in the work of correcting radio inductive interference, it was in its entirety a necessary means and instrumentality for performing that particular work. Without this mobile and specially equipped instrumentality the Radio Branch would not have been able to locate, and remove or mitigate interferences with radio reception, with the desired speed and satisfaction. True, the radio investigator might carry out this work without a motor car, but that was not the means in vogue, or the means adopted by the Radio Branch. I find it impossible to say that the equipped car was not as much a part, or as closely connected with the service or work which the Radio Branch was conducting from Ottawa, as was the motor truck transporting workmen to the Welland Canal in the *Schrobonst* case. It matters not that the radio service was carried on voluntarily by the Government. Burbidge J. disposes of any argument on that point in the *Leprohon* case (*supra*), wherein he stated that it did not make any difference in respect of liability that the Government postal service was carried on without any profit. The portion of the Government building used by the officers and employees of the Radio Branch for the correction of radio inductive interference, is as much a public work as a post office building is for the conduct of the postal service. A post office building is merely a structure of convenience wherein mail is received and distributed, or from which the same is forwarded. It could hardly be argued that the Crown would not be liable, if its own motor car used in conveying mail from a post office to a train, owing to

the negligence of its servant, injured or killed a person while en route. It is a sound rule of statutory construction, that the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. In *Attorney-General v. Edison Telephone Co.* (1) a telephone was held to be a telegraph under the old Telegraph Act of 1863 and 1869 although the telephone was not invented or contemplated in 1869; and in *Taylor v. Goodwin* (2), a bicycle was held to be a carriage. Let us assume that instead of the particular work here carried on by the Crown, the correction of radio inductive interference, it was an ordinary telegraph service owned and operated by the Government of Canada. Now, if servants of the Crown were engaged in repairing or replacing telegraph poles, or removing something that interfered with the functioning of the telegraph wires, and negligently a pedestrian was killed, or some property was injured, I can hardly conceive it to be successfully contended, that the accident had not occurred on a public work. In substance I see no distinction between a telegraph service and a radio service. As between subject and subject, any injury negligently caused by the driver of a motor car is actionable, and the only question for decision here is whether the work being carried on by Pollard and Langlois was a "public work" within the meaning of the Exchequer Court Act. The conclusion that I have arrived at is that this question must be answered affirmatively; that this court has jurisdiction to entertain the petition in question; and that Pollard and Langlois were servants of the Crown engaged upon a "public work," and at the material time were acting within the scope of their duties.

Mr. Morse raised two other points to which I think I should make reference, as this case is most likely to go to appeal. The first point I shall deal with very briefly. Mr. Morse argued that the English Judges of the last century misread the ancient precedents of petitions of right when they held that these precedents only disclosed that the Crown was liable for breach of contract and not for torts. He referred to Sir William Holdsworth's monu-

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(1) (1880-81) 6 Q.B.D. 244.

(2) (1879) 4 Q.B.D. 228.

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mental work, and this author seems to think that under the old common law a tort, for example a disseisin by the King, was redressible by petition of right, and that a petition lay for a chattel wrongfully taken, and the contention seems well supported by historical data. Holdsworth and other legal historians supporting this view may be perfectly correct and it is probably true that historical research in the nineteenth century was in its infancy in this field, and much data now available was unknown to the Judges of that time. It may be that in the well-known case of *Thomas v. The Queen*, the Judges erred in their understanding of and misread the opinion of Lord Somers in the equally well-known Bankers' case, and that the case of Viscount Canterbury was decided on a wrong theory of master and servant liability. There is no doubt a great weight of influential opinion against the principle that a petition of right will not lie against the Crown in tort. This is evidenced by the fact that some of the British Dominions have by statute declared the Crown liable in tort. In England, in 1921, a committee composed of distinguished members of the English Bar, was appointed by Lord Birkenhead, then Lord Chancellor, to consider the position of the Crown as litigant; in 1927 they submitted a draft Bill dealing with the matter and in which it was proposed to make substantial changes in the law. The Bill proposed that Crown proceedings were no longer to be by way of Petition of Right but were to be proceeded with in the same manner as an action in the High Court between subjects; that the Crown was to be liable in tort, and liable for the wrongful acts of its officers in the same way as a private principal was liable for the acts of his agent. The Bill has not yet been submitted to Parliament, but the delay in doing so has been the subject matter of criticism. However, for about a century the courts of binding jurisdiction have held that a petition of right does not lie against the Crown, in tort, except where the rule has been modified by statute. By that principle and these precedents I feel bound, and it is for other courts to decide that the ancient precedents have been misunderstood, and erroneous decisions reached, by the English Courts of the nineteenth century particularly, in respect of the liability of the Crown in tort.

The other point raised by Mr. Morse is quite substantial and to me a novel one, and on its face would seem to have merits. Briefly the point is that the Canadian Petition of Right Act is more than procedural, that it is substantive, and that thereunder, and without relying on the provisions of the Exchequer Court Act, a petition of right lies against the Crown, in tort.

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I now proceed to state Mr. Morse's argument on this point as I understood him to present it. In 1876 the Dominion Parliament enacted a Petition of Right Act, which closely followed the English Act of 1860. The Supreme Court of Canada, in the well known cases of *McFarlane v. The Queen* and *McLeod v. The Queen*, *supra*, followed the English cases which decided that as the English Petition of Right Act gave no remedy to the subject that was not available before, there was no remedy by petition for tort. That argument, Mr. Morse stated, was a perfectly valid one in the Canadian courts until the Act of 1887 was passed, separating the Exchequer Court from the Supreme Court, but not afterwards. That Act (Schedule B) repealed sec. 21 of the Petition of Right Act, and the repealed section was in part as follows:—

21. Nothing in this Act contained shall,—

- (1) Prejudice or limit otherwise than is herein provided, the rights, privileges or prerogatives of Her Majesty or Her Successors; or
- (2) Prevent any suppliant from proceeding as before the passing of this Act; or
- (3) Give to the subject any remedy against the Crown,—
 - (a) in any case in which he would not have been entitled to such remedy in England under similar circumstances, by the laws in force there, prior to the passing of an Act of the Parliament of the United Kingdom, passed in the session held in the twenty-third and twenty-fourth years of Her Majesty's reign, chapter thirty-four, intituled "An Act to amend the law relating to Petitions of Right, to simplify the proceedings and to make provisions for the cost thereof."

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Then, it was argued, that without this saving clause, if we find in our Petition of Right Act competent words to create a liability against the Crown for tort, then the suppliants here are not confined for their remedy to sec. 19 (c) of the Exchequer Court Act.

Sec. 2 ss. (c) of the Petition of Right Act reads thus:—

Relief includes every species of relief claimed or prayed for in a petition of right, whether a restitution of any incorporated right or a return of lands or chattels or payments of money, or damages, or otherwise.

Sec. 5 enacts the Exchequer Court shall have “exclusive original cognizance of such petitions.” Sec. 10 implements these provisions by enacting that the judgment on the petition shall be that the suppliant is not entitled to any portion, or that he is entitled to the whole or some specified portion of the relief sought by his petition, and upon such terms and conditions if any, as are just. A condition precedent, of course, to any proceeding under the Act, is that the fiat be granted.

Mr. Morse then contended that the use of the word “damages” was alone sufficient to cover a claim against the Crown for injury arising out of the negligence of its servants; that word is defined in Osborne’s Law Dictionary as “compensation or indemnity for loss suffered owing to a breach of contract or of tort.” The phrase “damages or compensation” used in an Ordinance of the legislature of the Straits Settlement, regulating suits against the Crown in that Crown colony, was held by the Privy Council, in *Attorney General of the Straits Settlement v. Wemyss* (1) to cover a claim by petition of right for damages suffered by the suppliant in respect of land by reason of certain works executed by the Government in front of his land which cut off his access to the water, a tort. In that case Lord Hobhouse stated: “When the legislature of a colony in such circumstances allows claims against the Crown in words applicable to claims upon torts, it should mean exactly what it expresses.” Their Lordships held that the expression “claim against the Crown for damages or compensation” was an apt expression to include claims arising out of torts. They also held that liability followed on a grant of jurisdiction. See also

(1) (1888) 13 A.C. 192.

Farnell v. Bowman (1). In the case under discussion, did the legislature intend by the elimination of sec. 21 of the Petition of Right Act, to grant a larger or an unlimited range of remedies to the subject as against the Crown?

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It was further urged by Mr. Morse as a logical consequence of his line of argument which I have outlined, that as the Petition of Right Act gave the subject relief in a claim for "damages," which embraces an action in tort, against the Crown, that the suppliants here had another arrow to their bow and that was the following. By Sec. 19 of the Exchequer Court Act the Court is given exclusive original jurisdiction in respect of a group of designated claims, and one of them is defined in ss. (d) as follows:—

Every claim against the Crown arising under any law of Canada, or any regulation made by the Governor in Council.

With this foundation Mr Morse contended that the Petition of Right Act did not protect or preserve the prerogative, but rather destroyed it, by reason of the elimination of sec. 21 of the Petition of Right Act, and that that Act is not now procedural only but creates a liability against the Crown in cases of "damages" which implies a tortious act, and that jurisdiction is given to the Exchequer Court in such cases. The recital to the English Petition of Right Act shows that it was intended to be procedural only, as also does the proviso to sec. 7 which reads:—

Provided always, that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act.

This was in effect the same as sec. 21 in the Canadian Petition of Right Act prior to its repeal in 1887. The English Act was so drafted as to make it fairly clear that the same was intended to be a procedural statute only, and was not intended to enlarge the remedies of the subject against the Crown, but the Canadian Act has no recital suggesting it was merely procedural, and there is no express provision to the effect, after 1887, that the Act was not intended to give to the subject new remedies against the Crown. The two Acts in this particular are in singular contrast.

(1) (1887) 12 A.C. 643.

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Now, I must say, that the contention of Mr. Morse appears quite impressive, having in mind the literal language of the Petition of Right Act. If the contention of Mr. Morse is a sound one, then its effect is that in all cases sounding in tort the prerogative is non-existent, a principle not hitherto recognized by our courts in Canada, and in such circumstances the Exchequer Court would seem to have jurisdiction to entertain any claim in tort, brought by petition of right, against the Crown. Now, is there any vulnerable point in this seemingly very formidable argument of Mr. Morse's? The draftsman of the Exchequer Court Act evidently thought that sec. 21 of the Petition of Right Act, as it stood in 1887, would be in conflict with sec. 16 (c) of the proposed Exchequer Court Act of 1887, unless repealed, as the latter section to some extent modified the common law and granted to the subject some remedies not available under the common law.

There are just two avenues of approach to the question which Mr. Morse has raised. If he is correct in saying that the Canadian Petition of Right Act is not merely procedural, but gives to the subject a remedy against the Crown in tort, which was non-existent prior to 1887, then that is the end of the argument, at least that is my first impression. Now what is there to be said against that view? Was sec. 16 of the Exchequer Court Act of 1887 intended to fill, in a modified form, the place of the repealed sec. 21 of the Petition of Right Act? The former Act enlarges the common law remedies of the subject against the Crown, but it would not appear to be so comprehensive as to completely alter the common law rule in respect of the Crown's liability in cases of tort. On the other hand, the Petition of Right Act appears to contemplate that a petition of right would lie in all claims for "damages," which would include any case of damages arising from any tortious wrong. If the former statute were alone to be looked at, then the Exchequer Court has jurisdiction only in claims of tort against the Crown in the cases mentioned in the present sec. 19 of the Exchequer Court Act.

The point for decision is a very interesting one. For forty-five years and more the Petition of Right Act has been regarded in Canada as merely procedural. The Ex-



chequer Court Act of Canada (1887), which amended the Supreme and Exchequer Courts Act, bears the title "An Act to amend the Supreme and Exchequer Courts Act, and to make better provision for the trial of claims against the Crown." The word "provision" in this title merely relates, I think, to the establishment of a court apart from the Supreme Court for the trial of claims against the Crown. My impression is that the repeal of sec. 21 of the Petition of Right Act, and the enactment of sec. 16 of the Exchequer Court Act, 1887, now sec. 19, must be considered together, in interpreting the effect of the Petition of Right Act as it now stands, and sec. 19 of the Exchequer Court Act. It is to be remembered also that the Exchequer Court is given exclusive jurisdiction in the claims enumerated in sec. 19 of the Exchequer Court Act. I doubt if the legislature intended by the repeal of sec. 21 of the Petition of Right Act to extend to the subject the same remedies against the Crown as prevail between subject and subject—though it might very properly have done so; I am inclined to the view that sec. 16 of the Exchequer Court Act (1887) was to fill the place of the repealed section, and that did not mean the entire elimination of the common law rule in respect of claims against the Crown but rather a modification of such rule, in case of the subject. That expresses presently my best judgment in the matter. On the whole, I feel obliged to hold that the contention of Mr. Morse in this regard fails.

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In the result, it is my opinion that the suppliants must succeed upon the law points submitted for determination, and costs will follow the event.

*Judgment accordingly.*

BETWEEN:

FRANCIS B. MATHYS..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1933  
            
 Oct. 4, 5, 6.

1934  
          

*Expropriation—Abandonment—The Expropriation Act—Compensation—Interest.*

Mar. 14, 15.  
            
 July 9.  
          

In March, 1929, land belonging to the suppliant in Montreal was expropriated for a public purpose, and became vested in the Crown; the amount of compensation was not agreed upon. After the expropriation, suppliant was permitted to continue in occupation of his

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property, and was authorized to receive and collect rents. In March, 1932, the Crown abandoned the expropriation. The suppliant claims *inter alia* as compensation the difference between the value of the property at the date of expropriation, and its value at the date it reverted back to him.

*Held:* That the value of the land at the time of taking, and at the time of the reversion, must be taken into account in connection with all the other circumstances in determining the amount to be paid. *Gibb v. The King* (1914) Ex. C.R. 157; (1915) 52 S.C.R. 402; 1918 A.C. 915, followed.

2. That suppliant is entitled to interest upon any compensation allowed, from the date of the abandonment of the expropriation.

PETITION OF RIGHT by suppliant claiming compensation arising out of an expropriation of certain land by the Crown, which was subsequently abandoned.

The case was heard before the Honourable Mr. Justice Maclean, President of the Court, at Montreal.

*F. A. Beique, K.C.* and *W. R. Henry* for suppliant.

*A. R. Holden, K.C.* and *C. T. Ballantyne* for respondent.

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

THE PRESIDENT, now (July 9, 1934) delivered the following judgment:

This is a petition of right brought by the suppliant, Mathys. In March, 1929, the Crown expropriated, for the use and benefit of the Canadian National Railways and for the purposes of a Railway Terminal Scheme, under the provisions of The Expropriation Act, a property owned by the suppliant located at the southeast corner of McGill College avenue and Burnside street, in the City of Montreal, consisting of three lots of land, comprising in all approximately, 7,186 square feet, together with the buildings thereon. This property was purchased by the suppliant in 1913-14, paying therefor the sum of \$85,000, and he subsequently expended upon the buildings by way of improvements, some \$30,000. The buildings were, I think, originally erected as three separate dwelling houses, but may here be regarded as one building. At the time of the expropriation the building had been altered so as to contain some small stores on the ground floor, and apartments on the upper floors. The area in the vicinity of the expropriated property was being rapidly commercialized,

though still a residential area, and this was particularly true of both sides of McGill College avenue, between St. Catherine street and Burnside street. It had been decided in December, 1929, to widen Burnside street on the northerly side, and this, I think, would tend to enhance the value of the property taken, but the project apparently has been postponed for the present. When the suppliant purchased this property, it was with the intention of erecting sometime a large building thereon, a project which would appear prudent in view of the fact that the land had a substantial market value over and above the building on it; the property is within a growing shopping district, and within a few hundred feet of perhaps the most highly developed shopping street in Montreal, St. Catherine street, which street runs parallel to Burnside street and connected by McGill College avenue. All the properties facing on McGill College avenue, between St. Catherine and Burnside streets, were expropriated for the same purpose, and were eventually taken over by the Crown, excepting the suppliant's property, and, I think, one other.

After the expropriation, the suppliant was permitted to continue in occupation of his property, and was authorized to receive and collect the rents, and to grant leases for a limited period but not exceeding three years, from May 1, 1929. In March, 1932, the Crown abandoned the expropriation, and the suppliant was so notified by the proper authorities, and thereby the legal title to the property taken reverted to the suppliant, the title to the property having been in the Crown for precisely three years, and three days. Broadly speaking, the suppliant by his petition claims by way of compensation or damages, the difference between the value of the property at the date of expropriation, and its value at the date it reverted back to him. The suppliant also claims compensation for legal and other expenses incurred by him in the preparation and prosecution of his claim for compensation, following the expropriation, altogether nearly \$10,000. The suppliant claims, in his petition, the sum of \$350,000 with interest less the net amount received from rentals during the period the title to the property was in the Crown, amounting to almost \$27,000, or about \$9,000 per year, and altogether.

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including the special claim mentioned, the total amount of compensation claimed in the petition is over \$403,000.

As already suggested, the suppliant's claim to compensation or damages rests upon the ground that when the property vested in the Crown, the property was worth so much, and that he thereupon became entitled to the agreed or adjudged value of the property as of that date, but that at the date of revestment the value of the property had depreciated, and that the difference was substantially the true measure of compensation or damages. We may now direct our attention to certain relevant provisions of the Expropriation Act. Sec. 9 of the Act is as follows:—

9. Land taken for the use of His Majesty shall be laid off by metes and bounds; and when no proper deed or conveyance thereof to His Majesty is made and executed by the person having the power to make such deed or conveyance, \* \* \* a plan and description of such land signed by the Minister \* \* \* shall be deposited of record in the office of the registrar of deeds for the county or registration division in which the land is situate, and such land, by such deposit, shall thereupon become and remain vested in His Majesty.

From this it consequently follows that, upon the plan and description of the property taken being deposited as required by the Act, the Crown became the legal owner of the property, and was entitled to exercise over the same all the rights and privileges inherent in that ownership. Though the suppliant was permitted to remain in possession of the property, that did not alter the fact that the suppliant had been deprived of the legal ownership of his property.

Sec. 23 of the Expropriation Act reads as follows:—

23. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property \* \* \*

From this section of the Act it was contended, on behalf of the suppliant, that when his ownership in the property ceased and the same vested in His Majesty, the compensation money ultimately to be adjudged, stood in the stead of the property.

Sec. 24 of the Act relates to the abandonment of expropriated property. The relevant provisions of that section are as follows:—

24. Whenever, from time to time, or at any time before the compensation money has been actually paid any parcel of land taken for a public work, or any portion of any such parcel, is found to be unnecessary for the purposes of such public work \* \* \* the minister may,

by writing under his hand, declare that the land or such portion thereof is not required and is abandoned by the Crown, \* \* \* \*

2. Upon such writing being registered in the office of the registrar of deeds for the county or registration division in which the land is situate, such land declared to be abandoned shall revert in the person from whom it was taken or in those entitled to claim under him.

4. The fact of such abandonment or reversion shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

In the construction of the several provisions of the Act just mentioned, the suppliant relies upon the case of *Gibb v. The King* (1), and it was agreed by counsel that the judgment of the Supreme Court of Canada in this case, which was sustained by the Judicial Committee of the Privy Council, was applicable here.

The facts of the *Gibb* case are briefly the following: For the purposes of the National Transcontinental Railway as a site for a railway station, at Quebec, the Champlain Market, and the property of Gibb and others, had been expropriated. In the Information of the Crown, the sum of \$61,747.75 was tendered Gibb as compensation for the property taken which, in his statement of defence, he accepted. Later, the expropriation was abandoned. Gibb, in the meanwhile, had been allowed to remain in possession of the property. Following the abandonment, Gibb, by a petition of right, claimed as compensation or damages, the difference between the amount tendered and the value of the property at the time of the abandonment, \$30,000, it being alleged that the depreciation was due to the fact that the railway station project had been abandoned, and that the Champlain Market had been demolished, as I understand it. The learned trial judge allowed only the sum of \$3,000, as damages arising from interference with certain tenancies unexpired when the property was taken. The case then went on appeal to the Supreme Court of Canada. Fitzpatrick C.J. observed concerning the judgment of the learned trial judge:—

The learned judge (trial judge) suggests that if the Crown is to bear decrease in the value of the land, it should benefit by any appreciation. He forgets, however, that this is an entirely one sided power and that while the Crown is not obliged to exercise it and presumably would only do so when such exercise would be beneficial to its interests, it would

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(1) (1914) 15 Ex. C.R. 157; (1915) 52 S.C.R. 402; and 1918 A.C. p. 915.

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obviously be impossible to force upon the former owner the property for which he may have no use and which he may not want and at the same time call upon him to pay for getting it a sum in excess of the compensation to which he was entitled on the expropriation.

Again he said:

The values of the land at the date of the expropriation and at the date of the abandonment have to be ascertained in the ordinary way, but otherwise, in my view, it is immaterial to inquire what were the causes of the value of the land at these dates.

The value of the land at the time of the expropriation is ordinarily the compensation which the owner is entitled to claim. I refer also to sec. 47 of the Exchequer Court Act \* \* \* If, by the inverse process to expropriation, the Minister forcibly vests the property in him again, the value of the land to the owner at the time of such reversion is an element to be considered in estimating the amount to be paid to him.

Upon appeal from the Supreme Court of Canada the Judicial Committee of the Privy Council held that the judgment of Fitzpatrick C.J. was "in all respects correct." Lord Buckmaster, who delivered the judgment of the Judicial Committee, said:—

Their Lordships are therefore unable to accept the view that the true measure of the appellants' right is something in the nature of a claim for damages for disturbing or injuriously affecting. In fact, so far as the particular piece of land is concerned, the Crown does not appear to have done any act upon the land itself that would either damage or injuriously affect its value. Its advisers have been enabled by virtue of the section to change their mind and give back the property which they originally took, and it is this fact which must be considered with other circumstances in determining the original amount of compensation which they became liable to pay. Their Lordships think, therefore, that the judgment of Fitzpatrick C.J. was accurate in all respects, and that this case should be remitted to the Exchequer Court to determine and assess the compensation payable upon the footing that the fact that the land has been revested shall be taken into account in connection with all the other circumstances in determining the amount to be paid.

It would seem therefore that the *Gibb* case lays down the principle that in a case of this kind, that the value of the land at the time of taking, and at the time of the reversion, must be taken into account "in connection with all the other circumstances in determining the amount to be paid."

Before proceeding further, it might be convenient here to refer briefly to what might be termed the minor issues raised in the case. The abandonment of the expropriation here was due to the temporary or permanent abandonment of the Canadian National Railways Terminal Scheme at Montreal, but while abandoning the expropriation of the suppliant's property, the Crown, as I understand it, concluded subsequently the matter of compensation, by agree-

ment with the owners of other expropriated properties on McGill College avenue, and did not abandon these properties, and it is urged that this fact, in some way or other, strengthens the claim which the suppliant makes here. Now that fact seems to me to be irrelevant to the issue here. It was within the right of the Crown to consummate some of the expropriations made, by amicable arrangements with the owners as to compensation, and to abandon the expropriation of the suppliant's property. Then considerable evidence was offered in an attempt to show that the building foundation and sub-soil of the suppliant's property had been injuriously affected by the excavations made in connection with the Railway Terminal Scheme, some short distance from the suppliant's property. I do not think the evidence sustains that contention, and upon the argument, heard long after the trial, suppliant's counsel did not press this point, and I treat it as having been abandoned. It was urged on behalf of the Crown that when the suppliant purchased the property in question he had in mind the erection of a large and modern building on the lands acquired, and that this project not having been carried out, the value of the property at the time of the expropriation, or the abandonment, was in some way affected by this fact; I am not sure that I properly appreciate the point. In any event, I think, the suppliant had a right to postpone or abandon altogether this project, and I think it is utterly irrelevant to the point to be determined. We may now proceed to a consideration of the question as to whether the suppliant is entitled to compensation, and if so in what amount.

Turning now to the evidence adduced at the trial by both parties. Some witnesses testified as to the value of the land, others the building, and others the combined value of the land and building, at the dates of the expropriation and the abandonment, respectively. I do not propose to discuss in detail the evidence of the witnesses that were called. I am prepared to hold that the market value of the property in question, and property on McGill College avenue, and generally property in the same vicinity, increased gradually in value from the time the suppliant purchased his property and down to the date of its expropriation, and that between 1925 and 1929 the increase was

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probably rather more marked. The suppliant's witnesses placed this increase at anywhere from fifty per cent to one hundred per cent; and briefly stated, they testified that the total value of the suppliant's property, in 1929, was in the vicinity of \$300,000, some placing it below and others above, that figure. The Crown's witnesses put the increase in value of the property, since the purchase by the suppliant, much below the minimum figure mentioned by the suppliant's witnesses, some fifteen per cent more and less, and they placed the value of the land and building, in 1929, by comparison with other sales in the vicinity, and upon other grounds, at figures ranging from \$108,000 up to \$143,000, the latter figure being an estimate made by Mr. Simpson, an experienced real estate broker, a witness called by the Crown. From 1929, down to the date of the revesting, I am inclined to think that the market value of the suppliant's property, and other properties in that immediate vicinity, in fact anywhere in the City of Montreal, had fallen to some extent, although some of the Crown's witnesses testified that there was practically no depreciation in real estate values between March, 1929, and March, 1932, and that no fall in rentals took place until after May 1, 1932.

As to the market value of the suppliant's property, at the date of expropriation, I am disposed to accept the evidence of the Crown's witnesses as affording the best criterion of such value. I think the estimates of market values made by the suppliant's witnesses are much exaggerated, and altogether too speculative. In my opinion, the amount mentioned by Mr. Simpson is a fair and reasonable one, and I am prepared to adopt it as a fair approximation of the value of the property, at that date. It is not, in my opinion, a speculative figure, neither is it one unduly depressed. Up to that date, I think, it may be fairly said, that the value of the land had increased, while the value of the building had decreased. The only sale of the property likely to be consummated within the time material here, would be to a buyer prepared and able to finance the erection of a new building on the land. In March, 1925, the suppliant gave a written option of purchase of this property, in the sum of \$175,000, Eaton & Company being the prospective purchaser, but the



option was not exercised. Whether the option was not exercised because the consideration stated for the property, really the land, was excessive, or whatever the cause, is unknown. The selling price mentioned in the option then represents no more than suppliant's valuation of his own property at that time, or the price which he hoped the prospective buyer might pay for it, and that is all that can be inferred from the option. At the date of the abandonment, the effective market value of the property had no doubt declined, there being little or no demand for real estate properties, although some of the Crown's witnesses thought the decline very little, if any. The difficulty confronting one here is that at that date, 1932, and going back beyond that for a short time, there was no active market demand in Montreal for real estate properties of any kind, at any but sacrifice figures, for causes which were then, and now, well known and applicable to the whole of Canada; all real estate owners in most parts of Canada were then, and are now, in the same position in this regard. How far causes, producing a decline in real estate values, or, effecting practically a total cessation of real estate transactions, and which condition is generally applicable to all real property, should be considered, is perhaps a debatable point, but as it was not specifically raised before me, I refrain from expressing any opinion concerning it. In many instances, real estate values in Montreal, in 1929, were probably elevated above their true market or investment values, they were being given a speculative value, while possibly in 1932, they were perhaps unduly depressed because of the lack of market demands, although I have no doubt many would assert, and with some justification, that the real estate values of 1932, in the area in question, represented their true and normal value in the eyes of experienced and prudent purchasers or investors; in fact that was in effect stated by some of the Crown's witnesses. However, it is a fact, I think, which cannot be disregarded, that the market value of the suppliant's property in March, 1932, was something less than it was in March, 1929. The suppliant was entitled to have the compensation fixed as of the date of expropriation; a sequence of events has made this hardly possible, and on this account, and according to the rule laid

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down in the *Gibb* case, I think, the suppliant is entitled to some allowance or compensation. Taking into consideration every circumstance properly involved in the case, flowing directly and indirectly from the deprivation of the suppliant's title to his property for three years, and the revestment of that title in the suppliant, I think, if I allow the suppliant \$35,000, he shall have been fairly dealt with, and that amount I allow.

There are two other matters which are the subject matter of claims for compensation, in this petition. The suppliant, as I have already stated, made efforts, on two separate occasions, to launch petition of right proceedings, in order to accelerate and conclude the matter of the settlement of the compensation to which he was in fact and law entitled, on account of the expropriation, but in each instance he was refused the fiat. The unexplained delay in submitting the matter of compensation to the court, and the refusal of a fiat in connection with his petitions of right, amply justified, I think, the engagement of the services of a solicitor, by the suppliant. It was agreed by counsel for the Crown, at the trial, that the sum of \$1,000 might be allowed on account of the legal services rendered by Mr. Henry to the suppliant, in this connection. This, I think, is a very reasonable allowance, and I allow it; I understood Mr. Henry to acquiesce in this amount, and I hope I have not misunderstood him. Then the suppliant, with the concurrence of Mr. Clarke, Chief Land Surveyor of the Canadian National Railways, charged with the duty of negotiating with the owners of expropriated properties for an amicable arrangement of the amount of compensation to be paid them, retained the services of several real estate and building experts to assist him in the preparation of his claim for compensation, either in connection with his negotiations for a settlement with Mr. Clarke, or in the preparation of his case before the court. According to the evidence very substantial bills were rendered by such persons to the suppliant, for such services, amounting to some \$7,800. It strikes me that at this stage the suppliant went to unnecessary expense. I see no reason for having incurred such an amount of expense at that time, either to assist him in his negotiations with Mr. Clarke, or, in the preparation of his claim for compensation to be presented

to the court, providing a fiat was granted; this has no reference to the petition now under consideration. Mr. Holden agreed, however, that \$1,000 might be allowed, in this connection, and that amount I allow; and I think it is sufficient in the circumstances.

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The suppliant will therefore have judgment for \$37,000, with interest at five per cent from the date of the revesting of the property upon the sum of \$35,000. I think in a case of this kind it is within the contemplation of The Expropriation Act that the suppliant should have interest from the date of the abandonment of the expropriation, upon any compensation allowed, just as in the case of an expropriation. I know of no authority directly upon the point, but reasoning by analogy, I think interest should be allowed. From the date of the expropriation until the date of the abandonment, the suppliant was in possession of his property and he had the benefit of all the rentals received. In such cases interest, so far as I know, is not allowed upon any compensation agreed or adjudged to be paid the owner of the property expropriated.

The suppliant will have the costs of his petition.

*Judgment accordingly.*

BETWEEN:

ELIE MASSEIN ..... SUPPLIANT;  
 AND  
 HIS MAJESTY THE KING ..... RESPONDENT.

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*Crown—Customs—Seizure—Liability of Crown for failure to restore seized goods pursuant to court order—Jurisdiction—Petition of Right—Right of friendly alien to Petition—Crown bound by judgment or order of court based on written consent—Res Judicata.*

Certain goods were seized by Canadian Customs officers, and by consent of counsel, an order was made by the Exchequer Court dissolving such seizure and directing that the property be restored to the suppliant. Some months later when he went for delivery of the goods, it was discovered there was a shortage, for the value of which this action was brought.

*Held:* That the Crown is liable for the value of goods unlawfully seized or detained if restoration cannot be made.

2. That the Court has jurisdiction to entertain a claim for goods of the subject in the possession of the Crown.
3. That a petition of right will lie against the Crown when specific chattels have found their way into the possession of the Crown, and if restitution cannot be made, for compensation in money.

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4. That a judgment or order of the Court, founded on a written consent between the Crown and the subject, constitutes a definite obligation entered into by the Crown.
5. That a friendly alien may maintain a petition of right.
6. That a friendly alien while in Canada, is in the allegiance of the Crown, and so long as he remains in Canada with the permission of the Sovereign, expressed or implied, he is a subject by local allegiance with a subject's rights and obligations. *Johnstone v. Pedler* (1921) 2 A.C. 262.
7. That on the facts the Crown cannot allege that following the date of the judgment the goods had been restored and were in the possession of the suppliant or of the owners.
8. That the subject matter of this petition did not become *res judicata* by virtue of the order made by the Court for the restoration of the goods.

PETITION OF RIGHT by the suppliant claiming compensation from the Crown for goods wrongfully seized and not restored to suppliant pursuant to an order of the Court directing restoration.

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

*J. W. Maddin, K.C.* for the suppliant.

*J. McG. Stewart, K.C.* for respondent:

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

THE PRESIDENT, now (May 9, 1934) delivered the following judgment:

This is in form a petition of right relating to a customs seizure and was heard upon certain admissions of facts made in writing by counsel, oral evidence adduced at the trial, and papers and evidence earlier referred to this court under sec. 174 of the Customs Act, and relating to the same subject matter. From the facts of the case there emerge for determination several unusual points of law and it will be desirable to state at once the relevant facts leading up to this proceeding, and fortunately they are not seriously in dispute.

On June 30, 1927, the master of the steamer *Margaret*, a Canadian revenue boat, seized the French registered ship *Ariel*, together with her cargo of assorted liquors, in the Gulf of St. Lawrence and more than twelve miles from the nearest point of land in Canada, the Magdalen Islands,

from whence she was towed to Gaspé, Quebec. The *Ariel* was some days later, on July 8, 1927, released and restored to her master, the suppliant herein, but her cargo was detained under seizure and forwarded by customs officers to Halifax, N.S., where the same was placed in a warehouse, by the customs authorities at that port. It might be stated that the *Ariel* cleared from a port in France with her cargo of liquor but she called at St. Pierre, Miquelon, en route to her destination on the high seas, and at the latter port she took aboard some small additional cargo of liquor.

The ship *Ariel* apparently was not charged with any offence after being seized and towed to Gaspé, but the owners of her cargo were charged with the offence of attempting to defraud the revenue of Canada, by attempting to avoid the payment of the duty on the said cargo found on the *Ariel*, which was said to be hovering in British waters off the course of her indicated voyage.

The seizure of the cargo was at once contested through the French Consular Office in Canada, and after ensuing correspondence between the customs authorities and those interested in the cargo the seizure was, on October 5, 1927, referred by the Minister of National Revenue to the Exchequer Court of Canada by virtue of sec. 174 of the Customs Act, without any decision having been made previously in respect of the seizure by the Commissioner of Customs, or by the Minister of National Revenue.

Before the reference was heard the seizure of the *Ariel's* cargo was abandoned on the ground, I assume, that the same was made beyond the territorial waters of Canada and therefore unlawful. On June 14, 1928, just about a year after the seizure of the cargo, the solicitor of the Attorney General of Canada and the solicitor of the owners of the cargo agreed to a dissolution of the seizure in the following terms: "The parties hereto consent to an order dissolving the forfeiture of the property of the claimants and for the restoration of the said property to the said claimants and that the claimants are entitled to costs to be taxed." On the same or the following day an order of this court was made by consent of counsel, in the following terms: "It is ordered that the forfeiture of the property of the claimant be dissolved and that the said

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property be restored to the claimant; and it is ordered that the said claimant recover from the said respondent his costs of this action forthwith after taxation." When the Reference was made to this court the claimant of the goods seized was the owner, Hannapier Peyrelongue et Cie, of Bordeaux, France, but on January 11, 1928, by a consent in writing entered into by the solicitors of the Attorney General of Canada and the owners of the cargo, the name of Elie Massein, the master of the *Ariel* and the suppliant herein, was substituted for that of the owners of the cargo as the claimant of the seized goods, and when the order of the court directing the restoration of the seized goods was made, the name of the master of the *Ariel* appears as claimant.

The cargo when seized consisted of 1,438 packages of assorted liquors. On November 27, 1928, the seized liquors were examined and inspected by customs examining officers in the warehouse at Halifax, an agent of the owners of the same being present, and it was found that certain demi-johns of malt whisky had been opened and all or part of the contents removed. Accordingly the examining officers filled 145 demijohns out of the total of 195 demijohns thus disclosing a shortage of 50 demijohns of malt whisky; this was referred to in the evidence as "reconditioning." On or about February 5, 1929, the schooner *Grace E. McKay*, on behalf of the owners, called at the Port of Halifax to take delivery of the goods ordered to be restored when it was discovered that 105 containers had been tampered with and the contents removed and then filled with water, and these, the master of the schooner refused to accept; while this discovery was only then made, it does not follow, that the theft had not been committed prior to the inspection made in November, 1928, and to this I shall be obliged to return later. It is agreed between the parties that the total shortage amounted to 427·8/12 packages or sacks, the particulars of which are set forth in the written admissions of fact. As will appear later, the Crown alleges as a defence that the failure of the suppliant to take prompt delivery of the goods, following the order of the court, relieves the Crown of any responsibility for the loss of the unrestored portion of the cargo of liquors.

The major question for decision is whether a petition of right lies against the Crown for the value of the goods which cannot in fact be restored to the suppliant, and into that issue there is interjected the question as to whether certain of the Royal Prerogatives are available to the Crown as a defence and whether and to what extent certain statutory provisions modify the common law rules applicable to the case, and therefore I think it desirable, for this and other reasons, at this stage, to refer with some care to the statutory provisions under which the controversy here had its origin. In the administration of the laws relating to customs there must inevitably occur unlawful seizures of property, or seizures of doubtful validity, and consequently there are to be found in the Customs Act, R.S.C. 1927, Chap. 42, certain enactments which provide for an enquiry by the Department of Government administering the Customs Act, and by the courts, into the validity of any seizure, so that eventually right may be done in the matter and any injustice or abuse of authority, may be reasonably avoided. Sec. 171 of the Customs Act requires that when any vessel or goods have been seized, the seizing officer must forthwith communicate the circumstances of the seizure to the Commissioner of Customs. By the next following section the Commissioner of Customs is then required to notify the owner of the thing seized or detained, of the reasons for the seizure, and to call upon him to furnish within thirty days from the date of such notice, such evidence in the matter as he desires to furnish. Sec. 173 provides that after the expiration of the said thirty days, or sooner, if the person so called upon to furnish evidence so desires, the Commissioner of Customs may consider and weigh the circumstances of the case, and report his recommendation thereon to the Minister, the Minister of National Revenue. The Minister may thereupon give his decision in the matter respecting the seizure, and the terms, if any, upon which the thing seized or detained may be released or the penalty or forfeiture remitted, or he may refer the matter to the Exchequer Court for decision. In the case of this particular seizure the Minister made no decision but referred it to the court on October 5, 1927. Sec. 177 then provides that

On any reference of any such matter by the Minister to the court, the court shall have and consider such matter upon the papers and evidence

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referred to and upon any further evidence \* \* \* and the court shall decide according to the right of the matter.

It was under sec. 174 that this court was empowered to entertain the reference made by the Minister, and to grant the order for judgment already mentioned.

Departing here for a moment in my references to the provisions of the Act. Upon a Reference to the court under sec. 174, and sec. 176, it has always been my view that all the court was required to pronounce upon was whether the seizure, detention, penalty or forfeiture was maintainable or not, and the terms, if any, upon which the thing seized or detained might be released, or the penalty or forfeiture remitted, which are precisely the same matters upon which the Minister himself might render a decision under sec. 174. I know of no case where the court, having decided that a seizure was unlawful, formally directed that in the event of the failure of the Crown to restore the seized property, the value thereof should be paid the claimant or owner. Possibly such an order might be made at this stage but for the moment I doubt it. I refer to this particularly because it was contended at the hearing of this petition, though not pleaded, that the cause of action raised by this petition was *res judicata* by virtue of the judgment already rendered, and to this point I shall return later.

Resuming now my reference to certain of the provisions of the Customs Act. Sec. 161 enacts

That no action \* \* \* shall be brought against the Crown or against any officer or person \* \* \* for the recovery of the thing seized until a decision has been first given by the Minister or by a court of competent jurisdiction in relation to the condemnation of the thing seized.

Such an action must be brought within three months after such decision has been given. I refer to this section because it purports to give a right of action against the Crown for the recovery of goods seized, after the Minister or a court has rendered a decision, apparently under sec. 177 of the Act, in respect of a seizure. If the "decision" by the Minister or the court were that the seized property should be restored to its owner, and there were no appeal, I can hardly conceive of any action that might be commenced against the Crown except one for the value of the seized goods if they were not restored, or one for damages in any way arising from the seizure. In any event it is



clear, I think, that this section contemplates a right of action against the Crown for the recovery of goods unlawfully seized, in sufficiently apt words I think, and it does not distinguish between the Crown and any officer of customs; this negatives the suggestion that the Crown is not liable for acts because they savour of tort. If this section is applicable here I should point out that the limitation as to time for the commencement of such an action was not pleaded by the Crown, and it is improbable that in the circumstances of a case of this kind that the Crown would think of doing so. Then I might point out that the Act frequently treats the value of property as the equivalent of the property itself. Goods seized may be released on a deposit in money being made to the duty paid value thereof pending a decision as to the validity of the seizure and the money deposited shall be forfeited if the goods are ultimately condemned. No proceedings for the recovery of the said money from the Crown shall be instituted except within six months from the date of the deposit thereof. See sections 168 and 169. Perishable goods seized may be sold and the proceeds thereof deposited to the credit of the Minister of Finance, and shall abide the judgment of the court with respect to the condemnation of the thing seized (sec. 170). Then, if judgment is rendered in any proceeding for any penalty or forfeiture under the Act, directing the restoration of property to the claimant thereof, the execution of any such judgment shall not be suspended by reason of any appeal from such judgment, if the claimant gives sufficient security to be approved of by the court to deliver the thing seized or the full value thereof if the judgment appealed from is reversed (sec. 280).

It is quite clear, I think, that the seizure in question was not made in exercise of the Prerogative but under a statute. It was not contended by either party that the seizure was not made under the Act. Indeed, the Customs Act frequently speaks of seizures made "under the Act," and it contemplates that some seizures may be held to be unlawful. The statute provides machinery for determining as between the Crown or its officers, and the claimant of any property seized, the question of the validity of any seizure. The statute obviously contemplates that

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where a seizure is not maintainable the thing seized must be restored to the claimant, and, in the absence of a certificate of probable cause, the statute would appear to make an unlawful seizure actionable; and it seems to say that an action may be maintained against the Crown as well as against any officer of customs. It does not appear to make any distinction between the Crown, and its officers of customs. Here, in proceedings in which the Crown apparently was a party and represented by His Attorney General, and by consent of the Attorney General on behalf of the Crown, it was ordered by the court that the seized goods should be restored to the claimant, because the seizure could not be maintained upon one ground or another. The owner of the goods had therefore, at that time at least, a legal right to the restoration of the goods, and there was a legal obligation cast upon the Crown to restore the same. That was, I think, the clear intendment of the statute, and that view the Crown conceded. The suppliant now claims he should be paid the value of such of the goods as have not and cannot be restored; that is the relief that is prayed for, and not damages for an unlawful seizure of the goods, or for damages for their unlawful detention, or for negligence on the part of servants of the Crown resulting in the loss of certain of the goods. The theft of a portion of the goods by a third party, because it was a tortious act, cannot I think be relied on by the Crown as a defence against the suppliant.

The Customs Act has given to the Crown statutory powers which render the exercise of the Prerogative unnecessary because the statutory powers conferred are wider and more comprehensive than the Prerogative itself; therefore the things which the Act empowers the Crown to do can only be done by and under the statute and subject to all the express or implied conditions and obligations imposed by the Act. The Act, I think, indicates that it was the intention of the legislature that the powers of the Crown should be exercised in an equitable manner; that the validity of any seizure or detention of property should be determined "according to the right of the matter" to use the words of the statute itself; and that no one should suffer loss of his property by the unlawful exercise of such powers by the Crown. "Right" means an interest recog-

nized and protected by the law. Therefore when powers covered by the statute are exercised by the Crown it is to be presumed that they shall be exercised under the statute and therefore subject to the provision that if property is seized or detained without right, they shall be restored; if that is correct, then, I think, it should follow that the Crown was liable for the value of goods unlawfully seized or detained, if restoration could not be made, otherwise the powers granted would not be exercised in an equitable manner, and "right" would not be done in the matter.

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Now, does a petition of right lie against the Crown for the recovery of the value of the goods which have not been restored? It would appear to operate as grave injustice if that question had to be answered in the negative; but I do not think the statute means that, nor do I think that such is the law. A petition of right was the only available step to which the suppliant could resort to reap the full fruits of his judgment recovered, under the provisions of the statute, against the Crown, and with its consent. A writ of execution could not issue against the Crown, and the remedy of mandamus was not available against the Crown. Unable to obtain a return of the goods in specie, then, I think, the relief contemplated by the statute extends to a claim for their value. In *Buckland v. The King* (1), a petition of right proceeding, the suppliant sought the return of certain films which had been seized by customs officials, or their value, and damages. While the suppliant failed upon statutory grounds, yet, apparently no objection was taken at the trial, or on appeal, that a petition of right did not lie against the Crown for goods wrongfully detained by the servants of the Crown, or their value, or that the action should have been taken against the customs officers seizing the films. The definition of the word "relief" in sec. 2 (c) of the Petition of Right Act is, I think, in its terms sufficiently wide to cover a claim for a declaration that the suppliant is entitled to the value of the goods. Further, sec. 18 (d) of the Exchequer Court Act enacts that the Exchequer Court of Canada shall have exclusive jurisdiction to hear

(1) (1933) 1 K.B.D. pp. 329 and 767.

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and determine "any claim against the Crown arising under any law of Canada." The Supreme Court of Canada, in *The King v. Armstrong* (2), held that where the Exchequer Court Act gave jurisdiction it imposed a liability upon the Crown. I think that this claim is one arising under the Customs Act, a statute of Canada.

But there is another section of the Exchequer Court Act which clearly seems to confer jurisdiction upon the court, and to create a liability against the Crown, in precisely a case of this kind, concurrently with any remedy to be found in the Customs Act. Sec. 18 of the Exchequer Court Act states that the Exchequer Court shall have jurisdiction in all cases where "the land, goods or money" of the subject are in the possession of the Crown; and this does not relate to "land, goods or money" taken for any public purpose, for, in that case jurisdiction is conferred by sec. 19 (a); sec. 18 also refers to contracts entered into by or on behalf of the Crown. Taken in their plain meaning these words clearly give jurisdiction to the court to entertain a claim for goods of the subject in the possession of the Crown; then if there is jurisdiction so conferred, under the decision of the Supreme Court of Canada in the case of *Armstrong v. The King* (*supra*), a liability is imposed upon the Crown. The claim here arises from the fact that the goods were in the possession of the Crown, and it matters not for the purposes of this case if that possession has in some way been lost. The suppliant claims restoration of the goods, and failing that, their value; if the goods cannot be restored, then, I think, the suppliant is entitled to their value. The word "subject," which I shall later on discuss, includes a friendly alien. The purpose of this section was to give jurisdiction and to impose a liability against the Crown in the class of cases mentioned, and to modify or perhaps rather to clarify, the common law in such cases; it seems to me to embody what were the common law rules in respect of such subject matters. In *Feather v. The Queen* (1), it was said that the only cases in which the petition of right is open to the subject are, where the land, or goods, or money of a subject have found their way into the possession of the Crown, and the pur-

(2) 40 S.C.R. p. 229.

(1) (1865) 6 B. & S. 257.

pose of the petition is to obtain restitution; or, if restitution cannot be given, compensation in money; or where the claim arises out of contract, as for goods supplied to the Crown, or to the public services. Sec. 18 is really a restatement of the principles there laid down, and was designed to place the Crown, and the subject whose land, goods or money were in the possession of the Crown, in the same position as subject and subject, or party and party. A petition of right will lie for the enforcement of a statutory right.

Clear of the statute however, I think, the authorities are to the effect that a petition of right will lie against the Crown when specific chattels have found their way into the possession of the Crown, and that if restitution cannot be given, then compensation in money. This seems to have been the view of several of the earlier text writers in respect of remedies against the Crown where goods of a subject had found their way into the hands of the Crown. In *Feather v. The Queen* (*supra*), it was stated by Cockburn C.J., who delivered the judgment of the Court, that a petition of right may be entertained where specific goods have found their way into the possession of the Crown, and if restitution cannot be given then compensation; and the same principle was affirmed by the Judicial Committee in *Windsor & Annapolis Railway Co. v. The Queen* (1). These and other authorities upon this point are referred to in Robertson's work on Crown Civil Proceedings at pages 335 and 336.

That a petition of right will lie in a case of this kind, may, I think, be rested on another ground. It is now settled law that in a claim founded upon a contract, a petition of right will lie against the Crown. That is expressly recognized by the Exchequer Court Act. I would say with some confidence that a judgment or order of a court, founded, as in this case, on a written consent between the Crown and the suppliant, is something untainted by tort and not affected by the principle that the King can do no wrong, and constitutes as definite an obligation or liability as any contract entered into by the Crown to purchase property of any kind; and if goods

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(1) (1886) 11 A.C. 607 at p. 614.

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directed by the court to be restored to the owner thereof are not so restored then, I think, a petition of right will lie as readily as upon a contract. Probably a case quite like this has never arisen before, here or elsewhere, but I believe the common law courts of England in the nineteenth century would have been disposed to put a case of this kind on a parity with contracts and would have held that a petition of right would lie for the value of goods which could not be restored to the suppliant. I can see no distinction in principle between a sum due by the Crown under a contract, and goods admittedly due to be delivered by the Crown to their owner under an order of the court. If such goods are not delivered then I fail to see why a petition of right should not lie against the Crown for their value.

The next point for discussion is whether an alien can maintain a petition of right against the Crown. There does not appear to be any suggestion of such a limitation in the Petition of Right Act, and the Customs Act makes no distinction between an alien and a subject. There is, I confess, a strange absence of definite authority upon the point and Mr. Stewart, for the Crown, stated there was no definite weight of authority one way or the other, but his submission was that there was no authority to the effect that an alien had the right to maintain a petition of right. Upon this point I was referred to sec. 18 of the Exchequer Court Act which reads thus:

The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made, or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of contract entered into by or on behalf of the Crown.

It was suggested that the use of the words "of the subject" operates as a bar to any suit or action brought against the Crown by an alien in the cases in which this Court is given jurisdiction by this section of the Exchequer Court Act. I think this section of the Act goes to the jurisdiction of the court and not to the status of any litigant; if the statute were intended to mean that only a British subject could bring suit against the Crown by petition of right, it would, I think, have said so, but

I do not think that was intended. The use of the word "subject" in a statute conferring jurisdiction upon a court in proceedings against the Crown is perhaps natural, but I do not think it was intended to create a distinction between an alien and a subject of the Crown; I think the word "subject" was intended to include any person ordinarily having access to our courts. And this would be equally applicable to the Petition of Right Act. Sec. 19 of the Exchequer Court Act gives exclusive jurisdiction to this court to hear and determine several enumerated claims that might be brought against the Crown, and the word "subject" is not used therein, nor is there any suggestion of prohibiting an alien from bringing an action under any one of such claims. The words "any person" might be read into all the subsections of sec. 19.

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Clode, in his work on the law and practice of Petition of Right states that all subjects of the Crown entitled to and governed by the common law of England may present a petition of right is well established by usage, whatever its origin may have been, but, he states, it is doubtful whether an alien can, and he seems to think that there is no authority extending this privilege to aliens; but he points out one possible exception to this rule, where under the Colonial Stock Act, 1877, it is enacted that "any person claiming to be interested in colonial stock to which this Act applies \* \* \* may present a petition of right in England, in relation to such stock \* \* \*" and he emphasizes the use of the words "any person" and not "any subject." I think it is fair to say that the discussion of this point in Clode does not appear sufficiently exhaustive as to afford authority for a conclusion one way or the other. In Robertson's Crown Civil Proceedings, Chap. III, there appears a rather exhaustive discussion on the point as to who may present a petition of right; that author states that it has been doubted whether anyone but a British subject may approach the Crown by petition of right, but he thinks there is no good reason for such doubt, and that there is nothing to support it in the Petition of Right Act 1860; the use of the word "subject" in sec. 7 of that Act does not in his opinion amount to a pronouncement on the matter. He then proceeds to say:—

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It is true that Staundford, Praerog. 72 sqq., speaks of petition of right as a remedy of "the subject," but he was not applying his mind to the question of subject as against alien; and, indeed, in his time the question would probably have remained an academic one. On the other hand, Fitzherbert, Abr. Error, 8, speaks merely of a person, "homme," as proceeding by petition of right; and so does Brooke, Abr. Prerog. 2, who cites him. Blackstone, 3 Comm. 256, speaks of King and subject in this connection, but the same observation applies to him as to Staundford, and also to Chitty, Prerog. 340, 341. The remark of the last named, that petition of right is "the birthright of the subject," does not appear to be borne out by his authorities. It seems probable to the author that, subject to any disabilities to which an alien person or corporation may still be subject, the Courts would not hold that an alien could not proceed by petition of right. They would remember that, at the date of the early authorities cited above, the right of an alien to maintain even a personal action was by no means admitted.

He then refers to the case of *Rustomjee v. The Queen* (1), where the petition contained an allegation that the suppliant was a subject of the Queen, but this he points out was essential to the claim in that case, since the fund, a share of which the suppliant claimed, was only distributable among British subjects. He then proceeds to refer to instances of petitions of right by an alien in the following language:—

On the other hand *in re von Frantzuis* (1858), 2 De G. & J. 126; 27 L.J. Ch. 368, was an instance of a petition of right by an alien, to wit, a native of Prussia, apparently resident in Prussia, and no objection was taken on the part of the Crown. De Dohse V.R. (1886), 66 L.J.Q.B. 422, n.; 3 T.L.R. 114, was a petition of right by an ex-captain in the Austrian army, who still retained his Austrian nationality, but resided at New Cross. The point was raised in the pleadings by the Crown—not in the demurrer, as it presumably would have been had the Crown thought it a complete bar to the proceedings, but in the answer—in these terms: "The suppliant was a person born out of Her Majesty's dominions and not of English parents." No allusion, however, seems to have been made to this plea in the course of the proceedings in any Court, and it is not repeated in the printed case lodged by the Crown in the House of Lords. It may be remarked that, to judge by the form of the Crown's plea, the Crown's advisers meant to suggest that neither an alien nor a naturalized alien could proceed by petition of right. It has been pointed out above that there seems to be no authority for the former part of this proposition; still less is there any for the latter.

The author's view is rather supported by the fact that by the Colonial Stock Act, 1877 (40 & 41 Vict., c. 59), s. 20 (as to which, see above, p. 348), it is provided that "any person claiming to be interested in colonial stock to which this Act applies "may present a petition of right in England in respect of it. "Any person" clearly includes aliens, and the legislature did not think it necessary to be more specific, as it ought to have been, if by the general law an alien could not present



a petition of right" \* \* \* \* "There seems to be no reason why, subject to the limitations contained in the two preceding chapters, any person or persons should not present a petition of right who would be entitled to bring an action against a subject, whether jointly or severally, by assignment, representation, or succession.

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Halsbury's Laws of England, Hailsham Edition, Vol. 9, page 693, states that the suppliant in a petition of right, "may it seems, be either a British subject, or an alien." Then again it is pertinent to say that petitions of right have been presented in this Court, by others than a British subject, without any objection being taken to the status of the suppliant as an alien.

My conclusion is that in England and here, an alien may maintain a petition of right. The friendly alien has access to our courts like any subject, upon terms perhaps, and if the Petition of Right Act is merely procedural, it is unlikely that it was intended to refuse an alien the right to maintain a petition of right against the Crown upon securing the fiat, without express words of exclusion. The use of the words "subject and subject" in sec. 8 of our Petition of Right Act merely means that in a proceeding against the Crown by petition of right all the defences available in a proceeding between "subject and subject" shall be available to the Crown. This is far however from saying that an action could not be maintained by a petition of right by any friendly alien against the Crown. I do not think the mind of the legislature was directed to that point at all. I therefore think that the suppliant here, even if an alien, was entitled to proceed by petition of right in his claim for relief. I might point out that under the Customs Act an alien is subject to the same penalties and forfeitures and enjoys the same rights and remedies as a subject; no distinction is of course made between them.

But, there is another aspect to the question, as to whether a petition of right might be brought by the suppliant here, who is a citizen of France. In this petition the suppliant is described as of Sydney, Nova Scotia, the inference being that at the time the fiat was granted, Massein was a resident of or had his domicile at Sydney. It was only in the last amended statement of defence that it was pleaded that the suppliant was not a subject of His Majesty and therefore not entitled to the relief claimed,

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but it is not denied that the suppliant was resident at Sydney when the petition was filed, and there is nothing to indicate that the suppliant is not now resident at Sydney. Assuming then that the petitioner was resident at Sydney when the petition was filed, yet there is no suggestion that he was an alien enemy. A friendly alien while in this country, as a matter of law, is in the allegiance of the Crown, and so long as he remains in this country with the permission of the Sovereign, express or implied, he is a subject by local allegiance with a subject's rights and obligations. This principle was discussed at great length in the House of Lords in *Johnstone v. Pedler* (1), and I would refer to that authority. Here, I think, the suppliant was competent to file a petition of right upon the ground that he was a subject by local allegiance, and was entitled to the protection of British law as would be a British subject.

The Crown pleads that on the entry of the judgment the suppliant became entitled to the possession of the goods and that they were thereafter in the possession of the Crown at the risk of the suppliant, and that the suppliant was guilty of negligence and laches in not accepting delivery before February 6, 1929. I do not think that this doctrine is applicable to the facts of this case. Perhaps the facts applicable to this point should be stated with some care. The suppliant, it is true, did not demand or accept delivery of the goods immediately after the recovery of the judgment. It will be remembered that the goods were under detention by the Crown for about one year prior to the date of the judgment. One can readily recognize the difficulties of the suppliant in the situation following upon the events I have narrated, and they were not of the suppliant's making. The actual owner of the goods was in France, the ship *Ariel* had probably long since returned to France, the goods could not be sold in Canada, and the solicitor of the owners of the cargo was insisting on a return of the full cargo. The owners of the cargo no doubt felt that they had unfairly suffered by the seizure and the year's detention of the goods, and had been otherwise seriously damaged, and

they no doubt entertained the belief that the customs authorities might in justice and with propriety, await the reasonable convenience of the owners in arranging for acceptance of delivery of the goods and their removal from Canada. And I am bound to say that would not appear, in the circumstances, to be an unreasonable expectation. In any event nothing immediately transpired in connection with the restoration of the goods to the owners. While the customs authorities, it is true, were pressing the suppliant from time to time to take delivery of the goods at Halifax, still it is also apparent that the same authorities were endeavouring to accommodate the suppliant, and even to the very end customs never acted, I think, upon the legal fiction that the goods had passed into the possession of the owners. The letter of January 18, 1929, from the Assistant Commissioner of Customs to Mr. Maddin is evidence of this. The customs authorities were aware they could not deliver or restore all the seized goods because in September, 1928, the Assistant Commissioner of Customs wrote to Mr. Maddin, the suppliant's solicitor, asking him to arrange to take delivery of the goods, and he stated "that any shortage that is finally established can be made good by delivery of other forfeited goods in substitution." Prior to the date of this letter correspondence had evidently been going on respecting a known shortage. Then later there was another letter from the same officer to Mr. Maddin stating that "any claim for shortage would be arranged afterwards." As late as November, 1928, the examining customs officers at Halifax reconditioned certain of the liquor containers, as I have already explained. The suppliant's solicitor apparently was taking the position that the seized goods were not to be restored by offering delivery of only a portion of the same at one time, and the balance at another time, which would obviously add to the perplexities of the suppliant's situation. It is possible that the suppliant might have demanded delivery of the goods beyond the territorial waters of Canada, but this was not done. The customs authorities evidently realized the difficulties concerning their own duties and obligations in the situation obtaining, and they never definitely took the position that in law the goods were in the possession of the suppliant, or that they were in warehouse at

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the risk of the owners. In the end it was the customs authorities at Halifax that delivered the goods at the ship's side. I do not think that in the facts of the case the Crown can now be heard to say that following the date of the judgment the goods had been restored and were in the possession of the suppliant or the owners. If there were any foundation for asserting such a position it was never done but was waived.

There is another aspect to this point to be considered. If the unreturned goods were stolen before the date of the judgment then not even under a legal fiction could the same be deemed to have passed into the possession of the owners. The fact that a portion of the shortage was discovered only when delivery of the restored goods was made—I refer to the containers where water was substituted for the original contents—does not prove that the theft of the same had not occurred before the date of the judgment; and the burden of showing this should not, I think, rest upon the suppliant. However, we may refer to the evidence of Mr. Acker, Collector of Customs at Halifax. Mr. Acker in cross-examination stated that two weeks after the goods were stored it was discovered that some of the goods were missing and at that time the skylight “was nailed up.” So the theft commenced early in the history of the unlucky cargo, after arriving at Halifax. Earlier, in his direct examination, Mr. Acker stated that on the same occasion it was found persons had entered the warehouse through a skylight on the roof and thus had gained access to the floor on which the goods were stored; then the owner of the rented warehouse planked the skylight up and Mr. Acker states that “the goods were not touched after that.” When the goods were stored in the warehouse, Mr. Acker stated, the owner of the warehouse put up a partition with “heavy two-inch plank, spaced between.” It was later discovered “that it was possible to slip two of the planks up,” and, he stated, “no doubt that is how the goods disappeared.” That this could be done was only discovered in November, 1928, but actual theft of the goods must have occurred before the planking of the skylight, because after that, Mr. Acker stated, the goods were not touched. This evidence seems to fix very definitely the fact that the theft of the missing goods

occurred prior to the date of the judgment. I think it may safely be inferred that the theft of all the missing goods occurred before the date of the judgment, though the full extent of the loss was unknown until the remaining goods were delivered to the master of the *Florence E. McKay*. That simply means that the containers in the end found to be filled with water were erroneously believed, at the examination in November, 1928, to contain the original contents. Now, that being so, and the missing goods having been stolen before the date of the judgment, the same could not in law be deemed to have passed into the possession of the suppliant or the owners, and this point therefore falls to the ground.

Mr. Stewart contended also that the subject matter of this petition was *res judicata* by virtue of the order made by the court upon the Reference. This point was not raised in the pleadings, and it should have been raised there if at all, or, on a motion in the nature of demurrer. The Reference, as I have already mentioned, could only determine the question of the validity of the seizure and detention of the goods, and whether or not they should be forfeited or released. A portion of the goods not having been restored, and being incapable of restoration, the suppliant now seeks from the Crown the value of such goods by this petition, which is, I think, another matter entirely; and it does not, I think, constitute an abuse of the process of the court. I cannot see that any other remedy was open to the suppliant than to proceed as he now does, and as I have already stated, I do not see how the matter now standing for determination here could have been raised upon the Reference; in fact it was not disclosed to the court at the time the order for judgment was granted that the Crown was unable to make full restoration of the seized goods, though it must have been known at that time that some of the goods were missing. I think the Crown must fail upon this point.

Another point raised as a defence may be briefly disposed of. It was urged that the lost goods were stored in a customs warehouse and that the Crown is not liable for any loss of goods occurring while the same are in a customs warehouse, which, under the Customs Act, means any place where imported goods are retained without pay-

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ment of duty. Under the Customs Act, any seized goods are required to be placed in the custody of the nearest collector of customs, and secured by him; they might, so far as I can see, be stored in any building. In this case the goods were not imported goods and they were stored in an ordinary warehouse. I agree that if imported goods are lost while in a customs warehouse in transit to the importer, as in the case of *Corse v. The King* (1), the importer must bear the loss; and ordinarily such goods would be insured. I do not think that is this case at all. I do not think it is of importance here how or where the goods were stolen; the fact is they were not restored to their owners.

There remains to be considered one further point urged on behalf of the Crown. When the master of the schooner *Grace E. McLeod*, accepted delivery of the returned portion of the cargo at Halifax, he gave an undertaking in writing to deliver to the Collector of Customs at Halifax, within thirty days, a foreign customs landing certificate of the goods laden aboard his schooner, and having failed to deliver such foreign customs landing certificate, it is claimed by the Crown that the suppliant is liable to certain penalties under the Customs Act, and upon this is based a counterclaim in the amount of \$47,280. The master of the schooner was not authorized to give such an undertaking and it should not, I think, have been demanded of him in the circumstances. In the proper sense of the word, and within the intendment of the Customs Act, this shipment of goods was not, an export. The master made an entry outwards in compliance with sec. 91 of the Act. Under sec. 96 (2) of the Customs Act, a bond is required upon the export of wines and spirituous liquors, and a foreign customs landing certificate is required before the bond is cancelled; but no bond was required of the master of the schooner here, or of any person representing the owner of the goods. I have no doubt the customs authorities both at Halifax and at Ottawa did not regard this shipment as an export of wines or spirituous liquors. At any rate I do not think the master of the schooner had any authority to give the undertaking he did, and I do not

(1) (1892) 3 Ex. C.R. 13.

think the customs authorities had any right to demand such an undertaking of him; the goods were not wines and spirituous liquors being exported from Canada within the meaning of sec. 96 of the Act. It was said that the customs authorities were exercised lest the goods should be smuggled back into Canada. The answer to that suggestion is that if they were they might be seized, and the master, together with his ship and cargo, would be liable to severe penalties. The counterclaim, I think, is utterly without foundation and the suppliant is not liable to any penalty for failure on the part of the master of the schooner to deliver a foreign customs landing certificate. It was suggested by Mr. Stewart that if the landing certificate had been supplied the claimant would have been paid for the shortage of goods in question. If that were intended, then there being no authority, so far as I can see, for requiring the delivery of a foreign customs landing certificate, and there being no suggestion that the liquors were ever landed in Canada, I think, that the Crown should not have set up the counterclaim.

It is my opinion therefore that the Crown is liable to the suppliant for the value of that portion of the seized cargo which has not been restored. Now, is the value of such goods the price at which the same were said to be tentatively sold, or the replacement cost of such goods in Canada at the time of the seizure, or the cost, insurance, freight, etc., plus the ordinary commercial profit usually enjoyed in the case of such a class of goods, or is it the price which the goods would likely bring if offered for sale and delivery upon the high seas, at or near the point of seizure. At once I conceive of many difficulties in reaching an entirely satisfactory conclusion upon this point. I have decided to reserve this question until the settlement of the minutes when I would desire further argument of counsel, and a further discussion of the effect of the evidence upon this phase of the case. It is clear, I think, that the value of the goods must be determined as of the time of seizure. The cost of the goods at the time and place of export, freight, insurance, and such items, I might now say, do not give me much concern. My difficulty is in determining the value of the goods to the owner at the time of seizure, and it is upon this point that I should

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like to hear counsel again. If any further evidence is available to either party which would assist me, it may be presented by affidavit.

The suppliant is entitled to succeed in his petition and costs will follow the event.

*Judgment accordingly.*

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BETWEEN:

CONTINENTAL OIL COMPANY.....APPELLANT;

AND

COMMISSIONER OF PATENTS.... RESPONDENT.

*Trade-Mark—Unfair Competition Act—Appeal from Registrar—“Motorine”—“Motorene”—Objection to registration—Date of application—User of trade-mark.*

The Continental Oil Company, on January 11, 1933, applied to the Registrar under the Unfair Competition Act, c. 38, 1932, to register the trade-mark “Motorine,” alleging in its application that it had used the mark in Canada, since December 17, 1932. The British American Oil Company, on February 28, 1933, applied to the Registrar to register the word mark “Motorene” alleging that it had used this mark continuously in Canada since February 1, 1911. Each mark is for use in association with lubricating oils and greases. The Registrar refused to register either mark on the ground that they were in conflict. From this refusal the Continental Oil Company appealed.

*Held:* That priority in date of application is not the sole determining factor in deciding which of two or more applicants, under the Unfair Competition Act, is entitled to registration; the words “first uses or makes known in Canada” in s. 4, ss. 1, must be considered when determining priority rights between rival applicants.

2. That an “objection” under s. 38 may be in the form of a second application for the same mark if made before the prior application has been disposed of.
3. That the Registrar should take cognizance of the alleged date of use of a trade-mark, as contained in the application, in differentiating between applications.
4. That “objection” in s. 39, means any objection to, or ground for refusal of an application, gathered from any material properly and in a formal way before the Registrar, before he has disposed of such application.

APPEAL by the Continental Oil Company from the refusal of the Registrar under the Unfair Competition Act to register the trade-mark “Motorine.”

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



*O. M. Biggar, K.C., and M. B. Gordon* for Continental Oil Co.

*R. L. Hughes* for British American Oil Co.

*E. G. Gowling* for Commissioner of Patents.

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

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THE PRESIDENT now, (July 12, 1934) delivered the following judgment:

This is an appeal from the refusal of the Registrar under the Unfair Competition Act 1932, hereinafter referred to as the Act, to register the trade-mark "Motorine," registration of which was applied for by the Continental Oil Company, on January 11, 1933. The appeal is asserted under sec. 51 of the Act. A motion was made before me sometime ago requiring the Registrar to register this mark, but the motion was denied upon the grounds stated in my reasons for judgment (1). It becomes necessary again to state the facts, and this may be done in brief terms. On January 11, 1933, the Continental Oil Company applied for registration of the word mark "Motorine," for use in association with oils and grease, and the applicant alleged in its application that it had used the mark in Canada, since December 17, 1932. On February 28, 1933, the British American Oil Company applied for registration of the word mark "Motorene," in association with lubricating oils, which mark the applicant alleged in its application to have continuously used in Canada, since February 1, 1911. The Registrar, deeming these applications to be in conflict, declined to dispose of either until the rights of the respective applicants had been determined either by mutual agreement, or by a court of competent jurisdiction. Upon a further consideration of the applications, on May 9, 1934, the Registrar refused to register either mark on the ground that they were in conflict, which, he held, created an objection to registration under the Act. From this refusal the Continental Oil Company now appeals.

Upon the former motion mentioned, the British American Oil Company was not heard, but a notice of this appeal was served upon that company, and it duly appeared on the hearing of the appeal, by counsel. Mr. Biggar, for

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the appellant, did not however concede that the British American Oil Company appeared as an appellant from the refusal of the Registrar to register its mark, and in fact it has not, so far as I know, appealed from such refusal. Had appeals been asserted in respect of the refusal of both applications, and heard together, I would have been in a position to make a final disposition of both the applications, which I think, I am now unable to do. There is another matter which I might conveniently mention and dispose of at this stage. On the appeal it was disclosed, for the first time, that the Shell Oil Company of Canada Ltd. had registered the mark "Motorine," in 1913, for practically the same uses mentioned in the two applications referred to here, and that the same stood on the register on the date of the applications of the Continental Oil Company and the British American Oil Company. This mark was however removed from the register later, in December, 1932, under sec. 49 of the Act; this matter is not, I think, of importance now, and may be wholly disregarded. Counsel rather left me with the impression that this was also their view.

The question for decision is whether the Continental Oil Company is entitled upon the facts, and under the terms of the Act, to the registration of its trade-mark, over the British American Oil Company, the prior user of the same trade-mark in Canada, though a later applicant for registration. No issue is raised as to the registrability of either mark, but it is obvious that only one of the two marks should be registered, because they are practically identical. Mr. Biggar argued that by the terms of the Act, the Continental Oil Company, as the first applicant, was entitled to the registration, regardless of any other fact or circumstance disclosed. The point to be determined is very important indeed to practitioners, and is surrounded by many difficulties. It is a case wherein, whatever conclusion I reach, doubt may reasonably persist; it is desirable, in the interests of the public and practitioners, either that the statute should be clarified by amendment, or that some judicial pronouncement be made upon the point in issue so that eventually the meaning of the Act in the particulars relevant here, may be ultimately settled.

It is necessary, I think, to discuss the several provisions of the Act with which we have to do here, and probably it would be most convenient to set out at once those provisions of the Act which appear to have a bearing upon the controversy. Sec. 4 is the first to be mentioned, and whether or not this section is in the end held to be relevant to the issue here—and Mr. Biggar thought it was not—it would, I think, be impossible to exclude its consideration, and, in any event, an argument was based upon it by counsel for the Registrar and counsel for the British American Oil Company. An examination of that and other provisions of the Act will assist, I think, in interpreting the intention and effect of the Act, particularly in respect of the duties and powers of the Registrar in connection with applications for the registration of trade-marks. Sec. 4 in part reads as follows:

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4. (1) The person who, in association with wares, first uses or makes known in Canada as provided in the last preceding section, a trade-mark or a distinguishing guise capable of constituting a trade-mark, shall be entitled to the exclusive use in Canada of such trade-mark or distinguishing guise in association with such wares, (a) provided that such trade-mark is recorded in the register existing under the Trade-Mark and Design Act at the date of the coming into force of this Act, (b) or provided that in compliance with the provisions of this Act he makes application for the registration of such trade-mark within six months of the date on which this Act comes into force, (c) or of the date of his first use thereof in Canada, (d) or of the date upon which the trade-mark or distinguishing guise was first made known in Canada, as provided in the last preceding section, and thereafter obtains and maintains registration thereof under the provisions of this Act.

(2) The use of a trade-mark or a distinguishing guise capable of constituting a trade-mark by a person who is not registered as the owner thereof pursuant to the provisions of this Act shall not confer upon such person any right, title or interest therein as against the person who is registered as the owner of the same or a similar trade-mark or distinguishing guise.

(3) Notwithstanding the provisions of subsection one of this section, the person who first uses or makes known in Canada, in association with wares a trade-mark or a distinguishing guise capable of constituting a trade-mark, may apply for and secure registration thereof after the expiration of any of the periods of six months specified by subsection one, provided the same or a similar trade-mark or distinguishing guise has not been registered by another for use in association with the same or similar wares, but such application shall not be allowed or the registration of such trade-mark made before the expiration of a period of six months from the date of such application.

In sec. 4 (1) as above quoted, for purposes of easy reference, I have designated the provisoes of the section, as

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(a), (b), (c), and (d) respectively, which designations are not to be found in the text.

Sec. 30 prescribes the manner of applying for registration of a trade-mark, and what the application shall contain, and the important part of the section is as follows:—

(1) Any person who desires to register a trade-mark under this Act otherwise than pursuant to a judgment order or declaration of the Exchequer Court of Canada shall make an application in writing to the Registrar in duplicate containing

- (a) a statement of the date from which the applicant or named predecessors in title has or have used the mark for the purposes defined in the application and of the countries in which the mark has been principally used since the said date;
- (b) a statement that the applicant considers that, having regard to the provisions of this Act, he was and is entitled to adopt and use the mark in Canada in connection with the wares described; and
- (c) the address of the applicant's principal office or place of business in Canada, if any, and if the applicant has no office or place of business in Canada, the address of his principal office or place of business abroad and the name and address in Canada of some person, firm or corporation to whom any notice in respect of the registration may be sent, and upon whom service of any proceedings in respect of the registration may be made with the same effect as if they had been served upon the applicant himself.

Sec. 36 relates to indexes of trade-mark applications which are to be kept by the Registrar. The section reads as follows:—

(1) There shall be kept under the supervision of the Registrar three indexes of applications for the registration or extension of trade-marks which have been received by the Registrar but are still pending and undisposed of; such indexes shall respectively contain

- (a) an alphabetically arranged list of the persons by whom such applications have been made, with an indication of the nature of the trade-mark applied for by each, and of the wares, if any are specified, in association with which it is proposed to be used;
- (b) an alphabetically arranged list of the word marks which are the subject of such applications and of the groups of letters and numerals forming part of them, with a note of the persons by whom such word marks have been respectively applied for and of the wares, if any are specified, in association with which the marks are proposed to be used; and
- (c) a classified list of the design marks which are the subject of such applications, with a note of the persons by whom such design marks have been respectively applied for and of the wares, if any are specified, in association with which the marks are proposed to be used.

(2) Upon the disposition of any pending application for the registration of a trade-mark, the nature and date of such disposition shall be noted in the indexes aforesaid against the entries therein relating to such application.

(3) The indexes and the applications therein referred to shall be open to public inspection during business hours and the Registrar shall, upon request and the payment of the fee prescribed therefor, furnish a copy of any entry in any index or of any application certified under his seal of office.

Sections 37, 38 and 39 are of importance here, and are as follows:

37. If the Registrar is of opinion that an application is one which cannot be allowed under this Act, he shall forthwith notify the applicant accordingly, giving his reasons for refusing to allow the application.

38. (1) If the Registrar is in doubt as to whether or not an application for registration should be granted by reason of any registrations theretofore made, he shall by registered letter request the owners of the previously registered marks upon which such doubt is based to state, within a period to be fixed by him, whether they have any objection to the proposed registration, and if so, the reasons for such objection.

(2) If any of them object for reasons which are not in the Registrar's opinion frivolous, he shall, subject as hereinafter provided, refuse the application and notify the applicant accordingly, giving full particulars of the registrations or applications on which the objections are based, and the reasons adduced in support of such objections.

39. If there is no objection to the registration of a trade-mark for the registration of which a sufficient and complete application has been made, the Registrar shall, subject as hereinafter provided, forthwith cause such trade-mark to be entered in the register as of the date upon which such application was received by him.

Section 52 (1) plays an important part in the foundation of the argument of the appellant's counsel and therefore might be set out; it is as follows:

52. (1) The Exchequer Court of Canada shall have jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

A cursory reading of the provisions of the Act which I have quoted, might leave one with the impression that priority of application for the registration of a mark represents the vital scheme of the Act, and that always the first application is entitled, with the two exceptions set forth in sections 37 and 38, to the registration, but a careful perusal of the Act reveals, in my opinion, that this is not the case, although in actual practice registration goes to the first applicant in the majority of cases. Sec. 4 (1) would seem to be intended to protect the old marks in use at the time of the coming into force of the Act, and others coming into use thereafter, within time limits. The proviso 4 (1) (a) presents no difficulties. Then, proviso 4 (1) (b) seems to read that the person who first uses a

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trade-mark in Canada before the passing of the Act, is entitled to the exclusive use of the mark, providing he register within six months of the date of the coming into force of the Act; and that on the material disclosed, is the case of the British American Oil Company, because it was the first to use or make known the mark in Canada, and it applied for registration within six months of the date on which the Act came into force; not anxious to anticipate difficulties I need not attempt to say what situation would develop, if the British American Oil Company did not register within the six months, but later another did after the expiry of that period, and the former then sought under sec. 52 (1) to strike out the registration. But sec. 4 (1) (c) would appear to go further still, and seems to grant the right to registration to the user of a mark providing application was made for registration within six months of his first use thereof in Canada, providing of course that he was also the first to use or make known the mark in Canada; that proviso purports to extend the rights of a trade-mark user to registration beyond that mentioned in 4 (1) (b), but I am not attempting to define its precise effect in this case, because both applications here fall within 4 (1) (b), although the Continental Oil Company's application would apparently fall also within the clause 4 (1) (c), because it applied for registration within six months of its first use in Canada, but it would also be necessary to establish that it was the first to use or make known that mark in Canada, in order to obtain the exclusive use of such mark in Canada. The British American Oil Company's application would not fall within 4 (1) (c) because its application was made more than six months after its first use in Canada. The "first use" by an applicant for registration is one thing, but "first use" \* \* in Canada" as used in the first two lines of sec. 4, is another thing. The remaining provisions of sec. 4 need not be considered because they are not pertinent to the facts disclosed in the matter under discussion. I am not attempting here to decide definitely what is the true construction and effect of sec. 4 in its entirety, and I only suggest that it negatives the assumption that priority in date of application is the sole determining factor in deciding which of two or more applicants is entitled to regis-

tration, and that the words "first uses or makes known in Canada" must be considered when determining priority rights between rival applicants.

Then it will be recalled that sec. 36 is the one that makes provision for the keeping of indexes, by the Registrar, of applications for registration received by him but which "are still pending and undisposed of." After a pending application is disposed of, the nature and date of such disposition must be noted, in the indexes, against the entries therein relating to such application. Then the section provides that the indexes, and the applications therein referred to, shall be open to public inspection during business hours at the Registrar's office and the Registrar must upon request furnish a certified copy of any entry in any index, or of any application. The immediate importance of this section is that it recognizes that applications need not be disposed of forthwith upon application, that indexes of applications must be kept, and that the indexes and the applications are open to public inspection. It follows that two or more applications, claiming the same trade-mark, may appear in the index on applications at the same time, awaiting disposition.

Then coming to that group of sections, 37, 38 and 39. Sec. 37 is clear, meaning only that if the Registrar is of the opinion that an application cannot be allowed he shall forthwith notify the applicant, giving his reasons therefor. The disallowance referred to in this section must, I think, be intended to relate to a disallowance based on the fact that it was not registrable, but I need not delay to enquire if it means more. Sec. 38 provides that if the Registrar is in doubt whether an application for registration should be granted by reason of a prior registration, he shall by registered letter enquire of such prior registrant if he has any objection to the proposed registration, and if so to assign his reasons therefor. If any objection is made and seems not frivolous, the Registrar shall refuse the application and notify the applicant accordingly, giving particulars of the registrations or applications on which the objections are based, and the reasons adduced in support of such objections. While sec. 38 would at first seem to relate only to objections based on a prior "registration," yet it would seem also that a contemporary "application"

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might also be a ground of objection, because ss. (2) requires that the Registrar, in refusing an application, shall give to the applicant particulars of the "registrations or applications on which the objections are based." In this regard sec. 38 seems somewhat obscure. If the construction which I suggest is well founded, then there is a further recognition of the fact that one application may constitute an objection to another application, both being before the Registrar at the same time. It would seem to me that the words "or applications" should be eliminated from sec. 38 (2) or incorporated in some way in sec. 38 (1), and also in sec. 51 (2). Then by sec. 39, if there is no "objection" to the registration of a trade-mark, for which a complete application for registration has been made, the Registrar is required to forthwith enter such trade-mark in the register as of the date of application. The words "objection \* \* \* has been made," must mean, I think, an objection made by any person, who knowing of the application made, from the index of applications, or from or through any other source, and who lodges with the Registrar in some tangible form an "objection"; an "objection" might be, I think, a second application for the same mark if made before the prior application were disposed of. An "objection" is, I think, something the Registrar may consider to be such. An "objection" must of course be one of substance, it must not be frivolous, and it must have some basis in fact or law, or both; the Registrar must not refuse an application to register a trade-mark if it is registrable, and, if upon the material before him, it would appear that there is no valid or meritorious objection to the registration of the mark.

Mr. Gowling, for the Registrar, urged that the question which concerned the Registrar was should he allow registration under the first application, when he had regularly before him a second application for the same trade-mark, and he said the Registrar considered that there was an "objection" to the first application when he found before him a second application for registration of virtually the same mark, and which second application disclosed that the second applicant was the prior user of the mark, and which user was prior to the passing of the Act, the second application being made within six months



of the Act coming into force. And he pointed out that the British American Oil Company, being a prior user of the mark as between the two applicants in Canada, had the exclusive right to the mark under sec. 4 (1), and that upon the material before him it would be an interference with the protection intended to be afforded to first users under sec. 4 (1), to refuse the second application; and that sec. 4 (1) of the Act should not be disregarded but should be read along with other relevant provisions of the Act. Evidently, the Registrar did not act as Mr. Gowling argued.

On the other hand Mr. Biggar, for the Continental Oil Company, in effect contended that if the trade-mark proposed to be registered by his client was registrable, and if the register disclosed no objections in the nature of similar prior registrations, then the trade-mark of the Continental Oil Company should have been forthwith registered as of the date of the application, as directed by sec. 39, notwithstanding that the application of the British American Oil Company had been received and was before the Registrar before he had made any disposition of the first application, and notwithstanding that the second application disclosed an earlier use of the mark than the first application. Mr. Biggar urged that this was the clear purpose and intention of the Act, to ensure, *inter alia*, expedition in the administration of the Act. He pointed out that even if the registration of his client's mark did not accurately express its existing rights to be registered, a simple and summary remedy was open to any objecting party under section 52, wherein by an originating notice of motion any person may move to strike from the register any entry on the ground that it did not accurately express or define the existing rights of the person appearing to be the registered owner of the mark. This, I think, expresses the substance of Mr. Biggar's argument.

Mr. Hughes, for the British American Oil Company, opposed Mr. Biggar's construction of the Act, and urged that upon the facts and the provisions of the Act, the application of his client should be considered by the Registrar before disposing of the first application, and that his client was entitled to priority and should be given registration of his mark. That expresses the substance of the argument advanced on behalf of the British American Oil Company.

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The matter for decision then is, what, in the state of the facts disclosed, and in virtue of the provisions of the Act, should the Registrar have done, in respect of these two applications. I am of the opinion, in the first place, that the Registrar should have made some disposition of the two applications, upon the material before him. I do not think he should have refused to act until the rival applicants settled the issue between themselves, or until the courts disposed of the controversy. Speaking with some reserve, I doubt also if he should have refused both applications on the ground that they were in conflict. The Act does not seem to make any provision for the case where concurrent applications are seemingly in conflict. Sec. 22 of the Exchequer Court Act grants jurisdiction to the Exchequer Court in all cases of conflicting applications for registration of trade-marks. Whether the grant of jurisdiction creates a remedy or procedure in such a case, as it does create a liability, may be debatable, and I am not expressing a definite opinion on the point; it may be that this is what the Registrar had in mind when he refused both applications, although his refusals seem to be based on something in the Act. I doubt, however, if the applications here were in conflict. The trade-marks themselves were in conflict, it is true, but I doubt if the applications were in conflict, because one showed a much earlier user than the other, and it seems to me, that in such circumstances, that was sufficient to differentiate the applications; I think the Act contemplates that the Registrar should take cognizance of this fact and act accordingly. The Trade-Mark and Designs Act, repealed, did not require an applicant to make "a statement of the date from which the applicant \* \* has or have used the mark for the purposes designed in the application," as does the Unfair Competition Act, and this requirement, a very desirable one to make, was, I think, intended to widen the discretion and powers of the Registrar, to supply further material on which he could act, and thus avoid needless litigation and delays in securing registration of trade-marks. With the introduction of this requirement in the written application, sec. 30 of the Act, it is hardly conceivable that two applications should be in such a state of conflict that a decision, as between two or more appli-

cations, should not be made by the Registrar. It is difficult to say just how useful now is sec. 22 (a) of the Exchequer Court Act, or when it may be resorted to, and no doubt the point will sometime arise for decision. Under the repealed Trade-Mark and Designs Act, there could be a reference by the Minister to the Exchequer Court when he was not satisfied that any applicant was entitled to the exclusive use of a trade-mark for which an application to register was before him, but there is not now such a statutory provision.

While appreciating the force of Mr. Biggar's argument, I am of the opinion that his contention cannot prevail. I think it is clear that section 4 (1) of the Act was intended to afford protection, for a limited period at least, to a trade-mark which had been in use prior to the passing of the Act, providing the user applied for registration within six months of the Act coming into force. That was the case of the British American Oil Company, and upon the material before the Registrar it would appear that the British American Oil Company not only commenced and continued the use of the mark prior to the Continental Oil Company, but it was also the first to use or make known the same, in Canada. I agree that applications for registration of trade-marks, should be disposed of as quickly as possible, but the Act contemplates such a thing as "pending and undisposed of" applications, and that indexes of the same shall be kept by the Registrar. I do not think the Act is to be construed as meaning that applications must of necessity be disposed of forthwith, or that, in a case of this kind, the first application is, on the ground of priority of application, entitled to the registration. The fact that the indexes of applications are open to public inspection, and that upon request certified copies of an application must be furnished to applicants, must mean that it was intended that some time might elapse between the date of applications and the disposition thereof, and that if any person, upon inspection of an index or an application, perceived grounds for objection to an application, he might in an appropriate manner communicate his objection to the Registrar, and if he made out a substantial case, and the Registrar so thought, I apprehend, effect should be given to the objection. The second

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application here, upon its face, as I have already pointed out, disclosed an objection to the registration of the trademark mentioned in the first application. The fact that the Act requires the applicant to state the date from which he used the mark applied for, indicates to me that it was intended that the Registrar should take cognizance of and act upon such statements. I fail to see why the second application here should not be construed by the Registrar as an "objection" to the first application. I think "objection," in sec. 39, means any objection to, or ground for refusal of, an application, gathered from any material properly and in a formal way before the Registrar, before he has disposed of such application. In this case, the Registrar found in one of the indexes of applications, two applications for the same mark. I think he was bound to consider them together, and upon the material before him decide which of the two was entitled to registration.

Therefore, I think the Registrar was bound, in the facts of this case, to consider the application of the British American Oil Company, which, upon its face disclosed a *prima facie* right to registration over the mark mentioned in the application of the Continental Oil Company. I am of the opinion that the Registrar, after considering both applications, and all the material therein contained, should have allowed the application of the British American Oil Company, and refused that of the Continental Oil Company. The latter company, if so advised, might then attack the registration under sec. 52, when material other than that contained in the two applications, might be introduced. This conclusion seems to me to be within the spirit and intention of the Act, it would seem to be a practical and workable construction of the Act, and would seem to do justice in this and similar cases.

The Registrar has refused both applications, but the Continental Oil Company alone has appealed, and it follows from what I have said that the appeal herein must be dismissed. The other applicant has not appealed from the refusal of the Registrar to register its mark, and in the circumstances I do not think that I should direct the Registrar to do so, which I probably would have done had it appealed, and both appeals were now before me.

There will be no order as to costs.

*Judgment accordingly.*

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See CROWN, No. 2.

## APPEAL FROM REGISTRAR OF TRADE MARKS

See TRADE-MARKS, Nos. 1 AND 2.

## BRITISH NORTH AMERICA ACT

See CROWN, No. 3.

## CANADIAN NATIONAL RAILWAYS ACT

See CROWN, No. 2.

## CHANTIER PUBLIC

See CROWN, No. 6.

## CLAIMS EQUIVALENCY

See PATENTS FOR INVENTION, No. 2.

## COASTING REGULATIONS

See REVENUE, No. 3.

## COLLISION

See SHIPPING, No. 1.

## COMPANY IN LIQUIDATION

See REVENUE, No. 1.

## COMPENSATION

See EXPROPRIATION, Nos. 1 AND 2.

## CONDITIONS RELATING TO USE OF NAME OR SURNAME

See TRADE-MARKS, No. 4.

## CONFLICTING APPLICATIONS TO REGISTER TRADE-MARK

See TRADE-MARKS, No. 3.

## CONFUSION DUE TO SIMILARITY OF NAMES

See FOREIGN INSURANCE COMPANY, No. 1.

## CONSTITUTIONAL LAW

See REVENUE, No. 1.

## CRIMINAL CODE

See REVENUE, No. 4.

## CROWN

- 1—*Action instituted in the name of His Majesty the King.* No. 2.
- 2—*British North America Act.* No. 3.
- 3—*Canadian National Railways Act.* No. 2.
- 4—*Chantier Public.* No. 6.
- 5—*Crown as Trustee.* No. 3.
- 6—*Crown Bound by Judgment or Order of Court Based on Written Consent.* No. 1.

## CROWN—Continued

- 6—*Customs.* No. 1.
- 7—*Damages.* No. 5.
- 8—*Damages to Canadian National Railways.* No. 2.
- 9—*Exchequer Court Act.* Nos. 2, 3, 4 and 6.
- 10—*Jurisdiction.* Nos. 1, 2, 3, 4, 5 and 6.
- 11—*Liability of Crown for Failure to Restore Seized Goods Pursuant to Court Order.* No. 1.
- 13—*Negligence.* No. 6.
- 14—*Non-Assignability of Claim against the Crown.* No. 3.
- 15—*Petition of Right.* Nos. 1 and 5.
- 16—*Petition of Right Act.* No. 4.
- 17—*Public Work.* Nos. 4, 5 and 6.
- 18—*Res Judicata.* No. 1.
- 19—*Responsibility.* Nos. 4, 5 and 6.
- 20—*Rideau Canal Act.* No. 3.
- 21—*Right of Friendly Alien to Petition.* No. 1.
- 22—*Statute of Limitation.* No. 3.

**CROWN — Customs — Seizure — Liability of Crown for failure to restore seized goods pursuant to court order—Jurisdiction — Petition of Right—Right of friendly alien to Petition—Crown bound by judgment or order of court based on written consent—Res Judicata.]** Certain goods were seized by Canadian Customs officers, and by consent of counsel, an order was made by the Exchequer Court dissolving such seizure and directing that the property be restored to the suppliant. Some months later when he went for delivery of the goods, it was discovered there was a shortage, for the value of which this action was brought.—*Held:* That the Crown is liable for the value of goods unlawfully seized or detained if restoration cannot be made.—2. That the Court has jurisdiction to entertain a claim for goods of the subject in the possession of the Crown.—3. That a petition of right will lie against the Crown when specific chattels have found their way into the possession of the Crown, and if restitution cannot be made, for compensation in money. 4. That a judgment or order of the Court, founded on a written consent between the Crown and the subject, constitutes a definite obligation entered into by the Crown.—5. That a friendly alien may maintain a petition of right.—6. That a friendly alien while in Canada, is in the allegiance of the Crown, and so long as he remains in Canada with the permission of the Sovereign, expressed or implied, he is a subject by local allegiance with a subject's rights and obligations. *Johnstone v. Pedler* (1921) 2 A.C. 262.—7. That on the facts the Crown cannot allege that fol-

## CROWN—Continued

lowing the date of the judgment the goods had been restored and were in the possession of the suppliant or of the owners.—8. That the subject matter of this petition did not become *res judicata* by virtue of the order made by the Court for the restoration of the goods. *MASSEIN v. THE KING*..... 223

2—*Damages to Canadian National Railways—Canadian National Railways Act—Action instituted in the name of His Majesty the King—Jurisdiction—Exchequer Court Act.*—*Held:* That as the *Canadian National Railways Act*, R.S.C. 1927, c. 172, does not vest ownership of the government railways in the Canadian National Railway Company, it being entrusted only with the management and operation of the railways as an agent or mandatory for the government, they remaining the property of the Crown, an action for damages to the Canadian National Railways, brought in the name of His Majesty the King, is properly instituted.—This action was brought for the recovery of a sum of money for damages caused through the derailment of a train of the Canadian National Railways in consequence of a wash-out of the embankment between the viaduct over the highway and the bridge crossing the St. Francis River, near Drummondville, P.Q. The Court found that the dam of the defendant company at Hemmings Falls was responsible for the wash-out of the railway embankment at Drummondville and the derailment of the train; that the accident was not the result of *vis major* nor was it caused by the fault or negligence of the Plaintiff; that consequently the defendant company is liable to the Plaintiff. *THE KING v. SOUTHERN CANADA POWER CO. LTD.*..... 142

3—*Jurisdiction—Exchequer Court Act—Rideau Canal Act—British North America Act—Crown as Trustee—Statute of Limitation—Non-Assignability of claim against the Crown.*—*Held:* That the Exchequer Court has jurisdiction to entertain an action arising out of the taking of lands under the Rideau Canal Act, 8 Geo. IV, c. 1.—2. That the Crown can only be constituted a trustee by express statutory provisions or a contract to which the Crown is a party.—3. That a claim against the Crown, in the absence of acquiescence, is not assignable. *CHIPMAN v. THE KING*..... 152

4 — *Responsibility — Public Work — Jurisdiction—Exchequer Court Act—Petition of Right Act.*] Specially equipped motor cars, owned by the Government of Canada, are employed by the Radio Branch of the Department of Marine, in the detection and elimination of radio

## CROWN—Continued

inductive interference. Two employees of the Radio Branch were returning to Ottawa in such a car, from a tour of inspection, when they stopped the car on one side of the travelled road to wipe the windshield which had become clouded due to weather conditions. An oncoming car, in which the son of the suppliants was a passenger, collided with the Government car, and he was killed.—*Held:* That the government owned motor car, in occupation and control of the government employees on the occasion in question, was a "public work" within the meaning of s. 19 (c) of the Exchequer Court Act, c. 34, R.S.C. 1927.—2. That the government employees in the said car were, at the time of the collision in question, officers or servants of the Crown acting within the scope of their duties or employment upon a public work, within the meaning of the said section of the Exchequer Court Act.—3. That the Court has jurisdiction to entertain the action.—The meaning of public work, within the Exchequer Court Act, and the liability of the Crown in tort, discussed. *DUBOIS ET AL v. THE KING*..... 195

5—*Responsibility—Petition of Right—Public Work — Jurisdiction — Damages.*] One K., an enlisted soldier in the Canadian Army Service Corps, engaged as a transport driver, stationed at Kingston, drove a motor truck, loaded with supplies, from Kingston and delivered the same to the Royal Air Force at Trenton. Whilst returning to Kingston, the motor truck driven by K., negligently collided with a motor truck in which M. was a passenger, causing his death. Suppliants are the widow and step-mother of M.—*Held:* That K. was engaged in a public work and was acting within the scope of his duties as a servant of the Crown, at the time of the accident. *Schrobounst v. The King* (1925) Ex. C.R. 167 and *Dubois v. The King* (1934) Ex. C.R. followed. *MOSCOWITZ ET AL v. THE KING* . . . . . 188

6 — *Responsibility — Negligence — Public Work — Chanier Public — Jurisdiction—Exchequer Court Act.*] One G.C., a constable of the Royal Canadian Mounted Police, was driving an automobile belonging to the Force, in the City of Montreal. Whilst attempting to pass a street car, which had stopped to allow its passengers to alight, the automobile struck the Suppliant, causing considerable injury to her person.—*Held:* That the automobile in question was not a public work within the meaning of s. 19 of ss. (c) of the Exchequer Court Act, R.S.C. 1927, c. 34, nor was such automobile used in connection with a public work to bring it within the decision in the case of *Schrobounst v. The King* (1925) Ex. C.R.

**CROWN—Concluded**

167 and (1925) S.C.R. 458.—2. That the Court was without jurisdiction to entertain the action.—The French version of a public work in said Act "chantier public" discussed. *TOMAN v. THE KING* ..... 161

*See also* EXPROPRIATION.

**CUSTOMS**

*See* CROWN, No. 1.

**CUSTOMS ENACTMENTS**

*See* REVENUE, No. 3.

**DAMAGES**

*See* CROWN, No. 5.

**DAMAGES TO CANADIAN NATIONAL RAILWAYS**

*See* CROWN, No. 2.

**DATE OF APPLICATION**

*See* TRADE-MARKS, No. 2.

**EXCESSIVE SPEED**

*See* SHIPPING, No. 1.

**EXCHEQUER COURT ACT**

*See* CROWN, NOS. 2, 3, 4 AND 6.

*See* EXPROPRIATION, No. 2.

*See* TRADE-MARKS, No. 3.

**EXCHEQUER COURT RULES**

*See* TRADE-MARKS, No. 3.

**EXCISE ACT**

*See* REVENUE, No. 4.

**EXPROPRIATION**

- 1—*Abandonment*. No. 1.
- 2—*Compensation*. Nos. 1 and 2.
- 3—*Crown*. No. 2.
- 4—*Expropriation Act*. Nos. 1 and 2.
- 5—*Injurious Affection*. No. 2.
- 6—*Interest*. No. 1.
- 7—"Public Work." No. 2.

**EXPROPRIATION** — *Abandonment* — *The Expropriation Act—Compensation—Interest.*] In March, 1929, land belonging to the suppliant in Montreal was expropriated for a public purpose, and became vested in the Crown; the amount of compensation was not agreed upon. After the expropriation, suppliant was permitted to continue in occupation of his property, and was authorized to receive and collect rents. In March, 1932, the Crown abandoned the expropriation. The suppliant claims *inter alia* as compensation the difference between the value of the property at the date of expropriation, and its value at the date it reverted back to him.—*Held*: That the value of the land at the time of taking, and at the time of the revestment, must be taken into account in connection with all the other circumstances in determining the amount to be paid. *Gibb v. The King* (1914) Ex. C.R. 157; (1915) 52 S.C.R. 402; 1918 A.C.

**EXPROPRIATION—Concluded**

915, followed.—2. That suppliant is entitled to interest upon any compensation allowed, from the date of the abandonment of the expropriation. *MATHYS v. THE KING* ..... 213

2—*Crown — Expropriation — Compensation — Injurious Affection — "Public Work" — Expropriation Act.*] The defendant owns two islands named Piers and Knapp, separated from each other a distance of 1,250 feet, in the Gulf of Georgia. The Crown expropriated Piers Island for a term of five years for use as a penitentiary. The defendant, in addition to rental, claimed compensation for injurious affection to Knapp Island.—*Held*: That in determining the compensation under the circumstances here existing, the value of the freehold must be considered in order to reach a fair and just conclusion as to the amount of compensation.—2. That there is no unity of property in the two islands, they being separate holdings or estates; it is not a case of the severance of a single holding or estate.—3. That the fact of common ownership does not constitute the two islands one estate.—4. That to entitle a person to recover compensation for injurious affection, the damage must arise from something which would, if done without statutory authority, have given rise to a cause of action.—5. That the penitentiary on Piers Island is a public work within the meaning of s. 2 (g) of the Expropriation Act, R.S.C., 1927, c. 64, the construction of which is that "public work" includes all public undertakings, public buildings, or properties which the Government of Canada is authorized to construct, acquire, extend or maintain for any authorized public purpose. *THE KING v. O'HALLORAN* ..... 67

**EXPROPRIATION ACT**

*See* EXPROPRIATION, NOS. 1 AND 2.

**FILING DATE,**

*See* PATENTS FOR INVENTION, No. 1.

**FOREIGN INSURANCE COMPANY**

- 1—*Confusion due to Similarity of Names*, No. 1.
- 2—"or otherwise on Public Grounds Objectionable." No. 1.
- 3—*Registration*. No. 1.

**FOREIGN INSURANCE COMPANY**

—*Registration—Confusion due to similarity of names—"or otherwise on public grounds objectionable."*] The Continental Assurance Company, a United States corporation, was refused registration in Canada under the Foreign Insurance Companies Act, 22-23 Geo. V, c. 47, on the ground that its name was liable to be confounded with that of the Continental Life Insurance Company, a Canadian

**FOREIGN INSURANCE COMPANIES***—Concluded*

corporation licensed under the Canadian and British Insurance Companies Act, 22-23 Geo. V, c. 46. On appeal from the ruling of the Minister of Finance, it was held:—1. That under s. 9 of the Foreign Insurance Companies Act registration may be refused if the name of the applicant company is so similar to the name of a company already registered under the same Act, as to cause confusion.—2. That the words "or otherwise on public grounds objectionable" in ss. 1 of s. 9, of the Foreign Insurance Companies Act mean something other than the question of confusion arising out of a similarity of names. *IN RE FOREIGN INSURANCE COMPANIES ACT, 1932*..... 84

**IMPROPER NAVIGATION***See SHIPPING, No. 1.***INCOME***See REVENUE, No. 1.***INCOME WAR TAX ACT, 19***See REVENUE, No. 1.***INFRINGEMENT.***See PATENTS FOR INVENTION, Nos. 1 AND 2.***INJURIOUS AFFECTION***See EXPROPRIATION, No. 2.***INTEREST***See EXPROPRIATION, No. 1.***INTEREST ON DEFERRED PAYMENTS***See REVENUE, No. 1.***INTERPRETATION***See REVENUE, No. 1.***INVENTION.***See PATENTS FOR INVENTION, No. 2.***JURISDICTION***See CROWN, Nos. 1, 2, 3, 4, 5 AND 6.  
See TRADE-MARKS, No. 3.***LIABILITY OF CROWN FOR FAILURE TO RESTORE SEIZED GOODS PURSUANT TO COURT ORDER***See CROWN, No. 1.***LIQUIDATOR***See REVENUE, No. 1.***MANDAMUS***See TRADE-MARKS, No. 3.***MERCHANT SHIPPING (COLONIAL) ACT, 1869***See REVENUE, No. 3.***NEGLIGENCE***See CROWN, No. 6.***NON-ASSIGNABILITY OF CLAIM AGAINST THE CROWN***See CROWN, No. 3.***NON-USER OF PATENTED INVENTION***See PATENTS FOR INVENTION, No. 1.***OBJECTION TO REGISTRATION***See TRADE-MARKS, No. 2.***PATENT ACTS 1906 AND 1923***See PATENTS FOR INVENTION, No. 1.***PATENTABILITY.***See PATENTS FOR INVENTION, No. 2.***PATENTS FOR INVENTION**

- 1—*Abandonment of Invention.* No. 1.
- 2—*Claims Equivalency.* No. 2.
- 3—*Filing Date.* No. 1.
- 4—*Infringement.* Nos. 1 and 2.
- 5—*Invention.* No. 2.
- 6—*Non-User of Patented Invention.* No. 1.
- 7—*Patentability.* No. 2.
- 8—*Patent Acts 1906 and 1923.* No. 1.

**PATENTS — Infringement — Abandonment of invention—Non-user of patented invention—Filing date—Patent Acts 1906 and 1923.]**

The patent in suit is for new and useful improvements in Automatic Train Control Apparatus. The Court found there was no infringement and further held:—1. That the abandonment of his invention by an inventor can only be inferred from such conduct as clearly denotes the voluntary surrender to the public of his rights in some form or other.—2. That non-user of a patented invention is not fatal to a patent.—3. That the Commissioner of Patents in the exercise of his discretion, having granted a patent under the Patent Act of 1923, the Court will not now hold that the filing date given to the applicant should be changed to another date and thus render the application subject to certain provisions of the Patent Act of 1906.—4. That the Patent Act of 1923 does not affect the operation of the Act of 1906 in respect of applications for patents made under that Act or to affect any right or privilege acquired by an applicant for a patent under that Act.—5. That s. 50 of the Patent Act means, that if a person has acquired in some way or other, something which was the subject of an application for a patent by another who is presumably the first inventor, but for which a patent had not yet issued, he, the former, should have a continuing right to use and vend the same notwithstanding the issue of the patent to the other person. *SCHWEYER ELECTRIC & MFG. CO. v. NEW YORK CENTRAL RAILROAD Co.*..... 31

2 — *Patentability — Infringement — Invention — Claims — Equivalency.*] The two patents in suit relate to electric signalling and particularly to signalling over ocean cables. The Court found that there was no infringement and—*Held*: That on a true construction of the



**PATENTS—Concluded**

patents, the monopoly claimed must be limited to the precise combination described, and if the claims purport to go beyond this, then such claims, if not the patents themselves, would be void.—2. These are not cases where the doctrine of equivalency applies. *WESTERN ELECTRIC CO. INC. ET AL V. BALDWIN INTERNATIONAL RADIO OF CANADA, LTD.* (13632) ..... 132

**PETITION OF RIGHT**

See *CROWN*, NOS. 1 AND 5.

**PETITION OF RIGHT ACT**

See *CROWN*, No. 4.

**PETITION TO REGISTER**

See *TRADE-MARKS*, No. 1.

**PRISONS AND REFORMATORIES ACT**

See *REVENUE*, No. 4.

**PROCEDURE**

See *TRADE-MARKS*, No. 3.

**PUBLIC WORK**

See *CROWN*, NOS. 4, 5 AND 6.  
See *EXPROPRIATION*, No. 2.

**REGISTRATION**

See *FOREIGN INSURANCE COMPANY*, No. 1.

**RES JUDICATA**

See *CROWN*, No. 1.

**RESPONSIBILITY**

See *CROWN*, NOS. 4, 5 AND 6.

**REVENUE**

- 1—*Coasting Regulations*. No. 3.
- 2—*Company in Liquidation*. No. 1.
- 3—*Constitutional Law*. No. 1.
- 4—*Criminal Code*. No. 4.
- 5—*Customs Enactments*. No. 3.
- 6—*Excise Act*. No. 4.
- 7—*Income*. No. 1.
- 8—*Income War Tax Act*, s. 19. No. 1.
- 9—*Interest on Deferred Payments*. No. 1.
- 10—*Interpretation*. No. 1.
- 11—*Liquidator*. No. 1.
- 12—*Merchant Shipping (Colonial) Act 1869*. No. 3.
- 13—*"On"*. No. 1.
- 14—*Prisons and Reformatories Act*. No. 4.
- 15—*Sales Tax*. No. 2.
- 16—*Seizure*. No. 3.
- 17—*Shareholder*. No. 1.
- 18—*Special War Revenue Act*. No. 2.
- 19—*"That the Company has on Hand"*. No. 1.
- 20—*When Sales Tax Exigible*. No. 2.
- 21—*Whether Province or Dominion Entitled to Fine Imposed under Excise Act*. No. 4.
- 22—*Winding-up Act*. No. 1.

**REVENUE** — *Company in liquidation—Shareholder—Interest on deferred payments—Income—Liquidator—Winding-Up Act—Income War Tax Act*, s. 19—*"On"*—*"That the company has on hand"*—*Interpretation—Constitutional law*.] The appellant owned shares in the North Pacific Lumber Company Limited, which company in 1926 was ordered wound up under the provisions of the Winding-Up Act. The appellant, in 1929, received the sum of \$5,439.91 from the liquidator of the company, this amount being paid out of the undistributed income of the company during the process of winding it up. This sum represented appellant's share of interest on the balance of deferred purchase prices of properties of the company. The Commissioner of Income Tax included this sum in the assessment notice sent to appellant. The assessment was confirmed by respondent, and, appellant being dissatisfied, the matter was referred to this Court.—*Held*: That interest on deferred payments of capital is income subject to taxation; and the distribution of assets of a company by a liquidator does not change the nature of such assets in such a way as to convert interest or earnings into capital. The *North Pacific Lumber Company Limited v. The Minister of National Revenue* (1928) Ex. C.R. 68, followed.—2. That the word *on* in s. 19 of c. 97, R.S.C., 1927, is equivalent to *from the date of or after* and implies a notion of continuity.—3. That the words *that the company has on hand* in said s. 19 do not mean *that the company has on hand at the time of the winding-up order*.—4. That taxing acts are not to be construed differently from any other act, when the language is clear and unambiguous.—5. That s. 19 is *intra vires* of the Parliament of Canada.—6. That there is no conflict between ss. 19 and 13 of c. 97, R.S.C., 1927. *MACLAREN v. MINISTER OF NATIONAL REVENUE* ..... 13

2—*Sales tax—When exigible—Special War Revenue Act*.] The Special War Revenue Act, R.S.C. 1927, c. 179, as amended by 21-22 Geo. V, c. 54, provided that there should be levied a sales tax of four per cent on the sale price of all goods produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof. The amendment also provided that goods sold prior to March 2, 1931, for delivery after June 2, 1931, were liable to the tax of four per cent.—The defendant company, a manufacturer of chocolate products subject to the tax, sought to avoid payment of the increased tax by accepting orders for future delivery of goods which were set apart in its warehouse and marked "Reserved stock sold." There was no identification of the particular goods representing the order of any indi-

## REVENUE—Continued

vidual purchaser. When a customer wished delivery of a portion of the goods ordered they would be taken from the reserved stock and payment made when shipped. The defendant notified the Department of National Revenue each month of the quantity of goods thus sold and later remitted the tax thereon calculated at the rate of one per cent.—The action was brought to recover the amount of the tax calculated at the rate of four per cent upon the sale price of goods sold after March 2, 1931, and delivered after June 2, 1931.—*Held*: That the tax was exigible by the manufacturer when the transaction was finally consummated by delivery of the goods to the purchaser, regardless of the precise date of sale, or where or when the title to the goods passed to him. *THE KING v. WILLIAM NEILSON LTD.* . . . . . 124

3 — *Seizure — Customs enactments — Coasting regulations—The Merchant Shipping (Colonial) Act 1869.*] Claimant's ship was seized in August, 1930, by an officer of the Customs Excise Preventive Service of Canada for alleged violations of the Customs Act and coasting regulations. To maintain the seizure the Crown relied upon certain sections of the Customs Act, R.S.C., 1927, c. 42, and certain coasting regulations made thereunder, or under corresponding sections of earlier Customs Acts. In 1883 certain regulations were enacted by Order in Council, pursuant to the provisions of the Customs Act, 1877, and they became effective upon publication in the *Canada Gazette*. In May, 1901, no. 12 of such regulations was rescinded by Order in Council, and the following substituted therefor: "No goods shall be taken into or put out of any coasting vessel or boat, while on her voyage by river, lake or sea, without permit of the Collector or proper officer of Customs," and it was for an alleged infraction of this regulation that claimant's ship was seized. The regulation never became effective, because of failure to publish it in the *Canada Gazette*.—The Crown contends that regulation no. 12 as originally enacted continued in force and effect, because the repeal of the same intended by the later regulation no. 12 never became effective, and that the seizure should be maintained under it, and also under regulation no. 4, which provides *inter alia* that if any officer finds that "any goods" had been unladen from a vessel before the master had reported to a customs officer, the goods and vessel shall be forfeited.—*Held*, that the coasting regulations and the statutory provisions under which they were made, never became effective since they were not enacted in the form required by *The Merchant Shipping (Colonial) Act 1869.*—

## REVENUE—Continued

2. That enactments in regulation of the coasting trade of Canada involve more than a mere determination of the nationality of ships which may engage in that trade. *SHEARWATER CO. LTD. v. THE KING.* . . . . . 1

4—*Excise Act—Whether Province or Dominion entitled to fine imposed thereunder—Criminal Code—Prisons and Reformatories Act.*] D. was convicted by an Ontario Magistrate under s. 176 of the Excise Act, R.S.C., 1927, c. 60, and sentenced to imprisonment for one month and a fine of \$200, and in default of payment, to a further term of imprisonment for six months. He served the definite term of one month's imprisonment in the common gaol at North Bay and was then transferred to Burwash Industrial Farm, an institution maintained and administered by the Government of the Province of Ontario. While there, the fine of \$200 was paid to that institution and the money was transmitted to the Treasurer of the Province of Ontario from whom it was demanded by the Commissioner of Excise on behalf of the Receiver General of Canada. This action was brought to determine the ownership of the money.—*Held*, upon a consideration of s. 1036 of the Criminal Code, s. 133 of the Excise Act, R.S.C., c. 60 and s. 40 of the Prisons and Reformatories Act, R.S.C., 1927, c. 163, the money in question is the property of His Majesty in the right of the Dominion. *THE KING v. ATTORNEY GENERAL FOR ONTARIO.* . . . . . 25

## RIDEAU CANAL ACT

See CROWN, No. 3.

## RIGHT OF FRIENDLY ALIEN TO PETITION

See CROWN, No. 1.

## SALES TAX, WHEN EXIGIBLE

See REVENUE, No. 2.

## SEIZURE

See CROWN, No. 1.  
See REVENUE, No. 3.

## SHAREHOLDER

See REVENUE, No. 1.

## SHIPPING

- 1—*Collision.* No. 1.
- 2—*Excessive Speed.* No. 1.
- 3—*Improper Navigation.* No. 1.

**SHIPPING — Collision — Excessive speed—Improper navigation.**] Action by plaintiffs (respondents) to recover damages suffered by them by reason of defendant ship (appellant) coming into collision with a bridge being erected by plaintiffs (respondents) over the York River at Gaspé, P.Q.—*Held*: (Affirming the judg-

**SHIPPING—Concluded**

ment appealed from) that the speed of the *Dodge* in passing through the bridge opening was, in the circumstances, excessive.—2. That since the speed of the *Dodge* was excessive it cannot be maintained that the ship was navigated with reasonable care and that the accident was inevitable. *STR. Philip T. Dodge v. DOMINION BRIDGE CO. LTD. ET AL.* . . . 181

**SPECIAL WAR REVENUE ACT**

See *REVENUE*, No. 2.

**STATUTE OF LIMITATIONS**

See *CROWN*, No. 3.

**TRADE MARKS**

- 1—*Appeal from Registrar of Trade-Marks*. Nos. 1 and 2.
- 2—*Conditions Relating to Use of Name or Surname*. No. 4.
- 3—*Conflicting Applications to Register Trade-Mark*. No. 3.
- 4—*Date of Application*. No. 2.
- 5—*Exchequer Court Act*. No. 3.
- 6—*Exchequer Court Rules*. No. 3.
- 7—*Jurisdiction*. No. 3.
- 8—*Mandamus*. No. 3.
- 9—*"Motorene"*. No. 2.
- 10—*"Motorine"*. No. 2.
- 11—*Objection to Registration*. No. 2.
- 12—*Petition to Register*. No. 1.
- 13—*Procedure*. No. 3.
- 14—*"Royal Flush"*. No. 1.
- 15—*Unfair Competition Act*. Nos. 1, 2, 3 and 4.
- 16—*Use of Name or Surname in Connection with Partnership or Incorporated Company*. No. 4.
- 17—*User of Trade-Mark*. No. 2.

**TRADE MARKS—Petition to register—Appeal from Registrar of Trade-Marks—"Royal Flush"—Unfair Competition Act.**—*Held:* That the Unfair Competition Act, 22-23 Geo. V, c. 38, does not prohibit the use of the word "Royal" in a trade-mark.—2. That the use of the word "Royal" in connection with tobacco, cigars, cigarettes and cigarette papers is not misdescriptive of the character or quality of the wares, or of the conditions of their production or place of origin. *B. HOUDE CO. LTD. v. COMMISSIONER OF PATENTS* . . . . . 149

2—*Unfair Competition Act—Appeal from Registrar—"Motorine"—"Motorene"—Objection to registration—Date of application—User of trade-mark.*] The Continental Oil Company, on January 11, 1933, applied to the Registrar under the Unfair Competition Act, c. 38, 1932, to register the trade-mark "Motorine", alleging in its application that it had used the mark in Canada, since December 17, 1932. The British American Oil Company, on February 28, 1933, applied to the Registrar to register the word mark

**TRADE MARKS—Continued**

"Motorene" alleging that it had used this mark continuously in Canada since February 1, 1911. Each mark is for use in association with lubricating oils and greases. The Registrar refused to register either mark on the ground that they were in conflict. From this refusal the Continental Oil Company appealed.—*Held:* That priority in date of application is not the sole determining factor in deciding which of two or more applicants, under the Unfair Competition Act, is entitled to registration; the words "first uses or makes known in Canada" in s. 4, ss. 1, must be considered when determining priority rights between rival applicants.—2. That an "objection" under s. 38 may be in the form of a second application for the same mark if made before the prior application has been disposed of.—3. That the Registrar should take cognizance of the alleged date of user of a trade-mark, as contained in the application, in differentiating between applications.—4. That "objection" in s. 39, means any objection to, or ground for refusal of an application, gathered from any material properly and in a formal way before the Registrar, before he has disposed of such application. *CONTINENTAL OIL CO. v. COMMISSIONER OF PATENTS.* . . . . . 244

3 — *Unfair Competition Act — Conflicting applications to register trade-mark—"Motorine"—"Motorene"—Mandamus — Exchequer Court Act—Jurisdiction—Exchequer Court Rules—Procedure.*] *Held:* That an application for a mandamus requiring the Commissioner of Patents, as Registrar under the Unfair Competition Act, 22-23 Geo. V. c. 38, to determine whether an application to register a trade-mark should be allowed, is a substantive proceeding, and not an interlocutory matter.—2. That such a proceeding should be instituted by statement of claim and not by an originating notice of motion.—3. That a mandamus will not be granted where a specific remedy is provided as by s. 30 (c) of the Exchequer Court Act, R.S.C. 1927, c. 34, and the rules made thereunder. *CONTINENTAL OIL CO. v. COMMISSIONER OF PATENTS* . . . . . 118

4—*Unfair Competition Act—Use of name or surname in connection with partnership or incorporated company—Conditions relating to use of name or surname.*] *Held:* That s. 9 of the Unfair Competition Act, 22-23 Geo. V, c. 38, does not restrict an individual or a group of individuals to the use, as a trade name, of his or their personal names or surnames alone, thereby debarring him or them from adding any word or words thereto indicating a body corporate or a partnership.—2. That no man can be deprived of the right of using his name honestly in con-

**TRADE MARKS—Concluded**

nection with his business.—3. That under s. 9, 22-23 Geo. V, c. 38, any individual or group of individuals may use his or their names or surnames in connection with his or their business, provided such business be commenced and carried on for his or their own direct benefit, in good faith and without any intention to deceive. Given these three conditions, confusion is immaterial. *J. V. BODRIAS FILS LTEE v. J. V. BODRIAS FRERE LTEE*..... 88

**UNFAIR COMPETITION ACT**

See **TRADE-MARKS**, Nos. 1, 2, 3 AND 4.

**USE OF NAME OR SURNAME IN CONNECTION WITH PARTNERSHIP OR INCORPORATED COMPANY**

See **TRADE-MARKS**, No. 4.

**USER OF TRADE MARK**

See **TRADE-MARKS**, No. 2.

**WHETHER PROVINCE OR DOMINION ENTITLED TO FINE IMPOSED UNDER EXCISE ACT**

See **REVENUE**, No. 4.

**WINDING-UP ACT**

See **REVENUE**, No. 1.

**WORDS AND PHRASES**

"*Motorene*" and "*Motorine*"—See **CONTINENTAL OIL Co. v. COMMISSIONER OF PATENTS**..... 118, 244

"*On*"—See **MACLAREN v. MINISTER OF NATIONAL REVENUE**..... 13

"*Or otherwise on public grounds objectionable*." See **IN THE MATTER OF THE FOREIGN INSURANCE COMPANIES ACT** 84

"*Public Work*"—See **THE KING v. O'HALLORAN**..... 67

"*Royal Flush*"—See **B. HOUDE Co. LTD. v. COMMISSIONER OF PATENTS**..... 149

"*That the company has on hand*"—See **MACLAREN v. MINISTER OF NATIONAL REVENUE**..... 13